Introduction

It has only been about decade since our courts have started talking about the fundamental rights of a workman. So far there has been no disagreement about the proposition that a workman has certain constitutionally guaranteed rights. The question is: what are those rights? In this paper, I will try to compile a list of what I think are the rights guaranteed by the constitution to a workman over and above other rights he or she has in common with other persons. This list is bound to be incomplete. But before I even set out on that task, it is necessary to see what rights a workman presently enjoys dehors the Constitution. These may be classified under two categories: common law rights and statutory rights.

A workman has few, if any, rights at common law. He is not entitled to be heard before he is dismissed. The only issue is whether: facts emerging at the trial prove breach of contract. If the facts do not warrant summary dismissal, the master must pay damages n1.

But, even at common law, the burden is on the master to justify the dismissal n2. However, if the master dismisses the servant for no reason or a bad reason, he may justify the dismissal for a good reason n3 unless he has behaved himself in such a way that it would be unjust to permit him to do so n4. Also, there is no duty on the part of a master to pay his servant an annual bonus or other benefit and the servant has no legitimate expectation to receive such benefits n5 unless there is an express or an implied term to that effect in the contract of service n6. Further, save in exceptional circumstances, the servant has no right to be reinstated in his employment even if he proves that he was wrongfully dismissed n7.

So much for the common law.

As for statutes, the principal pieces of beneficial legislation are the Employment Act 1955 and the Industrial Relations Act 1967. The former, for example, in s 14(1) mandates an employer to have due inquiry before dismissing
his employee for misconduct. 'Due inquiry' for the purposes of s 14 of the Employment Act includes the right to make representations against the punishment proposed as a result of adverse findings by a domestic body. But, a failure on the part of the employer to permit such representations will not vitiate the dismissal where no prejudice has been occasioned to the employee.

The Industrial Relations Act 1967 ('the 1967 Act') is by far the most important of all labour law statutes. For it elevates employment to proprietary status. No workman may be deprived of his employment save for just cause or excuse. And it is for the employer to provide the just cause or excuse to support the deprivation: not for the Industrial Court in proceedings brought by the workman or for the ordinary courts in judicial review proceedings. The claims of workmen are to be adjudged "according to equity, good conscience and the substantial merits of the case without regard to the technicalities and legal form. So, a workman who has been deprived of his livelihood without just cause or excuse is prima facie entitled to reinstatement with no loss. But there may be cases where reinstatement is inappropriate and compensation in lieu thereof may be the appropriate remedy.

Discovering the rights

In the Federal Constitution you will find a number of non-enumerated fundamental rights emerging from the rights enumerated in Part II of the supreme law. But that will only happen if courts interpret the Constitution as it should be interpreted, that is to say, in a broad and liberal fashion adopting a prismatic approach. If the approach of 'tabulated legalism' -- to borrow the phrase from Lord Wilberforce -- is adopted then you will find nothing there. In short, if judges interpret the Constitution like a last will and testament then that is what it will become. The correct approach to constitutional interpretation is that set out in the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craighead in Prince Pinder v The Queen:

"It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow, rather than broad, constructions': see The State v Petrus [1985] LRC (Const) 699, p 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in R v Hughes [2002] 2 AC 259, p 277, para 35.

The observations of Douglas J in Griswold v Connecticut are also relevant in the context of constitutional interpretation. In the first passage he said this:

"The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights."
Then, after a discussion of a number of cases, including *NAACP v Alabama*

n18 he continued:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v Ullman* 367 US 497, pp 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen.

If the express rights enshrined in the First Amendment to the United States Constitution have been construed as including a penumbra of implied rights, including the right to privacy, so too must human rights provisions in other written constitutions. An obvious example is the Indian Constitution.

In *Kharak Singh v State of Uttar Pradesh* n19, Subba Rao J delivering judgment on behalf of himself and Shah J interpreted the expression 'life' in the Indian art 21 as including in it the right of privacy. He put it in this way:

If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in art 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions to encroachments are directly imposed or indirectly brought about by calculated measures.

Again in *R Rajagopal v State of Tamil Nadu* n20, the Supreme Court held as follows:

The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by art 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.

The approach our courts should adopt when interpreting our Constitution should be no different. That should be the case if one bears in mind the following words of Raja Azlan Shah Ag LP (as His Royal Highness then was):

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way -- 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* n21).

A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the
process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v Reynolds. It is in the light of this kind of ambulatory approach that we must construe our Constitution.

The same view has been expressed more recently in Boyce v The Queen: Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts -- what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment -- had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a 'living instrument' when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life. Section 15(1) is a provision which asks to be construed in this way. The best interpretation of the section is that the framers would not have intended the judges to sanction punishments which were widely regarded as cruel and inhuman in their own time merely because they had not been so regarded in the past.

What a court must in all events avoid when interpreting a written constitution is set out in the powerful joint dissent of Lords Bingham, Nichols of Birkenhead, Steyn and Walker of Gestingthorpe in Matthew v State: In recent years the Privy Council has generally shown itself to be an enlightened and forward-looking tribunal. It has of course recognised that the provisions of any constitution must be interpreted with care and respect, paying close attention to the terms of the constitution in question. But it has also brought to its task of constitutional adjudication a broader vision, recognising that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a constitution as these evolve over time. It is such an approach which Lord Wilberforce stigmatised, in the phrase of Professor de Smith which
he made famous, as 'the austerity of tabulated legalism': de Smith, *The New Commonwealth and its Constitutions* (1964), p 194; *Minister of Home Affairs v Fisher* n26. It is such an approach also which, in our opinion, vitiates the reasoning of the decision of the majority in this appeal. We consider the decision of the majority to be unsound in law and productive of grave injustice to a small but important class of people in Trinidad and Tobago. It is in our opinion clear that the interpretation of the 1976 Constitution of Trinidad and Tobago which commends itself to the majority does not ensure the protection of fundamental human rights and freedoms, degrades the dignity of the human person and does not respect the rule of law. With much regret, but without doubt, we dissent from the majority decision.

I have earlier referred to art 21 of the Indian Constitution and art 5(1) of our Constitution. For completeness, here are the two provisions:

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

The absence of the word 'procedure' in our art 5(1) has been held not to distinguish the two provisions. This is because:

the expression 'in accordance with law' in art 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of art 5 n27.

Adopting the approach to interpretation that has been commended by high and distinguished authority, the Constitution guarantees, at the very least, the following rights of a workman:

(1) the protection of livelihood;
(2) the right to work in a reasonably safe environment;
(3) the right to unionise;
(4) the right to a fair wage; and
(5) the right to reinstatement.

Let me take each of these.

**Protection of livelihood**

As long ago as 1877, it was recognised that by the expression 'life' is meant:

something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed n28.

This interpretation has been accepted in India n29. We in the Court of Appeal of Malaysia have also adopted this interpretation of the expression 'life' in art 5(1) of our Constitution n30. But we have since been told in relation to other expression 'personal liberty' appearing in that Article that it should not:

'be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the
quality of life n31.

Fortunately, the following view which we applied in Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan n32 has not been touched and so must be deemed to continue to be good law:

The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them n33.

So, it is now appears to have been accepted by our courts that the right to earn a livelihood is a constitutionally guaranteed right.

A reasonably safe workplace

Just as a workman's right to a livelihood is constitutionally protected, so must his or her right to work in a fairly safe environment. There are several facets to this right. I will mention two. First, the right to work in a fairly healthy workplace. Second, the right to be treated with dignity.

The common law itself recognises that the workman should not be exposed to undue hazards at the work place. So, an employer is:

under a duty to use reasonable care to provide, among other things, safe plant and appliances for use by its employees and to maintain them in a proper condition n34.

That is the employer's duty in tort. But there is a parallel duty imposed on him by the Constitution. For, 'life' in art 5(1) includes 'the right to live [and work] in a reasonably healthy and pollution free environment' n35.

Not long ago, our national newspapers highlighted the plight of some plantation workers who had been abandoned by their employer; had had their supply of water and electricity disconnected and threatened to demolish the quarters they lived in. It was reported that for several months, unknown to many, these workers had been forced to drink untreated water as a result of which they all fell seriously ill. In such a case, there would have been no difficulty in mounting an argument that their constitutional right as workmen to be treated with dignity had been violated.

The rights at the workplace include the right to be free of harassment, sexual or otherwise. Thus, in Vishaka v State of Rajasthan n36, the Supreme Court of India held as follows:

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to
international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

In *Higgs v Minister for National Security* n37, Lord Cooke of Thorndon made the point in this way:

Self-evidently every human being has a natural right not to be subjected to inhuman treatment. A right inherent in the concept of civilisation, it is recognised rather than created by international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Courts have read international norms into a written constitution to enlarge existing rights. That has in fact been done by the courts of other countries n38. But not Malaysia. Our apex court has held that there is no room for this n39

Lastly, in the case of female victims of sexual harassment, I can do no better than to quote the words of Dipak Misra J in *Madhya Pradesh Human Rights Commission v State of Madhya Pradesh* n40:

A human right for woman has to be perceived in a collective spectrum. She must be allowed to exercise her rights as a complete human being and to support the development of others. Sexual harassment and physical assault and harassment cannot be permitted.

**The right to unionise labour**

Article 10(1)(c) guarantees to all citizens the right to form associations. This is subject to art 10(2)(c) which empowers Parliament by law to impose such restrictions on the right conferred by art 10(1)(c) 'as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'.

Although art 10(2)(c) appears to confer unlimited power on Parliament to impose restrictions, closer examination will show otherwise. In the first place, Parliament cannot enact a restriction that renders the right illusory -- a mere rope of sand n41. In the second place, all State action, including legislation must meet the objective criteria of fairness enshrined in art 8(1) n42 of the Constitution n43. For that reason, courts should be able to read the word 'reasonable' before the word 'restrictions' so that the phrase will read 'such reasonable restrictions'.

Reading words into our Constitution is nothing new. It has happened before. In *Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis* n44 the Federal Court read words into the fundamental right of an accused person to counsel under art 5(3) to restrict it so as not to hinder police investigations. So, if a fundamental right can be curtailed by words being implied into the Constitution it is difficult to see why the word 'reasonable' cannot be read into art 10(2)(c). It follows that any unreasonable restriction imposed by an Act of Parliament on the rights of a trade union may be challenged as an infraction of art 10(1)(c). Similarly, any Executive or administrative action that unreasonably interferes with the activities of a trade union may be challenged as being in violation of art 8(1).
Right to a fair wage

Once it is accepted that the right to life includes the right to live with human dignity, it follows as a matter of pure logic that any act or omission that violates that right is unconstitutional. So it is incumbent on an employer to have in place a salary structure that enables a workman to lead his life with human dignity. But you must recognise that this:

is a difficult exercise and cannot be measured in absolute terms. It will depend upon nature of duty and responsibility of the post, the requisite qualification and experience, working condition and a host of other factors. The salary structure of similarly placed persons working in other Public Sector Undertakings may also be relevant n45.

What is important to recognise is that the right to a fair wage is guaranteed. The issue whether the particular wage meets the standard of fairness is one that has to be determined as a question of fact according to the evidence that is placed before the court.

Reinstatement

As I have already said statute in the form of the 1967 Act has made employment a proprietary right. On this basis, employment would also be protected by Article 13(1) which provides that 'No person shall be deprived of property save in accordance with law'. Now, the word 'law' in the Article refers not to written law but to:

a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England ...

And it has now been recognised that the rule of law of which the rules of natural justice form an integral part has both a substantive as well as a procedural dimension n47. Hence, the 'law' which arts 5(1), 8(1) and 13(1) refer to is not any law, however illogical or oppressive it may be, but an objectively fair and just law.

It is commonsense that if you deprive someone of his property, you must either return it or compensate for the deprivation. In the same way, if a workman is wrongfully dismissed he must either get his job back or fair compensation for its loss. But, as I have already pointed out, the common law (in which expression I include equity) does not countenance specific enforcement of a service contract. This is a law which violates art 10 of the Constitution. It may be the common law. But that does not matter. Even a principle of the common law which is inconsistent with a constitutional provision must give way to the latter. To quote Kirby J in Dow Jones & Co Inc v Gutnick n48:

The responsibilities of this court extend to the re-expression of the common law of Australia. However, the court is bound by the Constitution. No principle of the common law may be inconsistent with its language or implications. Lange v Australian Broadcasting Corp n49. Nor may the common law be inconsistent with valid applicable legislation, whether federal, state or of a territory. Brodie v Singleton Shire Council n50; Conway v The Queen n51; Regie National des Usines Renault SA v Zhang n52.

In re-expressing the common law from time to time, regard may be had to
the general developments of statute law. (Emphasis added.)

A moment's digression. Notice that Kirby J says, 'valid applicable legislation'. A rule of the common law may therefore only be overridden by a valid statute. What happens if a common law right is an integral part of a constitutional provision? In that case, a statute which violates that right is unconstitutional and void. Take access to justice, for example. At common law, access to justice is a fundamental right \( n_{53} \). Or to use Lord Diplock's words \( n_{54} \), it is part of the 'fundamental rules of natural justice'. It is the common law in action in the public law environment. So a statutory provision that seeks to deny access to justice is \textit{prima facie} unconstitutional and void as it offends against art \( 5(1) \). Two attempts by the Court of Appeal to establish this rather trite proposition have failed \( n_{55} \).

Applying \textit{Dow Jones v Gutnick}, the common law rule against the reinstatement of a dismissed workman to his former employment save in rare cases is unconstitutional because it is not a fair and just law and therefore violative of arts \( 8(1), 5(1) \) and \( 13(1) \). So too must s \( 20(b) \) of the Specific Relief Act 1950 \( n_{56} \) as a pre-Constitution statute give way to the Constitution \( n_{57} \). It follows that even the High Court may, in an appropriate case reinstate an employee to his former employment \( n_{58} \).

\textbf{Contracting out of fundamental rights}

The enumerated and non-enumerated rights enshrined in Part II of the Constitution are conferred on the public at large or a class of the public and not upon any particular individual. Hence, it is not open to an individual or even a group of individuals in society to purport to contract out of these fundamental rights. This is what led Ong CJ to say that it is impossible to have a contract of employment the terms of which are inconsistent with the Constitution \( n_{59} \). The Supreme Court of India has also held that it is not open to a citizen to waive a fundamental right \( n_{60} \).

In Malaysia, the point was germane and could have been taken in a case concerning industrial law but, with respect, was unfortunately missed by counsel and the court. The case is \textit{Beatrice Fernandez v Malaysian Airline System} \( n_{61} \). There, the appellant, Fernandez, was a stewardess with the Airline. At the material time there was a collective agreement between the appellant's union and the employer Airline. There was a term in that agreement which said that a stewardess who became pregnant must resign. If she did not, the Airline could terminate her services. The appellant became pregnant but refused to resign. The Airline terminated her services. She then brought an action claiming that the relevant clause in the collective agreement was discriminatory and contravened art \( 8(2) \) of the Federal Constitution. She failed before the High Court and the Court of Appeal and her application for leave was refused by the Federal Court.

Delivering the judgment of the Federal Court, Abdul Malek Ahmad PCA said:

We took time to examine this allegation carefully and we found that it is simply not possible to expand the scope of art \( 8 \) of the Federal Constitution to cover collective agreements such as the one in question. To invoke art \( 8 \) of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said Article. Constitutional law, as a branch of public law, deals with the
contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the 'law' in art 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.

This view is correct in the sense that it was dealing with the submissions made by counsel for the appellant. And as it is well accepted that: by and large, courts of law in our system are the hostages of the arguments deployed by counsel n62.

It is obvious that the appellant addressed the wrong target. What she should have argued is that the relevant term in the collective agreement amounted to her contracting out of her fundamental right to life, i.e. to the livelihood she had. Since there could be no contracting out, the term in question was void and unenforceable as a matter of public law.

As for the observation of the Federal Court, it would be wrong to give it too wide an interpretation as saying that the Constitution operates only in the sphere of public law. That would be an error. Take art 6 for example. It says in clauses (1) and (2):

1. No person shall be held in slavery.
2. All forms of forced labour are prohibited, but parliament may by law provide for compulsory service for national purposes.

Suppose S enters into a contract with M to be M's slave, it would, mildly, be a little odd to suggest that the contract is good because the parties were ad idem and that the Constitution does not pervade private law. Of course it does. And we said as much in *Barat Estates Sdn Bhd v Parawakan* n63:

One begins with the premise that every employee has a right to choose his employer. And no person may dictate to another that he shall be the employee of the former. When an employer sells off his business to another, he must give his employees the right to make a choice as to the course he or she wishes to adopt. The employee may, because of an existing relationship, wish to be employed by the former employer in some other business that such employer may have. Or he may wish to seek employment elsewhere altogether. Or he may wish to remain in the same business under a fresh contract with the acquirer of the business. The giving of notice by the former employer upon the sale of a business thus enables the employee to exercise his right to the choice that he is entitled to make. A failure to give notice deprives the employee of his right to make a choice.

We spoke a moment ago of the right to make a choice in the context of employment as a constitutional right. In saying this we have in mind art 6 of the Federal Constitution.

The relevant clause in the collective agreement in the *Fernandez* case could also have been attacked on private law grounds as being opposed to public policy as it unfairly discriminated against pregnant women. *Nagle v Feilden* n64 could have been prayed in aid. The facts of that case are notorious. Mrs Nagle had trained horses for several years. She was refused a trainer's licence by the Jockey Club. She could not train without a licence. So that put an end to her livelihood. No reasons for the refusal were given. But it was the practice of
the Club not to issue licences to women. Against that matrix of facts Lord Denning MR said this:

The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it.

That would, in my view, have been a complete answer to the Airline's case.

**Remedies for infringement**

If a workman is dismissed without just cause or excuse, the Industrial Court established by the Act of 1967 has power to order his or her reinstatement. And, if it inappropriate to grant that remedy, it may award compensation. As the law now stands there is such power in the ordinary courts but they will not exercise it.

But what if the workman has to work in a less than safe environment and contracts some disease? Or what if a female workman is sexually harassed? In such cases, apart from the ordinary damages such workman may receive in tort, they are also entitled to receive compensation for breach of their fundamental right.

The starting point of the discussion on this topic is Maharaj v Attorney-General of Trinidad & Tobago (No 2) n65. The appellant, a member of the Bar had been convicted of contempt of court without the particulars of the charge being put to him as required by law and sentenced to imprisonment a portion of which he served. The Privy Council quashed his conviction. The appellant then brought proceedings to recover compensation for a breach of his fundamental right not to be deprived of his liberty save in accordance with due process of the law, which right was guaranteed by s 1(a) of the Constitution of Trinidad & Tobago. In allowing his claim, the Privy Council, speaking through Lord Diplock said:

The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view whether money compensation by way of redress under s 6(1) can ever include an exemplary or punitive award.

This principle has been applied by the courts of other countries with written constitutions or equipollent human rights legislation such as Canada n66, South Africa n67, New Zealand n68, India n69, Mauritius n70, Ireland n71 and Guyana n72. An attempt to assert this jurisdiction in this country has failed n73 although it has been recognised by the Federal Court n74.

In Cullen v Chief Constable of the Royal Ulster Constabulary (Northern
Ireland) n75, Lord Hutton said that:
where a right is contained in a written constitution it is accorded a
special value by the courts and a breach of that right without damage
or harm can lead to an award of damages.

In Rabindra Nath Ghosal v University of Calcutta n76, the same principle
was stated in slightly different language, though to the same effect:
A claim in public law for compensation for contravention of human
rights and fundamental freedom, the protection of which is guaranteed
in the Constitution is undoubtedly an acknowledged remedy for
protection and enforcement of such right and such a claim based on
strict liability made by resorting to a constitutional remedy, provided
for the enforcement of fundamental right is distinct from, and in
addition to the remedy in private law for damages for the tort ...

Conclusion

I conclude as I began. A workman's fundamental rights are there in the
Constitution. They are guaranteed by the Constitution. All you have to do is to
apply the correct interpretational approach to find them. But if you take a
narrow and literal approach n77, you will never find them. And it will be our
citizens who will ultimately bear the loss.

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FOOTNOTES:

n1 Menon v Brooklands (Selangor) Rubber Co Ltd [1968] 1 MLJ 15, per Raja
Azlan J (as his Royal Highness then was).

n2 SR Fox v Ek Liong Hin Ltd [1957] MLJ 1.

n3 Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 Ch D 339.

n4 Panchaud Freres SA v Establisement General Grain Co [1970] 1 Lloyd's LR
53.

n5 Lavarack v Woods [1967] 1 QB 278. But see the powerful dissent of Lord
Denning MR which I think is to be preferred to the majority.

n6 Orman v Saville Sportswear [1960] 1 WLR 1055; Powell v Braun [1954] 1
All ER 484, [1954] 1 WLR 401.


n8 Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn Bhd [1997] 1
MLJ 352.

n10  Section 20(1).


n12  Section 30(5).


n17  (1965) 381 US 479.

n18  357 US 449.

n19  1963 AIR SC 1295.

n20  AIR 1995 SC 264.

n21  [1979] 3 All ER 21.

n22  [1979] 3 All ER 129, p 136.

n23  Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29. Unfortunately, some of the later cases have ignored this dictum. See, for example, Ketua Polis Negara v Abdul Ghani Haroon [2001] 4 MLJ 11, where Steve Shim CJ (SS), Abdul Malek and Haidar FCJJ adopted a narrow and pedantic approach to art 5(2). It is submitted that the interpretation given to that article by Hishamudin J in the High Court is correct.

n24  [2004 UKPC 32.


n27 Re Tan Boon Liat @ Alien, Re [1977] 2 MLJ 108, per Lee Hun Hoe CJ.

n28 Munn v Illinois (1877) 94 US 113 at p 142 per Field J when interpreting the 14th Amendment to the US Constitution. This has been applied in later cases, for example, in 1985 in Walters v National Association of Radiation Survivors 473 US 305.

n29 See, for example, Islamic Academy of Education v State of Karnataka AIR 2003 SC 3724.


n32 Supra.

n33 Delhi Transport Corp v DTC Mazdoor Congress & Ors AIR 1991 SC 101, per Sawant J.


n35 See Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor.

n36 AIR 1997 SC 3011. This was applied in State of West Bengal v Kesoram Industries Ltd AIR 2005 SC 1646.


n39 See Mohamad Ezam bin Mohd Noor v Ketua Polis Negara and other appeals [2002] 4 MLJ 449, per Siti Norma FCJ.

n40 AIR 2002 MP 239.

n41 Siva Segara v Public Prosecutor [1984] 2 MLJ 212.

n42 Article 8(1) reads: All persons are equal before the law and shall have equal protection of the law.
n43 See Shri Sitaram Sugar Co Ltd v Union of India & Ors AIR 1990 SC 1277.

n44 [1975] 2 MLJ 198.

n45 AK Bindal v Union of India AIR 2003 SC 2189.

n46 Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64, per Lord Diplock.

n47 Pierson v Secretary of State for the Home Department [1997] 3 All ER 577, at p 606.

n48 194 ALR 433.

n49 (1997) 189 CLR 520 at pp 562-567.


n54 See fn 46.

n55 See Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1. Both decisions were reversed. It was held that Parliament may by ordinary legislation bar access to justice.

n56 This section reads: 'a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms'. And illustration (a) says: 'A contracts to render personal service to B; A contracts to employ B on personal service; A, an author, contracts with B, a publisher, to complete a literary work; B cannot enforce specific performance of these contracts.'


n58 A courageous attempt by NH Chan J to jettison the equitable rule against specific enforcement of service contracts failed. See, Dato HM Shah v Dato Abdullah bin Ahmad [1991] 1 MLJ 91. It is suggested that the attempt if now
made may succeed.

n59 Lionel v Government of Malaysia [1971] 2 MLJ 172. Reversed on another point on appeal but the principle that you cannot contract out of the Constitution was not disapproved [1974] 1 MLJ 3.

n60 Basheshar Nath v Commr of Income-tax, Delhi and Rajasthan AIR 1959 SC 149.


n62 per Steyn LJ in Darlington Borough Council v Wiltshier Northern Ltd [1995] 3 All ER 895, at p 905.


n64 [1966] 2 QB 633.


n70 Societe United Docks and others v Government of Mauritius; Marine Workers Union and others v Mauritius Marine Authority [1985] AC 585.

n71 Byrne v Ireland (1972) IR 241, Walsh J.


n73 Ng Kim Moi v Pentadbir Tanah Daerah Seremban [2004] 3 MLJ 301.

n74 R Rama Chandran v The Industrial Court Of Malaysia & Anor [1997] 1 MLJ 145.

n75 [2003] 1 WLR 1763.
n76 AIR 2002 SC 3560.

n77 Bear in mind that curial guidelines which may be used to interpret statutes do not apply to a Constitution. See, Hinds v The Queen [1976] 1 All ER 353.