

THE CONSTITUTIONAL RIGHT TO LIVELIHOOD AS A DEVELOPING FIELD IN MALAYSIAN LABOUR JURISPRUDENCE

by

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Introduction

This article discusses recent judicial approaches to the concepts of ‘right to livelihood’ and ‘procedural fairness’ in Malaysian labour law introduced by *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan (Tan’s case)*¹ and affirmed in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan (Hong Leong)*² and *Rama Chandran, R v The Industrial Court of Malaysia & Anor (Rama Chandran)*³ I will analyse selected cases of the higher courts⁴ to understand the development, or lack of development of the emerging constitutionalised labour jurisprudence.

The case of *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd (Said)*⁵

In *Said*, the Federal Court had to consider the scope and significance of a statutory right to a pre-dismissal inquiry provided by section 14(1) of the Employment Act 1955. In delivering the unanimous judgment of the court, Edgar Joseph Jr FCJ held that the statutory right to due inquiry included the right to enter a plea in mitigation in relation to the issue of penalty. His Honour went on to hold that a failure of process, in not being allowed to enter a plea in mitigation, would only vitiate the outcome if there was discretion in the issue of punishment. If however, dismissal was the mandatory or obvious punishment, then the right to enter a plea in mitigation would be a useless formality. The court concluded that on the facts before it, since the misconduct of theft was very grave, dismissal was the only possible punishment. Consequently, the failure to enter a plea in mitigation did not amount to a failure of the statutory requirement of due inquiry.⁶

Although the Federal Court in *Said* relied on common law public law precedents in analysing the consequences of a failure of natural justice,⁷ the court did not couch its

¹ [1996] 1 MLJ 261

² [1996] 1 MLJ 481

³ [1997] 1 AMR 433

⁴ The High Court of Malaya, the Court of Appeal and the Federal Court respectively, with the Federal Court being the highest civil court in Malaysia.

⁵ [1997]1 MLJ 352

⁶ *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997]1 MLJ 352 at 365

⁷ *General Medical Council v Spackman* [1943] AC 627, *Ridge v Baldwin & Ors* [1964] AC 40, *Malloch v Aberdeen Corp* [1971] 1 WLR 1578, *Glynn v Keele University & Anor* [1971] 2 All ER 89 and *Ward v Bradford Corp & Ors* (1972) 70 LGR 27, cited in *Said Dharmalingam bin Abdullah*

reasoning within the constitutional doctrines of the right to livelihood and procedural fairness propounded in *Tan's* case, *Hong Leong* and *Rama Chandran*. An application of the doctrine of procedural fairness, within the context of an individual employee having the constitutional right to procedural fairness if his right to livelihood was affected, may have produced a different result, as it cannot be said with certainty that dismissal was the only result in the facts relating to *Said*.

The case of *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor (Michael Lee)*⁸

The Court of Appeal in *Michael Lee* had to consider the nature of the Minister's discretion under section 20(3) of the Industrial Relations Act 1967, which provides that the Minister may refer a representation of unfair dismissal to the Industrial Court for arbitration.

In considering the scope of Ministerial discretion, Shaik Daud JCA held:

The court should not readily question the administrative decision of the first respondent as that is his *absolute discretion*. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision.

... it can be seen that s 20(3) of the Act confers a discretion on the first respondent as to whether or not to refer any particular representation. Whether a reference is made must, therefore, depend on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully.

... The exercise of this discretion is vested in the Minister, not in the courts. When this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration on the merits as if it is an appeal.

... An exercise of discretion does not always mean that it should be exercised only in a positive manner. A negative act, as in the present case, is equally an exercise of a discretion, provided the Minister had considered every aspect of the case.⁹

The traditional view of judicial review above ignores the growth, by leaps and bounds, of modern administrative law not only under English common law but in Malaysian administrative jurisprudence as well.¹⁰

(formerly known as *Dharmalingam a/l Ranganathan*) v *Malayan Breweries (Malaya) Sdn Bhd* [1997]1 MLJ 352 at 364 -365

⁸ [1998]1 MLJ 305

⁹ *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998]1 MLJ 305 at 309-310 [Emphasis added]

¹⁰ See generally Jain MP, *Administrative Law of Malaysia and Singapore*, 3rd ed, Malayan Law Journal, Kuala Lumpur, 1997 and Woolf, Jowell & Le Sueur, *de Smith, Woolf & Jowell's Principles of Judicial Review*, Sweet & Maxwell, London, 1999

Although the issue in *Michael Lee* was similar to the issue in *Hong Leong*¹¹ the Court of Appeal in *Michael Lee* did not utilise the doctrine of procedural fairness in their reasoning. Had they done so, the court may have held that the Minister was bound, under articles 5(1) and 8(1) of the Federal Constitution,¹² to give reasons for failing to refer the representation to the Industrial Court. A further aspect of judicial review would have been an examination of the reasons furnished, with a view of considering whether the Minister had taken into consideration irrelevant factors or failed to take into consideration relevant factors.¹³ Such an approach would have been in tandem with modern administrative law principles. The court in *Michael Lee* however, merely accepted the Minister's averment in his affidavit that he had conducted a thorough study of the facts pertaining to the representation of unfair dismissal.

The case of *Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd (Ganesan)*¹⁴

Ganesan concerned the question whether a breach of natural justice in the pre-dismissal stage could be cured at the subsequent Industrial Court hearing for unfair dismissal. The employee was an employee within section 2 of the Employment Act 1955 and was therefore entitled to the statutory requirement of a pre-dismissal hearing under section 14(1) of the Employment Act 1955. The High Court applied the curing principle in the Supreme¹⁵ and Federal Court cases of *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor (Dreamland)*¹⁶ and *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal (Wong)*¹⁷ and held that the failure in holding a statutory or contractual pre-dismissal hearing was cured through the *de novo* hearing of the Industrial Court.

In doing so, the High Court held that although *Dreamland* and *Wong* concerned employees who were not entitled to the statutory safeguard of a pre-dismissal inquiry in section 14(1) of the Employment Act 1955 as their earnings took them out of the coverage of the legislation, the principle propounded in those cases that an initial breach of natural justice could be cured at a subsequent *de novo* Industrial Court hearing applied to all employees instituting unfair dismissal proceedings in the Industrial Court. This was because the jurisdiction of the Industrial Court under section 20(1) of the Industrial Relations Act 1967 was only to decide whether the dismissal was for just cause and excuse, which was a consideration relating to the merits of the impugned dismissal. The Industrial Court therefore did not have the jurisdiction to consider issues of fair procedure and had therefore properly exercised its jurisdiction in considering the merits of the case before it.¹⁸

The cases of *Dreamland* and *Wong* were decided before the constitutional pronouncements in *Tan's* case, *Hong Leong* and *Rama Chandran*. The High Court in

¹¹ The scope of Ministerial discretion under section 20(3) of the Industrial Relations Act 1967.

¹² The constitutional provisions providing for the right to livelihood and procedural fairness respectively.

¹³ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997

¹⁴ [1998] 1 CLJ 637

¹⁵ The Federal Court of Malaysia was originally known as the Supreme Court.

¹⁶ [1968] 1 MLJ 111 cited in *Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd* [1988] 1 CLJ 637 at 642 - 646

¹⁷ *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 cited in *Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd* [1988] 1 CLJ 637 at 642 - 646

¹⁸ *Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd* [1988] 1 CLJ 637 at 644 and 646

Ganesan did not apply the constitutional reasoning in *Tan's* case, *Hong Leong* and *Rama Chandran* to consider the question of whether a constitutional right to procedural fairness within the context of the right to livelihood was compatible with the curing principle in natural justice.

The case of *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal (Lembaga Tata tertib)*¹⁹

In *Lembaga Tata tertib*, a public servant was dismissed from his position as hospital attendant without having been given the opportunity to mitigate upon the issue of punishment. The employee however, was given the opportunity to make written representations regarding the alleged misconduct. The question before the Court of Appeal was whether the employee should also have been given the opportunity to make representations upon the issue of punishment. The Court of Appeal unanimously held that the principle of procedural fairness includes the right to make representations upon the issue of punishment. In the words of Gopal Sri Ram JCA:

Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment.²⁰

Central to the question was whether the disciplinary process was viewed as one exercise involving a consideration of both guilt and punishment, in which case a single opportunity to make representations would fulfil the hearing requirement or whether it consisted of two separate stages and two separate hearing requirements. A precedent on point which the court was urged to follow was the Supreme Court's²¹ decision of *Inspector General of Police v Alan Noor bin Kamat (Alan Noor)*.²² In *Lembaga Tata tertib*, the Court of Appeal treated the Supreme Court's view in *Alan Noor* that the disciplinary process was one composite exercise, as mere *obiter dicta* since the point did not form the actual basis of the decision.²³ Further, Gopal Sri Ram JCA opined that the *Alan Noor* decision was 'plainly wrong' as it was reached 'without the benefit of a mature argument upon the combined effect of arts 5(1) and 8(1) of the Federal Constitution.'²⁴

Gopal Sri Ram JCA held that the disciplinary process involved a two-stage process and that since there was a possibility of a range of punishments²⁵ being imposed, once

¹⁹ [2000] 3 MLJ 281

²⁰ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 296

²¹ The Supreme Court was subsequently renamed the Federal Court.

²² [1988] 1 MLJ 260

²³ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 294, 296, 297 and 301

²⁴ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 296.

²⁵ Order 26 of the Public Officers (Conduct and Discipline) (Cap D) General Order 1980 provides for the possibility of any one or a combination of two or more of the following punishments: (a) warning; (b) reprimand; (c) fine; (d) forfeiture of salary; (e) stoppage of increment; (f) deferment of increment; (g) reduction of salary; (h) reduction in rank; (i) dismissal.

guilt had been established, the employee should be given the opportunity to mitigate upon the issue of punishment.²⁶

Siti Norma Yaakob JCA held that the principles of procedural fairness required that the employee should be allowed to make representations pertaining to punishment as such a procedure would be in harmony with article 135(2) FC, which gives civil servants a right to a reasonable opportunity of being heard prior to a dismissal or reduction in rank. Her Honour interpreted the requirement of being given a 'reasonable opportunity of being heard' in article 135(2) FC as conferring the right to be heard throughout the proceedings, on both, issues of guilt and punishment, especially since there was a range of nine different possible punishments.²⁷

Gopal Sri Ram JCA also clarified the constitutional basis of the right to procedural and substantive fairness in labour law when he said, 'The combined effect of arts 5(1) and 8(1) of the Federal Constitution is, in my judgment, to demand fairness both in procedure and substance whenever a public law decision has an adverse effect on any of the facets of a person's life. Among these facets are a person's livelihood and his reputation'.²⁸

An immediate observation from the quote above is that the court in *Lembaga Tata tertib* has embraced the protection of reputation as an extension of the right to life within article 5(1) FC.²⁹ If this is the case, then the question, which arises, is whether the protection of reputation has now acquired an independent constitutional standing or whether his Honour was only referring to the protection of reputation as an integral and inter-related aspect of the protection of livelihood within the context of employment law. This is not entirely clear from the judgment. What is clear is that his Honour relied on decisions of the Supreme Court of India to justify his reasoning. He did so in two ways.

Firstly, his Lordship relied on the case of *Francis Coralie v Union of India*³⁰ to support a liberal, flexible and expansive approach towards the interpretation of constitutionally protected fundamental rights. Secondly, his Lordship sought to adopt

²⁶ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 294 & 296.

²⁷ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 302

²⁸ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 296

²⁹ Article 5(1) of the Federal Constitution of Malaysia reads "No person shall be deprived of his life or personal liberty save in accordance with law". Article 8(1) of the Federal Constitution of Malaysia reads "All persons are equal before the law and entitled to the equal protection of the law".

³⁰ AIR 1981 SC 746 at p 752 cited in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 294. In referring to the approach taken by the Supreme Court of United States in *Weems v US* [1909] 54 L Fd 793 at 801, Bhagwati J had said:

"... This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but, in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems and challenges applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person".

the approach of the Indian Supreme Court in *Board of Trustees of the Port of Bombay v Dilipkumar*,³¹ where Desai and Misra JJ had said:

And this view was taken as flowing from art 21 which mandates that no one shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. The expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning. *Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person ...the same can be put in jeopardy only by law which inheres fair procedure.* (Emphasis added).

From the dicta above of the Indian Supreme Court, a clear observation may be made that the court, in discussing the issue in the context of a departmental inquiry, treated the protection of reputation as integral to the protection of livelihood. However, while the judgment of Gopal Sri Ram JCA in *Lembaga Tata tertib* does not make this link clear, an inference may be made that his Lordship was discussing the protection of reputation within the context of employment and thus the right to livelihood. This inference may be gleaned from the following reasoning of his:

Now, it cannot be gainsaid that any sort of punishment imposed upon a public servant has serious consequences. It carries with it a stigma. It tarnishes reputation. The authorities are now well settled that the punishment of dismissal deprives a person of his livelihood and therefore of his 'life' within the meaning of that expression in art 5(1) of the Federal Constitution. ... Similarly, when a person is de[p]rived of his reputation, it would in my judgment, amount to a deprivation of 'life' within art 5(1) of the Federal Constitution. The right to reputation is part and parcel of human dignity. And it is the fundamental right of every person within the shores of Malaysia to live with common human dignity.³²

If Gopal Sri Ram JCA indeed meant to find a general right to reputation within the right to life, the consequence of finding such a general right to reputation may be that a new light is thereby cast on the express freedom of speech and expression guaranteed by article 10(1)(a) of the Federal Constitution.³³ While article 10(2)(a) FC allows restrictions on the freedom of speech, there is no requirement within the express words of article 10(2)(a) FC that the restrictions ought to be reasonable. Thus, the new constitutional right to reputation may result in the laws which restrict free speech being subject to the fairness requirement within article 8(1) FC. It is however, not within the confines of this article to undertake a deeper analysis of yet another new constitutional phenomenon. Suffice to say that for the purposes of this article,

³¹ AIR 1983 SC 114 at 114 cited in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 295

³² *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 294

³³ Article 10(1)(a) of the Federal Constitution provides, "Subject to Clauses (2), (3) and (4) – (a) every citizen has the right to freedom of speech and expression. Article 10(2) of the Federal Constitution provides, "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;

either construction of the right to reputation recognised in *Lembaga Tata tertib* would embrace the protection of reputation within an employment context.

Apart from holding that the employee should have been given the right to make representations with respect to punishment, the court also held that the employee should have been given an oral hearing. While the Court of Appeal agreed with earlier judicial authority³⁴ that ‘an oral hearing is not the *sine qua non* of procedural fairness’,³⁵ it decided that the circumstances of the present case³⁶ warranted an oral hearing as there were factual issues that needed to be clarified and that the failure on the part of the employer to conduct an oral hearing requested by the employee constituted a breach of procedural fairness.³⁷ The court concluded that this new approach taken by the Court of Appeal in its earlier case of *Raja Abdul Malek v Setiausaha Suruhanjaya Pasukan Polis & Ors*³⁸ of requiring an oral hearing in deserving circumstances augured well with the approach taken by the courts in comparable common law jurisdictions, namely England,³⁹ India⁴⁰ and Australia.⁴¹

In *Lembaga Tata tertib*, Gopal Sri Ram JCA reinforced the notion of the right to procedural fairness as a constitutional right. His Honour described the right as ‘one of the cornerstones of our public law jurisprudence’ and that ‘although the content of procedural fairness is well settled, its application varies according to the facts of each particular case’.⁴²

However, while the content of procedural fairness may be well settled in administrative law, the same cannot be said of the content of procedural fairness in labour law. A question may arise whether or not the doctrine of legitimate expectation is indeed within the settled scope of procedural fairness in Malaysian labour law. One argument before the court in *Lembaga Tata tertib* was that civil servants neither had a

³⁴ *Najar Singh v Government of Malaysia* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar & Anor* [1994] 2 MLJ 114 cited in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 297

³⁵ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 297

³⁶ The allegation against the employee involved the use of illicit drugs and the only piece of incriminating evidence against him was the positive result of one urine test. The employee raised the possibility of an error and had suggested another test be conducted. There was also a long delay between the taking of the urine sample and the show cause letter. A strong mitigating factor against the guilt of the employee was his long and unblemished record of service with the public hospital for 27 years.

³⁷ *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 299

³⁸ [1995] 1 MLJ 308. In this case the Court of Appeal had held that while there was no right to an oral hearing, the failure to accord an oral hearing in deserving cases would amount to a failure of natural justice and a breach of the *audi alterem partem* rule. This case was decided before the principles of natural justice were given constitutional recognition.

³⁹ *R v Army Board; ex p Anderson* [1991] 3 All ER 375 cited in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 297

⁴⁰ *Travancore Rayons v Union of India* AIR 1971 SC 682 cited in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 298

⁴¹ *Jorgensen v Australian Securities & Investment Commission* [1999] FCA 356 cited in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 298

⁴² *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at 286.

right nor a legitimate expectation of a right to make representations on the issue of punishment. As the court disposed of the appeal by holding that civil servants did have a right to be heard on the issue of punishment, perhaps the court did not feel it necessary to consider the issue of legitimate expectation.

It would however have been useful if the court had considered the relevance of legitimate expectation within the doctrine of procedural fairness and explained whether there might be legitimate expectations of the right to make representations on the issue of punishment in analogous situations.⁴³

The case of *Esso Production Malaysia Inc v Aladdin bin Mohd Hashim (Esso)*⁴⁴

Esso concerned the continued postponement of an Industrial Court unfair dismissal trial.⁴⁵ After three previous postponements,⁴⁶ the Industrial Court had decided to proceed with the trial and refused a request for adjournment by the employee. The employee had requested an adjournment due to the reason that he only found out six days before the trial date that his solicitor had withdrawn from the case and was therefore left without legal representation.

Consequently, the Industrial Court proceeded with the hearing, with the employee representing himself and upheld the employee's dismissal in agreement with the employer's finding that the allegation of bribery against the employee had been made out. The employee then initiated judicial review proceedings and sought to quash the Industrial Court's award. The High Court granted the remedy of certiorari and the employer appealed against that order.

The Court of Appeal upheld the decision of the High Court by holding that the Industrial Court had not correctly exercised its discretion in relation to the request for adjournment. Gopal Sri Ram JCA, delivering the unanimous judgment of the court, agreed with the High Court's decision that an adjournment should have been granted.

The reasons given by his Honour were firstly, that the Industrial Court had failed to take into account a relevant consideration⁴⁷ and secondly that as the misconduct in question involved a bribery charge which concerned an individual's reputation, legal representation was all the more important.

However, the Court of Appeal was of the view that the High Court was wrong in treating the case as within article 5(1) FC. In the words of Gopal Sri Ram JCA:

The learned judge proceeded on the footing that the appellant had been deprived of his constitutional right to legal representation and that there had been a breach of art 5 of the Federal Constitution. We cannot accept that. This

⁴³ See the sequel to this article entitled 'Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law in Malaysia'.

⁴⁴[2000] 3 MLJ 270

⁴⁵The Minister had under section 20(3) Industrial Relations Act 1967 referred a complaint of unfair dismissal to the Industrial Court for arbitration proceedings.

⁴⁶The claimant had requested the first postponement on 26th June 1993 as he had engaged a new solicitor who was not familiar with the case. The second and third postponements were initiated by the Industrial Court.

⁴⁷ The fact that the employee had not requested two of the earlier postponements.

case does not turn on the provisions of the Federal Constitution. Neither does it have any relevance to the authority relied on by the learned judge ...⁴⁸

It is difficult to accept his Lordship's disapproval of the approach taken by the High Court judge especially since his Lordship said:

We remind ourselves that the charge is one of bribery. If proved, it *demolishes the reputation* of the person against whom it is made. In the circumstances, *the issue is whether the respondent was given a fair opportunity to redeem his reputation*. With respect, we do not think he was. The right to legal representation is a sine qua non in a case as the present. The Industrial Court ought to have allowed the respondent to be represented by legal counsel who is trained in the skill of cross-examination. We are therefore left in serious doubt whether the respondent was able to get his points across during cross-examination. We are therefore unable to say with confidence that a *fair procedure* was given to the respondent *on the facts peculiar to this case*.⁴⁹

It must be remembered that in the earlier case of *Lembaga Tatatertib* discussed above, this very same judge and court held that the 'right to life' in article 5(1) FC encompassed the protection of reputation and that article 5(1) FC read together with article 8(1) FC ensured that one's reputation can only be rightfully tarnished if the rules on fairness are met. Thus, a law or an action, which seeks to allow the negating of reputation, can be potentially tested against principles of procedural fairness and substantive fairness. In this category would perhaps be the defences under the law of defamation, most of the criminal code and the managerial prerogative of taking disciplinary action against employees who have allegedly committed acts of misconduct.

It is therefore respectfully submitted that the approach taken by the High Court in treating the facts in *Esso* as falling within article 5(1) FC was correct.

The case of *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors (Barat Estates)*⁵⁰

In *Barat Estates*, the company (Barat Estates) sold its business to a third party and wrote to its employees informing them that the sale would not affect the continuation of their employment and that the new owners had agreed to continue with the services of the employees on the same terms and conditions of employment. The letters were sent on 6 November 1990. The new owners wrote to the same employees the very next day offering them continuation of employment on the same terms and conditions of employment. All the employees accepted the new owner's offer and continued working. However, the employees later instituted proceedings against the new employer claiming a breach of section 12(3) of the Employment Act 1955 (EA)⁵¹ for failure to give appropriate notice of the termination of the contract of employment

⁴⁸ *Esso Production Malaysia Inc v Aladdin bin Mohd Hashim* [2000] 3 MLJ 270 at 275

⁴⁹ *Esso Production Malaysia Inc v Aladdin bin Mohd Hashim* [2000] 3 MLJ 270 at 275. (Emphasis added).

⁵⁰ [2000] 4 MLJ 107

⁵¹ Act 265

upon the sale of business and sought an indemnity under section 13(1) EA for such failure.⁵²

The Court of Appeal agreed with the High Court that the employees should have been given the right to choose whether or not they wished to be employed by the new owner and that this was the purpose behind the mandatory requirement in the Act that the appropriate notice be given in those circumstances. In this regard, the Court of Appeal agreed with an earlier decision of the same court on the same issue.⁵³

However, in *Barat Estates Gopal Sri Ram JCA* introduced a constitutionally based reasoning and held that article 6(2) FC⁵⁴ prohibited forced labour and that section 12(3) EA was harmonious with article 6(2) FC in giving employees the freedom of choice of employment and employer. In the words of his Lordship:

Of course, art 6(2) prohibits forced labour. That much is clear on a reading of its plain words. However, upon closer examination it does more than that. When the principles of construction established by our courts are applied to the article, it reveals a further meaning. By its spirit and intendment it vests in an employee the right to be employed by an employer of his choice. That is

⁵² The relevant parts of sections 12 and 13 of the Employment Act are:

12(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

(2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than –

- (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
- (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
- (c) eight weeks' notice if he has been so employed for five years or more on such date:

Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

(3) Notwithstanding anything contained in sub-s (2), where the termination of service of the employee is attributable wholly or mainly to the fact that –

...

(f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law, the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsub s (2) (a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

(4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

13(1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with s 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

(2) Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

⁵³ *Radtha d/o Raju & Ors v Dunlop Estates Bhd* [1996] 1 MLJ 116

⁵⁴ Article 6(2) of the Federal Constitution provides: "All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes".

because compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour. ... Hence, any written law or other State action or any arrangement (*whether made pursuant to public or private law*) under which an employee is deprived of the right of choice vested in him by art 6(2) would fall foul of the supreme law and be liable to be struck down or declared invalid.

We emphasise the inclusion of arrangements governed by private law within the scope of the principle because it is not open to parties to contract out of the provisions of the Federal Constitution. ...

Put shortly, the appellants, upon sale of the business were under a statutory obligation to terminate the contracts of service of each of the respondents by giving them the appropriate notice. Since they failed to do so, they are under an obligation to indemnify the respondents to the extent prescribed by s13(1) of the Act.⁵⁵

A few observations may be made from the judgment in this case. Firstly, it seems quite clear that the constitutional provisions apply equally to the public law and private law sphere of labour law. In saying that parties may not contract out of constitutional provisions, the court has recognised that all employment contracts, public and private, are subject to the Federal Constitution.

The principle of supremacy of constitutional provisions applies equally to ordinary legislation passed by Parliament. Therefore, labour statutes like the EA, the Trade Unions Act 1959⁵⁶ and the Industrial Relations Act 1967⁵⁷ are all subject to the Federal Constitution, the supreme law of the land. What necessarily follows is that sections 12 (3) and 13 EA must be interpreted in the light of not just article 6(2) of the Federal Constitution but also articles 5(1) and 8(1) of the Federal Constitution.

Clearly article 5(1) FC applies in these circumstances as no person ought to be deprived of his livelihood save in accordance with law. ‘Law’ within article 5(1) FC includes statute law, common law and the Federal Constitution. The relevant provisions in the EA seek to ensure that the appropriate notice is given upon change in ownership of business. The termination of the contract of employment in those circumstances may be viewed as a deprivation of livelihood as far as the opportunity to earn an income from the particular employer is concerned. This explains the statutory need for the appropriate notice or indemnity in lieu of notice to be given.

However, case law⁵⁸ provides that in matters of employment, the right to livelihood in article 5(1) FC should be read together with article 8(1) FC. Article 8(1) FC houses the equality doctrine and the courts have held⁵⁹ that the equality doctrine encompasses

⁵⁵ *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107 at p p 117 – 118. (Emphasis added).

⁵⁶ Act 262

⁵⁷ Act 177

⁵⁸ *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481

⁵⁹ *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481; *Rama Chandran, R v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433

principles of procedural and substantive fairness. There were no issues of procedure within this case. However, the facts do concern the principle of substantive fairness.

Principles of substantive fairness within administrative law, which by analogy apply to labour law, include, among other categories, the failure to take into consideration relevant facts or taking into consideration irrelevant facts.⁶⁰

While section 12(3) EA makes the notice requirement mandatory, the question that needs to be asked is whether the law does in any circumstance, notwithstanding the notice requirement, recognise the possibility of continuation of employment with the new owner of business. In *Barat Estates*, Gopal Sri Ram JCA was of the view that 'It is apparent that the section does not recognise the automatic continuation of employment with the new owner of the business'.⁶¹ While this may be true of the EA, it may not be an accurate view of the law in general.

In considering whether substantive fairness has been meted out in a given case, due regard must be had to unjust enrichment, equitable duties and unconscionable bargains. Principles of equality and the rule of law would require fairness to apply not just to employees but also equally to employers. As such, if the evidence in *Barat Estates* revealed that the employees would have chosen to continue their employment with the new employers, section 13(1) EA may have been read as subject to articles 5(1) and 8(1) of the Federal Constitution. Such a construction would prevent employees from taking advantage of a technical breach, which would not have caused any substantial injustice. Consequently, compensation for the statutory breach may be assessed differently.

The case of *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor (Sanya)*⁶²

In *Sanya*, the Court of Appeal quashed an unfair dismissal compensation award of the Industrial Court on the ground that the Industrial Court had failed to take into consideration the fact that the employee was gainfully employed after being dismissed. The case was remitted to the Industrial Court for re-assessment of compensation.

There were two issues before the Court of Appeal. The first issue was whether the Industrial Court was correct in holding that the employee had been dismissed without just cause⁶³ and the second issue was whether the Industrial Court's compensation award was excessive. The court agreed with the finding of the Industrial Court that the employee was dismissed without just cause. However, the court held that in calculating the sum of back wages, the Industrial Court had not taken into consideration the fact that the employee had been gainfully employed within 2 months of his dismissal and had consequently awarded an excessive sum as compensation.

⁶⁰ *Padfield v Mins for Agriculture, Fisheries and Food* [1968] AC 997

⁶¹ *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107 at 116.

⁶² [2000] 4 MLJ 87

⁶³ Section 20(1) of the Industrial Relations Act 1967 provides 'Where a workman ... considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; ...'

Gopal Sri Ram JCA relied on the highly respected academic opinion of Malhotra⁶⁴ in his leading textbook on the subject where he says:

In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a particular case to a particular workman in the matter of compensation by balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice. On the parity of reasoning, the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of employment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of back-wages is, therefore, a matter in the discretion of the tribunal dependent on the facts of a case. The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. The discretion is also to be exercised having regard to certain approved principles and procedures. A workman directed under an award to be reinstated with back-wages would not be entitled to back-wages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers.

While Malhotra is correct in requiring a fair assessment to be made taking into consideration relevant factors generally, the Court of Appeal could have also based their reasoning on the constitutional doctrine of substantive fairness found in article 8(1) FC as principles of substantive fairness require the decision maker to take into account relevant considerations.⁶⁵

The case of *Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju (Ramesh)*⁶⁶

The issue in *Ramesh* was whether the employee, a police officer, received procedural fairness in relation to his dismissal. The employee was dismissed based on corruption charges made against him. Disciplinary proceedings were held and the employee was given an oral hearing and allowed to make representations. Two officers of the Anti Corruption Agency who had witnessed the bribery incident appeared as witnesses and gave oral evidence. However, the written statement of another detective was introduced and recorded as part of the proceedings. This detective had, since making the written statement, died and was therefore not present at the inquiry to give evidence. The employee was given the opportunity to cross-examine the witnesses and the written statement.

⁶⁴ Malhotra, *The Law of Industrial Disputes*, Vol 2, 4th ed at p 961 cited in *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor* [2000] 4 MLJ 87 at p 94

⁶⁵ *Padfield v Mins for Agriculture, Fisheries and Food* [1968] AC 997. See the sequel to this article entitled 'Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law in Malaysia'.

⁶⁶ [2001] 1 MLJ 161

The employee argued that the introduction of the dead witness's written statement was a breach of procedural fairness. The regulations,⁶⁷ which governed the conduct of disciplinary proceedings made reference to written statements made by witnesses giving evidence at the proceedings but was silent as to the introduction of a deceased witness's written statement. The trial judge treated this omission as a prohibition of the admission of such evidence and therefore held that the admission of the deceased witness's statement was in breach of the regulation and a breach of procedural and substantive fairness.⁶⁸

While the trial court⁶⁹ was of the view that there was a breach of procedural fairness, the Court of Appeal held that the strict rules of evidence do not apply in domestic inquiries. The rules of natural justice and procedural fairness do not prescribe a strict code of rules to be followed in every case. Rather, the question the review court asks is whether a fair hearing had been given, considering all the circumstances of the case.⁷⁰ Consequently, the Court of Appeal held that the principle of procedural fairness had not been breached because firstly, the material witnesses who were the two Anti-Corruption Agency officers in the case gave their evidence in person and secondly, the employee was given full opportunity to cross-examine and contradict all evidence.⁷¹

The Court of Appeal in its unanimous judgment in *Ramesh* reiterated the constitutional status of the doctrines of procedural and substantive fairness when Gopal Sri Ram JCA, in delivering the judgment of the court said:

It is I think settled beyond argument that procedural and substantive fairness are constitutionally guaranteed by the Federal Constitution. The cumulative operation of arts 5(1) and 8(1) of the Constitution ensure this.

Now in the early days of the development of our jurisprudence, our courts adopted a narrow and literal approach to the interpretation of the Federal Constitution, in particular those provisions which confer fundamental liberties upon our citizens. ...

We have since jettisoned the narrow approach that hitherto held the field. A number of our decisions have conferred a broad and liberal interpretation upon art[s] 5(1) and 8(1). ...⁷²

⁶⁷ Regulation 6(3) of the Police (Conduct and Discipline) (Junior Police Officers and Constables Regulations) 1970

⁶⁸ The Court of Appeal did not consider the issue of whether there was a breach of substantive fairness, as the applicant did not raise the issue in his pleadings.

⁶⁹ The High Court of Malaya, where applications for judicial review are filed and heard.

⁷⁰ In this regard, the court accepted the view of the Court of Appeal of Singapore in *Abdul Raub v Attorney General* [1983] 1 MLJ 10 at 11 cited in *Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161 at 166-167, where that Singapore court had to consider a similar issue arising from regulations which were in pari materia with the Malaysian regulations in question and had decided that "The wrongful admission of a written statement as evidence is not, in our opinion, per se contrary to the principles of natural justice."

⁷¹ *Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161 at 167.

⁷² *Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161 at 166.

The Court of Appeal in *Ramesh* has demonstrated the pervading nature of articles 5(1) and 8(1) FC as having the potential to cover any fact situation arising within the employment relationship. Such an approach will ensure that both employees and employers are privy to the principles of fairness.

The case of *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor (Mohd Noor)*⁷³

In *Mohd Noor*, a junior police officer challenged his dismissal on the ground that he had not been given procedural fairness in the matter of his dismissal. He alleged that the show cause letter issued to him did not mention the possibility of dismissal and that he did not therefore appreciate the gravity of the situation.

Senior and junior police officers were governed by different sets of regulations relating to disciplinary proceedings. The Public Officers (Conduct & Discipline) Regulations 1993 (the 1993 Regulations) applied to senior police officers while the Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 (the 1970 Regulations) applied to junior police officers.

The 1993 regulations,⁷⁴ which applied to senior police officers, expressly provided that officers had to be informed of the possibility of dismissal as a punishment if such a possibility was contemplated by the disciplinary authority. The 1970 Regulations were silent on the issue. However, the precursor to the 1993 Regulations, the Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980 (the 1980 Regulations), which had a similar requirement of notification, was subject to an addendum, Addendum A 207 (the Addendum), in the Inspector General's Standing Orders. The Addendum sought to apply by extension, provisions in the 1980 Regulations to the 1970 Regulations in cases of omission. The issue in *Mohd Noor* was whether the reference in the Addendum to the 1980 Regulations should now be read as referring to the 1993 Regulations.

In *Mohd Noor*, the junior police officer argued that the beneficial provision in the Addendum should apply equally to the 1993 Regulations. He relied firstly, on a judicial precedent, *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah (Ekambaram)*⁷⁵ and secondly on the constitutional requirement of procedural fairness in article 135(2) FC⁷⁶ read with articles 5(1) and 8(1) FC.⁷⁷

In *Ekambaram*, the facts were similar to *Mohd Noor* and the High Court had held that the Addendum applied to the 1993 Regulations and that by not informing the police officer of the possibility of dismissal, there was a breach of the rule of natural justice, which required a fair hearing.

In *Mohd Noor*, the Court of Appeal agreed with the result reached in *Ekambaram* but preferred to base their reasoning on other grounds. Gopal Sri Ram JCA, delivering the

⁷³ [2001] 2 MLJ 257

⁷⁴ Regulation 28

⁷⁵ [1997] 2 MLJ 454

⁷⁶ Article 132(5) of the Federal Constitution provides that civil servants should be given a right to be heard before being dismissed or reduced in rank.

⁷⁷ Which together require procedural and substantive fairness in the deprivation of livelihood.

unanimous judgment of the court held that firstly, section 35(2) of the Consolidated Interpretation Acts of 1948 & 1967⁷⁸ would apply to produce, as a matter of deductive interpretation, a requirement that any reference in the Addendum to the 1980 Regulations should be construed as referring to the 1993 Regulations.⁷⁹

The second reason relied on by the Court of Appeal was based upon the doctrine of procedural fairness. The court applied the doctrine of legitimate expectation as received in England⁸⁰ and held that junior police officers had at all material times, a legitimate expectation that the relevant provisions in the 1993 Regulations would extend to them. His Honour said:

[O]nce a particular practice has been adopted, discontinuance of it without prior consultation with those adversely affected by such discontinuance fatally flaws a determination arrived at in consequence thereof. ...

The English requirement of legitimate expectation is therefore one of the constituents of the doctrine of procedural fairness which, so far as concerns the members of the civil service, is to be found in the joint operation of arts 5(1), 8(1) and 135(2) of the Federal Constitution. ... It follows that a decision, which in England, will be quashed as offending the principle of legitimate expectation, will in our jurisdiction be set aside under the much broader doctrine of procedural fairness. *I may add here that the doctrine of legitimate expectation has the effect of conferring both substantive rights as well.*⁸¹

Thirdly, the Court of Appeal was of the opinion that the fact that the show cause letter did not contain the contemplated punishments was ‘in itself’ a ‘deprivation of procedural fairness’ because the employee would not have appreciated the gravity of the situation as one necessitating a satisfactory explanation.⁸²

The question, which arises as a result of the court’s third reason for the decision in *Mohd Noor* is whether there is now a legal requirement that all show cause letters should mention contemplated punishments as a matter of fair procedure.

⁷⁸ The section provides: ‘Where any written law or any provision of a written law is repealed and re-enacted (with or without modification), references in any other written law to the law or provision so repealed shall be construed as references to the re-enacted law or provision.’

⁷⁹ *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257 at 265.

⁸⁰ The origins of the doctrine of legitimate expectation may be found in European administrative law. It was first received in England by Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 WLR 337. Later cases include *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, *R v Bent LBC ex parte Gunning* [1985] 84 LGR 168 and *R v British Coal Corporation, ex parte Vardy* [1993] ICR 720 cited in *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257 at 264

⁸¹ *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257 at 264. (Emphasis added).

⁸² *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257 at 265.

The case of *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik (Ang Beng Teik)*⁸³

The Federal Court in *Ang Beng Teik* ruled firstly, that for the purposes of calculating time in the initiation of statutory unfair dismissal applications, time begins to run from the date of the termination of the contract of employment if notice of termination has not been given.⁸⁴ Secondly, the Federal Court ruled that the act of being absent from work without permission constitutes gross misconduct, which entitles the employer to terminate the contract of employment.

In *Ang Beng Teik*, the employee had stayed away from work after being demoted from the position of General Manager to Manager. A domestic inquiry found the employee to be guilty of misconduct. The company had by letter informed the employee about the reduction in rank and had instructed the employee to report to that position on a particular date. The employee however, did not respond in writing but chose to stay away from work. About a week later, the company again wrote to the employee reiterating the same. The employee responded in writing disputing the findings of the inquiry, stated his reasons for staying away from work and continued to stay away from work.

The company then wrote to the employee giving him seven days to state in writing whether he was willing to accept the findings of the inquiry and report to work. This correspondence also made clear that if there were no response from the employee, the company would assume that the employee was no longer keen on continuing his employment with the company. The employee did not respond to the final letter and the company wrote to the employee terminating his services with the company on the ground that the employee was not interested in continuing in his employment. The employee initiated statutory unfair dismissal proceedings and the Minister referred his representations to the Industrial Court for arbitration.

The Industrial Court held that the employee had been unfairly dismissed. However, the High Court, on judicial review proceedings quashed the decision of the Industrial Court and held that the application was statute-barred as the dismissal took place when the employee made the decision to stay away from work and had thus dismissed himself.⁸⁵ The employee then appealed to the Court of Appeal, which upheld the decision of the Industrial Court.

The preliminary issue before the courts was whether the employee's unfair dismissal application was statute-barred. Section 20(1A) IRA imposed a mandatory requirement that the application be filed within sixty days of the employee being dismissed. The cardinal question was whether, on the facts, the dismissal occurred on the date of the termination of the contract of employment by the employer or by the repudiation of the contract by the employee, in abandoning his employment.

⁸³ [2002] 2 MLJ 27

⁸⁴ If notice of termination has been given, section 20(1) of the Industrial Relations Act 1967 provides that the employee may file his representation of unfair dismissal at any time during the period of notice but not later than sixty days from the expiry of such notice.

⁸⁵ The High Court had relied on Lord Denning's doctrine of self-dismissal in *London Transport Executive v Clarke* [1981] ICR 355 at 365 cited in *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 at 33-35

The Federal Court held that dismissal took place when the employer terminated the contract of employment by accepting the employee's misconduct of failing to report for work as directed.⁸⁶ Thus, time began to run from that date and consequently, the employee was within the statutory time-frame in lodging his application for unfair dismissal.⁸⁷

The High Court had held that the employee had repudiated the contract by unreasonably absenting himself from work without permission.⁸⁸ It therefore follows that the High Court considered the employee to be in breach of his common law implied duty to work. However, the Court of Appeal was of the view that the employee's absence from work was a rightful extension of his dispute over the findings of the domestic inquiry.

Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal had said that the common law principles on the discharge of a contract of service by repudiation on the part of the employee and acceptance of that repudiation by the employer, relied on by the High Court were "wholly irrelevant" to the construction of section 20 IRA because industrial adjudication under the IRA was concerned with equity, good conscience and the substantial merits of the case instead of legal technicalities. His Lordship had relied on the Supreme Court decision of *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* wherein the court had held that the English doctrine of unreasonableness for constructive dismissal only applied within the different English statutory scheme and could not apply under the Malaysian statutory scheme for unfair dismissal which operated under the traditional law of contract principles at common law.⁸⁹

There appears to be a contradiction in judicial reasoning here. On the one hand, Gopal Sri Ram JCA said that traditional contract law principles applied under English law and not the Malaysian legislation while on the other hand his Lordship refers to and attempts to apply the dicta of Salleh Abbas LP in *Wong Chee Hong* where his Lordship had held that traditional contract law theory at common law does apply under the Malaysian statutory scheme.

The basis of the Court of Appeal's decision was that the employer had dismissed the employee by terminating the contract of employment and that such dismissal was without just cause as the employee was merely engaged in an ongoing dispute over the correctness of the domestic inquiry. In refusing to treat the actions of the employee as amounting to a fundamental breach evincing an intention to repudiate the contract, Gopal Sri Ram JCA justified his movement away from traditional contract law principles by relying on *Hong Leong* wherein the court opined that the IRA was a piece of social legislation designed to mitigate the harshness of common law and

⁸⁶ The Federal Court explained that the doctrine of repudiation for fundamental breach of contract could not apply here as the evidence showed that the employee had the intention of solving the dispute and continuing with the employment contract. *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 at 37

⁸⁷ *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 at 40

⁸⁸ The employee had stayed away from work for a total period of 35 days.

⁸⁹ *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 at 35

equity in the sphere of labour relations and thus should not be interpreted in accordance with the common law.⁹⁰

However, the question, which arises from the approach of the Court of Appeal, is whether this scheme of ‘social consciousness’ created by beneficial social legislation like the IRA does also recognise certain duties and not merely confer rights upon employees? In this context, it is indeed ironical that the very judge who recognised labour rights as constitutional rights has not also embraced the concept of corresponding duties. Procedural and substantive fairness must involve a fair and just distribution of rights and duties. Further, the existing common law rights and duties arising under the contract of employment can be elevated to a constitutional footing within the right to livelihood and doctrines of procedural and substantive fairness.⁹¹ A Hofeldian analysis of rights and duties as jural correlatives will produce such an outcome.⁹² Examples would include the right to income vis-à-vis the duty to work and the right to suspend an employee for the purposes of investigating a misconduct vis-à-vis the duty to compensate the employee for the period of suspension.

The Federal Court however, recognised the common law duty upon the employee to attend work and had ruled that the Industrial Court had committed an error of law in not giving effect to such a duty. Although the Federal Court did not use the terminology ‘duty’, by saying that the employee did not have a ‘right’ of absence from work,⁹³ the Federal Court has indirectly said that the employee has a duty to work when lawfully required to by the employer.⁹⁴

However, in the light of the recent constitutional pronouncements within labour law, it is indeed unfortunate that the Federal Court did not couch their reasoning within the constitutional doctrines of right to livelihood, procedural fairness and substantive fairness in articles 5(1) and 8(1) FC. Procedural fairness would have been observed by the employer through the letters written to the employee requiring him to report for work. The responsible option, from the perspective of corresponding rights and duties for the employee would have been to attend work but challenge the legality of the earlier domestic inquiry in a separate action.

An interesting question, from the constitutional status versus contract perspective, is whether the respective courts in *Ang Beng Teik* had used a contract or status approach to the employment dispute before them. The reasoning of the High Court shows that the High Court had used a strict contractual approach in treating the fundamental breach as a repudiatory breach, while the reasoning of the Federal Court reveals a modified contractual approach as the court recognised the intention of the employee in wanting to resolve the dispute and continue working within the enterprise, but treated the failure to report to work as a gross misconduct entitling the employer to accept the misconduct and dismiss the employee. The Federal Court did not use the

⁹⁰ *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 at 35

⁹¹ See the sequel to this article entitled ‘Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law in Malaysia’.

⁹² See Sundra Karean V, ‘Can the “Right to Life” include the “Right to Livelihood”?’ [2005] *The Law Review* 42

⁹³ *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ27 at p 39. The Federal Court also relied on Indian academic authority to support its opinion.

⁹⁴ Exceptions may perhaps be made in relation to the performance of illegal contracts.

traditional contractual reasoning or terminology of fundamental or repudiatory breach. This supports the argument that traditional contract law theory is ill suited to the analysis and solution of employment disputes. Rather, the emerging constitutional norms provide a better methodology.

The case of *Rajasingam a/l VS Rasiah v Government of Malaysia (Rajasingam)*⁹⁵

In *Rajasingam*, an Immigration Officer in the Department of Immigration was required by letter from his employer, the Government of Malaysia to retire from public service on grounds of public interest.⁹⁶ The letter stated that the Yang di-Pertuan Agong⁹⁷ had exercised his discretion under section 10(5) d of the Pensions Act 1980⁹⁸ in requiring such retirement and by virtue of section 3(2) of the Pensions Act 1980,⁹⁹ had also imposed a 30% reduction on his pension. The public servant commenced judicial review proceedings and sought a declaration in the High Court that the decision by the Government of Malaysia was a nullity as it was harsh, unjust and in breach of procedural fairness as he was not given a fair hearing. The applicant relied on the constitutional principles in *Tan's Case*,¹⁰⁰ *Hong Leong*¹⁰¹ and *Rama Chandran*¹⁰² to support his argument.

However, the High Court ruled that since the proviso in article 135(2) of the Federal Constitution¹⁰³ expressly provided that public service terminations were not dismissals, the applicant was not entitled to the fair hearing requirement within article 135(2) FC. Jeffrey Tan J went on to hold that the case of *Ng Hock Cheng v Pengarah Am Penjara & Ors*¹⁰⁴ would apply in preference to *Tan's Case* on the issue of punishment as the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors*¹⁰⁵ had held that in the sphere of public service employment, the civil courts could not interfere with punishments decided by the disciplinary board.

⁹⁵ [2002] 1 MLJ 7

⁹⁶ The public servant had been acquitted and discharged on an earlier criminal charge.

⁹⁷ The Yang di-Pertuan Agong is the Head of State under the Malaysian system of constitutional monarchy and responsible government. Section 4(1) of the Federal Constitution provides that the Constitution is the supreme law of the Federation. Section 32(1) of the Federal Constitution recognises the Yang di-Pertuan Agong as the Supreme Head of the Federation. While section 39(1) of the Federal Constitution vests executive power in the Yang di-Pertuan Agong, section 40(1) of the Federal Constitution reflects conventions operating within a parliamentary system of government and provides that the Yang di-Pertuan Agong is to act on the advice of his Ministers.

⁹⁸ Section 10 (5) of the Pensions Act 1980 allows the Yang di-Pertuan Agong to terminate the services of a public servant on the grounds of national interest.

⁹⁹ Section 3(2) of the Pensions Act 1980 provides that the Yang di-Pertuan Agong may reduce or withhold pension if a public officer was guilty of negligence, irregularity or misconduct.

¹⁰⁰ *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261

¹⁰¹ *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481

¹⁰² *Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433

¹⁰³ Article 135(2) of the Federal Constitution provides "No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard: ... Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force ... , such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment ..."

¹⁰⁴ [1998] 1 MLJ 153

¹⁰⁵ [1998] 1 MLJ 153

A few important comments may be made on *Rajasingam*. Firstly, the High Court treated the issue of termination of employment by way of compulsory retirement in the same vein as public service ‘punishments’ and thus applied *Ng Hock Cheng v Pengarah Am Penjara & Ors*¹⁰⁶ when there is actually no issue of ‘punishment’ in compulsory retirements arising out of public interest. By doing so, the High Court decided that articles 5(1) and 8(1) of the Federal Constitution¹⁰⁷ did not apply to the case before them.¹⁰⁸ It is submitted that this approach was incorrect.

The second comment is that while the second proviso in article 135(2) of the Federal Constitution provides terminations of service in the public interest are not to be construed as dismissals, the same proviso does not expressly provide that there shall be no hearing in all such cases. It is important to note that while the first proviso in article 135(2) expressly provides that the right to be heard does not apply to the four categories stipulated therein,¹⁰⁹ the second proviso does not contain the same express negation of the right to be heard in terminations of service in the public interest. All the second proviso does is to provide that terminations in the public interest do not amount to dismissals. Therefore, the requirement of hearing for dismissals and reductions in rank provided for under article 135(2)FC would not apply to public interest terminations. As such, there is no express constitutional provision providing for the right procedure in public interest terminations.

However, even if the said proviso was to be interpreted to mean that there shall be no hearing in public interest terminations of service, it does not automatically follow that there should be no right to procedural fairness. Procedural fairness encompasses a much broader spectrum than the right to be heard. At the very least, procedural fairness includes the duty to act fairly.¹¹⁰

The High Court could have considered whether there was a general duty to act fairly when an individual’s livelihood was adversely affected. The Court of Appeal in *Hong Leong* had opined that procedural fairness extends to all state action and had also, in the same judgment recognised that there may be cases where it may not be appropriate to grant procedural fairness.¹¹¹ Although the Court of Appeal in that case

¹⁰⁶ [1998] 1 MLJ 153

¹⁰⁷ Which provided for procedural and substantive fairness in employment matters.

¹⁰⁸ *Rajasingam a/l VS Rasiah v Government of Malaysia* [2002] 1 MLJ 7 at 18 - 20

¹⁰⁹ The four categories under the proviso to Article 135(2) of the Federal Constitution are (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or (b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out a hearing; or (c) where the Yang di-Pertuan Agong, ... is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out a hearing; or (d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls.

¹¹⁰ See the sequel to this article entitled ‘Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law in Malaysia’. See also *Re HK* [1967] 2 QB 617; *Re Pergamon Press* [1970] 3 All ER 535; *R v Gaming Board for Great Britain exp Benaim & Khaida* [1970] 2 W.L.R. 1009

¹¹¹ *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481 at 537. The examples given by the Court of Appeal included national security, public safety and public interest.

did not provide an exhaustive list of possible situations where there may be a lawful negation of procedural fairness in the deprivation of livelihood, analogous circumstances may be drawn from the law concerning the exceptions to procedural fairness in administrative law.¹¹² This connects to the third comment regarding *Rajasingam*.

The High Court in *Rajasingam* could have considered whether the Yang di-Pertuan Agong's discretionary powers under the Pensions Act 1980 were reviewable in judicial review proceedings or whether they were in a class of unreviewable discretions. If the High Court was of the opinion that the class of powers under consideration were reviewable discretions, then the High Court could have gone on to consider if there was a duty on the part of the Yang di-Pertuan Agong to provide reasons for the decision. The High Court could have then assessed if the reasons amounted to relevant considerations. In failing to do so, there remains an uncertainty in relation to the width and breadth of procedural and substantive fairness in public employment.

Further, it is unclear whether Jeffrey Tan J appreciated that the dicta of the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors*¹¹³ concerning the substitution of punishment orders was confined to the public service as his Honour had, upon referring to the relevant dicta of the Federal Court said:

It could not be any more explicit that the court cannot interfere with the punishment, in that the court (whether it be the High Court, Court of Appeal or the *Industrial Court*) cannot substitute its own views as to what the appropriate penalty was for the view of the *particular employer* concerned.¹¹⁴

It is submitted that in referring to the 'Industrial Court' and 'particular employer', Jeffrey Tan J has not correctly applied the *ratio decidendi* of the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors*,¹¹⁵ which clearly restricts the pronouncement in *Ng* to public service discipline.

The case of *Abdul Majid bin Hj Nazardin & Ors v Paari Perumal (Abdul Majid)*¹¹⁶

Abdul Majid concerned the position of a probationary employee in private sector employment. The employee had continued to work after the probationary period was over but did not receive confirmation of permanent employment status. Although the employee had requested that he be given written confirmation of his employment status and that his salary be adjusted to reflect the change in employment status, the employers did not confirm his employment but continued paying him his probationary salary for nine months after the expiry of the three-month probationary period. However, the probationer was allowed to take annual leave on six occasions although contractually, only confirmed employees were entitled to annual leave.

¹¹² See Woolf, Jowell & Le Sueur, *de Smith, Woolf & Jowell's Principles of Judicial Review*, Sweet & Maxwell, London, 1999 at 361-394

¹¹³ [1998] 1 MLJ 153

¹¹⁴ *Rajasingam a/l VS Rasiah v Government of Malaysia* [2002] 1 MLJ 7 at p 20 (Emphasis added)

¹¹⁵ [1998] 1 MLJ 153. See Sundra Karean V, 'The Constitutional Right to Livelihood in Malaysia; A Reality or Mere Fallacy?' (2003) 11 *Asia Pacific Law Review* 23

¹¹⁶ [2002] 2 MLJ 640

The employee resigned and sued the employer for breach of contract claiming his entitlement to the increments he should have received as a confirmed employee. The Magistrate Court dismissed the suit but the High Court reversed the magistrate's decision and held that the employer had breached the contract of employment by not paying the employee his entitled confirmation increment upon expiry of the probationary period. The High Court inferred that the conduct of the employer in allowing the employee to take his annual leave meant that the employer had treated the employee as a confirmed employee. The High Court went on to award the employee compensation in the form of thirteen months back wages and the increment due to him.

The Court of Appeal upheld the decision of the High Court on appeal by the employer but restricted the quantum of damages to the increment due to the employee during his period of employment. The Court of Appeal reasoned that the employee should not be compensated for the thirteen-month period of non-employment because this would amount to punitive damages against the employer, considering that the employee had only been in their employment for a post-confirmation period of nine months. However, the Court of Appeal awarded an additional three months salary in compensation as payment in lieu of notice of termination. The court's reasoning was that the employer could have given the employee notice to leave and that since the contract did not contain any express stipulation as to the period of such notice, the court could imply a reasonable period of three months. It is submitted that the Court of Appeal's justification for the compensation in lieu of notice is flawed and arbitrary as there was nothing within the facts to suggest that the employer was considering termination.

The fact that the probationer in *Abdul Majid* had to rely on a contractual cause of action reveals the precarious position of probationers. In these circumstances, the 'probationer', who for all intents and purposes was *in fact* treated as a confirmed employee, should have been able to consider himself constructively dismissed as a result of fundamental breach on the part of the employer.

From the perspective of labour law theory, the Court of Appeal could have reviewed the law on probationary contracts¹¹⁷ and considered whether articles 5(1) and 8(1) FC also applied to probationers. There is no logical reason why the constitutional protection of livelihood should not also apply to probationary employees. If such an extension were made, then employers would have to observe principles of procedural and substantive fairness when dealing with probationers, as all contracts of employment would be subject to the relevant constitutional norms. The standards of fairness however, may differ as between confirmed and probationary employees as would expectations.¹¹⁸

¹¹⁷ *KC Matthews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320; *V Subramaniam v Craigielea Estate* [1982] 1 MLJ 317

¹¹⁸ See the sequel to this article entitled 'Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law in Malaysia'.

Conclusion

The judicial reasoning in the cases above reveals an emerging labour law theory with constitutional principles at its foundations. Although the Malaysian courts have not developed these doctrines fully and have not applied them consistently, it is apparent from the cases discussed above that the constitutional pronouncements in *Tan's* case¹¹⁹ have had a considerable impact on Malaysian labour jurisprudence.

As the courts continue to grapple with these new directions, it appears that the stage is being set for a movement away from contract to constitutional status in labour law theory.¹²⁰ I will in a sequel to this article,¹²¹ chart possible avenues for case law reform by utilising the emerging theories of a constitutionalised labour jurisprudence. This evaluation will prove that it is possible to construct a judicially developed framework of constitutional rules and principles, which will provide the foundation for a new labour law, one that is founded on an amalgamation of the law of contract, constitutional law and administrative law.

¹¹⁹ *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261

¹²⁰ See Sundra Karean V, 'Can the "Right to Life" include the "Right to Livelihood"?' [2005] *The Law Review* 42

¹²¹ Entitled 'Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law in Malaysia'.