



# UiTM LAW REVIEW

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## A CRITICAL EVALUATION OF THE CONSTITUTIONAL PROTECTION OF FUNDAMENTAL LIBERTIES IN MALAYSIA: THE MEANING OF "LAW"

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### Introduction

The purpose of this analysis is to evaluate the extent to which the definition of "law" in Articles 5(1), 13(1) and other fundamental liberties provisions of the Federal Constitution provides for the element of natural justice. The importance of this endeavour lies in the fact that in the absence of the element of natural justice, "law" may be utilised to wantonly abrogate the fundamental liberties provisions stipulated in the Federal Constitution.

### A General Definition of "Law"

The word "law" has been variously construed to bear different meanings at different points in time. According to Article 160(2) of the Federal Constitution, "law" "includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof".

This does not, however, reveal the extent to which such law contains principles of natural justice. It is defined in Article 1(1) of the United Nations Charter that the "adjustment or settlement of disputes ... [is to be carried out according to] principles of justice and international law". According to an article by Michael Stephen,

[Although] there is much controversy about the precise meaning of this article ... its broad intention is clear...if the [UN] is to command respect ... its organs must not act, or give occasion to be suspected of acting, in an unfair or arbitrary manner ... it is a minimum requirement that they conduct themselves so far as possible with the principles of natural justice. These principles, which are really no more than rules of fair play, are recognised in all civilised communities and foremost among them is the idea expressed by the maxim *audi alteram partem* - that if one side of the case is heard, the other side or sides must also be permitted a hearing.<sup>1</sup>

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1 Michael Stephen, "Natural Justice at the United Nations: The Rhodesia Case" (1973) 67 *American Journal of International Law* 479.

Indeed, Article 32 of the United Nations Charter states that:

... any State which is not a Member of the [UN], if it is a party to a dispute under the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute ...

Furthermore, the UN Security Council has adopted the stand that:-

There is [not even] a necessity for a special application to be made by the nation which is not a Member if it is a party to the dispute under consideration. The Security Council is bound to invite such a State to participate ...<sup>2</sup>

Thus in *The Indonesian Case*,<sup>3</sup> in which Indonesia requested participation in the discussion concerning its position *vis a vis* the Netherlands (which claimed colonial powers through the usage of military force over Indonesia), the Security Council ruled that participation in the question be allowed to the Indonesian representative (despite Indonesia's then questionable status as a sovereign nation).

### The Definition of "Law" in Some Malaysian Cases

The question of the extent to which the word "law" has been interpreted in Malaysia to include principles of natural justice can be studied in an analysis of the phrase "save in accordance with law", as found in Articles 5(1)<sup>4</sup> and 13(1)<sup>5</sup> of the Federal Constitution. It is thus instructive to study the various judicial decisions on the meaning of this phrase, as found in the cases where the definition of "law" was in issue. Malaysian courts have generally adopted a more conservative approach to the interpretation of the word "law" as contained in the phrase "save in accordance with law". Although there have been exceptions to the rule, the position of the Supreme Court of Burma in the case of *Tinsa Mau Naing v The Commissioner of Police Rangoon*<sup>6</sup> appears to have largely influenced local decisions on the point. The Burmese Supreme Court stated that:

... when the Constitution speaks of 'law' it speaks of the will of the legislature enacted in due form, provide that such enactment is within the competence of the legislature.<sup>7</sup>

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2 Ibid.

3 2 SCOR (Security Council Report) No 74, 181st Meeting, 12 August 1947, at 1920.

4 "No person shall be deprived of his life or personal liberty save in accordance with law".

5 "No person shall be deprived of property save in accordance with law".

6 [1950] Burma Law Rep 17, cited in Mohd. Ariff Yusof, "Saving 'Save in Accordance With Law': A Critique of *Kulasingham v Commissioner Of Lands, Federal Territory*" [1982] *Journal of Malaysian and Comparative Law* 155.

7 Ibid at 25-26.

The Malaysian case of *Comptroller-General of Inland Revenue v N.P.*<sup>8</sup> approved of this interpretation, and the Federal Court ruled that:

In the construction of what 'law' in this context means, it therefore appears reasonably clear that it means enacted law and that there can be no resort to natural justice. The Supreme Court of Burma has in a decision *Tinsa Maw Naing v The Commissioner of Police Rangoon* ... construed the meaning of the phrase 'save in accordance with law', in art 16 of the then Burmese Constitution which read 'No citizen shall be deprived of his personal liberty ... save in accordance with law' and held that when the Constitution speaks of 'law' it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature ...<sup>9</sup>

The rationale of the decision on "law" found in *Tinsa Maung Naing* was as follows:

On principle ... it seems to us difficult to accept the suggested contrary concept of "law" equating it with principles of absolute justice or the rules of natural justice as they have sometimes been called. With changing social and political conditions, notions regarding natural law change; all that remains constant is the appeal to something higher than positive law. Rules of natural law are the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which positive law should strive to conform. But to accept natural law as a higher law that invalidates any inconsistent positive law would lead to chaos. There is no certain standard and measuring rod by which the so-called principles of natural justice can be ascertained or defined. Each judge administering natural justice would be a law unto himself. In seeking to escape from the arbitrary exercise of power by the State, the exponents of this principle would but place themselves under the exercise of arbitrary powers by the judges. The burden on judges also could be intolerable. No judge worthy of his office relishes the exercise of arbitrary powers whether by himself or by any other person.<sup>10</sup>

The question at issue in *Comptroller-General of Inland Revenue v N.P.* was whether a particular method of tax assessment was constitutionally valid despite its not meeting standards of natural justice (the argument being that it thus fell short of the definition of "law" in Article 13(1)). The law in question, section 82 of the Income Tax Ordinance, 1947, required the relevant amount of tax assessed to be paid in advance; any objection to this amount would have to be subjected to the appeal procedure, which would take its due course (after advance payment of the assessed sum had been made). The appellant could not cite this law as being unreasonable for not allowing an appeal to be heard in advance of payment. The rule of natural justice in question was that of *audi alteram partem*,<sup>11</sup> which is one of the two principal rules of natural justice:<sup>12</sup> "if one side of the case is heard, the other side or sides must also be

8 [1973] 1 MLJ 165.

9 *Ibid* at 166.

10 [1950] Burma Law Rep 25-26, cited in [1973] 1 MLJ 165, 166.

11 Micheal Stephen, n 1.

12 The other major rule is *nemo debet esse iudex in propria causa* - "no one shall be a judge in his own cause".

permitted a hearing".<sup>13</sup> A law that does not allow for a hearing in advance of a decision, as the tax law above, is not then abiding by the above rule of *audi alteram partem*. However, the Federal Court did not in the above case consider this rule to be a requisite part of the meaning of "law". The case of *Arumugam Pillai v Government of Malaysia*<sup>14</sup> further affirmed the above decision. Gill CJ adopted the interpretation of "law" cited in the case of *Tinsa Maung Naing* and held that:

... whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be ... so long as the method of recovery [of tax] is laid down by the law, I do not see how it can be challenged.<sup>15</sup>

Nevertheless, the High Court in the earlier case of *Lai Tai v Collector of Land Revenue*<sup>16</sup> admittedly adopted a different interpretation. Adams J was of the opinion that it was

essential that the intention as well as the provisions of the enactment be observed. It is a matter of natural justice that before property is taken compulsorily and compensation fixed, the owner should be made aware of the proceedings, where it is humanly possible to do so, *so that he may be heard ...* [emphasis added]<sup>17</sup>

According to this case, in order for the law to be valid, it would thus not be sufficient merely to consider whether the law in question was "the will of the legislature enacted in due form". It would be necessary to consider, for instance, whether such law protected fundamental liberties by offering a person the right to a fair hearing before a decision is given against him or her. In the case above, the question in issue was whether the applicant had a right under section 22(iv) of the Land Acquisition Enactment to the court's discretion under "special circumstances"; this would allow her to apply for an extension of the time period which she needed in order to seek a hearing in respect of the compulsory acquisition of her land. The High Court thus ruled that she was entitled to the extension of time. This was based on the court's conclusion that sufficient effort was not made to serve the applicant with notice of the initial hearing that was scheduled to consider the acquisition of her land. This lack of effort formed the "special circumstances" which caused the court to grant the applicant the extension of time that she required. This extension in turn was required in order to meet the conditions of natural justice (right to a hearing) - which conditions were part of the "law".

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13 Micheal Stephen, n 1 at 479.

14 [1975] 2 MLJ 29.

15 Ibid at 30.

16 [1960] 26 MLJ 82.

17 Ibid at 85.

### A Singaporean Definition of “Law”

The Singaporean case of *Ong Ah Chuan v Public Prosecutor*<sup>18</sup> has aroused a new awareness on the need for an expanded definition of the term “law”. The Privy Council sought to dispel an extreme contention made on behalf of the Public Prosecutor to the effect that any written law made by Parliament affecting life and personal liberty was valid, no matter how arbitrary, and thus was not in breach of Article 9(1) of the Constitution. The Public Prosecutor had argued that “it would be within the competence of Parliament to pass any provision however arbitrary, provided that the lack of protection offered by the law affected all persons equally”.<sup>19</sup> The Privy Council, through Lord Diplock, and quoting Lord Wilberforce in *Minister of Home Affairs v Fisher*,<sup>20</sup> held that:

... the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but ‘as *sui generis*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law...[this would entail] a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the [fundamental liberties] referred to.<sup>21</sup>

He then proceeded to elaborate on the construction of the word “law”:

In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to ‘law’ in such contexts as ‘in accordance with law’, ‘equality before the law’, ‘protection of the law’ and the like ... refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation ... at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the ‘law’ to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be a misuse of language to speak of law as something which affords ‘protection’ for the individual ... and the purported entrenchment ... would be little better than mockery. [emphasis added]<sup>22</sup>

The facts of *Ong Ah Chuan* were as follows. The appellants were convicted under section 3 of the Misuse of Drugs Act 1973 and sentenced to death (section 29) for trafficking in heroin. Pursuant to section 15 of the above statute, they were found to

18 [1981] AC 648.

19 *Ibid* at 660.

20 [1980] AC 319, cited in [1981] AC 648 at 669.

21 *Ibid* at 329.

22 *Ibid*.

be in possession of more than 2 grammes of heroin each. This raised a rebuttable presumption that they were trafficking in the substance. A question posed before the Privy Council was whether the presumption of guilt (trafficking) contained in section 15 was in contravention of the definition of "law" found in Articles 9(1) and 12(1) of the Singapore Constitution (and thus Section 15 was void as being inconsistent with the Constitution).

As seen above, the Privy Council had held that "law" should include principles of natural justice. The relevant "law" in question here was section 15 of the Misuse of Drugs Act 1973:

Any person who is proved or presumed to have had in his possession more than- ... (c) 2 grammes of diamorphine (heroin) contained in any controlled drug; ... shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein.  
[emphasis added]

The court held that the important fact was that "a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it".<sup>23</sup> It was entirely acceptable, and not unfair, that the accused be required to prove that he did not intend to traffic in heroin. This was a crime of "specific intent"; for which it is essential to establish the purpose behind the commission of the crime. Since "the purpose with which he did [the] act is peculiarly within the knowledge of the accused",<sup>24</sup> it is up to the accused to prove that he possessed such a quantity of heroin with some purpose other than trafficking in mind. The law, in encapsulating the presumption of trafficking, does not contravene any principle of natural justice. In fact, it may be inferred from the judgment that the law actually upholds the right of the accused to natural justice, by allowing the accused to present his case before a court whilst seeking to prove the presumption wrong. "Their Lordships would see no conflict with any fundamental rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused) ..."<sup>25</sup>

In the final analysis, section 15 of the Misuse of Drugs Act was found not to contravene Articles 9(1) and 12(1) of the Singapore Constitution.

The Privy Council affirmed this opinion in the subsequent case of *Haw Tua Tau v Public Prosecutor*.<sup>26</sup> Thus although under the circumstances the legislature of Singapore could enact any law it considered appropriate to regulate criminal procedure, yet this enactment would be "subject ... to the limitation that ... such procedure does not offend against some fundamental rule of natural justice. It [was] not to be obviously unfair".<sup>27</sup>

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23 [1981] AC 648 at 670-671.

24 *Ibid* at 648.

25 *Ibid* at 671.

26 [1981] 2 MLJ 49.

27 *Ibid* at 50.

In *Haw Tua Tau*, the relevant issue for our purposes was whether sections 188(2), 195(1), (2) and (3) of the Criminal Procedure Code were in violation of Article 9(1) and were thus unconstitutional (and consequently void under Article 4(1) as being in contravention of the Constitution). Section 195(1) removed the right of the accused to give unsworn evidence that could not be cross-examined. The accused, if desiring to give evidence, would now have to do so on oath - and could be liable to cross-examination. In the event that the accused be called upon to give evidence, section 188(2) would empower the court to present an allocution to the accused, stating that upon a refusal by the accused to give evidence, the court (quoting section 195(2)) "may draw such inferences from the refusal as appear proper". Nevertheless, section 195(3) protected the accused from being compelled to give evidence. The appellants contended that the impugned sections contravened the right of an accused person against self-incrimination. This right is argued to be part of the rules of natural justice. Such law as contravened this right would thus be without the requisite natural justice - and would thus be against the definition of "law" in Article 9(1). Such law would thus be unconstitutional.

The Privy Council ruled that the relevant sections were not unconstitutional. The rule against self-incrimination was not a rule of natural justice cited even in the Universal Declaration of Human Rights of 1948 nor the European Convention of Human Rights of 1950. A point that the court did consider important, however, was that the accused should not be compelled to give evidence. This was an enduring rule of natural justice, having prevailed through the ages. The accused were entitled to a hearing, but could not be compelled to give evidence. The court held that in this case, although sections 188(2) and 195(2) provided a strong inducement to the accused to give evidence, the accused could not be compelled to do so. To infer from this, it may be said that the impugned law thus contained principles of natural justice, since it did not so compel, but merely induced.

The importance of the above decision lies in its affirmation of the need to uphold principles of natural justice in the construction of "law".

### **An Indian Definition of "Law"**

The Indian case of *Menaka Gandhi v Union of India*<sup>28</sup> provides further guidance on the possible meaning of the word "law". Article 21 of the Indian Constitution states that: "No person shall be deprived of his life or personal liberty except according to procedure established by law". Although it is not in *pari materia* with Article 5(1) of the Federal Constitution, which uses the phrase "save in accordance with law", it is engaged in a similar emphasis on the word "law". Thus it may be instructive in this respect.

In *Menaka Gandhi*, the Indian Supreme Court focused more on the concept of "procedure established by law" rather than on mere obeisance to written procedure. The question posed by Bhagwati J was:

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28 AIR 1978 SC 597.



Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be 'arbitrary, unfair or unreasonable'.<sup>29</sup>

The learned judge then went on to cite the views of three judges in the earlier case of *A.K. Gopalan v State of Madras*.<sup>30</sup> Fazl Ali J was quoted on the four essentials of natural justice discussed in that case. These principles he had extracted from the book "Constitutional Law", by an American Professor by the name of Willis (the American concept of "due process of law" was recognised by Fazl Ali J as being relevant since "the word 'law' is common to that expression as well as 'procedure established by law)').<sup>31</sup> The four essentials of natural justice were: "notice, opportunity to be heard, an impartial tribunal, orderly course of procedure".<sup>32</sup> The learned judge then made a mention of the legal position in England as follows:

Judicial opinion in England seems to be the same as that in America...it would shock one to be told that a man can be deprived of his personal liberty without a fair trial or hearing.<sup>33</sup>

Bhagwati J then quoted Patanjali Sastri J in *Gopalan*, who was of the view that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law".<sup>34</sup> Mahajan J's opinion was also relied upon - "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty ... it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings".<sup>35</sup>

Bhagwati J also quoted Lord Morris of Borth-y-Gest on the topic of "natural justice":

Is [natural justice] just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fair play in action - who would wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and logic but that its purpose will not be fulfilled: it lacks more exalted inspiration.<sup>36</sup>

Lord Morris's further remarks in the case of *Wiseman v Borneman*<sup>37</sup> were also quoted:

The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action".<sup>38</sup>

29 Ibid at 622.

30 AIR 1950 SC 27.

31 Ibid at 58.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

36 [1973] 26 Current Legal Problems 16.

37 [1969] 3 All ER 275.

38 Ibid at 278.

It may be noted that Lord Guest stated in the same case that "... Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest".<sup>39</sup>

Bhagwati J then quoted Lord Denning in *Schmidt v Secretary of State for Home Affairs*<sup>40</sup>:

Where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf.<sup>41</sup>

Tucker LJ in *Russell v Duke of Norfolk*<sup>42</sup> provided further inspiration to Bhagwati J: "... whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case".<sup>43</sup>

Bhagwati J's own view proceeded along the following lines:

... the procedure contemplated by Article 21 must answer the test of reasonableness...it 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.<sup>44</sup>

The learned judge then cited one essential factor necessary in the quest to achieve a "right and just and fair" standard of procedure. This is that "a fair opportunity of being heard"<sup>45</sup> be given to the person concerned. Indeed, such a provision should be "read by implication"<sup>46</sup> into the relevant law.

This raises the further question as to whether such provisions may at all be "read by implication" into law. Bhagwati J quoted Byles J in *Cooper v Wandsworth Board of Works*<sup>47</sup>:

A long course of decisions, beginning with *Dr. Bentley's Case* (1723) 1 Str 557 and ending with some very recent cases, establish that although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.<sup>48</sup>

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39 Ibid at 279. Furthermore, on the same page, Lord Guest stated that "... if the rule is silent on the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied". It was earlier pointed out, at page 277, that in *Wiseman v Borneman*, Lord Reid was of the opinion that "for a long time, the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for the purpose of being fair in all the circumstances".

40 [1969] 2 ChD 149.

41 AIR 1978 SC 597, 624.

42 [1949] 1 All ER 109, cited in AIR 1978 SC 597 at 630.

43 Ibid at 118.

44 AIR 1978 SC 597 at 624.

45 Ibid at 630.

46 Ibid.

47 (1863) 14 CBNS 180 at 194, cited in AIR 1978 SC 597, 624.

48 (1863) 14 CBNS 180 at 194, cited in AIR 1978 SC 597, 624-625.

Nevertheless, the above decisions do not appear to have been particularly persuasive to the Federal Court in Malaysia (although Article 9(1) of the Singapore Constitution, upon which the Privy Council opined in two of the earlier cases discussed above, is *pari materia* with Article 5(1) of the Federal Constitution).

### **The Singaporean Definition Considered in Malaysia: *Kulasingham & anor v Commissioner of Lands, Federal Territory***

In the case of *Kulasingham & anor v Commissioner of Lands, Federal Territory*,<sup>49</sup> the Federal Court adopted an interpretation of "law" which, although apparently wider than previous interpretations, yet remained conservative in nature. The judgment of Abdoolcader J, while acknowledging the Privy Council's definition of "law" in the case of *Ong Ah Chuan*, and its application to the Federal Constitution, yet limited the field to which such a definition of law could apply:

Lord Diplock ... said ... that 'law' in such context [Article 13(1)] refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution, referring to that of Singapore but this equally applies to such written constitutions including ours. *We should perhaps add that Ong Ah Chuan dealt with the question of presumptions and burden of proof.* [emphasis added]<sup>50</sup>

Furthermore, Abdoolcader J also stated that the legislature can expressly exclude the principles of natural justice where there are no specific constitutional requirements for these principles to be upheld:

The legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees. In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in *Furnell v Whangarei High Schools Board* [1973] AC 660, 679 which concerned the disciplinary code for New Zealand government teachers. Charges against a schoolteacher were investigated by a sub-committee which reported to the high school's board. Neither the sub-committee nor the board gave the schoolteacher an opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at p 679) that it is not the function of the court to redraft the code ... As we have said earlier there is express provision in the Act for an inquiry and hearing in respect of the quantum of compensation payable but none with regard to the acquisition itself of land needed for the purposes specified in section 3. This attracts the application of the maxim

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49 [1982] 1 MLJ 204.  
50 *Ibid* at 211.

*expressio unius est exclusio alterius* which has been used to exclude natural justice ...<sup>51</sup>

On the face of it, it would appear that rules of natural justice would form part of the definition of "law" only when such law deals with the field of presumptions and burdens of proof - evidential questions related to the area of criminal procedure. This would lead to the inference that law related to other areas would not be expected to include rules of natural justice; it would presumably be valid on the mere basis of being "the will of the legislature enacted in due form". In addition, Abdoolcader J appears to be saying that whichever principles of natural justice may be implicitly included in the law may themselves be excluded, by the simple device of express words to this effect. "*Expressio unius est exclusio alterius*" - "the special mention of one thing operates as the exclusion of things differing from it".

On this basis, the Federal Court found against the claim made by the Tamilian's Physical Culture Association for a pre-acquisition hearing. This claim related to a piece of land compulsorily acquired from the Association by the Government under the Land Acquisition Act 1960. The Government claimed that it required the land for a public purpose; whilst the Association contended that the land was already being used for a public purpose (in that the public were entitled to utilise the land). The Association claimed that it was entitled to a hearing on the question of acquisition itself - and not just on the amount of compensation payable following the acquisition of the land. The Federal Court ruled that a pre-acquisition hearing was not requisite, since the legislature had effectively excluded such a hearing. This it had done by stating in the Land Acquisition Act that a hearing on the sole issue of compensation was necessary, thus effectively excluding a pre-acquisition hearing.

Any confusion arising from the Federal Court's decision may have been caused by the fact that Abdoolcader J did not in reality restrict principles of natural justice merely to criminal procedure. The fact that he found it relevant to form an argument as to why principles of natural justice are in this case excluded from land acquisition law, means that other areas of law (such as property law) may otherwise also contain principles of natural justice.

Furthermore, he saw it as possible for the legislature to exclude natural justice through clear words to that effect. This does not mean, as it may at first appear, that Abdoolcader J was denying the need for principles of natural justice. Instead, Abdoolcader J was working on the assumption that law *was* to contain principles of natural justice - unless the legislature uses clear words to rule otherwise.<sup>52</sup> In reality, he is not thus denying the need for law to contain principles of natural justice.

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51 Ibid.

52 A maxim sometimes said to be "a valuable servant but a dangerous master" and "ought not to be applied where its application, having regard to the subject matter...leads to inconsistency or injustice" (see *Colquhoun v Brooks* [1889] 21 QBD 52 at 65). In *Lowe v Dorling* [1906] 2 KB 772, it is said that the maxim's generality requires "caution" in its application"; Mohd Ariff Yusof, above n. 6 at 163.

Thus, the Federal Court's opinion on natural justice may possibly be summed up in the following manner. First, by ruling out a pre-compensation hearing from the realm of land acquisition law, it has extended the discussion on natural justice beyond the scope of criminal procedure to other areas of law. Second, principles of natural justice are generally expected to exist in law (and this includes all areas of law), unless excluded by clear words.

It may be added that the decision of the High Court in the self-same case of *Kulasingham* was far more obviously in line with the Privy Council's comments in *Ong Ah Chuan*. Hashim Yeop Sani J in the High Court opined that:

... In my view the proper interpretation of "law" is not as in *Comptroller-General of Inland Revenue v N.P.* which is with respect, too restrictive, but as interpreted in *Ong Ah Chuan v Public Prosecutor* ...<sup>53</sup>

This was a direct assertion of the need to uphold principles of natural justice in the law (as the Privy Council stated in *Ong Ah Chuan*). In comparison, the Federal Court in *Kulasingham* made a far more ambiguous statement on the extent to which principles of natural justice belong to the law.

## Conclusion

The definition of "law" remains an arbitrary one within the Malaysian context. In the event that a judgment is interpreted in a certain manner, as done with Abdoolcader J's judgment in *Kulasingham*, it appears possible to elicit the requirement of natural justice in law. However, Abdoolcader J's judgment is sufficiently guarded to cause a less liberal interpretation to be drawn, to the effect that natural justice in *Ong Ah Chuan* is merely restricted to criminal procedure. Although strong arguments have been contended against this interpretation, the fact remains that there is no outright declaration in *Kulasingham* of the need for principles of natural justice to be infused into the meaning of "law". As it stands, the lack of an outright, definitive statement (as presented by the Privy Council in *Ong Ah Chuan*) has the consequence of introducing a subjective approach to the question of whether natural justice should indeed be infused into the meaning of law. This vagueness has the far-reaching effect of decreasing in efficacy the protection of the fundamental liberties supposedly enshrined in the Constitution.

Nevertheless, it would not suffice for the courts to make a statement on the need for law to include principles of natural justice. In the words of Abdoolcader J, "the legislature can by clear words *exclude the principles of natural justice* in the absence of specific constitutional guarantees" (emphasis added).<sup>54</sup> No proliferation of *rationes decidendi* by a host of courts can substitute the protection that only a Constitution

53 [1982] 1 MLJ 204, 206.

54 [1984] 1 MLJ 204, 211.

may offer against “clear words” which rule out natural justice. As such, it is suggested that the Constitution defines the meaning of “law” in clearer terms. This may be done in two ways. The first method is that of rewording each and every provision enshrining fundamental liberties - from Articles 5 to 13. Thus in Article 10(2),<sup>55</sup> for instance, the phrase “Parliament may by law impose ...” may be amended to “Parliament may by law (‘law’ as incorporating principles of natural justice) impose ...”. This would have the effect of preventing the legislature from arguing that natural justice can be ruled out by clear words. Apart from this, it may prevent the legislature from arguing that natural justice need not exist at all, “written law” as passed by Parliament being sufficient to constitute “law”, no matter how arbitrary or unreasonable such law may be.

A second method is that of merely amending Article 5(1) - whereupon the injunction that - “No person shall be deprived of his life or personal liberty save in accordance with law”, is amended to - “No person shall be deprived of his life or personal liberty save in accordance with law (‘law’ as incorporating principles of natural justice)”. “Personal liberty”, if interpreted in the way the Supreme Court has interpreted the phrase in *Menaka Gandhi*, “is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man ...”. The fundamental rights which are included in this “variety of rights” are those contained in Article 19(1)(a) to (g). Paragraphs (a) to (c) are respectively on “[the right] to freedom of speech and expression”, “[the right] to assemble peaceably and without arms”, and “[the right] to form associations or unions”. These three areas of rights are contained within Article 10(1)(a) to (c) of the Federal Constitution. Thus the phrase “personal liberty” in Article 5(1) would arguably include the three rights mentioned above. There are a variety of other rights which could be so included.

A third method is possibly that of inserting into the general definition of “law” at the beginning of the chapter on fundamental liberties the phrase “the inclusion of principles of natural justice”.

Nevertheless, since the second method leaves an element of vagueness as to whether the other rights as found in Articles 6, 7, 8, 9, 11, 12 and 13 may be included in the phrase “personal liberty”, these rights may not realise the protection that the amended definition of “law” in Article 5(1) may offer. As such, it may be of greater advantage to include the amended version of “law” in every article, from Article 5 to 13 (as per the first suggestion on the issue).

It is on these amendments, and an enlightened attitude of the courts, wherein rests the hope that freedom of speech and expression, not to mention other fundamental

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55 Parliament may by law impose:- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence...

liberties, will not be arbitrarily abridged by "law" which sees no use for principles of natural justice. It is only when natural justice remains an integral part of all law, that fundamental liberties will be enshrined - that is, protected from any and every abridgement that may strike the imagination of (in the event that it may exist), a short-sighted legislature.