

PUBLIC SERVANTS & THE CONSTITUTION

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THE EPICENTER OF GOVERNMENT

Modern society is held together by services provided by officials of the state. The civil service is the pivot around which the administration of the contemporary state revolves. Every country's economic, social and educational policies are ultimately dependent on the quality and commitment of its public officials. The vast increase in the functions and powers of the executive in the welfare state has substantially enhanced the impact that high-level administrators can have on the quality of life of the population.

CHARACTERISTICS

Around the world the civil service exhibits a number of salient features.

- There is a group-spirit, an *esprit de corps* reflecting a sense of pride and honour in the profession. At the higher levels there is professionalism and specialisation.
- All public servants hold office during the pleasure of the Yang di-Pertuan Agong: Article 132(2A). In actual practice, however, except for those holding political or contractual posts, public servants enjoy security of tenure and a steady and assured income.
- Appointments are to grades that are organised into categories and groups reflecting a hierarchy. The terms and conditions for each level of the hierarchy vary significantly. How just and reasonable these differences are is a matter of opinion.
- Appointees are required to observe a neutrality and reserve in politics and are expected to give their best no matter which party is in power. Public servants do not go out of office when a Minister or government is replaced.
- Another significant feature is political anonymity. When a Ministry is criticised in Parliament, the Minister concerned must take the rap¹ and the public servants involved are not exposed to political vitriol on the floor of the Houses.
- Service conditions are generally laid down in statutes or subsidiary legislation and free negotiation as in the private sector plays very little role. Qualifications and procedures are pre-prescribed and benefits (like loans and

¹ Article 43(3)

pensions²) and liabilities (like asset-declaration³) are a matter of law, not of contractual agreement.⁴

- Matters of training, promotion and discipline are, likewise, governed by elaborate rules and procedures.

WHO IS A PUBLIC SERVANT?

Article 132(1) defines public services to include the armed forces, the judicial and legal service, the general public service of the Federation, the police force, the joint federal-state public service, the public service of each state and the education service.

But under Articles 132(3) and (4), the following are not within the definition of public servants:

- President, Speaker, Deputy President, Deputy Speaker of Parliament; members of Parliament and State Assemblies;
- judges of the superior courts;
- members of Commissions or Councils established under the Federal and State Constitutions;
- the Attorney-General;
- such diplomatic posts as the Yang di-Pertuan Agong may prescribe;
- the legal adviser of any State;
- members of the personal staff of the Yang di-Pertuan Agong or Ruler or Governor;
- the President and Secretary of the Malacca and Penang Religious Affairs Department; Muftis and Kadi's in these two States.
- Ministers (Article 43), Deputy Ministers (Article 43A), Parliamentary Secretaries (Article 43B) and Political Secretaries (Article 43C) are not within the definition of "members of the public services" under Article 132(1) of the Constitution. Recently a complaint of misfeasance against the PM failed on this ground.
- Employees of statutory bodies, of public companies, of universities, or of any other body or authority established under federal law, are not public servants for the purpose of the Constitution. In *Ramalingam v Chong Kim Fong* [1978] 1 MLJ 83 FELDA officers were declared to be outside the definition of public servants.

² Articles 147 and 180.

³ Sections 10-16, Public Officers (Conduct And Discipline) Regulations 1993, P.U. (A) 395 (henceforth "Regulations")

⁴ General Orders Chapter A, 1973 (Appointments and Promotions); Chapter B, 1974 (Service Allowances); Chapter C, 1974 (Leave); Chapter E, 1974 (Houses and Government Office Buildings); Chapter F, 1974 (Medical); Chapter G, 1974 (Office Hours and Overtime); Public Officers (Conduct & Discipline) Regulations 1993; Service Circular No 9 of 1991 Implementing the New Remuneration Scheme in the Public Sector.

CONTROL AND ACCOUNTABILITY

The performance of the Malaysian civil service compares favourably with public services in other Asian and African societies. But there is no dearth of criticisms.

It is alleged that government service is marked by lack of initiative and imagination. There is mechanical application of rules and over-devotion to precedents and red-tape. There is lack of coordination between departments performing related tasks. What could be accomplished at a one-stop centre often requires a run-around through many corridors of power. Some civil servants are not so civil. There is a feeling of self-importance. Elitism and remoteness from the rest of the community are not uncommon. There are occasional cases of overzealousness, bias and negligence. Some sectors and services are riddled with delays and corrupt practices. In one case, *Wong Cheong Kim v DPP* [1962] 28 MLJ 304, the learned judge observed that an unreasonable delay in granting a license or permit raises the inference that a bribe was expected.

To remedy these defects, institutions and procedures exist to ensure that professionalism is improved and wrongdoing is punished.

Training: The government invests heavily in retraining and upgrading its staff. Many rewards and incentives have been put in place though these do not always reach the deserving.

Constitutional and administrative law literacy: Regrettably this is lacking and only superficial measures are undertaken to remedy this lack.

Internal controls: Procedures for internal supervision, planning, programming, budgeting, and management by objectives, job-evaluation, job-description, auditing, cost-benefit analyses and departmental discipline seek to provide internal controls.

External controls: External checks are available in many ways:

- By way of ministerial responsibility to Parliament.⁵
- There is judicial control of administrative discretion under the principle of constitutional supremacy, the doctrine of ultra vires and the principles of natural justice.
- In addition there is the possibility of investigations by the Auditor-General⁶ and the Public Complaints Bureau. The PCB is useful but full of flaws and a full-fledged, statutory system of ombudsman at both federal and state levels is needed
- There are laws to regulate corruption⁷.
- Commissions of enquiry may be set up⁸.

⁵ Article 43(3)

⁶ Article 105

⁷ Anti-Corruption Act 1997; Emergency (Essential Powers) Ordinance No. 22, 1970

- The legal system permits proceedings against the government in tort and contract⁹ for torts committed by civil servants.
- Such extra-legal checks as Services Centres run by political parties and Letters to the Editor columns in major newspapers do much to help citizens against maladministration.

Commissions and Councils: Given the importance of the administrative services, it is important that public servants must possess abilities commensurate with their duties. Recruitment should be based on merit rather than on patronage so that the civil service does not become the dumping ground of the unambitious, indolent and worthless. In many countries competitive examinations are used to choose entrants into government service. In Malaysia the Constitution in Article 137-144 provides for independent Service Commissions to control appointments, confirmation, transfers, emplacement on the permanent or pensionable establishment, promotions, discipline and dismissal of employees in public services.

Persons appointed to these bodies, Commissions and Councils cannot be removed from office except in the like manner as a judge of the Federal Court: Article 143(1)(c).

Among the Commissions and Councils are the Armed Forces Council (Article 137), the Judicial and Legal Service Commission (Article 138), the Public Service Commission (Article 139), the Police Force Commission (Article 140) and the Education Service Commission (Article 141A).

SERVICE CONDITIONS

The qualifications for appointment and conditions of service are regulated by federal and state law as well as by the common law of England. A number of basic rules apply.

No security of tenure: All public servants hold office “during the pleasure” of the Yang di-Pertuan Agong or Ruler or Governor: Article 132(2A). There is no security of tenure. The Crown’s right to terminate the services of its employees is implied in any contract of employment. In *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155, Suffian LP ruled that unlike in India where a pensionable officer has a right, a lien and a title to his post equivalent to property, in Malaysia there is no such right as against the government to continuity of employment, promotion or pension. The courts should not fetter the undoubted discretion of the government to terminate the services of the public servant. In *Haji Ariffin v Government of Pahang* [1969] 1 MLJ 6 it was held that “in Malaysia

⁸ Commissions of Enquiry Act 1950 (Act 119)

⁹ Government Proceedings Act 1956 (Act 359)

there is no such thing as permanent service ... because every member of the public service (other than judges and the Auditor-General) holds office during the pleasure of the State". In *State Public Service Commission, Sarawak v Sarjit Singh Khaira* [1999] 1 MLJ 618, it was held that the length, time and place of a civil servant's service are subject to the Governor's pleasure. See also *Badrul Ahmad v Government of Malaysia* [1987] 2 MLJ 178; *Jacob v AG* [1970] 2 MLJ 133; *Pengarah Pelajaran Wilayah Persekutuan v Loot Ting Yee* [1982] 1 MLJ 68; *Doraisamy v Government* [1982] 2 MLJ 155; *Najar Singh v Government* [1976] 1 MLJ 203; *Government v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222; *General Manager Keretapi Tanah Melayu v Veeriah* [1975] 1 MLJ 123; and *Doraisamy v Government* [1982] 2 MLJ 155.

Terms of service alterable: The terms of service of a public servant may be altered without his consent. Rules prevailing at the time of the appointment may be changed: *Rajion Haji Sulaiman v Government of Kelantan* [1976] 1 MLJ 118. These rules are merely directory and liable to be changed to suit the public policy of the state. In this case, a post-entry requirement of an examination was imposed as a pre-requisite for further increments. The court held that the government can, unilaterally, impose post-entry requirements on its employees.

No absolute right to pension: There is no absolute right to pension, gratuity or other allowances. The Yang di-Pertuan Agong may reduce or withhold pension but only if he is satisfied that the public servant is guilty of negligence, irregularity or misconduct: Pensions Act 1980 (Act 227).¹⁰

SUBSTANTIVE SAFEGUARDS FOR PUBLIC SERVANTS

All public servants enjoy many rights and privileges under various Acts of Parliament and quasi-legislative service regulations and circulars. In addition, the Constitution confers some substantive safeguards on them.

Impartial Treatment: Article 136 states that all persons of whatever race in the same grade in the service of the Federation shall be treated impartially. Difficult issues arise because Article 136 has to be read along with Article 153 which permits reservations and quotas in favour of Malays and natives of Sabah and Sarawak. The late Tun Suffian was of the opinion that the combined effect of Articles 136 and 153 is that at entry point the ethnic factor may be taken into consideration; but, once in service, promotions, awards etc. must be based on merit.

Even a cursory look at the public service's profile will indicate that the reality is quite different. Impartial treatment, as required by Article 136, is hardly evident at the higher echelons of public service. Sadly, public service employment after

¹⁰ *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155; [1978] 2 MLJ 136 and 137; *Haji Wan Othman v Government* [1965] 2 MLJ 31; *Rajasingam V S Rasiah v Government* [2002] 1 MLJ 7

1969 has begun to reflect the same ethnic imbalances that afflict the private sector.

Pensions: Article 147 protects pensions, gratuities and other similar allowances for members of the public service, their widows, children, dependents or personal representatives. The detailed rules about pensions are contained in various laws, among them, the Pensions Act 1980 (Act 227) and Pensions (Public Authorities) F.M. Act 28/1962. A look at the Public Services Department Annual Report 2000 indicates that in the year 2000, there were 433,474 beneficiaries of the pension scheme of whom 316,852 were pensioners and 116,622 were receiving derivative pensions. The total pension bill for the year 2000 was a staggering RM 3,541,732,942.37. In 1990 the Bill for 224,053 beneficiaries of whom 155,155 were pensioners and 68,898 were receiving derivative pensions was 1,154,037,231.22.

Recovery of arrears: Despite his vulnerable position, a civil servant can sue the Crown for recovery of arrears or for any other breach of the law of contract.

Tortious claims: A civil servant can sue the government for damages in torts if the Crown or a public authority had caused him a loss. If a public servant has proof of malice or bad faith by his superior, he can institute a civil action for malicious falsehood against the officer, though not the government.

Proportionality in punishment: In all “legitimate expectation” situations, the decision-maker must observe a “duty to act fairly”. Over the years, this duty has acquired a substantive as well as procedural dimension. Fair procedures must lead to fair results. It is not enough to go through the motions of fair procedures. The end results must be fair, proportionate and reasonable. A disciplinary authority “must, when deciding what punishment it ought to impose on the particular servant, act reasonably and fairly. If it acts arbitrarily or unfairly imposes a punishment that is disproportionate to the misconduct, then its decision, to this extent, becomes liable to be quashed or set aside”. This remarkable decision in *Tan Teck Seng*¹¹ was endorsed by the Federal Court in *Rama Chandran v The IRC* [1997] 1 AMR6:433. Unfortunately, *Tan Teck Seng* was rejected by the later Federal Court decision in *Ng Hock Cheng v Pengarah Am Penjara* [1997] 4AMR 53:4193.¹² In *Rajasingam V S Rasiah v Government* [2002] 1 MLJ 7 the High Court reiterated that the court could not interfere with the punishment meted out to the plaintiff and could not substitute the government’s view with its own view of what punishment was appropriate.

¹¹ *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261

¹² Was *Ng Hock Cheng* decided per incuriam?

PROCEDURAL SAFEGUARDS UNDER ARTICLE 135(1)

Though public servants have no substantive right to their posts, there are some procedural safeguards that are available to them under Article 135 Clauses (1), (2) and (3) and under the common law principles of natural justice.

No member of the public services (except a member of the armed forces) may be dismissed or reduced in rank by an authority subordinate to that which had the power to appoint: Article 135(1). See also the cases of *Surinder Singh Kanda v Government of Malaya* [1962] MLJ 169, [1962] AC 322; *Government v Iznan Osman* [1977] 2 MLJ 1; and *Zainal Hashim v Mohamed Hanif Omar* [1975] 2 MLJ 262. However, there are many exceptions to the Article 135(1) safeguard:

- Article 135(1) is not applicable to situations where the dismissing authority, though subordinate in rank to the appointing authority, was acting in pursuance of a power delegated to it by a Commission: *Government v Zainal Hashim* [1977] 2 MLJ 254. But see *Sithambaran v AG* [1972] 2 MLJ 175 where the court held that the case did not involve delegation. The two authorities were coordinate to each other.
- In States other than Penang and Malacca, members of the public service of each state may be removed by a Board appointed by the Ruler if State law has delegated the power of the State Public Service Commission to the Board.
- The safeguard of Article 135(1) does not apply to members of the armed forces.
- The safeguard of Article 135(1) does not apply if the removal from office does not amount to “dismissal” or “reduction in rank” but falls within the concept of “termination”.

PROCEDURAL SAFEGUARDS UNDER ARTICLE 135(2)

Article 135(2) constitutionalises the natural justice rule of prior hearing. No public servant may be ‘dismissed’ or ‘reduced in rank’ without being given a reasonable opportunity of being heard: *Government v Mahan Singh* [1978] 2MLJ 133; *IGP v Alan Nor Kamat* [1988] 1 MLJ 260. Note also, Regulations 25, 27-28, 29(1) and 49(4), Public Officers (Conduct and Discipline) Regulations 1993, which confer a similar right to hearing as in Article 135(2).

Meaning of ‘dismissed’: Removal from office is not necessarily a dismissal: *Government v Mahan Singh* [1975] 2 MLJ 155. In this case, the plaintiff’s service was terminated and he was pensioned off at the premature age of 49. Ten per cent of his pension was ordered to be forfeited. He was not given a hearing before being “terminated” from service. The Federal Court held that termination does not constitute dismissal and therefore the Article 135(2) safeguard of prior hearing was not applicable. On appeal to the Privy Council, the Federal Court

was reversed¹³. Lord Diplock laid down that any removal, by whatever name called, will amount to dismissal if (i) it is connected with the conduct of the appellant in relation to his office which was regarded by the Government as unsatisfactory or blameworthy, and (ii) if the consequences of the termination involved an element of punishment. The Privy Council found that both prerequisites were met. Mahan Singh was dismissed, not merely terminated. As no prior hearing was given, there was a breach of Article 135(2) and his dismissal was declared null and void.

Subsequent to the *Mahan Singh* decision, Article 135(2) was amended to provide in a proviso that “Where the service of a member of such a service is terminated in the public interest ... such termination ... 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 ... “

As a result of this amendment, cases like *Mahan Singh* will, henceforth, fit into the category of termination in the public interest for which no prior hearing is required.

Meaning of ‘reduction in rank’: A reversion to the former post does not amount to reduction in rank provided the public servant was not already confirmed in his new post: *Munnusamy v PSC* [1967] 1 MLJ 199; *Badrul Ahmad v Government* [1987] 2 MLJ 178. It is not a reduction in rank to transfer a schoolmaster from one school to another if he continues to be employed in the same category as previously and his remuneration remains the same even though he loses his supervisory duties: *Pengarah Pelajaran v Loot Ting Yee* [1982] 1 MLJ 68.

Meaning of ‘reasonable opportunity of being heard’: A wealth of case law on this issue has clarified the ingredients of this constitutionalised rule of natural justice.

- The officer concerned should have a full opportunity of stating his case before he is dismissed: *Najar Singh v Government* [1976] 1 MLJ 203.
- The accused should be supplied with all information and documents made known to the adjudicator. The deciding authority must not receive evidence behind the back of the accused without giving him an opportunity to rebut such evidence: *Surinder Singh Kanda v Government* [1962] MLJ 169; *Shamsiah bte Ahmad Sham v PSC* [1990] 3 MLJ 364.
- The appeal authority should not enhance the punishment without providing a hearing. In *AG, Singapore v Ling How Doong* [1969] 1 MLJ 154 the employee appealed against a fine and reprimand but the appellate authority dismissed the employee. The court held that the employee “had a right to know his dismissal was under consideration ,, and therefore a right to be heard on the question of his dismissal”.

¹³ [1978] 2 MLJ 136

- The right to be heard does not imply the right to be heard orally. Hearing can be oral or by way of written representation: *Najar Singh v Government* [1976] 1 MLJ 203. All that is needed is that the officer concerned should have a full opportunity of stating his case: *Lembaga Tata tertib Perkhidmatan Awam v Utra Badi* [2001] 2 MLJ 417. See also *Ghazi Mohd Sawi v Mohd Haniff Omar* [1994] 2 MLJ 114; *Zainal Hashim v Government* [1980] AC 734; *Ningkan Umu v Suruhanjaya Perkhidmatan Awam* [1999] 1 CLJ 448; *Abdul Jalil Rashid v Mamat Talib* [1999] 3 MLJ 598; *Ang Seng Wan v Suruhanjaya Polis* [2002] 2 MLJ 131; *Dr Chandra Muzaffar v Universiti Malaya* [2002] 5 MLJ 369. However it must be noted that though a hearing need not be oral, the courts have in some cases sounded a caution that the measure of fairness given to the plaintiff is a question of fact and degree and in some circumstances a fair hearing must permit oral representations: *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308 and *Rohana Ariffin v USM* [1989] 1 MLJ 487.
- Unlike criminal cases where there is always a plea in mitigation before sentencing, in disciplinary cases there is no need to give a separate hearing on what punishment is to be imposed, provided that at the launching of the proceedings the accused was alerted that dismissal or reduction in rank was contemplated. In *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang v Utra Badi* [2001] 2 MLJ 417, the respondent had tested positive for drug use and was given a show cause letter outlining the charge and indicating that unless he gave a satisfactory written explanation he would be dismissed or reduced in rank. Two key issues surged up before the court. First, whether the term “hearing” refers to face to face, oral hearing in order to comply with the requirement of Article 135(2). Second, whether the accused is entitled to two hearings – one relating to the charge and, if he is found guilty, a second hearing on the punishment to be imposed. After a course of appeal, the Federal Court answered both questions in the negative. Hearing need not be oral. There is no requirement of a separate hearing on the question of punishment. In *Ningkan Umu v Suruhanjaya Perkhidmatan Awam* [1999] 1 CLJ 448 and *Mohd Daud Mahmood v Suruhanjaya Perkhidmatan* [2001] 6 MLJ 750 it was held that the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 do not require a second hearing or second representation in mitigation before punishment is meted out. See also the Singapore cases of *Jacob v AG* [1970] 2 MLJ 133; *Sithambaran v AG* [1972] 2 MLJ 175 and *AG v Lee Keng Kee* [1982] 2 MLJ 6.

EXCEPTIONS TO THE ARTICLE 135(2) RULE OF HEARING

There are many exceptions to the right to be heard. The vicissitudes of the law in this area are so many that the law has become a maze and not a motorway.

1. **Armed forces:** The safeguard of Article 135(2) does not apply to members of the armed forces¹⁴. Due to the combined effect of Articles 132(1), 135(1) and 135(2) all members of the armed forces are excluded from the protection of the *audi alteram partem* (no person shall be condemned unheard) rule. Courts are generally reluctant to review any military proceedings. “Military discipline and justice in the courts seem to be uneasy bedfellows”.¹⁵ In *Abdul Salam* it was held that the court has no jurisdiction to inquire into the circumstances under which the member of the armed forces ceased to hold office¹⁶. In *Peter Chong Ngen Onn v Col. Adam Abu Bakar* [1997] 2 MLJ 142, the court refused to interfere in proceedings before military courts. In *Captain Kamarul Azman Jamaluddin v Lt Col Wan Abdul Majid Abdullah* [1983] 2 MLJ 4, the Privy Council ruled that the failure to comply with procedural rules relating to the administration of oath, did not go to jurisdiction and in any event, the complainant had not suffered substantial or serious injustice.

If armed force personnel do not have the right to be heard, are they entitled to any other rights or remedies? It is submitted that Articles 135(1) and (2) should not be interpreted so harshly as to deny all justice to members of the armed forces. Firstly, other than the excluded principle of *audi alteram partem*, all other constitutional and common law rights should apply. The natural justice rule against bias should apply. The doctrine of ultra vires should be available in all its dimensions (illegality, irrationality, procedural impropriety and proportionality). Secondly, under Section 9 of the Armed Forces Act 1972, “the Yang di-Pertuan Agong may, on the recommendation of the Armed Forces Council, at any time without assigning any reason therefore, cancel any Commission granted under the provision of this Part”. This implies that the ultimate decision by the King to dismiss an armed force personnel is exempted from the duty to give a prior hearing. However, it is arguable that this duty should, nevertheless, be imposed in relation to the administrative enquiry that normally precedes the recommendation. The duty to hear should also be imposed on the recommending authority before it makes representations to the Yang di-Pertuan Agong. A malicious, arbitrary or uninformed recommendation should not be exempt from judicial scrutiny. Thirdly, as to the giving of reasons, the Yang di-Pertuan Agong is not required to give any reasons to the dismissed officer. But this does not mean that the Government should be exempt from supplying reasons to the court. In the British case of *Council of Civil Service Union v Minister for the Civil Service* [1983] AC 374, Lord Diplock supplied guidelines on the judicial role in security cases: “Where a question as to the interest of national security arises in judicial proceedings, the court has to act on evidence ... Once the factual

¹⁴ See Section 9, Armed Forces Act 1972; Armed Forces (Court Martial) Rules of Procedure 1976; *Abdul Salam Husin v Majlis Angkatan Tentera* [2001] 1 MLJ 147.

¹⁵ DeSmith as quoted in Wan Azlan Ahmad and Nik Ahmad Kamal Nik Mahmud, *Administrative Law in Malaysia*, 2006, p. 47.

¹⁶ Syed Ismail Syed Omar, “Court Martial: Comparative Aspects of Pre-Trial Practice” [1997] 2 MLJ cxviii. See also [1997] 2 MLJ A 57; Abdul Aziz Bari, “Armed Forces Personnel As Public Servants Under the Federal Constitution: A Review on the Decision in Abdul Salam bin Husin [2001] 1MLJ xxix.

basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown... as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held". In sum, the Crown should have a duty to give some evidence to the court that national security was indeed involved in the case thereby justifying judicial restraint.

Fourthly, it is arguable that section 9 of the Armed Forces Act 1972 is ultra vires Article 135(2) because it goes beyond the exemption granted by the Article. Article 135(2) excludes prior hearing but does not authorize a dismissal "without assigning any reason therefore". Fifthly, the nature and content of natural justice is changing. At one time, natural justice was viewed as a common law safeguard of a purely procedural nature. Recent decisions assert that the right to natural justice is derived from Article 5's promise of due process and Article 8's requirement of equal protection. Natural justice is not merely about fair procedures. It requires fair results¹⁷. Even if the procedural aspects of natural justice are excluded, the substantive dimension of natural justice requiring proportionality in decision-making is not ousted by Article 135(2).

2. Under provisos to Article 135(2), there is no need to give a hearing prior to dismissal or reduction in rank in four situations:
 - **Where a criminal charge has been proved:** Where a criminal charge has been proved against a member of the service. In *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 it was emphasised that since the word used in Article 135(2)(a) is 'proved' and not 'convicted', there must first be a plea or a finding of guilt. Only then can the protection of Article 135(2) be deemed to be statutorily withdrawn. It must also be noted that conviction in a court does not automatically justify dismissal of the public servant. It was laid down in *Tan Teck Seng*¹⁸ that "a public servant against whom a criminal charge has been proved ... may or may not be dismissed solely in reliance on that ground. It all depends on the particular facts of each case. The relevant disciplinary authority must call for and peruse the record of criminal proceedings and take into account all the relevant circumstances of the case including any departmental report or recommendation. It should then decide whether the public servant in question has committed misconduct. If it decides that he has, then it must go on to decide which of the several punishments prescribed ...ought to (be) imposed".

¹⁷ *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Hong Leong v Liew Fook Chuan* [1996] 1 MLJ 481.

¹⁸ [1996] 1 MLJ 261

- **Hearing not reasonably practicable:** Where the authority empowered to dismiss or reduce in rank is satisfied that for some reason to be recorded in writing, a hearing is not “reasonably practicable”. It is arguable that as the reasons have to be reduced to writing, they should be amenable to judicial review.
- **Security considerations:** Where the Yang di-Pertuan Agong, State Ruler or Yang di-Pertua Negeri is satisfied that a hearing will not be in the “interest of the security of the Federation”. It is submitted that though issues of security are for the executive and not the courts, judicial review is not totally ousted. On the authority of the *CCSU* case, courts can insist that the executive should offer some proof that considerations of security are indeed at play.¹⁹
- **Public servant under detention:** Where an order of detention, supervision, banishment, deportation, or restricted residence has been imposed upon the public servant.

These important exceptions were added to the Constitution after the government’s defeat in the *Mahan Singh* case. These exceptions the right to be heard to vanishing point.

3. **Where there is some other action other than dismissal or reduction:** The safeguards of Article 135(1) and (2) apply only to situations where the public servant is “dismissed” or “reduced in rank”. The safeguards do not apply if the disciplinary or administrative measure does not amount to a “dismissal” or a “reduction in rank”. In reality there are fifteen or so other ways in which the government can deal with an errant civil servant. The safeguards of Article 135 clauses (1) and (2) do not apply to these types of disciplinary or administrative measures but the Public Officers (Conduct and Discipline) Regulations 1993 P.U. (A) 395 are applicable to some but not all such disciplinary and administrative measures.

3.1 Interdiction: Interdiction is exclusion from office on not less than half a public servant’s emoluments There are two types of interdictions. First, interdiction under Regulation 44 if the officer is facing criminal proceedings or disciplinary proceedings with a view to dismissal or reduction in rank. There is no time limit to such an interdiction. Second, interdiction under Regulation 45 for a period not exceeding one month in order to facilitate investigation. In both types of interdiction, the Regulations are silent about any prior hearing.

3.2 Suspension: This is exclusion from office on no pay under Regulations 32(5), 36(1) and 46(1) of 1993. Suspension is permitted where the officer is convicted by any criminal court, or where an order of detention or restriction is imposed on the officer. There is no time limit to the suspension. The Regulations are silent about any prior hearing.

¹⁹ *Council of Civil Service Union v Minister for the Civil Service* [1983] AC 374,

3.3 Termination under contract: Termination of the service of a temporary or a probationary or contract officer can be done by giving the contractual notice or salary in lieu of notice. No hearing needs to be given. *Haji Ariffin v Pahang* [1969] 1 MLJ 6; *Gnanasundram v PSC* [1966] 1 MLJ 157; *Gnanasundram v Government* [1971] 1 MLJ 208; *Gomez v Government* [1978] 2 MLJ 69; *Government v Lionel* [1974] 1 MLJ 3; *Abd Rauf Alif v Suruhanjaya Pasukan Polis* [2003] 1 MLJ 18; *Thambipillai v Government* [1969] 2 MLJ 206. However, the government must act bona fide. It must give reasonable notice in accordance with the contract. If the officer is on probation for a permanent appointment, he could be terminated with notice at the end of the probation period without complying with Article 135(2). He could even be terminated prematurely upon reasonable notice before the end of the probation period. However, if allegations of misconduct are made, a hearing may become necessary.

3.4 Termination in the public interest: This leads to premature retirement under Regulations 33(c), 36(2)(c) and 49(1) of the Public Officers (Conduct and Discipline) Regulations 1993.²⁰ The safeguards of Article 135 are not applicable: *Rajasingham V S Rasiah v Government* [2002] 1 MLJ 7 but Regulation 49(1) gives to the disciplinary authority a discretion whether to give a prior hearing or not. *Mahan Singh v Government* [1978] 2 MLJ 135; *Doraisamy v Government* [1982].

3.5 Reversion to former post: If an officer is not confirmed in a substantive post or is merely in an acting capacity or is on a short-term appointment to a temporary post or if it is discovered that he is not qualified for the post in which he was acting (*Munusamy v PSC* [1967] 1 MLJ 199), then it does not amount to a reduction in rank to send him back to his former post either after or before the expiry of his term. There is no right to a fixed tenure for such postings. No officer has a right that his temporary or short term appointment shall be renewed.

3.6 Lateral or Horizontal Transfer: In *Pengarah Pelajaran v Loot Ting Yee* [1982] 1 MLJ 68 Salleh Abas FJ ruled that “the pleasure of the Yang di-Pertuan Agong not only applies to tenure of office ... but also extends to ... appointments, promotions, transfers, salaries, leaves and other benefits”. In the case at hand, a Chinese schoolmaster was moved from one State to another. He complained of victimization due to his association with the Merdeka University movement. The learned judge held that “if an officer can be dismissed at pleasure ... he can be asked to serve anywhere at pleasure...” With all due respect, the learned judge overstated his case. “Anywhere” cannot mean “anywhere outside the country” or “anywhere outside government service” unless the contract so stipulates. Further, promotions cannot, under Articles 136 and 8, be entirely at pleasure. Salaries

²⁰ Formerly, General Order 44 of the Public Officers (Conduct and Discipline) General Orders 1980).

cannot be solely at discretion. The requirement of equal treatment under the law definitely applies. Unlike in ancient England, in Malaysia the “Crown’s prerogatives” cannot ignore constitutional principles.

3.7 Detention, supervision, banishment etc: Under Regulations 36-37 if an officer is subject to an order of detention, supervision, restricted residence, banishment or deportation, he is summarily suspended; disciplinary action is commenced and punishment is imposed forthwith. The requirement of a prior hearing is excluded by Article 135(2).

3.8 Institution of criminal proceedings: The government may report an officer to the police or the Anti-Corruption Agency without alerting him. If criminal proceedings are instituted, no disciplinary action can be taken pending the completion of criminal proceedings: Regulations 32- 34. Even if the officer is ultimately found not guilty, the government may proceed with disciplinary action. The rule against double jeopardy in Article 7(2) will not apply: *Wong Kim Sang v AG* [1982] 1 MLJ 176.

3.9 Compulsory retirement: An officer may be compulsorily and prematurely retired on a number of grounds provided in the Pensions Act 1980.

- Firstly upon reaching the normal superannuation age: section 10(1) Pensions Act 1980.
- Secondly, he may be retired if his post is abolished: section 10(5)(b), Pensions Act 1980.
- Thirdly, if there is re-organisation and restructuring of the service: section 10(5)(c), Pensions Act 1980. No prior hearing is required in all of the above cases.
- Fourthly, if, on the recommendation of the Disciplinary Authority, the officer is terminated in the public interest by the government. On the authority of Article 135(2), section 10(5)(d) of the Pensions Act and Regulation 49, 1993 there is no need for a prior hearing: *Rajasingam V S Rasiah v Government* [2002] 1 MLJ 7. However, under section 13 of the Pensions Act a pension or gratuity or other benefit may, nevertheless, be granted to the retired officer.
- Fifthly, an officer may be compulsorily and prematurely retired on medical grounds: section 10(5)(a) Pensions Act and Part III Chapter F of the General Orders 18-20. In case of retirement on a medical ground, the statutory law is silent on the question of hearing. However, the court has held in *Syed Mahadzir Syed Abdullah v Ketua Polis* [1994] 3 MLJ 391 and *Aziz Abdul Rahman v AG Singapore* [1979] 2 MLJ 93 that the same rules of natural justice as apply to dismissal, apply to the enquiry leading to compulsory retirement.²¹

²¹ See also *R v Kent Police Authority ex p Godden* [1971] 2QB 662; *Ridge v Baldwin* [1963] 2 AllER 66

3.10 Surcharge: Under the Financial Procedure Act 1957 and Regulation 51, any public officer who is in charge of public funds and is adjudged to be guilty of financial irresponsibility is liable to be surcharged with a view to compensating the government for the loss. A right to written representation is granted. An order of surcharge is not regarded as a punishment.

3.11 Reduction of salary: Under Regulation 38(e) of 1993, the appropriate disciplinary authority may, after proper hearing, impose the punishment of reduction of salary.

3.12 Deferment of salary movement: An officer convicted of a disciplinary offence may, under Regulation 38(d), suffer this penalty.

3.13 Forfeiture of emoluments: This punishment may be imposed in accordance with Regulations 31 and 38(c).

3.14 Fine: This punishment may be imposed in accordance with Regulation 38(b).

3.15 Warning: In appropriate cases a convicted officer may be let off with a reprimand: Regulation 38(a).

The above fifteen disciplinary and administrative measures are not within the protection of Article 135(1) and (2). The Public Officers (Conduct and Discipline) Regulations 1993, therefore, step in to fill the gaps left by Article 135. However, the requirement to give a prior hearing applies to only some and not to other measures as the Table below indicates. Administrative action covered by the first nine paragraphs is not subject to any duty to observe natural justice. This is unsatisfactory for two reasons. First, the requirement of equality before the law in Article 8 prohibits arbitrary classifications between subjects. It is not reasonable to deny hearing to an officer who suffers serious jeopardy by way of interdiction, suspension, termination under contract, termination in the public interest, reversion to former post, transfer or premature retirement but to allow hearing to another officer facing lesser punishments like warning, fine, forfeiture of emoluments, deferment of emoluments, reduction of salary and surcharge. Second, the natural justice requirement of *audi alteram partem* is not just a rule of common law. It is an integral part of the Constitution's promise of due process in Article 5 and right to equality in Article 8.²²

²² *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Hong Leong v Liew Fook Chuan* [1996] 1 MLJ 481.

PROBLEMS & CHALLENGES

Lack of constitutional literacy: At all levels of the bureaucracy, this is a serious problem and needs to be addressed.

Many civil service circulars disregard laws: Many civil service circulars are in disregard of the Constitution or of the statutes involved.

Principle of non-justiciability: Courts have held that administrative policy is non reviewable but execution of policy can be examined by the courts.

Political neutrality: Appointees to the public services are required to observe a neutrality and reserve in politics. They are expected to give their best no matter which party is in power. This neutrality has been seriously questioned in opposition controlled states. The politicization of the public services appears to be a serious problem.

Check & balance role: Public servants with professionalism and integrity can do much to provide a brake against the over-exuberance of politicians, the disregard by many of them of the Constitution and the laws and the indulgence by many of them in corrupt practices. Behind the scenes, top public servants probably supply the needed, constructive critique of governmental policy. But the public perception is that politics reigns supreme and check and balance has broken down.

The spate of mega economic scandals, mismanagement of environmental resources, poor town and country planning, and the serious problem of illegal immigrants indicates that the role of the civil service as not only executors but also initiators and formulators of national policy for ministerial consideration has not been effective.

Official Secrets Act: This Act was meant to prevent security leaks. It mostly prevents information about corruption and nepotism from being exposed. Civil servants with a conscience who may wish to play a mole or whistleblower are seriously hampered in their patriotic duty to serve the nation. The Whistleblowers Act does not override the OSA.

Problem of corruption: Corruption in the public services has become a serious problem. One area of concern is civil servants doing favours in return for lucrative positions in the sector after retirement. Regrettably there is no rule barring a civil servant from working for a prohibited period in an industry connected with his official work

Ethnic disparities: Despite Article 136 (impartial treatment of federal employees) and a clear cut provision in clause (5) of Article 153 that "This Article does not derogate from the provisions of Article 136", ethnic disparities in the

public services, statutory bodies and GLCs are extremely serious and growing. Meritocracy (subject to Article 153 quotas) can do much to restore our nation's position as a leading player in the region.

Disciplinary rules: The law relating to the discipline of public servants is unnecessarily complex and contradictory. There is no rational distinction between situations when the right to a fair hearing is granted and when it is denied.

- For the penalties of dismissal and reduction in rank, the right to a prior hearing is generally available (except when excluded under the provisos of Article 135(2)).
- For the penalties of fine, reprimand, stoppage of increment, etc., though there is no constitutional right to a hearing, the Regulations of 1993 provide a statutory right to a prior hearing.
- However, for the punishment of interdiction and suspension (Regulations 44-48), reversion to former post and transfer (which may be disciplinary measures), there is no right whatsoever to a prior hearing. This seems unjust. It is submitted that courts can remedy the injustice of the law by importing natural justice into the statutory context for the following reasons.

First, natural justice is part of common law and common law is part of the definition of law in Malaysia: Article 160(2).

Second, in the matter of interdiction, suspension, reversion to former post and transfers, there is no clear cut statutory exclusion of natural justice. The law is silent. It neither allows nor forbids natural justice. Courts should "fill the gaps" in the law by importing natural justice.

Third, in the private sector, labour law requires that an employee not be interdicted or suspended without a prior hearing. Even a transfer may amount to victimization. The safeguards of private law should be extended to the public sector. In the matter of justice, the government sector must show the lead to the private sector, not lag behind it.

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