ARTICLE: SECURITY OF TENURE IN EMPLOYMENT -- CONSTITUTIONAL AND PROPRIETARY RIGHTS OF EMPLOYEES

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TEXT: Introduction

Food for thought in this paper arose as a result of a critical examination of the landmark decisions of the Court of Appeal in two recent cases: (i) Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 ('Tan Tek Seng'); and (ii) Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 ('Hong Leong Equipment').

In these two cases, the Court of Appeal held that arts 5(1) and 8(1) of the Federal Constitution ('the Constitution') have a profound impact on the statutory law of unjust dismissal, the remedy for which is in s 20(1) of the Industrial Relations Act 1967 ('the Act').

The constitutional right not to be dismissed except according to law -- Scope of arts 5(1) and 8(1) of the Constitution

The decisions of the Court of Appeal in these two cases have direct and important implications both in the substantive and procedural law of unjust dismissal and the law of judicial review of administrative actions.

In Tan Tek Seng, the Court of Appeal (majority judgment of Gopal Sri Ram JCA) referred to the provisions of arts 5(1) and 8(1) of the Constitution (at p 282):

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

and stated (at the same page):
The expression 'law', which appears in both these articles, has been defined by art 160(2) as follows:

"Law" includes written law, the common law in so far as it is in
operation in the Federation or any part thereof, and any custom
or usage having the force of law in the Federation or any part
thereof.

And the expression 'written law' that appears within the definition above quoted is itself defined by the same article
as follows:
"Written law" includes this Constitution and the Constitution of any
State.

The Court of Appeal then examined the authorities and went on to hold (at p 283):
It follows from what was said in Ong Ah Chuan v Public Prosecutor
[1981] 1 MLJ 64 that the term 'law' encompasses both substantive law
and procedure established under enacted law. (Emphasis added.)

The court then went on to examine the decisions of the Indian Supreme Court and the authorities in the USA and
held (per Gopal Sri Ram JCA at p 288):
In my judgment, the courts should keep in tandem with the national
ethos when interpreting provisions of a living document like the
Federal Constitution, lest they be left behind while the winds of
modern and progressive change pass them by. Judges must not be blind to
the realities of life. Neither should they wear blinkers when
approaching a question of constitutional interpretation. They should,
when discharging their duties as interpreters of the supreme law, adopt
a liberal approach in order to implement the true intention of the
framers of the Federal Constitution. Such an objective may only be
achieved if the expression 'life' in art 5(1) is given a broad and
liberal meaning.

Adopting the approach that commends itself to me, I have reached the
conclusion that the expression 'life' appearing in art 5(1) does
not refer to mere existence. It incorporates all those facets that are
an integral part of life itself and those matters which go to form the
quality of life. Of these are the right to seek and be engaged in
lawful and gainful employment and to receive those benefits that our
society has to offer to its members. It includes the right to live in a
reasonably healthy and pollution-free environment. For the purposes
of this case, it encompasses the right to continue in public
service subject to removal for good cause by resort to a fair
procedure. (Emphasis added.)

The court went on to hold (at p 289) that in the context of public service '... art 135(2) (of the Constitution) ...
houses the doctrine of fairness in particular cases ...'.

The Court of Appeal went on to state that arts 5(1) and 8(1) of the Constitution have a wider and general
application in two broad categories (at pp 289-290):
In the first category will fall cases in which a determination has to
be made as to the nature and extent of a fair procedure that is
required to be applied to the facts of a particular case. The second
category comprises those cases in which the punishment imposed is
found to be disproportionate to the nature of the misconduct found to
have been committed in a given case. Thus, the requirement of fairness
which is the essence of art 8(1), when read together with art 5(1),
goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case.

(Emphasis added.)

In *Hong Leong Equipment*, the Court of Appeal -- after setting out the history of the development of the current s 20 of the Act -- went on to apply the rule of construction in *Heydon's case* (1584) 76 ER 637 and held (per Gopal Sri Ram JCA at pp 509-510):

Adopting the approach that has commended itself to me, it cannot be in doubt that s 20 must, as a whole, receive an interpretation that will have the effect of advancing the purpose for which Parliament passed the Act. To invert the proposition, this court should not, in the process of determining the true nature and scope of s 20, apply a rule of construction that will have the effect of thwarting the object for which Parliament has enacted the section. That object may be gauged from the way in which the legislature, fully cognizant of the inadequacies of the common law in the area of employment, has intervened with a view to improve the legal position in favour of workmen. It has done so in stages through the amendments I have earlier referred to. Each amendment was an improvement upon the former -- a clear move in a forward direction.

The section is obviously a remedial provision, housed in an Act that is itself a piece of beneficent social legislation. It should, therefore, based on the rule in *Heydon's case* receive a broad and liberal interpretation.

It cannot be gainsaid that Parliament intended to elevate the status of a workman as defined in the Act from the weak and subordinate position assigned to him by the common law to a much stronger position. The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum damages should be altered in favour of the workman. It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save, and except, for just cause or excuse. Due recognition of this higher status must therefore be accorded by our courts if they are to act in obedience to the will of Parliament.

*Employment as a fundamental right*

Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Pt II of the Federal Constitution. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*[1996] 1 MLJ 261 and the cases cited therein. The reasons for the view taken having been expressed by the majority in that case, I find it unnecessary to repeat them here. Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

(Emphasis added.)

It is therefore submitted that the above views of the Court of Appeal will mean that in Malaysia, a workman has the
fundamental constitutional and proprietary right not to be dismissed from employment except according to law. The term 'law' will include both substantive and procedural law.

The right not to be dismissed except for just cause

(a) At common law, there is no cause of action for unjust dismissal (as opposed to wrongful dismissal). Therefore, it is trite law that statute has to confer that right. With respect, the Court of Appeal was therefore right to equate the word 'life' in art 5(1) of the Constitution to 'livelihood'. The author is fortified in this view on an examination of our legislation on unjust dismissal.

(b) Section 20(1) of the Act does not create a cause of action but a remedy for a pre-existent cause of action in the form of the fundamental rights in arts 5(1) and 8(1) of the Constitution. Section 20(1) of the Act states that:

20(1) Where a workman ... considers that he has been dismissed without just cause or excuse ... he may make representations in writing ... to be reinstated in his former employment ...

(Emphasis added.)

The Court of Appeal in Hong Leong Equipment had recognized this when it stated (at p 510):
The section is obviously a remedial provision, housed in an Act that is itself a piece of beneficent social legislation. n1

Applying the rule in Heydon's case (cited with approval by the Court of Appeal in Hong Leong Equipment), one will note as follows: The remedial s 20(1) of the Act presupposes a pre-existing right or cause of action (either at common law or under a statute) of the workman not to be deprived of his right to 'livelihood' (as the Court of Appeal in Hong Leong Equipment called it) except according to law. With respect, this pre-existing right is founded on art 5(1) of the Constitution. The author's views are further fortified when we examine other common law jurisdictions.

(c) In other common law jurisdictions -- for example, in the UK (where there is no written constitution), statute provides the cause of action. Section 54 of the Employment Protection (Consolidation) Act 1978 provides:

54(1) In every employment to which the section applies, every employee shall have the right not to be unfairly dismissed by his employer.

(2) This section applies to every employment except in so far as its application is excluded by or under any provision of this part or by sections 141 to 149. n2

Likewise, in India (with a written constitution like ours), the provisions of s 2K (inserted in 1965) of the Industrial Disputes Act 1947 ('the Indian Act') -- read with s 11A -- are also remedial in nature. Section 2K of the Indian Act makes the dismissal of a single workman a deemed 'industrial dispute' which can be referred to a labour court or tribunal or national tribunal under s 10 of the Indian Act. Upon referral, s 11A of the Indian Act would apply. This section provides:

11A Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was
not justified, it may, by its Award, set aside the order of

discharge or dismissal and direct reinstatement of the workman on such
terms and conditions, if any, as it thinks fit, or give such other
relief to the workman including the Award of any lesser punishment
in lieu of discharge or dismissal as the circumstances of the case may
require:

Provided that in any proceeding under this section the Labour Court,
Tribunal or National Tribunal as the case may be, shall rely only on
the materials on record and shall not take any fresh evidence in
relation to the matter ... (Emphasis added.)

It is to be noted that in India:
... the goals set by the Indian Constitution have a bearing on
industrial legislation and adjudication ... n3

The same thing can be said of the Malaysian industrial legislation. Two principal examples are the Trade Unions
Act 1959 -- which gives the right to associate (for both employees and workmen) in trade unions -- and the Act, which
in Pt II thereof protects the rights of both employees and workmen in trade unions and delineates their respective rights
and duties. These provisions, the author submits, have their bedrock in art 10(1) and (3) of the Constitution.

With respect, in Hong Leong Equipment, the Court of Appeal has correctly held that the bedrock of s 20 of the Act
is arts 5(1) and 8(1) of the Constitution. This is implicit in the judgment of the court.

The absence of the substantive right in s 20(1) of the Act is an indication of the Parliamentary intention that for the
right not to be dismissed except according to law, one has to refer to art 5(1) of the Constitution.

Hence, with respect, the constitutional philosophy behind the decisions of the Court of Appeal in Tan Tek Seng and
Hong Leong Equipment when interpreting the Act is based on sound authorities both within our written constitutional
framework and that of the Indian written constitutional framework.

The author is fortified in this view when one looks at the industrial legislation in the UK (without a written
constitution) and the Indian and Malaysian industrial legislation (with written constitutions), viewed against the trite
principle of statutory interpretation that only Parliament can create a right not available at common law. Article 5(1) of
the Constitution provides that substantive right; and in 1971, introduced the remedy for it in s 20(1) of the Act. n4

Therefore, with respect, the Court of Appeal was right in Tan Tek Seng and Hong Leong Equipment when it applied
the right to life as including the right to livelihood in art 5(1) of the Constitution, as was done by the Indian Supreme
Court when interpreting the equivalent art 21 of the Indian Constitution.

This position should be contrasted with another common law country nearer to home, Australia. In Australia, there
is a written constitution under which the Commonwealth Conciliation and Arbitration Act 1904-1973 ('the Australian
Act') (with subsequent amendments) operated until 1988.

Under the Australian Act, the definition of 'industrial matter' in s 4 read with s 30 thereof is a provision for
arbitration of, inter alia, substantive right:
... theright to dismiss or to refuse to employ or the duty
reinstate in employment a particular person or class of person ... (s
4(k) of the Australian Act).

It will be seen that the Australian Act expressly preserves the common law 'right to dismiss' of an employer. Hence,
in Australia, that right may only be interfered with where there is victimization of an employee. n5 The test for the
Australian Industrial Relations Commission in a dismissal case is whether an employer was entitled to do what he did,
not whether the reason for so doing was good or bad. n6 That is a statutory embodiment of the common law position in the cause of action for wrongful dismissal as opposed to the industrial (statutory) law position or cause of action for 'unjust dismissal' in Malaysia or the statutory 'unfair dismissal' cause of action in the UK under the Employment Protection (Consolidation) Act 1978.

However, it is to be noted that today, by the Industrial Relations Act 1988 ('the 1988 Act'), the provisions on unfair dismissal in the Australian Act have been replaced by the 1988 Act with effect from February 1994. In s 170DE of the 1988 Act, there is now a statutory right not to be dismissed except for 'valid reasons' (as in the UK). Under s 170EE of the 1988 Act, the Industrial Court of Australia can give a range of remedies which our Industrial Court is also empowered to give by virtue of the Act.

However, as the author has stated above, in Malaysia, art 5(1) of the Constitution provides the right not to be dismissed except in accordance with law. The remedy for breach of that provision is in s 20(1) of the Act.

In Australia, its written constitution has no provision equivalent to our art 5(1) of the Constitution. As stated by the Court of Appeal in Tan Tek Seng, our art 5(1) is equivalent to art 21 of the Indian Constitution.

Hence, on this score also the Court of Appeal was, with respect, right to adopt the reasoning of the Indian Supreme Court on the meaning of 'life' in our art 5(1) and 'law' in both arts 5(1) and 8(1) of the Constitution.

Therefore, it will be seen that for s 20(1) of the Act to provide a (procedural) remedy, there must be a pre-existing (since none exists at common law) statutory right (substantive), not to be dismissed without just cause or excuse at the pain of a sanction of a claim for reinstatement (which also does not exist at common law).

With respect, as the Court of Appeal has stated in Hong Leong Equipment, it is submitted that the substantive right is in art 5(1) of the Constitution which has existed since Merdeka Day. The latter (remedial) right was only introduced vide the Act (which is an Act made under the mechanism of the Constitution) to carry out, albeit belatedly, the original intention of the framers of our supreme law.

This construction of art 5(1) of the Constitution and s 20(1) of the Act is on the reasoning as laid down by the rule in Heydon's case. Hence, with respect, the Federal Court was right in Hoh Kiong Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 when it held that the only test to determine whether an employee is a 'workman' or otherwise (for the purposes of s 20(1) of the Act) is the wider 'contract of employment' test, and not the test as laid down in Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297. n7

With respect, with the benefit of hindsight, the author submits that the Federal Court in Hoh Kiang Ngan carried out the spirit and intention of art 5(1) of the Constitution although it did not say so in so many words. The principle evolving from Hoh Kiang Ngan that unless expressly stated otherwise in a 'subordinate' Act (the Industrial Relations Act 1967), fundamental rights in the Constitution, ie the right to livelihood, should be given a liberal and wide construction.

The requirement to give reasons for a dismissal

In Hong Leong Equipment, the Court of Appeal stated (at p 510) that s 20 of the Act has:

... provided for security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save, and except, for just cause or excuse. (Emphasis added.)

It is submitted that proprietary rights cannot be removed without procedural fairness. And that concept includes the duty to give reasons: Hong Leong Equipment.

The author submits that if the employer does not give reasons, the Industrial Court may assume that the employer
has no good reasons. It was held in *Hong Leong Equipment* that if the Minister did not give reason for his statutory decision, the courts may assume that he has no good reasons. This principle should apply to an employer's failure to give reason for a dismissal.

The Court of Appeal in *Hong Leong Equipment* had held that in a case where the Minister refuses to refer a representation of a workman pertaining to unjust dismissal under s 20(3) of the Act, the Minister must give reasons why he refused to do so. This has been held to be a requirement of law (per Gopal Sri Ram JCA at pp 536-537):

In my judgment, as a general rule, *procedural fairness, which includes the giving of reasons* for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. Whether a particular right is a fundamental liberty, and therefore falls within the wide encompass of any of the articles under Pt II of the Federal Constitution is a question that has to be dealt with on a case by case basis. Suffice to say that the instant appeals are concerned with a *fundamental liberty*. (Emphasis added.)

The Court of Appeal's basis for this appears to be that (at p 532):

... Procedural fairness is accordingly part of our law, not by reason of the application of English cases, but because of the terms of arts 5(1) and 8(1). See *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

It is submitted that if the right to security of tenure is embraced by arts 5(1) and 8(1) of the Constitution, then the employer who dismisses a workman must have good reasons for the dismissal and state the reasons at the time of the dismissal. Failure to do so may ipso facto make that dismissal unjust. That is because giving of reasons is a principle of procedural fairness. As stated above, procedural fairness is part of the term 'law' in art 5(1) of the Constitution. In fact, in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, the Federal Court had held that reasons given by the employer (or failure to do so) is a matter of jurisdictional importance for the Industrial Court. In *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537, another division of the Federal Court has attached jurisdictional relevance on the reasons an employer had at the time of dismissal of an employee.

*The right of an employee to be heard before his dismissal*

Since procedural fairness is within the scope of art 5(1) of the Constitution, it is submitted that the right to a pre-dismissal domestic inquiry is also a fundamental constitutional right. Therefore, failure to hold a fair and impartial domestic inquiry before a dismissal can ipso facto result in a finding of unjust dismissal by the Industrial Court. Hence, the effect of *Tan Tek Seng and Hong Leong Equipment* is that the private sector employee has a fundamental constitutional right to procedural fairness just like the public sector employee whose right is expressly (and separately) enshrined in art 135(2) of the Constitution. n8 The remedy for unjust dismissal

In *Hong Leong Equipment*, the Court of Appeal had held (at p 510) that on a finding of unjust dismissal:

The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a *paltry sum* damages should be altered in favour of the workman. (Emphasis added.)

The above-mentioned philosophy has its roots in the Federal Court's decision in *Dr A Dutt v Assunta Hospital*
[1981] 1 MLJ 304. The Court of Appeal has also held that in an application for judicial review, the High Court can order as a remedy what the Industrial Court ought to have ordered on a finding that the dismissal was without just cause or excuse. His Lordship Gopal Sri Ram JCA stated (at p 544 in Hong Leong Equipment):

In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal. (Emphasis added.)

In Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, the Federal Court (at p 769G) echoed the same principle:

To avoid further delay in the disposal of this case, there appeared to be hardly any reason to quash the other parts of the award regarding compensation in lieu of reinstatement. (Emphasis added.)

When the Court of Appeal departed from the common law (pertaining to the remedy the High Court can give in judicial review), again avoidance of delay was the main reason. The departure from the common law is well-founded on the statutory basis as enshrined in s 30(3) of the Act:

30(3) The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under section 20(3). (Emphasis added.)

In Wong Yuen Hock (at p 761F), the Federal Court -- relying on this aforesaid subsection -- stated:

It is therefore essential that when a reference is made under s 20(3), the paramount function of the Industrial Court is to deal with 'the substantial merits of the case without regard to technicalities and legal form', in addition to determining the dispute with a sense of urgency. (Emphasis added.)

Another case of relevance is the (then) Supreme Court's decision in Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd [1987] 2 MLJ 81 at p 84C, which held that in a complaint of non-compliance under s 56(1) of the Act, the Industrial Court is empowered to order reinstatement in a proper case. The court added that this was:

... wholly in consonance with the principle that differences and dispute in industrial relations ex necessitate reirequires to be disposed of as expeditiously as possible -- a prescriptive postulate statutorily endorsed and affirmed in s 30(3) ... as otherwise recourse would have to be had to a reactivation ab initio and repetition of the wholetedious exercise of the conciliation and consequential process under s 26 by reference to the Industrial Court ... (Emphasis added.)

In Hong Leong Equipment, the Court of Appeal relied on the Schedule to the Courts of Judicature Act 1964 as the basis to depart from the English common law principle that in the field of public law remedies the High Court (and consequently the Court of Appeal) will not usurp the statutory function of the Industrial Court in relation to the remedies that can be given by the Industrial Court under the Act. This principle is based on the common law rule that where a statute creates a right and provides a remedy for the same, one must have recourse to that procedure and nothing else. The basis for the common law rule is that in a democracy, Parliament's will must prevail. The question therefore arises, has the Court in Hong Leong Equipment ignored Parliamentary intention? The answer is in the negative for the following reasons:
(a) as the author has said, the right to have the representations on unjust dismissal referred to the Industrial Court not to be dismissed except according to law is in arts 5(1) and 8(1) of the Constitution, not the Act. The latter only provides a remedy;

(b) it can be argued that the relief which is provided for in the Act -- ie the Minister's discretion whether or not to refer the representations to the Industrial Court (under s 20(3) of the Act) -- and the right to seek the relief of reinstatement or compensation in lieu thereof (under s 30 of the Act) are vested in the Minister and the Industrial Court respectively. For the Court of Appeal to award the same is a usurpation of the statutory functions of both the Minister and the Industrial Court. However, if (as stated by the Court of Appeal) the High Court's jurisdiction is based on the Schedule to the Courts of Judicature Act 1964, then there appears to be a conflict between the Act and the Courts of Judicature Act 1964. In that event, s 4 of the Courts of Judicature Act 1964 provides the answer:

4 Provision to prevent conflict of laws
   In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail. (Emphasis added.)

(c) hence, with respect, the Court of Appeal was right in departing from the common law in giving relief to a workman which is vested by the Act in the Minister and the Industrial Court;

(d) in fact, the policy of s 30(3) of the Act that industrial matters should be settled as soon as possible is also reflected in s 59 of the Act. Section 59(3) of the Act provides that even a subordinate court like a magistrate's court can, after conviction of an employer under that section:

   ... order the employer to pay the workman the amount of any wages lost by him and also, where appropriate, direct the employer to reinstate the workman in his former position or a similar position. (Emphasis added.)

(e) therefore, it will be seen that even under the Act, the Industrial Court does not have exclusive jurisdiction to give the relief of compensation and/or reinstatement to a workman. Hence, again on this point, the Court of Appeal's decision to give the remedy that ought to have been given by the Industrial Court was well founded on a statutory basis, ie carrying out Parliament's intention;

(f) while this paper was in its final draft, the Federal Court had -- in the case of R Rama Chandran v Industrial Court & Anor (Civil Appeal No 02-13-1994) (yet unreported) ('Rama Chandran') -- given the remedy of compensation to the appellant which was denied by the Industrial Court. In Rama Chandran, the Federal Court has approved the principles embodied in Hong Leong Equipment pertaining to the construction to be put to Pt II of the Constitution; and

(g) the Court of Appeal in Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 had given the remedy of reinstatement with arrears of salary from the date of dismissal to the date of reinstatement to all the respondent workmen following the
principles in *Rama Chandran*. Again, the delay factor was the main reason for the Court of Appeal in awarding the remedy which was entrusted to the Industrial Court under the Act. However, the Court of Appeal relied on Parliament's express intentions in the Courts of Judicature Act 1964.

The applicability of administrative law principles to the employer's decision to dismiss a workman

Finally, one may argue that *Tan Tek Seng* and *Hong Leong Equipment* are decisions in the realm of public law (administrative law) and not private law (industrial law). With respect, this common law distinction is fallacious for the following reasons:

(a) as stated above, s 20(1) of the Act is a remedial section for an infringement of the right in arts 5(1) and 8(1) of the Constitution;
(b) any question of a breach of arts 5(1) and 8(1) of the Constitution is in the realm of public law -- especially if it relates to the proprietary rights of the workman;
(c) the Act has made inroads into the common law of master and servant. For example, s 20(1) of the Act had made an inroad into the common law principle that there can be no specific performance of contracts for personal service. Other examples are ss 5(1)(b) and 17 of the Act which have overridden the common law principle in *Young v Canadian Northern Railway Co* [1931] AC 83 that a person has no rights in a pre-employment situation or where the person is not a party to a contract;
(d) this point was taken in *Hong Leong Equipment* by counsel for the appellant when trying to differentiate between 'administrative' and 'quasi-judicial' function. The Court of Appeal demolished that distinction on the authority of *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 and *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487;
(e) if the principles on administrative (public) law in *Hong Leong Equipment* apply to the decision of the Minister whether or not to refer the workman's representations to the Industrial Court, the author submits that they apply with equal force to the Industrial Court's determination (in public law) of whether or not the employer in a given case has established as a jurisdictional fact the reasons for its dismissal of the workman in the light of the latter's fundamental constitutional rights enshrined in arts 5(1) and 8(1) of the Constitution;
(f) the English law position at appellate proceedings is that the appellate court can grant the remedy which the lower court ought to have given. This principle, which is enshrined in s 69(4) of the Courts of Judicature Act 1964, is founded on the appellate court's ability to examine both findings of fact and law by the lower court. This distinction between appellate jurisdiction and review jurisdiction was brought out by the Federal Court in *Minister of Labour and Manpower & Anor v Paterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122 (at p 124). However, a lot of water has flowed under the bridge since that case even in English law. Today, judicial review has developed to such a stage that (following English law) the superior courts can also examine
findings of fact, ie the evidence. The English law authorities and their development were examined and the current position was stated by the (then) Supreme Court in Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204. Hence with respect, it is submitted that there is no basis for adhering to the outdated English law position on remedies the Federal Court can give in review proceedings; and

(g) apart from the above, the principles in Tan Tek Seng and Hong Leong Equipment are, it is submitted, equally applicable to a workman’s constitutional rights under art 5(1) of the Constitution, when the matter is ventilated in the Industrial Court.

Summary

In this article, the author has argued that the Court of Appeal’s reliance on arts 5(1) and 8(1) of the Constitution in Tan Tek Seng and Hong Leong Equipment as the bedrock for the substantive right of a workman not to be dismissed without just cause or excuse (both as to the reason for and the manner of dismissal) is, with respect, sound for the following reasons:

(a) principles of statutory interpretation (the rule in Heydon’s case) in common law jurisdictions;

(b) the Parliamentary intention in providing the relief or remedy (rather than the substantive right) in s 20(1) of the Act and not the substantive right not to be dismissed without just cause or excuse lends support to the decision of the Court of Appeal in Hong Leong Equipment on the construction of the word ‘life’ in art 5(1) of the Constitution in relation to the law of unjust dismissal;

(c) that construction is supported by the remedial s 20(1) of the Act because the substantive right not to be dismissed without just cause or excuse is in art 5(1) of the Constitution. This is similar to the position in India (also with a written constitution). Hence, the Court of Appeal was correct in following the Indian Supreme Court on the matter;

(d) that construction is also correct when we examine labour legislations in the UK (without a written constitution) on unfair dismissal and compare it with the position in Australia (with a written constitution);

(e) the point is fortified by the broad and liberal interpretation given to the term ‘workman’ in the unanimous decision of the Federal Court in Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369;

(f) since dismissal involves fundamental rights, reasons must be given for the dismissal. The giving of reasons is a matter of jurisdiction in the Industrial Court: Goon Kwee Phoy v J & P Coats (M) Bhd and Milan Auto Sdn Bhd v Wong Seh Yen; and

(g) the Court of Appeal’s reliance on the Schedule to the Courts of Judicature Act 1964 to depart from the common law in relation to the remedy available in the High Court in public law was correct; s 4 of the Courts of Judicature Act 1964 lends support to that departure from common law remedy available in public law. The decisions of the Federal Court in Wong Yuen Hock and Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd lend support to the point.
Conclusion

The Court of Appeal's construction of Pt II of the Constitution in Hong Leong Equipment (wherein arts 5(1) and 8(1) are located) has very recently been approved by the majority judgment of the Federal Court, per Edgar Joseph Jr FCJ in Rama Chandran.

Chief Justice Eusoff Chin in Rama Chandran, while distinguishing R v Barnet London Borough Council[1983] 1 AC 309, stated that:

... this (R v Barnet) is not a case of a workman's right to his job and livelihood which is of a fundamental importance ... n9
(Emphasis added.)

Therefore, it now appears that the constructions to arts 5(1) and 8(1) of the Constitution in relation to security of tenure in employment have been approved by the highest court in this country. This, with respect, recognizes the important role that employees play in national development.

FOOTNOTES:

n1 On s 20 of the Act being a 'remedy' section, see also the Federal Court decision in Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238 at p 239.

n2 Sections 141-149 exclude employees engaged outside the UK, employees on fixed term contract, etc.


n4 In the form of the then s 16A of the Act -- which is today (in its present form) reflected in s 20(1) of the Act.


n6 Ibid at p 147.


n8 See the author's paper on 'The Domestic Enquiry In Industrial Law -- Contractual, Statutory and Constitutional Implications' [1996] 2 ILR ix.

n9 See the author's observations on livelihood being an important right in modern day industrial law in his paper,The Domestic Inquiry -- Procedural Unfairness? [1994] 2 ILR i. See also Prof V Anantaraman, Procedural Fairness in Dismissal Proceedings in Malaysia [1996] 2 MLJ cxiii.