INTENSITY OF JUDICIAL REVIEW: THE WAY FORWARD

It is a fundamental requirement of a democratic state that all forms of State action must be supportable in law – either a statute or the common law. Illegal State action is incompatible with a democratic society. This proposition lies at the heart of the rule of law.

The elements of a democracy were set out in The State v Abdul Rachid Khoyratty [2007] 1 AC 80. It is a case of first importance. It was an appeal from Mauritius, a country governed by a written constitution modelled along Westminster lines. It is a very important case for several reasons not all of them relevant to the present occasion. Two of them may be mentioned. In a normal case before it, the Board of the Privy Council when it is unanimous delivers only a single judgment in the form of an Advice to the Head of State of the country from which the appeal emanates. However, in Khoyratty, three members of the Judicial Committee delivered separate judgments all concurring in the result. It is necessary to quote from each of them. In his judgment Lord Steyn analysed the elements of a democratic state. He said:

"The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that
fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.”

In his separate judgement, Lord Rodger of Earlsferry said this when speaking of interpreting the Constitution of Mauritius:

“On the other hand, what matters is the content of the concept of a democratic state as that term as used in section 1 and not just generally. That said, the Constitution is not to be interpreted in a vacuum, without any regard to thinking in other countries sharing similar values. Equally, experience in Mauritius is likely to prove of value to courts elsewhere. Therefore, the decisions cited by Lord Steyn do indeed "help to give important colour" to the guarantee that Mauritius is to be a democratic state. In particular, it is a hallmark of the modern idea of a democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary, on the
Lord Mance added this observation:

"34 On the one hand, the Attorney General and Minister of Justice made clear that Chapter 2 (sections 3 to 19) of the Constitution was not in the same situation as Chapter 1: sections 1 and 2. This is evident from the confined nature of the entrenchment achieved by section 47(3). So, many amendments of the "fundamental rights and freedoms" of the individual spelled out in detail in Chapter 2 of the Constitution are possible with a two-thirds majority of the Assembly. On the other hand, the Attorney General and Minister of Justice also made clear that section 1 was not envisaged as an empty general statement, but as a real bastion to "protect and perpetuate" among other things "the rule of law" and "the existence of an independent judiciary", that is independent of the executive and legislature.

35 These are basic principles themselves not expressly spelled out elsewhere in the Constitution, for reasons explained by Lord Diplock in Hinds v The Queen[1977] AC 195
(a decision followed in Director of Public Prosecutions of Jamaica v Mollison [2003] 2 AC 411, to which Lord Steyn has referred). Lord Diplock, giving the majority judgment, said that new constitutions on the Westminster model were, particularly in the case of unitary states, evolutionary not revolutionary and, at p 212:

‘Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature...

Nevertheless it is well established as a
rule of construction applicable to constitutional instruments under which this governmental structure is adopted 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.” [Emphasis added.]

What is to be gathered from these statements is (i) that the rule of law and the doctrine of separation of powers is an integral part of a democratic constitution founded on the Westminster model although it may not be expressly provided for and (ii) decisions interpreting such a constitution of one member of the Commonwealth cast much light on how the constitution of another member should be interpreted.

These observations are made to emphasise three important points that underpin the difference between a public law challenge in England and a similar challenge made in Malaysia. First, the challenge in England as will become clear in a moment is founded on rights conferred by the common law which rights are subordinate to the will of Parliament. However, in Malaysia the Federal Constitution is the supreme
law as it declares itself and it is from that document that all organs of Government derive their respective powers. Secondly, as will be seen, the right of judges in England to review administrative action has to be justified upon principles that have evolved over the centuries by which the power to adjudge the legality of administrative action has become vested in the courts. In Malaysia, the power is derived from the supreme law itself. The Constitution has entrenched in it Part II which contains the constitutionally guaranteed rights that are enforceable against all three organs of Government. It is a solemn covenant between the Executive and Legislature on the one hand and the citizens and their heirs of future generations that the former will conduct their business subject to the restrictions imposed upon them by Part II. Third and last, there is no power in an English Court to strike down an Act of the UK Parliament. This is because of the settled doctrine of the common law that Parliament is supreme. But in Malaysia, it is the constitution and not Parliament that is supreme. As Suffian LP said in *Ah Thian v Government of Malaysia [1976] 2 MLJ 112*:

"The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited
by the Constitution, and they cannot make any
law they please."

In administrative law terms, the Executive cannot act or
exercise discretion so as to infringe a right that is protected by
the constitution save to the extent permitted by the constitution
itself.

In England judicial review is founded upon the common law
principle of ultra vires which itself is one of the facets of the rule
of law. Because England has no formal constitutional
document English judges have to find justification why a non-
elected body, that is to say the courts, should have the right to
supervise the actions of an elected Executive that has the
mandate of the people to rule them. In his speech in A v
Secretary of State for the Home Department [2005] 2 AC 68
Lord Bingham provided the justification in these terms:

"It is of course true that the judges in this
country are not elected and are not
answerable to Parliament. It is also of course
true, as pointed out...above, that Parliament,
the executive and the courts have different
functions. But the function of independent
judges charged to interpret and apply the law
is universally recognised as a cardinal feature
of the modern democratic state, a cornerstone
of the rule of law itself."

The basis upon which judicial review is founded has been recently expressed by Floyd J in *Virgin Atlantic Airways Ltd v Jet Airways (India) Ltd [2012] EWHC 2153*:

“There is, of course, a longstanding principle of English common law that any individual affected by an act of a public authority should have the opportunity to challenge that act through the courts. The principle is, as Mr Saini recognises, not an absolute one. There is, however, a very strong presumption that an individual affected by the act of a domestic public authority can ask the court, as the ultimate guardian of the rule of law, to enquire into the legality of the public authority's acts...”

To sum up, the essential features of the Malaysian parliamentary democracy is the rule of law, a separation of powers between the executive and the legislature on the one hand and an independent judiciary on the other. The function of the judiciary is to ensure that the other two arms of Government act in accordance with written law, the common law and the Federal Constitution. The performance of this function may conveniently be termed as “judicial review”.

The intensity with which the court will examine an impugned
decision appears to depend on the nature and quality of the right that is alleged to have been infringed. Generally speaking, when exercising its powers of review over executive action, the court is only concerned with the legality of the decision, act or omission that is challenged. It is not concerned with the correctness of the decision. The administrator is the primary decision-maker. The court merely performs the function of a secondary decision-maker. This is sometimes expressed in the formula "judicial review is concerned with the decision-making process and not the merits of the decision". In **Chairman, All India Railway Recruitment Board v Shyam Kumar (2010) 5 ALD 1**, the Supreme Court of India re-stated the formula as follows:

"Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the Court is not much concerned with the merits of the decision but how the decision was reached."

In the earlier case of **Apparel Export Promotion Council v Chopra AIR 1999 SC 625**, Anand CJ referred to the well settled principle that:

"...even though Judicial Review of administrative action must remain flexible and its dimension not closed, yet the Court in
exercise of the power of judicial review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial Review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process."

The formula that judicial review is restricted to the decision making process represents the lowest level of intensity that a court will apply when examining an impugned administrative decision, act or omission. It is referred to as the "Wednesbury test". It takes its name from the case where this level of intensity of judicial review first made its appearance, Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. What had happened was this. The plaintiff applied for a licence from the defendant local authority for a licence for Sunday performances at its theatre. The local authority granted a licence but imposed a condition that no children under fifteen years of age should be admitted
to such performances with or without an adult. The plaintiff challenged that decision. Lord Greene MR said:

“What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion
of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion."

Here then is the clearest statement of the role of the court as a secondary decision maker. Lord Greene MR then explained the very limited circumstances in which a court may review an executive discretion:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a
person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926] Ch. 66 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

"Wednesbury unreasonableness" is now recognised as a separate and distinct ground for low intensive judicial review. In Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, Lord Diplock gave it a new label. He
called it "irrationality". And this is how he explained it:

"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an
accepted ground on which a decision may be attacked by judicial review." [Emphasis added.]

In *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 the scope of judicial review was extended using the Wednesbury approach. It is a case that forever changed the face of administrative law. There, the issue was whether the respondent Commission had exceeded its authority or jurisdiction in rejecting the appellant’s claim for compensation. The statute in question contained an ouster or privative clause that sought to immunise decisions of the Commission. Browne J at first instance found for Anisminic. The Court of Appeal reversed. On further appeal, the House of Lords restored the judgment at first instance. It was held that the ouster clause in question did not immunise a decision that was made without jurisdiction or authority. Although the speeches of all the Law Lords should be read, it is the statement of principle by Lords Reid and Pearce that is repeatedly referred to. This is what Lord Reid said:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion
that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much
entitled to decide that question wrongly as it is to decide it rightly."

And this is what Lord Pearce said:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The essence of the decision in Anisminic is that a public law decision may be quashed or declared void because the decision-maker has committed one or more of the errors
alluded to by Lord Reid and Lord Pearce. As shorthand, these errors are referred to as “Anisminic errors”. If an Anisminic error is committed by a decision-maker then an ouster no matter how widely cast will immunise the decision. In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317, we incrementally extended the principle and held that an inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not.

But however wide the scope of intervention may be put in Anisminic terms, the function of the court is still limited to one of secondary decision maker. The Wednesbury level of intensity of judicial review has been consistently applied to all cases which have involved the exercise of a power or discretion conferred by statute.

By 1987, English courts realised the inadequacy of the Wednesbury low intensive review as a universal standard for all cases irrespective of the right that has been infringed. There was recognition that all rights are not equally weighted and that some rights are more important than others. In *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514, Lord Bridge made the following observation:
"I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz. that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny." [Emphasis added.]

In the same case, Lord Templeman said:

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“In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.”

Subsequent decisions accepted this shift in the intensity of review. In *R v Secretary for the Home Department ex parte Brind* [1991] 1 A.C. 696 the judicial House of Lords used different words to express the test set by Lord Bridge in *Bugdaycay*. Lord Ackner said:

“In a field which concerns a fundamental human right - namely that of free speech - close scrutiny must be given to the reasons provided as justification for interference with that right.”

In *R v Ministry of Defence ex parte Smith* [1996] QB 517 Simon Brown LJ in the course of his judgment in the Divisional Court said:

“...even where fundamental human rights are being restricted, "the threshold of unreasonableness" is not lowered. On the other hand, the minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the
restriction and he must expect his reasons to be closely scrutinised. Even that approach, therefore, involves a more intensive review process and a greater readiness to intervene than would ordinarily characterise a judicial review challenge."

A common thread runs through all these cases. Where a right classified or recognised by the common law to be a fundamental right is allegedly infringed by administrative action the court will adopt a more rigorous approach when scrutinising the impugned decision. The decision will be subjected to anxious or close or heightened scrutiny. It may be added for good measure that the common law of England classifies the right to free speech, the right to life and liberty as fundamental or basic rights. Access to justice is also classified a basic or fundamental right at common law, as held in Raymond v. Honey [1983] 1 AC 1. So, when a public decision maker's action violates any of these rights, the court will increase the intensity of its scrutiny. But even this increased level of scrutiny is insufficient when a right guaranteed by the European Convention on Human Rights (what is referred to by English judges as a Convention right) is infringed.

That was made clear in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, where Lord Steyn in his
much celebrated speech after describing the earlier cases as requiring a “heightened scrutiny in cases involving fundamental rights” went on to say this:

“There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.

The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to
accomplish the objective.'

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Professor Paul Craig, Administrative Law, 4th ed (1999), pp 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in The Principle of Proportionality in the Laws of Europe edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due
allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights.” [Emphasis added.]

We now see that by the common law of England, the Wednesbury intensity of review is inapplicable where there is a breach of a fundamental right guaranteed by written law,
namely, the Human Rights Act 1998 which incorporates the European Convention of Human Rights and makes it applicable to the United Kingdom. In such a case, the correct test to apply is that of proportionality.

For completeness it must be borne in mind that a Convention right in English constitutional law is the identical equivalent of a right guaranteed by our Federal Constitution. This was made clear by the judgment of Jagannadha Rao J in *Om Kumar v Union of India AIR 2000 SC 3689.*

The common law of England requires a higher level of scrutiny not only in cases where there has been a violation of a fundamental right recognised by it but also in cases where there is a legitimate expectation to such a right. In *R v North & East Devon Health Authority ex parte Coughlan [2001] QB 213,* the applicant was a tetraplegic with other disabilities because of an accident. She and other similarly disabled persons were placed by the respondent local authority in a purpose built facility called Mardon House. The local authority made a clear promise to the applicant and the other patients that Mardon House would be their home for life. Later, the local authority decided to close Mardon House. The applicant sought judicial review. She succeeded at first instance. One of the grounds advanced by her was that she had a legitimate expectation of the substantive right to remain and be cared for
at Mardon House because of the promise of a home for life. The local authority appealed. It argued, inter alia, that there was an overriding public interest which entitled it to break the "home for life" promise. The Court of Appeal accepted that the decision to close Mardon House was not irrational and that it therefore passed the Wednesbury standard. Yet it dismissed the appeal on the ground that the breach by the local authority of a home for life was unfair and therefore constituted an abuse of power. In a ground breaking judgment Lord Woolf MR identified three possible outcomes of a challenge where a public authority makes a promise to a person or a class of persons in the matter of the exercise of a statutory discretion and then reverses itself.

First, "the court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds..." The approach here is therefore along traditional lines, that is to say "The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise."

Second, the promise or the practice of an authority may induce a legitimate expectation in the applicant to be consulted before
a particular decision is taken. In such a case, “the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it... in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.” In other words the court here is concerned with procedural fairness.

Third, where a lawful promise or practice or practice of an authority induces a legitimate expectation of a substantive benefit “the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.” In this third outcome, the court is tasked with determining whether “there is a sufficient overriding interest to justify a departure from what has been previously promised.”

At the time Coughlan was decided the Human Rights Act was yet to come into force. However, the Court of Appeal upheld the ruling of the judge that the authority had acted in breach of article 8 of the Convention (which protects the home and privacy of an individual) which was soon to become part of English law. The court held that:
"the health authority would not be justified in law in doing so without providing accommodation which meets her needs. As Sir Thomas Bingham MR said in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554: "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable ..." or, we would add, in a case such as the present, fair."

By asking whether the exercise of executive power vested by statute has been exercised fairly or reasonably in cases involving substantive legitimate expectation, the court shifts the intensity of review from the mere Wednesbury level to an examination of the merits of the case. This encompasses a review of the reasons put forward by the decision maker including any overriding public interest it took into account when it chose to depart from the promise it made or the assurance it gave. The burden of course lies on the decision maker to justify the departure. This is really asking whether the departure was proportionate to the object it sought to achieve which again is another way of examining the decision on its merits although Lord Steyn in Daly says it is not. Lord Bingham in Huang v Secretary of State for the Home
Department [2007] 2 AC 167 explained Lord Steyn's dictum as follows:

"The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker. It is not for him to decide what the recruitment policy for the armed forces should be. In proceedings under the Human Rights Act 1998, of course, the court would have to scrutinise the policy and any justification advanced for it to see whether there was sufficient justification for the discriminatory treatment."

In Shyam Kumar's case, the Supreme Court explained what proportionality involves:

"Proportionality requires the court to judge whether the action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or
equilibrium. The court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merits review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.”

This, then, is the highest level of scrutiny where the court examines the reasonableness of the decision on the totality of the facts and decides whether it was fair in an objective sense. To a large extent it makes the court the primary decision maker (save on issues of pure policy) although judges continue to deny that they are.

Thus far we have looked at the different levels of judicial review intensity under the common law of England. It is clear that the same levels of intensity apply in a country with a written constitution containing a chapter on fundamental guarantees. In Om Kumar’s case, it was held that where a fundamental right was infringed, the test is one of proportionality by virtue of Article 14 of the Indian Constitution. However, where a
fundamental right is not infringed then Wednesbury unreasonableness is the test to be applied. So too, in *Sivarasa Rasiah v Badan Pequam Malaysia [2010] 2 MLJ 333*, the Federal Court held that “the violation of a fundamental right where it occurs in consequence of executive or administrative action must not only be in consequence of a fair procedure but should also in substance be fair, that is to say, it must meet the test of proportionality housed in the second, that is to say, the equal protection limb of art 8(1).”

What then is the way forward? In England, Lord Woolf’s judgment in *Coughlan* points to a possibly full blown merits review as does the speech of Lord Bingham in *Huang*. But there are issues of pure policy which are well out of judicial reach. They may range from as simple a question as to whether a road should be built in a particular area to whether Malaysia should enter into a treaty with another country. These are really matters of pure policy which the public authority – be it a local council in the first example or the Cabinet in the second – should decide as courts are ill-equipped to deal with them. These are matters on which the courts defer to the executive. By doing so there is no abdication of the judicial function. It is a mere consequence of the doctrine of separation of powers. As Lord Hoffmann put it in *R v British Broadcasting Corporation ex parte ProLife*
"My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the
legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in article 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.”

But once a prima facie case of an abuse of power is shown, for example that the approval for the construction of a road was given in breach of a statute, be it even a penal law, the court is
duty bound to make inquiry and apply the appropriate level of intensity of review to determine whether there has been an abuse of power. The failure of the majority judgments in particular the judgment of Salleh Abas LP in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 to recognise this important principle ranks that case as the lowest ebb in the field of Malaysian public law. The dissents of Seah and Abdoocader SCJJ really point the way forward. The way forward therefore lies in applying the highest level of scrutiny whenever a fundamental right is infringed and whenever an abuse of power by reason of unfairness is brought home. But there is a proviso to this. Those entrusted with the judicial power of the State must act according to established principles of constitutional and administrative law and not display a propensity that shows them to be – to paraphrase Lord Atkin – more pro-executive than the executive. When that happens, the rule of law dies as does the Constitution itself.