ROLE OF THE JUDICIARY IN A DEMOCRACY

I

In democratic countries, the judiciary is given a place of pride, honour and dignity. The role of the judiciary in a democracy is that of multi-faced activism and creativeness. A democratic society lives and swears by certain values – individual liberty, human dignity, rule of law,[1] constitutionalism,[2] limited government etc. A well organised, strong and impartial judiciary is most essential to achieve these values on which a democratic system thrives. It is the function of the courts to infuse these basic values in the country's legal and constitutional system. Form this point of view, the role of the judiciary in a democracy becomes crucial and significant.

Primarily, the courts constitute a disputes-resolving mechanism. The primary function of the courts is to settle disputes, and dispense justice between one citizen and another. Another function, and perhaps even more significant in the modern administrative age, is to settle disputes and dispense justice between a citizen and a state organ. Further, the courts may have to decide disputes amongst the organs of the state itself, e.g., in a federation, disputes between the centre and the states, or between the states, *inter se,* fall to the courts for adjudication.[3] In the area of criminal law, the courts legitimize the application of the community's coercive force to the wrong doer. In discharging these functions, the courts interpret and apply the law, and the constitution if the country has a written

[1]This article is based on a paper presented at the Fifth Malaysia Law Conference, 1979.

[1a]Dynamic Aspects of the Rule of Law in the Modern Age, Conclusions and Resolutions made at the South-East Asian and Pacific Conference of Jurists in Bangkok, Thailand, Feb. 15–19, 1965, (1965) *Jl. of the Int'l Comm. of Jurists.*

[2]Giovanni Sartori, Constitutionalism: A Preliminary Discussion, (1962) 56 *Am. Pol. Sc. Rev.,* 853. Also see, Sec. VI of this paper, *infra.*

[3]Freund, Umpiring the Federal System, 54 *Col. L.R.* 561, 574.

constitution. While interpreting the ordinary law of the land, and applying the same to concrete factual situations, the courts discharge a creative function. Society does not stand still; it is not static but is dynamic; human conditions – social, economic etc. – chnage continually. Lest the law should fall behind the changing, contemporary societal needs and wants, it is for the courts to so interpret the law of the land that the gap between the living law and the societal needs is bridged. In a country with a written constitution, the judiciary discharges the onerous task of acting as the protector and guardian of the supremacy of the constitution by keeping all authorities – legislative, executive, administrative, judicial or quasi-judicial – within legal bounds. The judiciary has the responsibility to scrutinize all governmental actions in order to assess whether or not they conform with the constitution and the valid laws made thereunder. The task of interpreting the constitution is a highly creative judicial function. Further, in a constitution having provisions guaranteeing fundamental rights of the people, the judiciary has the power as well as the obligation to protect the people's rights from any unjustified encroachment by any organ of the state. And, further, in a country having a federal system, the judiciary acts as the balance-wheel of the federalism by settling disputes between the centre and the states, or among the states themselves. Federalism is a legalistic form of government because of distribution of powers between the centre and the states by the constitution itself, and, therefore, an arbiter is needed to draw a balance between the centre and the states.

The twentieth century has cast another heavy burden on the judiciary. The present is characterised as the administrative age. With the demise of the *laissez faire,* and the emergence of the concept of the social welfare state, powers of the administration are multiplying by leaps and bounds. Administrative process proliferates in the name of public interest and public good, but at the cost of individual freedoms. Because of this feature of modern administration, the judiciary also has the crucial role to play by way of enunciating the norms of administrative behaviour in its dealings with the individual, and also supervising the functioning of the administration in order to ensure that it conforms to the standards of conduct set for it. In the modern context, this is developing into a major exercise for the courts

because of the large number of cases coming before the courts for adjudication raising in some way or the other some problem of administrative law. By and large, development of administrative law is the result of the creative genius of the courts.

It is the function of the courts to protect individual rights and dignity as against administrative excesses to the extent the same can possibly be done within the confines of the law. But the frontiers of administrative law are expanding fast (faster in some countries, not so fast in other countries) because of the creativity of the courts. The courts work constantly to ensure that the administration does not come to exercise absolute powers.[4]

All these crucial tasks can be discharged properly only if the courts constantly play a creative role. A democratic judiciary cannot afford to take a mere passive or mechanical view of its functioning.

II

In a totalitarian society, the judicial machinery is completely subservient to the dominant political ideology. The court acts more as a mere mouthpiece of the political executive, and the law is made subservient to political ideology. No effective guarantees exist for the independence of the courts. As Friedmann points out:[5]

> ". . . ordinary justice is subject to being overruled by administrative action . . . . Moreover, the bulk of the judiciary has complied with an essentially political interpretation of law. In this type of society the judge is indeed rather free from the rule of statutes and codes and from all written texts. He is enslaved instead to the political dictates of his superiors, and the sanction for non-compliance is severe".

At another place, Friedmann states:

> "Modern totalitarian theories, no less than Marxist legal theory, make the law changeable at will by making it entirely dependent on outside agencies and depriving it of any autonomy. In order to facilitate legal change, the constitutional machinery of totalitarian States makes legal change as swift and unencumbered as possible."[6]

[4] See Part V of this Paper, *infra*.

[5] W. Friedmann, *Legal Theory*, 441 (1967).

[6] *Ibid.*, 87. For a description of the Soviet Legal System see, Friedmann, *op. cit.*, 373.

In a democratic society, on the other hand, the processes of administration, legislation and adjudication are more clearly distinct than in a totalitarian society, where legislative and administrative procedures tend to merge and the judges are expected to be the executants of the political ideology of the government. Democracies treat the judiciary differently. Democracies go by the rule of law and constitutionalism, and, therefore, the judiciary is accorded an august position in the constitutional system of the country.

Dias draws a distinction between the role of the judiciary in a democracy and in a totalitarian society from a different angle. In a totalitarian society, "the task of the judge is the relatively simple one of reflecting an official set of values. In a democracy, the judge has to consider these alongside others, which may be opposed to them." This is a much more difficult task. According to Dias, therefore, "judicial independence" means "independence in the choice of values, and it is in this way that the individual can be protected."[7]

III

Before undertaking a review of judicial creativity in some select fields, it seems proper to have some idea of the structure and organisation of the judiciary in some democratic countries. Reference is here made mainly to two such countries – India and Malaysia.

In India, the Supreme Court is at the apex of the judicial system. This court has a very broad jurisdiction. It can hear appeals in constitutional, civil and criminal matters and is the final court of appeal in the country in all cases. It is the supreme interpreter of the constitution. Any case involving interpretation of the constitution can reach the Supreme Court in appeal without any difficulty.[8] One notable feature of this court is its special leave appellate jurisdiction under which it can hear appeals from any court or tribunal in the country if it

[7] *Jurisprudence*, 294 (1976).

[8] Art. 132 of the Indian Constitution.

wishes to do so.[9] This means that all tribunals functioning within the country, outside the regular judicial hierarchy, fall under the appellate jurisdiction of the Supreme Court and this jurisdiction cannot be affected by any 'finality' or 'privative' clause in any legislation. Thus, all tribunals in the country fall under the umbrella of the Supreme Court. The court has given an expansive interpretation to the expression 'tribunal'. Practically all quasi-judicial bodies exercising any adjudicatory functions fall within the court's appellate jurisdiction. In several cases, the court has held even the government, acting in an adjudicatory capacity, as a 'tribunal' for hearing appeals therefrom.[10]

The court enjoys an original jurisdiction in which it can issue writs in the nature of *certiorari*, prohibition, *mandamus, quo warranto, habeas corpus*, or make any order or issue any direction for the specific purpose of enforcement of fundamental rights.[11] The constitution thus provides a guaranteed, quick and summary remedy for enforcement of the fundamental rights. This is a very popular jurisdiction as a large number of writ petitions are moved every year to enforce fundamental rights. A person can go straight to the Supreme Court to vindicate his fundamental rights. He does not have to go through lower courts for this purpose. The Supreme Court also enjoys an advisory jurisdiction.[12] The President can refer to the court any question of law or fact to seek its advice. The court then holds a hearing and gives an advisory opinion. Since the inception of the constitution, many significant controversies have been referred to the court on its advisory jurisdiction. In all, so far seven cases have been referred to the court for advice.[13] The Supreme Court also has power to punish for its

[9] Art. 136 of the Constitution. For details see, M.P. Jain, *Indian Constitutional Law*, 125 (1978).

[10] *Harinagar Sugar Mills* v. *Shyam Sunder Jhunjhunwala*, A.I.R. 1961 S.C. 1669; *Shivji Nathubhai* v. *Union of India*, A.I.R. 1960 S.C. 606; *Shri Bhagwan* v. *Ram Chand*, A.I.R. 1965 S.C. 1767.

[11] Art. 32 of the Constitution. For details see, Jain, *Op. cit.*, 116.

[12] Art. 143(1) of the Constitution.

[13] For details see Jain, *Op. cit.*, 134–139.

contempt.[14] The court also has an exclusive original jurisdiction to settle disputes between the centre and the states or between the *states inter se*. On the whole, therefore, there is a good deal of truth in the assertion that the Supreme Court of India has wider powers than the highest court in any other federation.

Another significant feature of the Indian Judiciary is Art. 226 which authorises the High Courts to issue writs to enforce the fundamental rights or for any other purpose. The judiciary is thus constituted into the guardian of fundamental rights. Any person complaining of an infringement of a fundamental right can go straight either to the High Court or the Supreme Court for a writ to enforce his fundamental right.[15] The constitution thus provides for a quick remedy to enforce fundamental rights. The framers of the constitution recognised that rights without effective remedy will only be paper rights and of not much consequence. Therefore, they provided for effective and efficient remedies for the enforcement thereof. In India, the power of the High Courts to issue writs under Art. 226, and the power of the Supreme Court to do the same under Art. 32, constitute constitutionally guaranteed power to give relief in case of infringement of the fundamental rights. No statutory provision can affect this power. Under Art. 226, writs can be issued by the High Courts for any other purpose. This means that even when a question of fundamental rights is not involved, writs can be issued. This provision is the source of much of administrative law in India.[16]

Adequate provisions have been made in the Constitution to protect and safeguard the impartiality and integrity of the Supreme Court and the High Courts. Thus, the age of retirement has been fixed at 65 for the Supreme Court Judges and 62 for the High Court Judges. They cannot be removed from their offices before the prescribed age of superannuation except by a resolution passed by the two Houses by a special majority

[14] For details of the jurisdiction of the Court see, M.P. Jain, *Indian Constitutional Law*, 115 *et seq*.

[15] For details of this jurisdiction, see Jain, *op. cit.*, 191–209.

[16] See Sec. V, *infra*, this paper.

(absolute majority in each House and 2/3 of those who are present and voting) for *proved* misbehaviour or incapacity. The word 'proved' indicates that the misbehaviour or incapacity of the Judge has to be established before an impartial judicial commission before the resolutions in question can be passed by the Houses of Parliament. The mechanism and the procedure for this purpose have now been provided for by Parliament through an Act, the Judges (Inquiry) Act, 1968. The inquiry is to be conducted by a committee appointed by the Speaker. The committee is to consist of a Supreme Court Judge, a Chief Justice of a High Court and a distinguished jurist. The report of the committee is laid before the two Houses of Parliament and necessary action taken therein. For appointment of a Supreme Court Judge, a person should be – (i) a High Court Judge for five years; or (ii) an advocate of a High Court for ten years; or (iii) a distinguished jurist. The High Court Judges are also appointed by the President in consultation with the Chief Justice of the Supreme Court, Chief Justice of the High Court concerned, and the State Governor. A High Court Judge is appointed from amongst advocates of 19 years' standing or those holding high judicial offices. The tradition in India is to appoint advocates to the High Courts, and the senior High Court Judges are then appointed to the Supreme Court. Thus, the highest judiciary in India is manned mostly by practising lawyers.

The expenditures of these courts (High Courts and the Supreme Court) are charged on the Consolidated Fund of the concerned State or of India as the case may be, and the conduct of a Judge cannot be discussed in any House of Parliament or a State Legislature.

There are provisions made in the Constitution to safeguard the independence of the Judiciary subordinate to the High Courts. District Judges can be appointed only from amongst the judicial officers and on the recommendation of the High Court. Control over district and subordinate judges is vested in the concerned High Court including their posting, promotion, grant of leave, etc.[17] Further, under Art. 227, a High Court has superintendence over all courts and tribunals within its terri-

[17] For details see, Jain, *op. cit.*, 206.

torial jurisdiction. Thus, a 'tribunal' falls within the superintendence of a High Court under Art. 227 and under Art. 136, an appeal lies from a tribunal to the Supreme Court. A High Court can also issue a writ to a tribunal under Art. 226. Thus, a tribunal is subjected to adequate and constitutionally guaranteed judicial control.

There is one more feature of the Indian Legal System which needs to be mentioned here. India has a Law Ministry with a Law Minister which is a political appointment made by the Prime Minister. But the tradition so far has been to appoint distinguished lawyers to this office. Then there is the office of the Attorney-General created by Art. 76 of the Constitution. He is a person qualified to be appointed as a Supreme Court Judge. He gives legal advice to the Government, appears on behalf of the Government of India before the Supreme Court and High Courts and may also attend a session of a House of Parliament without a vote. He is not a member of the Central Cabinet. Only eminent lawyers have been appointed so far to this post. There was a time when the Government of India toyed with the idea of appointing the Law Minister as the Attorney-General as well, but the public opposition to the idea was so intense that the Government gave up the move. Hitherto, appointments of Attorneys-General have been non-political. Besides, there is also a Solicitor-General. This is not a constitutional office but has been created administratively to relieve the pressure of work on the Attorney-General. He also gives advice to the Government on legal matters and also appears before the courts on its behalf. This also is a non-political office and a leading practising lawyer is appointed to this office.

The Constitution of India contains adequate formal provisions to guarantee the independence of the Judiciary but, at times, certain steps taken by the Government, though within the letter of the law, have raised controversies and have been very vehemently criticised by the public as these steps have appeared indirectly to compromise judicial independence. For long, the tradition has been to appoint the senior-most Judge of the Supreme Court as its Chief Justice whenever a vacancy occurs in that office. But in 1973, this tradition was broken for the first time and a judge, fourth in the order of seniority at the time, was appointed as the Chief Justice. This led to a public

outcry and the three Judges resigned from the Court. Then, again, in 1975, the Judge who was number 2 at the time in seniority was appointed as the Chief Justice by-passing the senior-most Judge which also led to his resignation from the Court. But these appointments have been vehemently criticised on the ground of propriety though not on the ground of legality as the President has power to appoint the Chief Justice. Then, there has also been the question of the retired Supreme Court Judges accepting high political offices depending on the pleasure of the Executive, such as, governorships of the states, ambassadorships, ministerships, etc. Recently, when a retired Supreme Court Judge (the Judge who had been earlier by-passed) was appointed as the Minister of Law, there was such a public outcry that he resigned from the Ministership. Another sore point is the transfer of a Judge from one High Court to another. The relevant constitutional porivision is that the President can transfer a Judge from one High Court to another in consultation with the Chief Justice of the Supreme Court.[18] Unfortunately, the consent of the concerned Judge is not necessary for his transfer. During the emergency of 1975–1977, 16 High Court Judges were transferred. The suspicion in the mind of the public is that these Judges were transferred as a punishment for giving judgments against the Government.[19] Barring this short emergency spell of two years, there has never been any controversy on this score as no judge is ordinarily transferred without his consent.

There are marked differences between the Supreme Court of India and that of the U.S.A. The U.S. Supreme Court has primarily appellate jurisdiction, and has a very limited original jurisdiction. Its appellate jurisdiction is mainly in relation to federal law and the constitution. It arises when a state law is challenged as being against the federal law, or where a U.S. law or treaty is challenged as being unconstitutional. The U.S. Supreme Court is thus the final arbiter and interpreter of the U.S. Constitution, its laws and its treaties. It does not have a general jurisdiction as regards interpretation of general laws

[18] Art. 222 of the Constitution.

[19] This led to a case in the Supreme Court, viz.: *Union of India v. Sankalchand Himatlal Sheth*, A.I.R. 1977 S.C. 2328.

which does not involve a question of federal law. On the other hand, the jurisdiction of the Indian Supreme Court is much more extensive. It can enforce fundamental rights on its original jurisdiction and every year quite a number of writ petitions are moved before the court for this purpose (known as Art. 32 jurisdiction). It can hear appeals in any matter. The U.S. Supreme Court does not exercise any advisory jurisdiction but the Indian Supreme Court has such a jurisdiction. As a matter of formal law, it will, therefore, be correct to say that the Indian Supreme Court has much more extensive jurisdiction than the U.S. Supreme Court.[20]

In England, there is no formally written constitution and no formally declared fundamental rights of the people. The doctrine of parliamentary supremacy prevails there. The role of the courts in England, therefore, qualitatively is somewhat different from the role of the courts in India or in the U.S.A. or in Malaysia. It is not for them to interpret fundamental rights or to uphold them against legislative onslaughts. It is not for them to declare laws unconstitutional and void as there is no written constitutional document. But as we shall see later, courts can accomplish something by their interpretative process so as to deviate or minimize the effects of statutes which judges may not like.[21]

A word need be said about the structural organisation of the judiciary in Malaysia.

The Judiciary has been accorded an honourable place under the Malaysian Constitution. The apex court is the Federal Court and below it are two High Courts and several subordinate courts. The Federal Court has a limited exclusive original jurisdiction. This jurisdiction extends to: (i) any question whether any law made by Parliament or by a state legislature is invalid on the ground that it makes provision with respect to a matter with respect to which it has no power to make laws; and (ii) disputes on any other question between states or between

[20] See M.P. Jain, *Indian Constitutional Law*, 112–147 (1978).

[21] See Sec. IV, *infra*.

the Federation and any state.[22] The Federal Court also has an advisory jurisdiction. So far, this jurisdiction has been invoked only in one case, viz: *Government of Malaysia* v. *Government of Kelantan.*[23] The Federal Court's main work comprises of hearing appeals in civil, criminal and constitutional matters from the High Courts. It is now the final court of appeal in constitutional law and criminal cases. In civil cases, appeals still go to the Privy Council. Under Art. 128(2), the Federal Court also has jurisdiction to resolve constitutional questions referred to it by the High Courts. The independence and integrity of the judiciarry have been preserved through adequate constitutional guarantees. A judge of the superior court may be removed from office by the Yang di-Pertuan Agong only on the ground of misbehaviour or inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, but only on the recommendation of a tirbuanl consisting of five Judges and ex-Judges.[24] The conduct of a Judge cannot be discussed in a House of Parliament except on a substantive motion of which notice has been given by at least a quarter of the number of members of that House. A Judge's remuneration is charged on the Consolidated Fund of Malaysia. The remuneration of a sitting judge cannot be reduced to his disadvantage. The age of retirement of a Judge is 65 years. The courts have power to interpret the constitution. Subject to certain conditions, the courts have power to declare a law unconstitutional and hence void. The courts also have power to declare any act of government unlawful.

At least four points of difference may be underlined between the Supreme Court of India and the Federal Court of Malaysia, viz:

1) The Federal Court does not enjoy any jurisdiction like that enjoyed by the Indian Supreme Court under Art. 32 to enforce fundamental rights.

[22] Art. 128(1) of the Malaysian Constitution. For details see Tun Mohamed Suffian, *An Introduction to the Constitution of Malaysia,* 97–120(1976).

[23] [1968] 1 M.L.J. 129.

[24] Art. 125, cls.(3), (4) and (5) of the Malaysian Constitution. Also see, Tun Dr. Mohamed Suffian, *Administrative Problems in the working of Superior Courts of Justice in Malaysia (1975).*

2) The Federal Court of Malaysia does not enjoy any jurisdiction like that enjoyed by the Supreme Court of India under Art. 136 to hear an appeal from any court or tribunal.
3) The Federal Court is not the final court of appeal in civil cases.
4) The advisory jurisdiction of the Federal Court is not invoked often while in the case of the Supreme Court of India, this jurisdiction has been invoked several times and many crucial and critical constitutional controversies have been resolved that way.

Assessing the role played by the Judiciary in Malaysia, Tun Mohamed Suffian, Lord President has observed:

> "Many factors have been responsible for the steady progress made by the country in so many areas. Not least is the contribution made by the judiciary that has quietly maintained the supremacy of the Constitution and the rule of law, and determined the matters that come up before it fairly and impartially, without fear or favour . . . ."[25]

The subordinate Judiciary is also well protected in Malaysia. Although, in theory, a judge of a subordinate court holds office at the pleasure of the Crown, and so he may be removed for any or no reason without compensation, but he may be removed only by an independent service commission – the Judicial and Legal Service Commission – which has a majority of Judges.[26] It is this commission which appoints, confirms, transfers (if promotion or demotion is involved) and promotes officers of the Judicial and Legal Service.[27]

Attention must now be focussed on the fundamental question of the functional aspects of the judiciary in a democracy.

IV

The old orthodox theory was that a judge never creates new law. As Blackstone said, the duty of the court was not to

[25] Tun Dr. Mohamed Suffian, The Judiciary – During the First Twenty Years of Independence, *The Constitution of Malaysia, Its Development: 1957–1977*, 231.

[26] Art. 138 of the Malaysian Constitution.

[27] Tun Dr. Mohamed Suffian, *Safeguards for the Judiciary-Malaysia*, (1979) 1 M.L.J. xcv–xcix.

"pronounce a new law but to maintain and expound the old one".[28] Many famous figures in the history of English Law – Coke, Hale, Bacon and others – were convinced that the function of a Judge was to declare and interpret the law, but not to make it.

Even as late as 1951, Lord Jowitt, Lord Chancellor, rejected the law-making function of the British Judiciary. While speaking at the Australian Law Convention of 1951, he asserted:

> "It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation, but do not expect every lawyer ... to act as Lord Mansfied did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is . . . please do not get yourself into the frame of mind of entrusting to the judges the working out of a whole new set of principles which does accord with the requirements of modern conditions. Leave that to the Legislature, and leave us to confine ourselves to trying to find out what the law is".

But this view no longer holds the field now. It is doubtful if even in the past this theory was wholly true as such an attitude was never adopted by some of the greatest of the British Judges such as Holt,Mansfield, Blackburn, Wright and Atkin. In modern times, the radical transformations which, for example, the laws of contracts, torts[29] and family have undergone at the hands of the courts have made it increasingly difficult to maintain the time-honoured fiction of the declaratory role of the Judge. Lord Denning has openly preached that the task of the common law is to act as an instrument of evolution in accordance with the changing needs of society and the demands of justice.[30] For a time, Lord Denning stood alone in preaching this thesis in England, but now his views are shared by many other eminent British Judges. We now find Lords Diplock, Devlin and Reid and others as explicitly accepting the law-making role of the Judge in a democracy. Lord Diplock has

[28] Blackstone, *Commentaries*, 69 (1808).

[29] Keeton, *Venturing to do Justice.*

[30] Denning, *From Precedent to Precedent.*

recently laid emphasis on the role of the Judge in making new law not only in the common law field but also in the statutory field.[31] As Griffith has very aptly remarked recently:

> "If the judicial function were wholly automatic then not only would the making of decisions in the courts be of little interest but it would also not be necessary to recruit highly trained and intellectually able men and women to serve as judges and to pay them handsome salaries."[32]

It is the creative function discharged by the Judges that makes their job important and worthwhile and that is why their independence becomes meaningful.[33] The declaratory doctrine of the judicial function has been abandoned much more heartily in the U.S.A., than in England. From Holmes and Geny to Pound, Frank and Cardozo, contemporary Judges have increasingly recognized and articulated the law-making function of the courts.[34] One of the main reasons for this is the presence of a written constitution and its interpretative function discharged by the Judiciary (Supreme Court). This constitution has remained practically unchanged for over 200 years but it has been adapted to the changing socio-economic conditions of the country by the judiciary – this function has created quite a different picture of the judge in the U.S.A. from the one traditionally held in England. It is clear that a constitutional-cum-private law court plays a more creative role in the development of law than a court having no function of constitutional interpretation to discharge. A constitutional court has to interpret 'static' clauses of the constitution so as to suit the needs of a

[31] Judicial Development of Law in the Commonwealth, (1978) 1 M.L.J. cviii–cxiii.

[32] J.A.G. Griffith, *The Politics of the Judiciary*, 16 (1977).

[33] In England, Salmond contended that Judges unquestionably make law and that one should recognize "a distinct law-making power vested in them and openly and lawfully exercised." 16 *L.Q.R.*, 376, 379.

[34] Besides the judges, some of the American jurists have also emphasized the law-creating function of the judges. For example, Gray shifted the seat of sovereignty in law-making from the sovereign to the judiciary. Gray maintained that the law of a state "is composed of the rules which the courts, . . . lay down for the determination of legal rights and duties." Gray, *The Nature and Sources of the Law*, 84 (1931).

dynamic society[35] and this demands a high creativity on its part.

The major function of the judiciary in a democratic country lies in the interpretation of statutes and the application of common law precedents. The Judge whether he is in the U.S.A., or Australia, England, India or Malaysia, is faced with the perennial problem, whether he interprets a statute or applies a precedent: How to balance the need for stability and constructive adaptation of the law to changing social needs? How to balance norms of law with individual justice?

Interpretation of statutes involve law-making by the judges because they have to choose between alternative meanings of the words used in a statute and which those words can bear, and exercising this choice amounts to law-making. This consciousness has led to the shifting of judicial emphasis from a literal interpretation of statutes to a broader interpretation of statutes based on considerations of social objectives, legislative history and the balance of public interests. The process may be more pronounced in the U.S.A. than in England but it is to be found everywhere to some extent. A mere literal interpretation of a statute irrespective of individual injustice or broad social policies underlying the statute is an out of date approach. Statute law itself cannot be a perfect instrument. Doubts constantly arise as to the meaning of words used in a statute. Judges make law through their process of interpretation. The old technique of literal construction of statutes is now on its way out and in its place courts adopt purposive interpretation.[36] In the beginning, there were protests against this technique of interpretation from the Bench. Lord Simonds in *Magor and St. Mellons Rural District Councils* v. *Newport Corporation*[37] poured scorn on this approach by characterising it as a "naked usurpation of the legislative function under the thin disguise of interpretation". But the new approach has become established now. Lord Denning is a great protagonist of

[35] See, *infra*, section VI of this paper for constitutional interpretation.

[36] Lord Diplock in *Kammins* v. *Zenith Investments Ltd.*, [1971] A.C. 850, 881.

[37] [1951] 2 All E.R. 839.

this approach.[38] This approach can be illustrated by reference to two English cases. *Nothman* v. *Barnet Council,*[39] and *Bradford City* v. *Lord Commissioner.*[40] Taking up *Nothman* first, men and women teachers were entitled, under their contracts, to continue in employment until the age of 65. A lady teacher of 61 was dismissed from service on the ground of incompetence. She claimed compensation for unfair dismissal. The Employment Appeal Tribunal held that if she had been a man, she would have been entitled; but as she was a woman she was not. The tribunal accepted the fact that this was a glaring example of discrimination against a woman on the ground of her sex and that the facts of the case pointed to a 'startling anomaly'. But the tribunal felt helpless in the matter as it felt that it was bound 'to apply the provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be". The tribunal went on to say further:

> "The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or the judicial tribunals".

The law in question said that an employee could not make a claim for unfair dismissal if the employee "on or before the effective date of termination attained the age which, in the undertaking in which he was employed, was the normal retiring age for an employee holding the position which he held, or, if a man, attained the age of sixty-five, or if a woman, attained the age of sixty".

However, Lord Denning in the Court of Appeal repudiated such a timid judicial approach. He called it as "a voice of the past", "voice of the strict constructionist", "voice of those who go by the letter", "voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences". Lord Denning pointed out that the literal method is completely out of date now. The judges are not now "impotent, incapable and sterile" in the face of injustice. He

[38] Lord Denning, *The Discipline of Law*, 9.

[39] [1978] 1 All E.R. 1243.

[40] [1979] 2 W.L.R. 1.

emphasized that in all cases of interpretation of statutes, now, the judges adopt such a construction as will "promote the general legislative purpose" underlying the provision. He laid down the true principle applicable in such situations as follows:

> "Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the Judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."

Lord Denning therefore proceeded in the instant case with the question: What was the 'normal' retiring age for the lady teacher? He held this age to be 65 both for men and women in the teaching profession. He read the law in question to mean that if there was no normal retiring age in a profession, then the retiring age would be 60 for women. Lord Denning interpreted the whole provision 'so as to do justice', by inserting a few words therein. The lady teacher in the instant case had not reached the normal age of retirement, i.e. 65 years and so was held entitled to claim either reinstatement or compensation for unfair dismissal. The court thus took a sensible interpretation of the provision in question because the other interpretation would have resulted in injustice and blatant discrimination.

In the *Bradford Corporation* case, the legal provision involved was s. 26(1) of the Local Government Act referring to an investigation of a complaint by a local commissioner. The local commissioner is entitled to investigate a written complaint by or on behalf of a member of the public claiming to have sustained:

> "injustice in consequence of maladministration in connection with action taken by . . . an authority . . . , being action taken in the exercise of administrative functions of that authority . . . ."

This provision was interpreted by the Queen's Bench Division, as meaning that "the complainant claims to have sustained injustice, and that that has occurred in consequence of maladministration . . . must appear on the face of the complaint expressly or by necessary inference". According to the Judge, "the written complaint itself must expressly or by the necessary inference indicate prima facie that the complainant has been treated unfairly and that this has been due to bad administration. So, this was a restrictive interpretation of a provision made by Parliament to remedy the consequences of

maladministration which the courts could not remedy. It meant that there must be a specific complaint of maladministration, for example, of delay or incompetence or neglect of duty, and that it was not sufficient merely to complain that a decision was unjust or unfair – because that complaint was only as to the merits of the decision and was not a complaint of maladministration. Thus, the complainant must specify the maladministration due to which he suffered injustice. In the Court of Appeal, however, Lord Denning took a different and liberal view of this provision and one favourable to the complainant. He noted that in the nature of things a complainant only knows or feels that he has suffered injustice. He cannot know what was the cause of the injustice. It will be putting too heavy a burden on the complainant to make him specify the maladministration, since he has no knowledge of what took place behind the closed doors of the administration's offices. Lord Denning departed from the literal words but he justified this departure on the ground that it will "promote the general legislative purpose" underlying the provision. He observed:

> "It cannot have been intended by Parliament that a complainant (who of necessity cannot know what took place in the council office) should have to specify any particular piece of maladministration. Suffice it that he specifies the action of the local authority in connection with which he complains there was maladministration."

There is an interesting aspect of statutory interpretation in England. The House of Lords has re-affirmed in *Davis* v. *Johnson*[41] that Hansard (Parliamentary Debates) can never be relied on by the court in construing a statute. Lord Diplock, otherwise a liberal judge, agreed with Lords Scarman and Dilhorne in banning Parliamentary Debates from the courts. He said: "What is said by a Minister or by a member sponsoring a Bill is not a legitimate aid to the interpretation of an Act."[42] This is an "unreliable" guide to the meaning of what is enacted; it promotes confusion, not clarity."

[41] [1978] 1 All E.R. 1132.

[42] Lord Reid also expressed a similar view in *Beswick* v. *Beswick*, [1967] 2 All E.R. 1197 at 1202.

Now in the *Bradford Council,* the question of interpreting the word "maladministration" arose. The only reliable guide to the interpretation of this word is to be found in the list of instances of maladministration given by Mr. Crossman (the then Lord President of the Council) on the floor of the House of Commons. Now, judges cannot consult Hansard and so cannot make use of this list to interpret the word "maladministration". Then, what is to be done? Lord Denning says that the way to overcome this obstacle is to refer to academic writings where debates from Hansard may be quoted. For instance, Wade in his *Administrative Law*[43] has quoted the words of Crossman. The courts have not yet been debarred from looking at academic writings. Lord Denning has thus stated:

> "I hope therefore that our teachers will go on quoting Hansard so that a judge may in this way have the same help as others have in interpreting a statute."

Instances of purposive interpretation of statutes may be found in India and Malaysia as well. For example, in India, the courts implied a number of principles of administrative law to control administrative discretion to order preventive detention in the interests of justice to the individual. The courts have not adopted a mere literal, positivist view of the law in question.[44] In Malaysia, one can find the Federal Court resorting to such an approach in the recent case on S. 123 of the Evidence Act, *B.A. Rao* v. *Sapuran Kaur.* [45] But examples of such an approach are few and, by and large, the courts resort to literal statutory interpretation. The difference between the two approaches (purposive *v.* literal) becomes clear from the minority and majority opinions in the recent Federal Court case *Superintendent of Pulau Jerjak Detention Centre & Minister of Home Affairs* v. *Wong Chen Cho.*[46] The minority adopted an interpretation of the statute which it thought was more in

[43] At p. 82.

[44] M.P. Jain, *Judicial Creativity and Preventive Detention in India,* (1975) J.M.C.L. 261.

[45] See, *infra,* Sec. V.

[46] [1980] 1 M.L.J. 154.

accord with the "intention of Parliament" and also in the interest of the juvenile. The majority went merely by the words of the statute in question.

Coming to the doctrine of judicial precedents and *stare decisis,* it appears to be quite natural, and indeed necessary, to follow past decisions to some extent. One usual justification for following the precedents is that it is conducive to legal certainty[47] on which individuals can rely in the conduct of their affairs. It also provides a basis for orderly development of legal rules. But now, reservations have come to be made on this score as well. Questions are now raised whether certainty of law can be achieved at all, or whether it is achievable, or whether it is worth achieving at all? Frank has characterised this instinct of achieving certainty in law as a childish instinct.[48] It is now realised that certainty in law is an illusion. On the point of certainty in the law, Lord Denning said nearly 25 years ago:

> "The law is not static. It is developing continually. Those who emphasize the paramount importance of certainty delude themselves. It is not certain and it is a mistake to think that it can be made certain."[49]

It is now realised that a rigid doctrine of *stare decisis* is inimical to the scientific development of the law. Bad decisions, if allowed to stand, may direct law into wrong channels, and impede a rational approach to law. There is the inevitable danger in too rigid adherence to past precedents, viz., it may lead to statism in law; it may stultify progress. After all, conditions of human society are changing over time. They are not the same today as they were 25 years or 50 years ago. Law has continually to respond to societal changes. That is why Roscoe Pound called Lawyers as "social engineers". Legislature is not always active in bringing the law up-to-date. A chasm thus

[47] It was in 1898 in *London Street Tramways Co. v. London County Council,* (1898) A.C. 375, that the House of Lords had ruled that it was bound by its own decisions.

[48] J. Frank, *Law and the Modern Mind,* 10 (1930).

[49] *The Changing Law,* 78 (1953).

separates the law from contemporary social needs.[50] It therefore becomes necessary for the courts to apply precedents creatively and not mechanically, and old rules have to be moulded gradually to meet fresh human situations as they arise. That the old attitude towards the sanctity of *stare decisis* has undergone a change was demonstrated dramatically in 1966 when the Lord Chancellor announced as regards the House of Lords:

> "... Their Lordships ... recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so".

Thus, after an interlude of 68 years, the House held that it would assume a more creative and active role in the development of law.[51]

In 1944, in *Young* v. *Bristol Aeroplane Co.*,[52] the Court of Appeal had re-defined the doctrine of *stare decisis* applicable to it. While affirming that it was bound by its own decisions, it defined certain exceptions to it: (1) it will decide which of the two conflicting decisions of its own it will follow; (2) it will not follow a decision of its own if it cannot stand with a decision of the House of Lords; (3) it will not follow a decision of its own if it was given *per incuriam*. It has been opined by some writers that this re-enunciation of the doctrine of *stare decisis* has "completely changed the character of that rule in modern English law".[53]

The Indian Supreme Court ruled as early as 1955 that it will not regard itself bound by its own decisions. In *Bengal Immun-*

[50] Of course, in some countries, efforts are being made to bring the law up to date through legislative process. For example, England and India, both have law commissions for the purpose.

[51] See, note 46 *supra*.

[52] (1944) K.B. 718.

[53] Schmitthoff, The Growing Ambit of the Common Law, 30 *Can.B.R.* 58 (1952).

ity Co. v. *State of Bihar,*[54] the court expressed the opinion that it could reconsider its decisions, and even depart from them, as there was nothing in the constitution against such a course of action. The court has however emphasized that it would exercise its power to reconsider previous decisions with due care and caution and only to advance the public well-being. If on re-examination of the question, the court concludes that its previous decision was wrong and erroneous then it would be its duty to say so and not to perpetuate the mistake. The Supreme Court of India is thus a self-correcting agency.[55] It has changed its views several times, much more so in the matter of constitutional interpretation rather than in the matter of private law. In the U.S.A., a mechanical attitude to *stare decisis* is decried. The U.S. Supreme Court does not regard itself bound by its own decisions. As Chief Justice Hughes has warned, one must not expect from the court "the icy stratosphere of certainty".[56] The reason for this flexibility is that the Supreme Court is primarily a constitutional court, and amendment of the U.S. constitution is a very difficult process and so the Court reserves to itself the power to correct its own errors.

The judicial doctrine of prospective overruling, a doctrine evolved and articulated in the U.S.A., overtly testifies to the law-making function of the judiciary. The doctrine involves overruling of a well-established precedent from a future date and not retroactively. The court asserts that it has the power to decide on a balance of all relevant considerations whether a decision overruling a previous principle should be applied retroactively or not.[57] The court can decide that instead of disturbing the past transactions, the newly developed judicial view of law might be made effective as regards the future transactions only. The court thus consciously modifies a rule and also makes it operative only as to future transactions. This view rests to some extent on the acceptance of the modern view

[54] A.I.R. 1955 S.C. 661.

[55] Jain, *Indian Constitutional Law*, 695.

[56] McWhinney, *Judicial Review*, *Passim*.

[57] *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965).

that law in general is not a fixed and durable set of rules, but something whose meaning and application varies from time to time and is actually established only in the act of judicial decision.[58] In India, the Supreme Court applied the doctrine of prospective overruling in *Golak Nath v. State of Punjab*.[59] Prospective overruling is not all compatible with the Blackstonian proposition that courts do not pronounce a new law but only expound the old one. The doctrine of prospective overruling implies a clear admission on the part of the courts that they do make new law, and the posing of the question whether new rule should be applied retrospectively or only prospectively indicates awareness of its legislative aspects.[60]

There is thus no gainsaying the fact that in a democratic society courts do and must play the role of law-makers.[61] The judiciary has to play a vital role in the evolution of the law. In a democracy, the courts have to participate in the law-making and law-reforming process. Of course, one must realise that the courts' creativity cannot supplant, but only supplement, legislative activity. Judges do not make law on the same scale, or in the same manner, as does the legislature. Where basic institutional changes are required, legislation will need to be undertaken. At times, courts may exhort the legislature to take suitable action to modify the law for the courts feel helpless to achieve the same results.

Inspite of the power to overrule their decisions, the superior courts do not use their power liberally. Most often, courts would seek to get over an inconvenient precedent by the technique of either ignoring the same or distinguishing it.

[58] Sawer, *Modern Federalism*, 173.

[59] A.I.R. 1967 S.C. 1643; Jain, *Indian Constitutional Law*, 686–7.

[60] In another context, a law-making aspect of the judicial function becomes clearly obvious from some of the judicial pronouncements made by the courts in some countries after constitutional breakdown, such as, in Pakistan, Ghana, Rhodesia, etc. See, for example, *The State* v. *Dosso*, PLD 1958 S.C. 533; *Asma Jilani* v. *Government of Punjab*, PLD 1972 S.C. 139; *Begum Nussurat Bhutto* v. *Chief of Army Staff*, PLD 1977 S.C. 657.

[61] Also see, Lord Hailsham, The Independence of the Judiciary in a Democratic Society, [1978] 2 M.L.J. cxv. According to him, in England, judicial creativity has covered the entire field of law.

Distinguishing precedents is a favourite juidicial devise of developing the law, though the disadvantages of this technique are uncertainty and haphazardness in law. Only in one case so far, *Conway* v. *Rimmer,*[62] has the House of Lords overruled its previous decision in *Duncan* v. *Cammell Laird & Co.*.[63] It may also be interesting to note that when, recently, the Court of Appeal overruled its previous decision,[64] the House of Lords came down heavily on the court and denied to it the same freedom as is enjoyed by the House itself. The House of Lords reaffirmed expressly and unequivocally the rule that the Court of Appeal is bound by its previous decisions subject to certain clearly defined exceptions.

The important thing is that since the Judges do discharge a law creating function in any case, they should do so consciously rather than unconsciously, purposively rather than haphazardly, and that they should shed their mental inhibitions, reluctance and reservations in this respect.[65]

It may be an interesting question to raise whether the Federal Court of Malaysia will regard itself bound by its own decisions or follow the example set by other appellate courts. In criminal and constitutional matters, this court is now the ultimate court of appeal in Malaysia. In these areas, at least, there is no reason for it to regard itself bound by its own decisions. Recently, in *Public Prosecutor* v. *Ooi Khai Chin,*[66] the Federal Court has overruled its earlier decision in *P.P.* v. *Tai Chai Geok.*[67] These cases fall in the area of criminal law. Presumably, the same will be true in the area of constitutional law. In civil cases, the

[62] See, *infra*, Section IV of this paper.

[63] See, *infra*, Section IV of this paper.

[64] *Davies* v. *Johnson*, [1978] 1 All E.R. 841, 1132.

[65] See, on this topic generally, Jack A. Hiller, The Law-Creative Role of Appellate Courts in the Commonwealth, (1978) 27 *I.C.L.Q.* 85; J. Hiller, The Law Creative Role of Appellate Courts in Developing Countries: An Emphasis on East Africa, (1975) 25 *I.C.L.Q.* 205.

[66] [1979] 1 M.L.J. 112. Also see, *Oie Hee Koi* v. *P.P.*, [1966] 2 M.L.J. 183.

[67] [1978] 1 M.L.J. 166.

position of the Federal Court may be on the same level as that of the Court of Appeal in England.[68]

There is another interesting and important area in Malaysia where the courts will have to show creativity, viz., the effect of the Civil Laws Act and the reception of English law. If too strict a view is taken of the provisions of the Act, and all developments in English law subsequent to the specified date (1956 for Peninsular Malaysia, 1951 for Sabah and 1949 for Sarawak) are rejected as non-applicable here, then the law in Malaysia will become static and out of date. The courts have therefore either to adopt later developments of English law (so far as suitable to Malaysia), or develop the norms of law independently. Both these processes demand creativity on the part of the courts.[69]

V

In modern times, creative genius is being displayed by the courts in evolving the principles of administrative law. This development is being mentioned here to illustrate the extent of the law-creative role being played by the courts in modern times. Administrative law is by and large judge-made law. It has emerged as a restraint on the administration. Administrative law forces the administration to adopt proper behaviour in its dealings with the people. The powerful engines of authority must be prevented from running amok. The public authorities must be compelled to perform their duties. A heavy responsibility has fallen on the courts to develop the system of administrative law in the modern administrative age when administration enjoys vast powers. The courts have to discharge a creative function in this area. It is since the 1960's that the British courts have displayed vigour and enterprise in developing administrative law and this spirit has infected, to some extent, other Commonwealth courts. Had the courts adopted a mechanical attitude, there would not have been any administrative law. It is only because the courts are prepared to imply certain

[68] *Hendry v. De Cruz*, [1949] M.L.J. Supp. 25.

[69] See Case Note on *Lee Kee Chong v. Empat Nombor Ekor (N.S.) Sdn. Bhd.*, [1976] 2 M.L.J. 93 by Prof. Ahmad Ibrahim in [1976] *J.M.C.L.* 303; also see, Wu Min Aun, *An Introduction to the Malaysian Legal System*, 18–24 (1977).

restraints in an otherwise broadly worded statutory provision that administrative law can emerge and has emerged. Reference may be made to three English cases in this regard to illustrate the point. First, the area of Natural Justice. Since 1963, in England, a transformation has taken place in the application of the concept of natural justice beginning from the landmark case of *Ridge* v. *Baldwin.*[70] A basic principle established by this case is that wherever in the exercise of a power a decision is taken which affects the legal rights of an individual to his detriment, the rules of natural justice must be observed by the decision-maker. This case has had its impact in practically every common-law jurisdiction. In essence, the natural justice concept is implied by the courts in the written provisions of a law. Not many provisions of law expressly lay down the requirement of giving a right of hearing to a person affected by administrative action. If the courts interpret such a provision in a mechanical manner, by applying the canons of literal interpretation, it is not possible to read natural justice in a statutory provision because it is not expressly mentioned there. It is only the creative genius of the judiciary which can lead it to imply a concept into the written law because it believes that the law must be humane, that rule of law requires that the person be given an opportunity to defend himself before any adverse decision is taken, and that is in the interest of democratic traditions and values.

Or, take the case of 'finality' clauses found in the modern legislation. A decision of an authority is declared to be 'final'. If this clause is read and interpreted according to the strict positivist approach, then the authority's decision becomes non-questionable in the courts. Thus, a large number of authorities exercising discretionary powers would be without any control from any quarters. In such a situation, only the judiciary's constructive and creative genius can save the situation. The highwater mark in this respect was reached in England in *Anisminic*[71] in which case the House of Lords made it possible to challenge an administrative decision, in spite of the 'finality'

[70] [1964] A.C. 40.

[71] *Anisminic Ltd.* v. *Foreign Compensation Comm.*, [1969] 2 A.C. 147.

clause. This decision has found acceptance by the judiciary in countries other than England rather grudgingly. In some countries, courts have enthusiastically adopted the *Anisminic* approach; in some other countries, the courts have displayed a hesitant attitude.[72] The judicial attitude is conditioned by the fact whether a 'dynamic' or 'static' view of law is adopted by the court concerned. Administrative Law can progress in a democratic country only if a dynamic, forward looking view is adopted by the courts. The reason is that the need for Administrative Law has been felt keenly only recently, after the demise of the doctrine of *Laissez faire.* Such a body of law cannot develop properly in modern times if the *doctrine of stare decisis* were to be applied strictly by the courts and if XIXth century precedents were sought to be invoked for solving our modern contemporary problems. The problems of administration then, and the judicial attitudes to solve them, were entirely different. England and the common-law world was then under the spell of Dicey who even denied the very existence of administrative law and regarded it as being repugnant to the rule of law.[72a] In fact, I believe, that, in the area of administrative law, modern courts should not cite the XIX century or even early XX century precedents for most of them are so antiquated and out-dated that they appear to be irrelevant in the context of modern times and they unnecessarily distort the judicial approach to our problems of to-day. It is the responsibility of the courts to develop this branch of law keeping in view the modern needs of the society, especially when Parliament and the Government in many countries are not doing much by way of developing this branch of law.

Or, take the case of 'discretionary powers'. It has become a fashion for the legislative draftsman to say in the law that a decision or action is to be taken by an authority in its discretion or subjective satisfaction. Again, if the canon of literal interpretation is applied, the decision of the authority cannot be questioned on any ground. This will be violative of the well recognised canons of rule of law. Rule of law can tolerate

[72] In Malaysia, the High Court refused to follow *Anisminic* in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia,* [1975] 2 M.L.J. 175.

[72a] Dicey, *The Law of the Constitution* 202, 203, 329 (1965).

discretionary powers but not absolute powers. It is a contradiction of democratic norms to have any absolute power. The courts have therefore to develop a jurisprudence to control discretionary powers. So, we have the famous *Padfield*[73] case and other cases following the same[74] in which the notion of unfettered administrative discretion has been totally rejected.

Recently, Lord Hailsham has assessed in the following words, the value of the role played by the courts in this area:

> "On the whole I would say that the increase of judicial sensitivity to the abuse of power has been both beneficial and popular. Laws are unnecessary to protect the strong against the weak. So long as they pursue the paths of justice (but only so long) laws are valuable in so far as they protect the weak against the strong, or the inarticulate and often helpless majority against highly organised or excessively powerful groups. It is increasingly recognised that judicial independence remains one of the few remaining protections for the individual, for minority groups, or even, as I say, the inarticulate and largely helpless mass of citizens against the encroachment of the bureaucracy and the politically motivated Ministers against intrusiveness of mass culture and the oppressiveness of unions .... Individuals and minorities are becoming more and more discontented at what they regard as the increasing remoteness of Government .... the insensibility of officials whether in public bodies or private associations. Sometimes this restlessness results in a direct appeal to the courts, by individuals complaining of the unfairness on the part of various powerful people concerned, such as Ministers .... But sometimes these individuals take the law in their own hands and then it is the public authority which seeks to restrain or coerce them by appealing to the courts. In either case it is the judiciary which has to hold the balance, and I doubt not myself that their continued independence is to the advantage of both parties, and increasingly popular with the people."[75]

It may be of interest to know that the Supreme Court of India has been playing a highly creative role in the area of

[73] *Padfield* v. *Minister of Agriculture*, [1968] A.C. 997.

[74] *R.v. Hillingdon London Borough, Ex p. Royco Homes Ltd.*, [1974] 2 All E.R. 643; *British Oxygen Co. Ltd.* v. *Minister of Technology*, [1970] 3 All E.R. 165; *H.' Lavender* v. *Minister of Housing & Local Goverment*, [1970] 3 All E.R. 871.

[75] *Supra*, note 61; [1978] 2 M.L.J. cxv, cxviii.

administrative law. The English cases in this area are well-known but the contribution made by the Indian Court to the development of administrative law may not be so well-known and, therefore, some mention may be made here of a few outstanding Indian cases to illustrate the activist and creative role the judiciary may play in a democracy in developing norms of controlling the administration.

A.K. Kraipak v. *Union of India*[76] is a trend-setting pronouncement of the Supreme Court on the question of quasi-judicial and natural justice. A member of a selection board for several posts in a Central Government service was himself a candidate for one of the posts and he was selected. Some of the unsuccessful candidates challenged the selection and the Supreme Court quashed the same. The Court refused to characterise the selection board's function either as administrative or quasi-judicial. The court declared that the line of demarcation between these functions is 'quite thin' and is being 'gradually obliterated'. The concept of rule of law would lose its validity if the state instrumentalities do not discharge their duties and functions 'in a fair and just manner'. The court noted that, in recent years, the concept of quasi-judicial power has been undergoing a radical change and that what was once considered as an administrative power is now being considered as a quasi-judicial power. Assuming for the sake of argument that the function involved in the instant case was 'administrative', the court ruled that it was nevertheless improper to have a candidate on the selection board. This was a clear case of bias as such a person would be interested in safeguarding his own position while making selection for the posts concerned. The court also ruled that principles of natural justice could be applied even to the so called 'administrative' proceedings as contrasted to 'quasi-judicial' proceedings. The rules of natural justice only aim at securing justice, or, to prevent miscarriage of justice. As such, the rules of natural justice should apply to administrative proceedings as well. After all, arriving at a just decision is the aim of both quasi-judicial as well as administrative enquiries. In

[76] A.I.R. 1970 S.C. 15. For details in the area of Indian Administrative Law, reference may be made to Jain and Jain, *Principles of Administrative Law* (1979).

the instant case, the selections were quashed as the decision of the selection committee could not be said to have been taken 'fairly' or 'justly' insofar as one of the members of the board was a judge in his own case, a circumstance abhorrent to the concept of justice.

This judgment is regarded as epoch-making in India. Its law-creative qualities are obvious. It demolishes the artificial, and conceptualistic distinction between "quasi-judicial" and "administrative" functions as well as the link between quasi-judicial and natural justice. *Kraipak* has had a profound impact on the growth of administrative law in India insofar as the horizons of natural justice have been expanded a great deal. This has been achieved by following two channels – (i) increasing judicial trend of characterising many more functions as 'quasi-judicial' and, thus, ensuring 'hearing' to the party affected; or, in the alternative, (ii) applying natural justice without characterising the function as 'quasi-judicial' or 'administrative.'[77]

Recently, in *Maneka Gandhi* v. *Union of India*,[78] arguing in favour of giving a hearing when the government proceeds to impound a passport, the Supreme Court has characterised natural justice as a great "humanising principle" intended to invest law with fairness and to secure justice. The soul of natural justice, the court has emphasized, is 'fair play in action' and this being the test of applicability of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The court has emphasized that the requirement of fairplay in action is as important in an administrative inquiry as in a quasi-judicial inquiry. This statement of the court would give a further fillip to the process of 'universalisation' of natural justice in administrative process in India. This trend is reinforced by another decision in 1978 in which the Supreme Court has ruled that when the Election Commission proposes to cancel the poll in a constituency because of some violence or malpractices therein, the

[77] *C.B. Boarding and Lodging* v. *State of Mysore*, A.I.R. 1970 S.C. 2042.

[78] (1978) 2 S.C.J. 312; A.I.R. 1978 S.C. 598; Also see, *infra*, next section.

Commission must give a hearing to the candidates before taking a final decision.[79] Even if the cancellation of the poll be regarded as an administrative act, that would not repel the application of natural justice. Referring to the argument that the Election Commission is a highly-placed body, the court cautioned that "wide discretion is fraught with tyrannical potential even in high personages".

In the area of natural justice, one principle which has become very well established in India is that the decision-making authority must give reasons for its decision. In this respect, the courts in India have gone much beyond what the English courts have held. In England, it is not a firm rule yet that it is a part of natural justice that the authority gives a reasoned decision.[80] On the other hand, in *Travancore Rayons* v. *Union of India*,[81] the Supreme Court of India quashed the decision of the Central Government given as an appellate body in a tax matter. The court emphasized that it is a part of natural justice that a decision-making authority should make a speaking order. This obligation has been emphasized upon recently by the Supreme Court in the *Siemens* case.[82] Here was a case of assessment of customs duties on an imported consignment. The highest appellate body in this area is the Government of India. Hearing an appeal from the Government's decision, the court expressed displeasure on the unsatisfactory manner in which the customs authorities discharged their function of assessing customs duties. None of the various authorities through whom the assessment proceedings passed in the instant case, chose to give reasons in support of its order. The court emphasized that it was an inevitable part of natural justice that the decision-making authorities give sufficiently clear and explicit reasons in

[79] *Mohinder Singh* v. *Chief Election Commissioner*, A.I.R. 1978 S.C. 851.

[80] *R.* v. *Gaming Board ex p. Benaim*, [1970] 2 Q.B. 417; *Breen* v. *A.E.U.*, [1971] 2 Q.B. 143.

[81] A.I.R. 1971 S.C. 862.

[82] *Siemens Engr. & Mfg. Co.* v. *Union of India*, A.I.R. 1976 S.C. 1785.

support of their orders. That way, the decision-making bodies will carry credibility with the people by inspiring confidence in the adjudicatory process.

In the area of Natural Justice, a very significant judicial pronouncement of the Supreme Court, *Nawabkhan* v. *State of Gujarat*[83] needs to be mentioned here. The Police Commissioner of Bombay passed an order externing a person from Bombay. He disobeyed it and so was prosecuted for it. In the meantime, the High Court, on a writ petition by him, held the externment order to be invalid because of failure of natural justice to the externee. The question was whether the person concerned could be convicted for not obeying the said order. The Supreme Court ruled that as the order affected the fundamental rights of the person concerned under Art. 19, and, as the order was illegal and unconstitutional, its non-observance could not be punished. The court stated the principle in the following words:—

> "Where hearing is obligated by a statute which effects the fundamental right of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such duty is fatal."

The court left open the broader question whether a person can disobey a void order with impunity, before it is declared so by a court, in an area outside the fundamental rights. The court noted that there could be two views in the matter. One, 'law and order' will be in jeopardy if a person were to have discretion to disobey any invalid order before it is declared to be so by a court and this would lead to anarchy. Two, a person commits no crime if he disobeys an invalid order for why should a person be forced to obey an order which is a nullity? These are questions left unanswered by the court.

In the area of delegated legislation, the Supreme Court of India, as early as 1951, in the famous *Delhi Laws Act* case,[84] had enunciated a restriction on the Legislature delegating legis-

[83] A.I.R. 1974 S.C. 1471. For a detailed comment on this case see S.N. Jain, Is an Individual bound by an Illegal Executive Order? Distinction between 'void' and 'voidable' administrative orders, VI *J.I.L.I.*, 322 (1974).

[84] A.I.R. 1951 S.C. 332. This case was cited by the Malaysian Federal Court in *Eng Keock Cheng* v. *Public Prosecutor*, [1966] 1 M.L.J. 18

lative power on an administrative authority, viz., that the legislature can delegate its legislative power subject to its discharging the essential legislative function; the legislature must declare the policy of the law, lay down the legal principles and provide standards for the guidance of the official or the administrative body to promulgate delegated legislation, otherwise the law will be bad on account of excessive delegation. In applying the test of excessive delegation, apart from considering the breadth of the discretion conferred by an Act to promulgate delegated legislation, the courts also examine the procedural safeguards contained in the Act against misuse of power. To understand the significance of this case, it is necessary to keep in mind the necessary background. The Constitution of India has no provision one way or another either to permit, or to bar, delegation of legislative power. India being a parliamentary system, and working on the premise of close relationship between the Legislature and the Executive, the courts could have easily opted for the doctrine of unlimited delegation of power as is the position in England. In spite of all these significant factors, the Indian Supreme Court opted for the American model rather than the British model. This choice was made in the interests of placing a limit somewhere on the legislature in the matter of delegation. The theoretical justification for this view is that the legislature derives its powers from a written constitution which creates it, and, therefore, such a legislature could not be allowed to enjoy the same freedom as the British Parliament has in the matter of delegation which functions under an unwritten constitution. The result of this approach is that while legislature can certainly delegate powers, the final say in this respect is in the hands of the courts. When they feel that an unduly large amount of legislative power is being conferred without adequate restraints, they can cry a halt to the process of delegation. There are quite a few cases in India where delegation of legislative power has been held to be excessive, and hence invalid.[85]

[85] *Rajnarain v. Chairman, Patna Administration Committee*, A.I.R. 1954 S.C. 569; *Jalan Trading Company v. Mill Mazdoor Union*, A.I.R. 1967 S.C. 691; *Lachmi Narain v. Union of India*, A.I.R. 1976 S.C. 714.

The principle of excessive delegation has been reconsidered by the Supreme Court in *Gwalior Rayon Mills* v. *Assistant Commissioner of Sales Tax,*[86] and the court reiterated the same by a majority in the following words:

> ". . . . the view taken by this court in a long chain of authorities is that the legislature in conferring the power upon another authority to make subordinate or ancillary legislation must lay down policy, principle or standard for the guidance of the authority concerned."

The majority reiterated this view as it wanted to have checks and balances in the system. Suppose, the majority argued, the crime situation in the country deteriorates. Can Parliament pass a law saying that henceforth criminal law enforced in the country would be such as is framed by a designated officer? Can Parliament confer such a blanket power on an officer? In a Parliamentary system, the Government enjoying majority support can persuade Parliament to enact a law desired by it. Parliament, in practice, cannot resist the Government. Therefore keeping in view the interests of the democracy at heart, the rule against excessive delegation seems to be very appropriate. It introduces a flexible yardstick of judicial control over delegation of legislative power.

On the question of publication of delegated legislation, the position taken by the Supreme Court in India is more strict than that adopted by the courts in any other country. The Supreme Court has ruled in *Harla* v. *State of Rajasthan*[87] that publication of some reasonable sort is essential to make a rule effective and to bring it into force. Thus, publication in the customary channel (in a Gazette) was essential for making the rules effective. But, recently, in *Govindlal* v. *Agriculture Produce Market Committee,*[88] the Supreme Court has gone much further than that. Here the law in question required that the rules under it be published in the official Gazette as well as in the local language in a newspaper. Rules were published in the Gazette but not in the local newspaper. The Court declared that

[86] A.I.R. 1974 S.C. 1660.

[87] A.I.R. 1951 S.C. 467. This case has been cited in Malaysia in *N. Madhavan Nair* v. *Government of Malaysia,* [1975] 2 M.L.J. 286.

[88] A.I.R. 1976 S.C. 263.

the rules lacked validity as publication in a newspaper was mandatory. Adequate publicity of the rules was necessary as they vitally affected valuable rights of the people. Publication in a newspaper attracts greater public attention. It is to be noted that in England or the U.S.A., publication of rules is not mandatory, and lack of publication can be cured by invoking the doctrine of notice.[89]

State of Uttar Pradesh v. *Raj Narain*[90] is a significant pronouncement of the Supreme Court on the question of the scope of Government privilege not to produce documents in a court. In India, as in Malaysia, the privilege is conferred under S. 123 of the Evidence Act. In *Raj Narain*, the controversy arose out of a claim for privilege by the Government of Uttar Pradesh in respect of the bluebook – a booklet issued by the Central Government and containing rules and instructions for the protection of the Prime Minister when on tour and travel – before the Allahabad High Court in the election case of *Raj Narain* v. *Indira Nehru Gandhi*.[91] The question was whether privilege could be claimed in respect of the blue book. The court clarified that the basis of the doctrine of privilege is injury to the public interest. If certain documents are disclosed then it may injure public and national interests. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have access to all relevant materials. When public interest outweights the latter, the evidence cannot be admitted. The highlight of the Court's pronouncement is the clear enunciation of the principle that the court may inspect a document to satisfy itself whether it needs to be protected in the public interest from production in the court. The court also ruled that if the affidavit filed on behalf of the government claiming privilege in respect of a document is defective, then the court can ask for filing of a better affidavit. It will be seen from this pronounce-

[89] *Simmonds* v. *Newell*, [1953] 1 W.L.R. 826.

[90] A.I.R. 1975 S.C. 865. Also see, *infra*, note 103. The Federal Court in Malaysia has based its ruling in *Rao* on *Raj Narain*.

[91] On Appeal in the Supreme Court, *Indira Nehru Gandhi* v. *Raj Narain*, A.I.R. 1975 S.C. 2299.

ment that an antiquated provision (S.123) has been purposively interpreted by the court so as to bring the law in accord with the progressive law prevailing in England, as held by the House of Lords in *Conway* v. *Rimmer.*[92] The court has claimed the power to inspect the document. The Government's affidavit is no longer conclusive of the matter whether a document ought to be produced in the court or not in evidence. The view adopted by the Supreme Court is in line with the progressive thinking on the subject.

A significant development in India is in the field of estoppel against the government. In *Union of India* v. *Anglo-Afghan Agencies Ltd.*,[93] an export promotion scheme was announced by the Central Government administratively. Under the scheme, a person exporting woollen goods was to be entitled to import raw materials of equal value. The Supreme Court held that the scheme was binding on the government and that the exporter was entitled to get the benefit promised by it. Even though the scheme had no statutory force and was merely administrative in character, the government could not ignore the promises made by it at its mere whim. The claim of the exporter was founded upon "the equity which arises" in his favour as a result of the representation made on behalf of the Union of India in the scheme and the exporter's action in acting upon that representation under the belief that the government would carry out the representation made by it. The same principle has been applied by the Supreme Court recently in *Motilal Padampat Sugar Mills* v. *State of Uttar Pradesh.*[94] The Government announced a scheme of exempting new industrial units from sales tax for three years. The appellant set up his factory on this assurance and the government then went back on this promise. The court held that the government was bound by its promise or assurance on the ground of equity. The Government had argued that the appellant's concern was quite profitable and no prejudice was

[92] [1968] 1 All E.R. 874 overruling *Duncan* v. *Cammell Laird & Co.*, [1942] A.C. 624.

[93] A.I.R. 1968 S.C. 718.

[94] A.I.R. 1979 S.C. 621.

caused to him by his acting on the government assurance. The court ruled that what was material was "the altering of the position" by the petitioner and not the prejudice caused to him. "The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise, but the prejudice which would be caused to the promisee, if the promisor were allowed to go back on the promise". In the instant case, the relevant statute contained a clause authorising the government to grant exemptions from sales tax to new enterprises. The government could issue a notification under this statutory provision to honour its promise.

Finally, in *Ramana Dayaram Shetty* v. *The International Airport Authority,*[95] the Supreme Court has recently made a dent in an area which has traditionally been regarded hitherto as purely discretionary. The question was: Is the state entitled to deal with its property in any manner it likes or award a contract to any person it chooses, without any limitations upon it? What are the parameters of its statutory or executive power in the matter of awarding a contract or dealing with its property? When the government invites certain tenders for a contract, subject to certain conditions and terms, is the Government entitled to accept the tender of a person who does not fulfil those conditions? The court has answered these questions in the negative in *Shetty.* The court has formulated the following principle for this purpose. An executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe these standards on pain of invalidation of an act in violation of them. The court has pointed out that to-day the State confers a large number of benefits such as jobs, contracts, licences, quotas, mineral rights, etc. A large majority of these forms of wealth are in the nature of privileges. But merely on that account, it cannot be said that they do not enjoy any legal protection. "The discretion of the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will", and that "Government action be based on standards that are not arbitrary or unauthorised." In granting largess, the Government

[95] A.I.R. 1979 S.C. 1628.

cannot act arbitrarily. The Government is still the government and it does not stand exactly in the same position as a private individual.[96] The court has thus stated:

> "It must, therefore, be taken to be the law that where the Government is dealing with the public whether by way of giving jobs or entering into contracts or issuing of quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standards or norms which are not arbitrary, irrational or irrelevant."

The court has ruled further that where a corporation is an instrumentality of the government, it would be subject to the same public law limitations as the government itself. The corporation cannot act arbitrarily and enter into relationship with any person it likes at its sweet-will, its action must be in conformity with some principle which meets the test of reason and relevance. "The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise, with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory." The International Airport Authority, a statutory body, has been held to be an instrumentality of the Central Government, and hence subject to the same norms of administrative law as the government itself. The Authority had invited tenders for running a restaurant at the airport from those who fulfilled certain norms of eligibility. The court has ruled that these norms were reasonable and non-discriminatory, but when the Authority accepted the tender of one not satisfying the prescribed conditions of eligibility, the action of the Authority became clearly discriminatory, "since it excluded other persons similarly situate from tendering for the contract and it was plainly arbitrary and without reason".

The ramifications of this pronouncement on the exercise of discretionary power of the government have not so far been worked out fully. But it is obvious that there are great poten-

[96] The court referred to an article by Prof. Reich, The New Property, 73 *Yale L.J.* 733, in support of this view.

tialities hidden in this judicial pronouncement which will unfold in course of time in the future.

The above is a very brief outline of the creative role which the Supreme Court in India has been playing in expanding the frontiers of administrative law, and articulating and refining its norms, with a view to control and regulate governmental powers impinging on the governed. In some respects, the court has travelled even much further ahead in this area than what the English courts have done, although the English courts themselves have been very active and creative in this area since the 1960's as stated above.[97]

In this context, one could mention a few decisions from Malaysia as proof of the judicial creativity in the area of administrative law. As these cases are already well known to the Malaysian lawyers, it is not necessary to note them here at great length. It will be sufficient just to mention their highlights here. A significant pronouncement in the area of applicability of natural justice is *Ketua Pengarah Kastam* v. *Ho Kuan Seng*[98] in which the Federal Court enunciated a broad principle of the applicability of natural justice. The court noted that the principles of natural justice to-day "play a very prominent role in administrative law, particularly since the House of Lords, invigorated them by a strong decision in *Ridge* v. *Baldwin*". The rule requiring a fair hearing, the court pointed out, is "of central importance because it can be used to construe a whole code of administrative procedural rights". Taking note of some of the English cases,[99] the court observed: "The essence of this and many other such cases is that drastic statutory powers cannot be intended to be exercised unfairly, and that fairness demands at least the opportunity of a hearing". The court emphasized the point that the cases show that fairness "is required as a rule of universal application, "founded on the plainest principles of justice", and that "the silence of the statute affords no argu-

[97] Also see, Lord Denning, *The Discipline of Law*, 61–144 (1979).

[98] [1971] 2 M.L.J. 152.

[99] *Cooper* v. *Wandsworth Board of Works*, 143 E.R. 414; *R.* v. *Gaming Board for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417; also *infra*, next section.

ment for excluding the rule, for the 'justice of the common law will supply the omission of the legislature'." The court then enunciated the following principle as regards the applicability of natural justice to the administrative process:

> "... the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter it is labelled 'judicial', 'quasi-judicial', or 'administrative', or whether or not the enabling statute makes provision for the hearing."

The court has thus sought to make the application of the principle of hearing as universal to all administrative proceedings adversely affecting an individual. This pronouncement is very meaningful and "is bound to make a deep impact on the development of administrative law in Malaysia as it expands the horizons of natural justice".[100] The view expressed in this case accords with "modern judicial thinking" in other common-law countries on the question of availability of the right of hearing. In *Re Tan Boon Liat @ Allen & Anor.*,[101] the court sought to import the concept of procedural *ultra vires* in the area of preventive detention. In *Port Swettenham Authority* v. *T.W.W.U. & Co. (M) Sdn. Bhd.*.[102] a piece of subsidiary legislation has been held to be *ultra vires* the parent statute. In *B.A. Rao* v. *Sapuran Kaur*,[103] the Federal Court has asserted a right to inspect an unpublished document before accepting the government claim to privilege of not producing the same in evidence in the courts under S. 123 of the Evidence Act. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the document, examine it, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interests. It is for the court, not the executive,

[100] M.P. Jain, *Annual Survey, Administrative Law*, 36–39 (1977).

[101] [1977] 2 M.L.J. 108; Survey, *ibid*, 50, 105; also see *infra*, next section.

[102] [1978] 2 M.L.J. 137.

[103] [1978] 2 M.L.J. 146.

ultimately to determine that there is real basis for the claim that "affairs of state" is involved.

In *Pengarah Tanah dan Galian Wilayah Persekutuan, K.L.* v. *Sri Lempah Enterprises,*[104] the court has repudiated the idea of uncontrolled discretion. The following observation from the opinion of Raja Azlan Shah Ag. C.J. needs to be underlined:

> "Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite*[105] and its progeny[106] compel me to reject it .... It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when Government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasize what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place."[107]

Thus the discretionary power to impose such conditions as the authority "thinks fit" does not confer an uncontrolled power to impose any conditions the authority likes. The conditions to be valid must fairly and reasonably relate to the permitted development. The concerned authority is not free to use its powers for an ulterior object, however desirable that object may seem to it to be in the public interest. In *Government of Malaysia* v. *Loh Wai Kong,*[108] the Federal Court has

[104] [1979] 1 M.L.J. 135.

[105] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government,* [1958] 1 All E.R. 625.

[106] *Fawcett Properties* v. *Buckingham County Council,* [1960] 3 All E.R. 503.

[107] *Bradbury* v. *London Borough of Enfield,* [1967] 3 All E.R. 434, 442.

[108] [1979] 2 M.L.J. 33.

explicitly adopted the norms stated in the academic works of Wade and De Smith as regards the control of administrative discretion in Malaysia. Incidentally, the court has accepted in this case that academic writings can be cited in the court. This is what Tun Suffian L.P. has stated in this area on this point:

> "As regards the question .... as to whether the Executive's power to issue or not to issue and the power to withdraw a passport is subject to review by a court of law under Section 44(1) of the Specific Relief Act, 1950 – in our judgment when exercising this discretionary power in the Executive is expected to behave in the same way as when exercising its other discretionary powers. It must act *bona fide*, fairly, honestly, and honourably, and if it does not, the aggrieved party will probably make a noise in the press, in Parliament and in public. What if he comes to court? If it is established that Government has acted *mala fide* or has in other ways abused this discretionary power, the court may .... review Government's action and make the appropriate order, and the principles which the court will apply are well-established and may be found in two authoritative books: *Administrative Law by Professor H.W.R. Wade*, and *Judicial Review of Administrative Action by the late Professor de Smith.*"

A significant and positive aspect of this case is that although a person may not have a right to get a passport, nevertheless, government must exercise its discretion in a proper manner and according to law, and that he can still challenge the exercise of discretion (although he has no right as such) as a "person aggrieved" under S. 44(1) of the Specific Relief Act. The court thus rejected the contention of the government that the power to issue or refuse to issue and the power to withdraw a passport was not subject to review by a court by virtue of S. 44(1) of the Specific Relief Act.

Further, the law in Malaysia as regards the control of discretionary power has been fully assimilated to that prevailing in England in all its aspects. That appears to be the result of the reference made in this case to the two leading works on administrative law in England.

[109] For an outline of the development of administrative law in Malaysia see, M.P. Jain, Development of Administrative Law in Malaysia Since Merdeka [1977] 2 M.L.J. ms. ii–xvi.

These few cases are being cited here to show that the judiciary in Malaysia is showing signs of creativity in the area of administrative law. There are however quite a few cases on the other side of the line which are not being noted here. Nevertheless, as yet, administrative law in Malaysia is in its formative stages. It will take time before it can mature into a viable, sophisticated and self-sufficient system. In this destined task, courts have to play a significantly creative role. As administrative powers impinge more and more on the individual, more and more court cases are bound to arise bringing into focus various points of administrative law and the courts can play a meaningful role in developing the norms of administrative behaviour towards the citizens consistent with law and democratic values. This is going to be a challenging task for the legal profession in this country.

VI

The responsibilities which a court carries in a country with a written constitution are enormous – much more onerous than the responsibilities of a court in a country without a written constitution. The courts in a country like England interpret the laws but not the constitution whereas the courts in a country with a written constitution give meaning to the cold letter of the constitution. The task of interpreting a written constitution is given to the courts because of the feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution. The Constitution of Canada, or Australia or the U.S.A. does not contain any express provision for judicial review, yet it has become an integral part of the constitutional process. In one of the most creative opinions penned by Chief Justice Marshall in 1803 in *Marbury* v. *Madison,*[110] he argued for judicial review of the U.S. Constitution. He pointed out that the constitution defines and limits

[110] Cranch 137; 2 L. Ed. 60.

the powers of the legislature and there would be no purpose in doing so if the legislature could over-step these limits at any time. The framers of the written constitution contemplate it to be the "fundamental and paramount law of the nation". In case of conflict between the constitution and a statute, it is the duty of the courts to follow the former and declare the latter to be unconstitutional.

The function of interpretation of a written constitution is a very crucial one and the approach to this task has to be entirely different from that of interpreting a statute. Interpretation of a statute one way or another affects only a limited number of persons. But interpretation of the constitution and declaring an Act of Parliament constitutional or unconstitutional affects the entire governmental functioning, policy-making and even the constitutional process in the country.

In a country with a written constitution, the bare text of the constitution does not represent in itself the 'living' law of the country. For that purpose, one has to read the fundamental text along with the gloss put thereon by the courts. As Dowling has stated evaluating the role of the Supreme Court in the U.S.A.: "The study of constitutional law . . . . may be described in general terms as a study of the doctrine of judicial review in action".

The task of rendering an authoritative interpretation of the constitution converts the courts into vital instruments of government and policy-making. Here is a challenging and creative task for the judiciary to perform. It will be a mistake to suppose that the task of constitutional interpretation can be performed by the courts in a mechanical manner by finding out the meanings of the words used in a constitutional provision with the help of a dictionary. The function of interpreting the constitution ought not to be discharged in a positivist, Austinian, tradition, but from a liberal outlook, drawing balances between public interest and individual interest. In India, positivist approach adopted by the courts has invariably resulted in bad decisions. Good constitutional decisions, which have come to be regarded as landmarks in the country's constitutional history, are those where the courts have shed the positivist, mechanical approach and have adopted a liberal, purposive, creative approach. A court in a democracy has to

fulfil the great and noble task of upholding democratic traditions and rule of law and promoting constitutionalism in the country.[111] Constitutionalism envisages a balanced, limited constitution. In discharging this noble task, the courts may have to make implications within the written words of the constitution to bring it in accord with the more acceptable contemporary democratic norms. The word "democratic" is being used here in the sense of a proper balance being drawn between administrative exigencies and individual rights. The process of constitutional interpretation, whenever there emerges a conflict between administrative expediency and individual freedom, cannot always be one-sided, i.e. on the side of the administration. Democracy involves restraints on the government and its organs as well. To draw such a balance is the creative task which the courts have to undertake.

It may be pointed out that the task of reviewing legislation and interpreting the constitution may not always be smooth for the judiciary. Many a time, its pronouncement may not be palatable to the government of the day. In India, such controversies have arisen from time to time. For example, the judicial approach to protection of private property, especially the question of compensation for compulsory acquisition of property by the Government has generated a public controversy. The Supreme Court's ruling in *Kesavanand* was not liked by the previous government which wanted an unrestricted power in Parliament to amend the constitution. Such controversies have arisen in the U.S.A. in the 1930's.[112] But this is inevitable in any system of constitutional government. Courts have no control over the cases which reach them for decision. When a case comes before the court, it cannot duck the issue. The court must dispose of the case one way or the other and, in a politically sensitive case, either way it will give rise to controversy. Even if the courts were to refuse jurisdiction, or refuse to give the relief asked for, it is equally going to give rise to a controversy. There are many who may argue against the very concept of judicial review of the constitution. Such a

[111] *Supra*, Sec. I.

[112] Cope, Alfred Haines, *Franklin D. Roosevelt and the Supreme Court* (1952).

debate has been carried on passionately in the U.S.A. for a long time since *Marbury* v. *Madison*. But, there are overwhelming reasons as to why the courts should act as authoritative expounder of the constitution. A written constitution would be reduced to a mere paper document in the absence of an independent organ to interpret, expound and enforce the same. In the absence of an accepted authority to interpret a written constitution, it would promote discord rather than order and unity in society because different organs of government would then take conflicting action in the name of the constitution. The legislature and the executive are politically partisan and motivated bodies and are committed to certain policies and programmes which they wish to implement and, therefore, they cannot be trusted with the final power of constitutional interpretation. They would often bend the constitution to accomodate their own views and their own policies. The judiciary is by and large free from active political bias, is politically neutral (to the extent it is humanly possible) and can bring to bear somewhat detached and non-political outlook on constitutional interpretation. If there is any institution in the country which can do so, it is the judiciary and it is, therefore, regarded as most suited to act as an umpire in constitutional controversies. In the absence of any effective enforcement machinery, the fundamental rights in the constitution will be reduced to mere formal and empty platitudes with no restraint on the government or the legislature. As Justice Jackson has observed:

> "The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands."[133]

There is, perhaps, a much more abiding reason in favour of judicial review. Modern political thought draws a distinction between 'constitution' and 'constitutionalism'. A country may have a 'constitution' but not necessarily 'constitutionalism'. Constitutionalism denotes a constitution not only of powers

[113]Jackson, *The Supreme Court in the American System of Government*, 23, (1965).

but of restraints as well, not only engine but some brakes as well. Judicial review can promote constitutionalism in the country, rule of law and constitutional and democratic behaviour on the part of all concerned. It is wrong to assume that a society is not democratic unless its legislature has unlimited powers. The British model is not the best to follow in every country. In a parliamentary system, the majority automatically supports the government of the day and, thus, the powers of the legislature gravitate towards the government, and to maintain individual rights and balanced administration, some external restraint on the government becomes an absolute necessity.

Justice Cardozo has put the matter succinctly in the following words:

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and decision of those who have no patience with general principles, but enshrining them in constitutions, the consecrating to the task of their protection a body of defenders. By conscious or unconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."[114]

The courts may either adopt a literal approach to the interpretation of the constitution or may adopt a liberal approach thereto. Literal approach envisages applying the same canons to interpreting a constitution as are usually applied to the interpretation of ordinary legislative enactments.[115] This can be characterised as the positivist approach. The liberal approach is to give a creative and purposive interpretation to the constitution "with insight into social values, and with suppleness of adaptation to changing needs."[116] By and large,

[114] Benjamin N. Cardozo, *The Nature of Judicial Process*, 91–93.

[115] The question of statutory interpretation has already been considered before, see Sec. IV, *supra*.

[116] Cardozo, *op. cit.*

the Privy Council followed a literal approach to constitutional interpretation mainly because the colonial constitutions which it was called upon to interpret were statutes of Parliament of England, and being accustomed to interpretation of statutes, it could not but interpret these statutes merely as statutes and not as a constitution which forms the basic law of a country.[117] Of course, one could point to a few decisions of the Privy Council which have deviated from the technique of literal interpretation. Thus, in *Liyanage* v. *Reginam*,[118] a Ceylonese statute was declared unconstitutional not because it was inconsistent with any specific provision of the constitution, but because it was "contrary to the clear intention of the constitution". The reason was that the Act in question interfered with the functions of the judiciary; it constituted "a grave and deliberate incursion into the judicial sphere". If such an Act were valid, then the whole of the judicial power would be "absorbed by the legislature and taken out of the hands of the Judges." If this is allowed, judicial power may be eroded. Or, take another decision of the Privy Council, *Hinds* v. *The Queen*.[119] Here also an Act of the Legislature was declared unconstitutional practically on the same ground as in *Liyanage*. The Privy Council asserted that "the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively". And then the Privy Council decried the literal interpretation of the constitution in the following words:

> "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would .... be misleading – particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge on the subject."

[117] See for interpretation of the Canadian Constitution (The British North America Act, 1867), Bora Laskin, *Canadian Constitutional Law*.

[118] [1966] 1 All E.R. 650.

[119] [1976] 1 All E.R. 356.

A similar approach is implicit in the Malaysian case *Teh Cheng Poh @ Char Meh* v. *The Public Prosecutor,*[120] where by the process of interpretation, the regulations were equated to an 'ordinance' and, thus, the executive had to seek powers from the Parliament to make regulations which it had been doing hitherto under its own ordinance. Such a judicial approach is consistent with the function of the judiciary to promote constitutionalism, democratic values and rule of law in the country. But, the Privy Council has not always displayed such an attitude. More often than not, it has adopted a literal approach to the constitution. The highwater mark of such an approach can be seen in *Kariapper* v. *Wijesinha,*[121] where the Privy Council accepted the theory of implied amendment of the constitution. The Privy Council ruled that a written constitution can be amended by an ordinary inconsistent enactment without a constitution amendment act being passed specifically. This amounted to applying the principle of ordinary legislative process that a statute later in date, if inconsistent with an earlier statute, will prevail over the earlier one. This approach did violence to the basic concept of a written constitution as the fundamental law of the land.

On the other hand, the U.S. Supreme Court has never adopted a literal approach to the constitution. It has interpreted the U.S. Constitution as a 'constitution' and not as a 'statute'. The Judges of the Supreme Court in the U.S.A. frankly and avowedly take recourse to policy considerations and use socio-economic materials in interpreting the constitution.[122] The U.S. Supreme Court's approach is to canvass, directly and openly, the merits of alternative choices in arriving at a decision. Social and economic facts are directly incorporated into the briefs presented to the Supreme Court. This kind of brief is known as the Brandeis brief. Two main reasons for such an attitude on the part of the U.S. Supreme Court are: the brief

[120] [1979] 1 M.L.J. 50.

[121] [1968] A.C. 717.

[122] Policy-making in a Democracy: The Role of U.S. Supreme Court (1957) *Jl. of Public Law*, 275–508.

and compact nature of the U.S. Constitution and use of very general phrases in the U.S. Constitution which can be interpreted and re-interpreted by the courts from time to time in the context of the contemporary circumstances, e.g., due process of law, interstate commerce, etc. The court has therefore evolved a number of doctrines which are not mentioned explicitly in the Constitution, e.g. immunity of instrumentalities, separation of powers, police powers, etc. The U.S. Supreme Court has interpreted the U.S. Constitution in such a creative manner that an old document, of nearly 200 years in age, without many amendments, has been serving the needs of the present highly sophisticated technological era. In this way, the court has not only played the role of an interpreter of the constitution but even the role of a constitution-maker. Many outstanding decisions have been rendered by the Supreme Court on the Constitution. For example, on the question of desegregation, the court changed its old ruling regarding 'separate but equal' to 'equal and not separate'. The two monumental decisions of the court, *Brown* v. *Board of Education*[123] and *Baker* v. *Carr*[124] have triggered revolutionary changes in the social, economic and political structure of America's body politic. In the words of Chief Justice Warren, "The Court's essential function is to act as the final arbiter of minority rights."[125]

During the course of the evolution of the Indian Constitution over the last 30 years, innumerable decisions have been rendered by the Supreme Court of India on central-state relationship, fundamental rights, minority rights, governmental structures, etc. The Indian Supreme Court is perhaps one of the busiest courts in the world. Some of the decisions of the court, at one end of the spectrum, may be regarded as purely positivist in approach based on formalistic, mechanical *canons* of statutory interpretation of the constitution. On the other end

[123] 347 U.S. 483 (1954).

[124] 369 U.S. 186 (1962) – It is a case on legislative districting.

[125] Quoted in Abraham, *The Judiciary: The Supreme Court in the Government Process*, 189 (1977).

of the spectrum, one can find highly creative decisions. The high water mark of the positivist approach was exhibited in *Gopalan*[126] which was the very first decision under the Indian Constitution. A person detained under the Preventive Detention Act challenged his detention and sought an interpretation of Article 21 (equivalent to Article 5 in the Malaysian Constitution) which says that no one shall be deprived of his personal liberty except according to "procedure established by law". Gopalan argued that this provision does not warrant 'any' procedure which may be laid down by an enacted law but procedure should be such as incorporates the principles of natural justice, or is reasonable, or is according to "procedural due process". By a majority, the court overruled these contentions and ruled that Article 21 only envisages such procedure as is laid down in an enacted law, no more and no less. Another case depicting a purely positivist approach is an emergency case, *A.D.M. Jabalpur* v. *S.S. Shukla,*[127] where the Supreme Court completely closed its doors on a detenu under the Emergency Preventive Detention law and left him completely without any redress. This has been characterised, as one of the worst decisions rendered by the Supreme Court in its entire career. The *Shukla* ruling was startling, to say the least, and it struck at the very foundations of constitutionalism and rule of law in the country.[128] But, on the other hand, there are highly creative decisions of the Supreme Court. One such decision which stands out is *Kesavanand Bharati*[129] in which the court evolved the doctrine of non-amendability of the basic features of the Indian Constitution. The judgment depicts an attempt on the part of the judiciary to protect some of the basic values of the constitution from the onslaught of a transient majority in Parliament.[130]

[126] *A.K. Gopalan* v. *State of Madras,* A.I.R. 1950 S.C. 27; Jain, *Indian Const. Law,* 485 *et seq.*

[127] A.I.R. 1976 S.C. 1207.

[128] For comments on *Shukla,* see Jain, *op. cit.,* 586–591.

[129] *Kesavanand Bharati* v. *State of Kerala,* A.I.R. 1973 S.C. 1461.

[130] Jain, *op. cit.,* 711.

The legal profession in Malaysia is familiar with this case as it has been cited before the Federal Court here in at least two cases.[131] As is well-known, in *Kesavanand,* the Supreme Court has laid down a restrictive doctrine as regards the power to amend the constitution. The amending power cannot be exercised in such a manner as to destroy or emasculate the fundamental features of the Indian Constitution.

Even a brief review of the constitutional jurisprudence as evolved by the Indian Supreme Court is impossible in this paper.[132] Mention may however be made here of some of the exciting recent developments in the judicial thinking which have taken place in one area, viz., personal liberty.

Recently, the Supreme Court has rendered a highly creative opinion in *Maneka Gandhi* v. *Union of India*[133] which is a landmark case of the post-emergency era. The Supreme Court at present appears to be undergoing its most creative phase. The basic philosophy underlying the pronouncement in *Maneka Gandhi,* in the words of Bhagwati, J., is:

> "The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction."

In *Maneka,* three points made by Supreme Court stand out prominently:

1. The right to travel abroad is a part of 'personal liberty' guaranteed by Article 21.
2. The court repudiated the suggestion that the expression 'personal liberty' in Article 21 be interpreted narrowly and restrictively with the terse remark mentioned above. The court has given an expansive significance to the term 'personal liberty'. This expression is of "widest amplitude" and "it covers a variety of rights which go to constitute the personal liberty of man."
3. The *Gopalan* approach[134] that the expression 'procedure

[131] See, *infra,* notes 168 and 169.

[132] For details, reference may be made to M.P. Jain, *Indian Constitutional Law* (1978).

[133] [1978] II S.C.J. 313.

[134] *Supra,* note 126.

established by law' in Article 21 envisages only the statutorily enacted procedure and nothing more has now been repudiated. Instead, the court has now introduced the concept of 'reasonableness' and natural justice. If the procedure lacks in these attributes, then it is no procedure at all. As has been stated by Bhagwati, J., the procedure "must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied".

4. The court has insisted in *Maneka* that while impounding the passport of a person, the concerned authority must act according to natural justice.

The *Maneka* decision may usher in a revolution in the administration of criminal justice in India. The court has adopted a very activist stance in this area as if it wants to wipe out all its passivism in the area of personal liberty for the last thirty years. Already the court has criticised long delays in criminal trial particularly of those who are accused of petty crimes and have to remain in prisons for long periods pending their trial. The court has already ordered release of many such under-trials because they had remained in prisons for a longer period than what their offences merited.[135] The court has already emphasized that rules for bail be liberalised and bail should not always be financial as poor people cannot furnish such a bail and *per force* they have to remain in prisons. The court has suggested release of the accused on their personal bonds rather than asking for financial bail which indigent prisoners cannot furnish. The court has insisted that 'procedure' in Article 21 means 'reasonable, fair and just' procedure and no procedure can satisfy this qualification unless it ensures a reasonably quick trial and, therefore, speedy trial is 'an integral and essential part of the fundamental right to life and liberty enshrined in Article 21'. In *M.H. Haskot* v. *State of Maharashtra*,[136] the court has insisted on the state providing legal aid to a prisoner who is seeking his liberation through court

[135] *Hussainara Khatoon* v. *State of Bihar*, A.I.R. 1979 S.C. 1360, 1369, 1377.

[136] A.I.R. 1978 S.C. 1548.

procedure. In *Sunil Batra* v. *Delhi Administration,*[137] the court has drastically curtailed the power of jail authorities to impose solitary confinement on prisoners under the sentence of death. The Supreme Court has taken a great step in *Maneka Gandhi* by introducing elements of procedural due process in Article 21. This exemplifies the liberal spirit which has overtaken the court in post-emergency era. The mechanistic approach of *Gopalan* has now been given a complete go by. For all these years, the right to personal liberty was under a cloud, but now it has come into its own. It is a general trend all over democratic countries that 'personal liberty' is emphasized more than 'property' rights. In between *Gopalan* and *Maneka Gandhi,* the courts sought to control administrative discretion in the area of preventive detention by applying principles of administrative law. In a number of cases, orders of preventive detention were quashed on such grounds as *mala fides,*[138] making the order mechanically without applying the mind,[139] or irrelevant grounds,[140] or subjective satisfaction to detain not being based on adequate or rational material,[141] etc. Now with the new judicial emphasis on due procedure in cases of deprivation of liberty, the courts have found an additional tool to police the area. The courts may now insist on better procedural safeguards. The courts lay great emphasis on procedural safeguards as is clear from the following statement:

> "The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years."[142]

The Constitution of Malaysia has been in force for over twenty years now. During this period, a number of decisions

[137] A.I.R. 1978 S.C. 1675.

[138] *L.K. Das* v. *State of West Bengal,* A.I.R. 1975 S.C. 753.

[139] *Abdul Gaffer* v. *State of West Bengal,* A.I.R. 1975 S.C. 1496.

[140] *Gopal Bihari* v. *District Magistrate,* A.I.R. 1975 S.C. 781.

[141] *Khudiram Das* v. *State of West Bengal,* A.I.R. 1975 S.C. 550.

[142] *Prabhu Dayal* v. *District Magistrate, Kamrup,* A.I.R. 1974 S.C. 183, 199; on Preventive Detention, *supra,* note 44; also M.P. Jain, *Indian Constitutional Law,* 506–524 (1978).

have been rendered by the Judiciary on various aspects of the constitution. So far no scholar has undertaken an evaluative study of the role played by the Judiciary in the evolution of the constitutional process in the country.[143] It will not be possible even to attempt such an exercise in this paper. Nevertheless, a few general remarks can be made here. A perusal of the Federal Court opinions indicate that on several parallel points of constitutional law, there exists a divergence of opinion between the Federal Court here and the Supreme Court in India. It is not possible to go into this question at some depth or length within the confines of this paper, but a few examples of this difference in approach may be cited here. In *Government of Malaysia* v. *Loh Wai Kong,*[144] the Federal Court has adopted a restrictive view of the expression 'personal liberty' used in Article 5(1) which is similar to Article 21 of the Indian Constitution. The Federal Court has excluded from the scope of Article 5(1) the right to travel from Malaysia to a foreign country. On the other hand, the Supreme Court of India, as already noted, has given a very broad significance to the expression personal liberty as is indicated by *Maneka.*[145] The Federal Court has confined Article 5(1) as guaranteeing a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained". The court has reached this result by applying the principle of statutory interpretation that the meaning of the words used in a statute (and the same principle, according to the court, applies to a constitution) depends on the context in which they are placed. Thus, other clauses of Article 5 guarantee rights relating to the *person* or body of the individual and, accordingly Article 5(1) is also to be limited to the right of the person or the body of the individual. Thus, "a citizen has no fundamental right to leave the country and travel abroad" and "the issue of a passport" is "only a privilege which can be exercised with the concurrence of

[143] A few evaluative works on Judicial Review in India have appeared: see, for example, Rajiv Dhawan, *The Supreme Court of India* (1977); Bakhshish Singh, *The Supreme Court of India as an Instrument of Social Justice* (1976); M.P. Jain, *Indain Constitutional Law* (1978).

[144] [1979] 2 M.L.J. 33.

[145] *Supra*, note 133.

the executive, it is not a right".[146] One of the implications of this ruling is that no law to regulate issue, denial or cancellation of a passport is necessary. In India, such a law had to be made by the Government of India after the Supreme Court's decision in *Satwant Singh*.[147]

In the area of preventive detention, there exist some attitudinal differences between the two courts. The Supreme Court of India has claimed a fairly broad judicial review in this area,[148] arguing that preventive detention infringes the right to personal liberty guaranteed by Art. 21. It has, therefore, applied norms of administrative law to subjective satisfaction of the administration to detain, and has also insisted on a scrupulous observance of procedural safeguards as contained in Article 22, and/or in the Preventive Detention Law, and/or as implied by the court from these provisions. The Federal Court has, on the other hand, by and large, shown disinclination to exercise such a review power in the area. The mention of alternate grounds of detention in the detention order has been regarded in India as indicating casualness and non-application of mind on the part of the detaining authority and such an order has been invariably quashed. The Federal Court has treated this to be a "defect of form only and not of substance".[149] Similarly, mention of the past activities of the detainee as grounds of detention have been treated as irrelevant grounds in India.[150] But the Federal Court has held the grounds of past activities to be "relevant as instances of past activities of the detainee and are relevant to be considered for the subjective satisfaction of the detaining authority".[151] The court's attitude towards the review of discretion to detain or not has been well expressed in the following words:[152]

[146] *Supra*, note 144 at 36.

[147] *Satwant Singh Sawhney* v. *D. Ramarathnam* A.I.R. 1967 S.C. 1836, cited by the Federal Court in *Lob Wai Kong*.

[148] See, *Supra* notes 44, 138–142.

[149] Azmi L.P. in *Karam Singh*, [1969] 2 M.L.J. 129.

[150] *L.K. Das* v. *State of West Bengal*, A.I.R. 1975 S.C. 753.

[151] Azmi L.P. in *Karam Singh*, *supra*, note 149.

[152] Tun Suffian F.J. in *Karam Singh*.

> "The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making this decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of facts."

However, from the later High Court cases, it appears that courts will exercise review power on the grounds of *mala fides* and irrelevance of the grounds of detention.[153]

There exists another difference of significance between the Indian and the Malaysian constitutions. In Article 21 of the Constitution of India, the word 'procedure' is used. The law depriving a person of his life or personal liberty must lay down a 'procedure' for the purpose. The courts have emphasized that this procedure must be followed strictly otherwise the order of deprivation of life or personal liberty will be invalid.[154] The Supreme Court has now held that this procedure has to be reasonable and fair.[155] On the other hand, the phraseology of Article 5(1) of the Malaysian Constitution is somewhat different from Article 21. Article 5(1) does not include the word 'procedure'. This difference has been cited as one of the reasons as to why in India "strict compliance" with statutory procedure is necessary but not so in Malaysia[156] in the matter of deprivation of life or personal liberty.

This raises a substantial point. The absence of 'procedure' in Article 5(1) may mean, unlike India, that a law depriving a person of his personal liberty need not lay down a 'procedure' for the purpose. But the question is whether it also means that even if a procedure is laid down in the concerned law, it need

[153] *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia,* [1975] 2 M.L.J. 279.

[154] *Naranjan Singh v. State of Punjab,* A.I.R. 1952 S.C. 106; *Maqbool Hussain v. State of Bombay,* A.I.R. 1953 S.C. 325. On Article 21, see M.P. Jain, *Indian Constitutional Law,* 485–492.

[155] *Maneka Gandhi, supra,* note 133.

[156] Tun Suffian F.J. in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri,* [1969] 2 M.L.J. 129.

not be compiled with. Since, under Article 5, personal liberty cannot be taken away "save in accordance with law", a plausible view can be that it means "law as a whole", including 'substantive' as well as 'procedural' parts thereof; 'law' ought not to be interpreted narrowly as 'law sans the procedural' part'.[157] The *Re Tan Boon Liat*[158] decision does not resolve this point conclusively. Here the question was whether the continued detention of the said person after a period of three months without the Advisory Board's recommendation, as envisaged by Art. 151 (as it then stood) was lawful or not. The Federal Court ruled that the detention became unlawful after three months. Tun Suffian L.P. took the view that the condition of the Advisory Board's recommendation within three months was a "fundamental condition" or a "condition precedent" for further detention. If this condition precedent is not satisfied then the continued detention would become unlawful as it would not be "in accordance with law" required by Article 5(1). He thus put the matter on substantive grounds. Tun Suffian L.P. thus appears to have reiterated his view expressed in *Karam Singh* because he recalled what he said there, viz: "I drew a distinction between law and procedure and said in effect that the courts will take a serious view of failure to comply with substantive law but not failure to comply with procedural law."[159] But he did not say anything to suggest that he has now modified his earlier stand. Ong Huck Sim F.J. however put it on procedural grounds insisting that mandatory procedural rules could not be ignored as merely irregularities "because they are incurably illegal as being in contravention of strictly imperative provisions". This view would appear to give better protection under Article 5 as it gives a wider significance to the constitutional provision.[160]

[157] *See Jayakumar, Constitutional Law Cases from Malaysia and Singapore*, 435 (1976).

[158] [1977] 2 M.L J. 108.

[159] *Ibid.*, 109.

[160] M.P. Jain, Survey of Administrative Law, 1977, 50–51 in *Survey of Malaysian Law* (1977).

Another interesting but debatable question is whether or not rules of natural justice can be imported into a law authorising deprivation of personal liberty. As is well known, the concept of natural justice is *dehors* the legislation. Therefore, it cannot be denied merely on the ground that the statute does not provide for natural justice. As has been said recently in *Ketua Pengarah Kastam* v *Ho Kuan Seng*[161] the justice of the common law will remedy the omission of the legislature in this respect. Recently, in this case the applicability of this concept has been defined in very broad terms. It stands to reason that if natural justice is applicable when a person is affected adversely by administrative action, why should it not be applicable to him in case of deprivation of personal liberty? It has to be remembered that on this point the English cases like *Liversidge* v. *Anderson*[162] will not help for several reasons: First, these are wartime cases; secondly, the concept of natural justice had not then developed in England as much as it has developed now ; and, thirdly, England has no written constitution and no fundamental rights. This point may have to be settled by the Malaysian courts as and when it is raised. It may be remembered that in many instances of deprivation of personal liberty, only procedural safeguards may help. The Supreme Court has emphasized upon the importance of procedural safeguards.[163]

Then, on the concept of 'equality' as enshrined in Article 8 of the Malaysian Constitution (which is equivalent to Article 14 of the Indian Constitution), the Federal Court has adopted a cautious attitude in *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor.*[164] There has been immense case-law in India on Article 14. One of the principles developed by the Supreme Court is that absolute discretion by itself involves discrimination and negates the principle of equality.[165] Therefore, to contain the danger of administrative arbitrariness, it is essential

[161] *Supra*, note 98.

[162] [1942] A.C. 206.

[163] *Supra*, note 142.

[164] [1977] 2 M.L.J. 155.

[165] Jain, *Indian Constitutional Law*, 419, 420 (1978).

that the law conferring discretion lays down the policy regulating the exercise of discretion. Uncontrolled discretion without being governed by any standards or guidelines is regarded as violative of the equality clause.[166] After reviewing the Indian case-law on Article 14, the Malaysian Federal Court has stated in *Datuk Haji Harun*, that it would select only such principles as regards equality from the Indian cases "with which the Judges agree, irrespective of whether they are majority or minority opinions, certainly at this early stage of the development of this branch of law, leaving the future to be determined and shaped in the light of particular cases that come before us". The door to future development in this area has thus been explicitly kept open by the Federal Court.

As regards the power to amend the constitution, the Malaysian Federal Court has not agreed with the approach adopted by the Indian Supreme Court in *Kesavanand Bharati.*[167] In *Loh Koi Choon* v. *Government of Malaysia*[168] and then in *Phang Chin Hock @ Ah Tee* v. *Public Prosecutor,*[169] the Federal Court has refused to accept the thesis that the courts should read into the Malaysian Constitution an implied limitation on the power of Parliament to amend the constitution insofar as Parliament cannot destroy the "basic structure" of the constitution. In *Loh Kooi Choon*, Raja Azlan Shah F.J., in refuting the doctrine of inviolability of the basic structure of the constitution, took recourse to the technique of statutory or literal interpretation of the constitution.[170] He pointed out that the question at issue was 'fraught with political controversy', and that the function discharged by the courts in guarding the constitution was very much criticised and frequently misunderstood. He argued that "the question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and, therefore, not meet

[166] See Annual Survey, Administrative Law, 1977, 40–41, *supra* note 160.

[167] *Supra*, note 129.

[168] [1977] 2 M.L.J. 187.

[169] [1980] 1 M.L.J. 70.

[170] See Azmi Khalid, Annual Survey, Constitutional Law, 1977, 97–98.

for judicial determination"; "Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the constitution"; fundamental rights are "inviolable by ordinary legislation", but in the absence of any clear intention to the contrary, "it is difficult to visualize that they (framers of the constitution) also intended to make those rights inviolable by constitutional amendment"; once an Amendment Act has complied with the process of amendment prescribed by Art. 159, the Act becomes an integral part of the Malaysian Constitution.

Raja Azlan Shah F.J. happens to observe in *Loh Kooi Choon*:

> "It is therefore plain that the framers of our constitution prudently realised that future context of things and experience would need a change in the constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the constitution must be as solid and permanent as we can make it, there is no permanence in it".

It is respectfully submitted that the *Kesavanand* doctrine does not make the constitution immutable; it will be wrong to take that view of this case. What it insists is that there are some basic values inherent in a constitution, and that these values must be beyond the reach of transient majority. If, however, even these values need to be changed in a particular context, then a much more formal procedure should be resorted to, viz. convening a constituent assembly, or referendum of the people, etc.[171]

In *Phang Chin Hock*, the Federal Court has argued that considering the differences in the Indian and Malaysian constitutions, it cannot be said that Malaysian Parliament's power to amend the Malaysian Constitution is limited in some way as the Indian Parliament's power to amend the Indian Constitution is. These differences are: (i) The Indian Constitution was drafted by a constituent assembly; (ii) the Indian Constitution has a preamble which is regarded as the soul of the constitution — eternal and unalterable; (iii) the Indian Constitution has

[171] See, for comments on this case, from two different angles: Tan Sri Salleh Abas, Amendment of the Malaysian Constitution, [1977] 2 M.L.J. xxxiv, xliii–xlvi; and Lee, The Process of Constitutional Change, in Tun Suffian, *The Constitution of Malaysia; Its Development*, (1957–1977) 369, 392.

directive principles which are the objectives of the constitution. Thus, according to the Federal Court, "it is understandable that Indian jurists should infer from the preamble and the directive Principles ideas and philosophies animating the Indian Constitution and controlling its interpretation so much so that there are limits on the power of the Indian Parliament to amend their constitution." On the other hand, in Malaysia, there was a ready made constitution and there was no occasion for Malaysians to get together to draw up a constitution. The Malaysian Constitution has no preamble and no directive principles of state policy. The fear of abuse of Parliament's power to amend the constitution in any way they think fit cannot be an argument against the existence of such power.

It is respectfully submitted that the question whether any limit is to be implied on the Parliament's power to amend the constitution cannot be decided by resorting to mere logical arguments. Arguments can be found on the other side of the line suggesting that some restraint be placed on the amending power. For example, the Malaysian Constitution, although not drafted by the Malaysian people, yet had a very wide national consensus behind it before it was promulgated.[172] Should such a constitution be amended by a mere 2/3 vote in the Parliament which may not represent a very broad national consensus? Parliament is the creature of the constitution itself. It is not like the British Parliament which is not controlled by any constitution. A valid question can be raised whether Parliament created by the constitution should have an unlimited power to amend the parent document itself, or should there be some limits on this power? The power given to Parliament is to 'amend' and not to rewrite the constitution. May be that the word 'amend' itself suggests some inherent limitations. The concept of implied restrictions on broad powers is not unknown

[172] The Federal Court has itself described the process of constitution-making as follows: the first draft was put up by the Reid Commission appointed by the British Sovereign and the Malay Rulers. It was published for public debate and discussion. An amended draft was then agreed upon by the British Government, the Malay Rulers and the Alliance Government. It was then approved by the British Government, by the Malayan Legislative Council and by every State Legislature. It was then promulgated when the British finally surrendered legal and political control.

to the courts. These and many other such arguments can be raised one way or the other to support one or the other position. Lord MacMillan once said:

> "Judges . . . have to administer the law as they find it, but all the time they are themselves slowly shaping and developing it. In almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification."[173]

So, too, Lord Wright has stated: "Notwithstanding all apparatus of authority, the Judge has nearly always some degree of choice."[174]

After all, in India itself, in *Shankari Pershad*[175] and *Sajjan Singh*,[176] the Supreme Court adopting the technique of literal interpretation of the constitution concluded that there were no restrictions on the amending power. Things changed when Chief Justice Subbarao took over the leadership of the court and had an opportunity to preside over the court deciding the *Golaknath* case.[177] It is submitted that the decision of the instant question involves a high policy-making function on the part of the judiciary. It was a conscious decision on the part of the Indian Supreme Court in *Golaknath* and then in *Kesavanand* to read implied limitations on the amending power to preserve what the court thought to be the basic, central, core of the constitution against the onslaught of the majority in Parliament. Some of the Supreme Court Judges were convinced in their minds that there are certain ideals or values inherent in the constitution and these ideals or values should be preserved and not be destroyed by any process of constitutional amendment. The basic philosophy underlying the majority approach in *Kesavanand* is beautifully expressed in the following words by Justices Hedge and Mukherjee:[178]

[173] *Law and Other things*, 48.

[174] *Legal Essays and Addresses*, p. xxxv.

[175] *Shankakri Prasad* v. *Union of India*, A.I.R. 1951 S.C. 458.

[176] *Sajjan Singh* v. *State of Rajasthan*, A.I.R. 1965 S.C. 845.

[177] [1967] 2 S.C.R. 762.

[178] A.I.R. 1973 S.C. at 1624.

> "Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a constitution like ours contains certain features which are so essential that they cannot be changed or destroyed."

According to Justice Holmes' famous epigram, the life of law is not logic but experience[179] and it is as true of the constitution as of any ordinary law.

VII

To end this paper, the upshot of the above discussion is to show that the judiciary in a democracy plays a very crucial and sensitive role by way of upholding and promoting the democratic values in the country and upholding a balance between different interest groups, and between the government and the individual. This is a task which the courts cannot avoid for even if they take an extremely limited and passive perspective of their task, and an extremely literal view of the law, their decisions are bound to have a deep impact on the various people and interests in the country. Therefore, the courts cannot afford to be passive in their approach to the various alternatives which are open to them in any given situation. It is their task, therefore, to make such choices as strengthen the fabric of democracy, constitutionalism and rule of law as well as promote social and economic justice in the country. This involves creativity of a high order on their part and it is not possible for the courts to withdraw themselves from performing this challenging role. Judges have to make due choices so as to promoted some preferred basic values in the society.[180]

M.P. JAIN*

[179] *The Common Law*, p. 1.

[180] On values in the administration of justice, see, Dias, *Jurisprudence*, 257–298.

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CONTRACTS RELATING TO MARRIAGE

INTRODUCTION

The purpose of this paper is to make a study of the Malaysian cases on certain contracts relating to marriage: marriage brocage, restraint of marriage and promises by married persons to marry another. A common feature of the contracts under study is that they are rendered void under the common law. The reason attributed for so rendering it void is that such contracts are against public policy. It is proposed in this paper to make a comparative study of these three types of contracts both under the common law and under Malaysian law. A study will also be made to determine whether the reasons for not enforcing these contracts under the common law are also applicable in Malaysia. The paper will be divided into two parts: Part I deals with marriage brocage agreements, whilst Part II deals with restraint of marriage and promises made by married persons. The consequences of such agreements will also be dealt with in Part II.

PART I

MARRIAGE BROCAGE AGREEMENTS[1]

Introduction

A marriage brocage agreement has commonly been defined to mean an agreement for reward for the procurement of a marriage. The typical form of such an agreement is where A enters into an agreement with B, promising B a sum of money if B procures a marriage for A with a specified person T. However, a study of the cases both in England and in India reveals that the Courts have given an extended meaning to this definition and have held any agreement where a sum of money is to be paid in the event of a marriage to be a marriage brocage agreement. Therefore, a marriage brocage agreement may take a

[1] 'Brocage' and 'brokage' are both accepted form of spelling.