

# The Legal Rights of Students and Teachers in Malaysia

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## Abstract

This article examines the provisions encapsulated in the Child Act of 2001 that strives to further delineates and enhance the rights of the child in Malaysia. The issue of students' rights is discussed from the perspective of these provisions, especially with respect to court proceedings. The common law principle of the duty of care and the right of students to be safe from harm is also examined. Further, the constitutional rights accorded to teachers to be engaged in lawful and gainful employment without being deprived of procedural fairness as provided under the Federal Constitution and from the perspective of the court in a land mark case is also discussed.

## Introduction

In Malaysia, the primary legislative provision that governs the system of education is found in the Federal Constitution<sup>1</sup>, and the various Acts approved by parliament.<sup>2</sup> Article 12 of the Federal Constitution ensures that all citizens are guaranteed a right to education. It stressed that there shall be no discrimination against any citizen based on religion, descent or place of birth, in the administration of any educational institution maintained by a public authority, especially, in the admission of students. In addition, the common law also exerts a significant influence on the system of education.

Further, the Ministry of Education also issues administrative circulars to all schools that govern school management and school regulations, especially in matters pertaining to the enforcement of school discipline.<sup>3</sup> Administrative circulars are also sent to schools to disseminate information and policies decided by the Ministry of Education with regard to school governance and management. In addition, there are other legislations that guarantee the fundamental legal rights of students, particularly in court proceedings, such as the Child Act of 2001.<sup>4</sup> Conversely, the legal rights of teachers, are expressed in the Federal Constitution, the Public Officers (Conduct and Discipline) (Chapter 'D') General Order 1980, and certain provisions of the Criminal Procedure Code.<sup>5</sup>

## The legal rights of students

Where court proceedings are concerned, the rights of students in schools are protected by the provisions encapsulated in the Child Act 2001 (hereinafter referred to as 'the CA'). Enacted on 1 August 2002, the CA represents a significant 'watershed' in terms of providing a regulatory and legislative framework that seeks to further enhance and protect the rights of children in Malaysia. In effect, the Child Act<sup>6</sup> repealed three earlier legislations, namely: the Juvenile Court Act of 1947; the Women and Girls Protection Act of 1973 and the Child Protection Act of 1991. The CA seeks to consolidate and amend the laws relating to children. According to the CA, a child is defined as a person who is under the age of 18; and, in a matter relating to criminal proceedings,

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<sup>2</sup> Malaysia, *Federal Constitution*, International Law Book Services, Kuala Lumpur.

<sup>3</sup> These include the Education Act of 1996; the Private Higher Educational Institutions Act of 1996; the National Accreditation Act of 1996; the Universities and University Colleges Act of 1996 and the National Council of Higher Education Act of 1996.

<sup>4</sup> An example is that of the School Discipline Regulations of 1959.

<sup>5</sup> Malaysia, *Child Act 2001 (Act 611)*, International Law Book Services, Kuala Lumpur.

<sup>6</sup> Malaysia, *Public Officers (Conduct and Discipline) (Chapter 'D') General Order (1980)*, International Law Book Services, Kuala Lumpur; Malaysia, *Criminal Procedure Code (F.M.S. Cap. 6)*, International Law Book Services, Kuala Lumpur.

<sup>6</sup> S. 130.

means a person who has attained the age of criminal responsibility.<sup>7</sup> The Penal Code stipulates that the age of criminal responsibility is 10 years and above.<sup>8</sup>

To protect the child from the emotional and psychological stress associated with court proceedings, the CA allows for the establishment of a Court for Children to hear, determine or dispose any charge against a child.<sup>9</sup> In addition, it stipulates that the Court for Children shall have jurisdiction to try all offences except those punishable with death.<sup>10</sup> The Court for Children consists of a Magistrate who, in the exercise of his functions in a Court for Children, shall be assisted by two advisors to be appointed by the Minister from a panel of persons resident in the state.<sup>11</sup> Nevertheless, one of the two advisors shall consist of a woman.<sup>12</sup>

The functions of the advisors consists of informing and advising the court with respect to any consideration affecting the order made upon a finding of guilt or other related treatment of a child brought before it and, if necessary, to advise the parent or guardian of the child.<sup>13</sup> The Court for Children may impose any of the orders stated in section 30 of the CA. Nevertheless, no children under the age of 14 years shall be ordered to be imprisoned for any offence or be committed to prison in default of payment of a fine, compensation or costs. A child aged 14 years or above shall not be ordered to be imprisoned if he can be suitably dealt with in any other way, whether through probation, detention or by being sent to an approved school. Further, a child aged 14 years or above, if imprisoned, shall not be allowed to associate with adult prisoners.

A death sentence shall not be imposed against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.<sup>14</sup> However, this provision is subject to another condition that, in lieu of the death sentence, the person will be detained under the pleasure of the His Majesty the King or Ruler of the relevant state.<sup>15</sup>

To maintain strict privacy, the CA expressed that the Court for Children should be either in a different building or room from the other sittings of the court<sup>16</sup> or it should be on different days from the days other courts are held.<sup>17</sup> The privacy of children is guaranteed as the CA also provides that if the courts for children are in the same premises with the other courts, then the Court for Children shall have a different entrance and exit from those of the other courts.<sup>18</sup>

Where proceedings are concerned, individuals are prohibited to attend except: members and officers of the court; children who are parties to the case, their parents, guardians, advocates and witnesses and other persons directly concerned in that case; and, such other responsible person as determined by the court.<sup>19</sup>

If an offence is committed by a child but the charge in respect of the offence was only made after he attained the age of 18 years, the charge shall be heard by a court other than the Court for Children wherein the other court may exercise the powers pursuant to section 83(2)(a), (b), or (c). In circumstances where a child is charged jointly with another person who has attained the age of 18 years, the matter shall be heard by a court other than a Court for Children.<sup>20</sup> The other court shall exercise all the powers that may be exercised under the CA in respect of the child, taking into account the probation report.<sup>21</sup> Where during the case the child attains the age of 18 years, the Court for Children shall continue to hear the charge against the child.<sup>22</sup> It may exercise the following powers: the power under section 76 of the CA; the power under section 91(1)(a), (b), (c), (d) or (g) of the CA; or, if the offence is punishable with imprisonment, impose any term of imprisonment that could be awarded by a Sessions Court.

<sup>7</sup> S. 2.

<sup>8</sup> S. 82 of the Penal Code.

<sup>9</sup> S. 11(1).

<sup>10</sup> S. 11(5).

<sup>11</sup> S. 11(2).

<sup>12</sup> S. 11(3).

<sup>13</sup> S. 11(4).

<sup>14</sup> S. 97(1).

<sup>15</sup> S. 97(2).

<sup>16</sup> S. 12(1)(a).

<sup>17</sup> S. 12(1)(b).

<sup>18</sup> S. 12(2).

<sup>19</sup> S. 12(3).

<sup>20</sup> S. 83(4)(a).

<sup>21</sup> S. 83(4)(b).

<sup>22</sup> S. 83(2).

The CA also allows bail to be provided. If a child is arrested with or without warrant, the child shall be brought before a Court for Children within 24 hours exclusive of the time necessary for the journey from the place of arrest to the Court for Children.<sup>23</sup> If it is not possible to bring a child before a Court for Children within the time specified, the child shall be brought before a Magistrate who may direct that the child be remanded in a place of detention until such time as the child can be brought before the Court for Children.<sup>24</sup>

The Court for Children before whom a child is brought shall inquire into the case and – unless the charge is one of murder or other grave crimes; it is necessary in the interest of the child arrested to remove him from association with undesirable persons; or, the Court for Children has reason to believe that the release of the child would defeat the ends of justice – the Court for Children shall release the child on a bond, with or without sureties, for such amount as will, in the opinion of the Court for Children, secure the attendance of that child upon the hearing of the charge, being executed by his parent or guardian or other responsible person.<sup>25</sup> Nevertheless, nothing in this proviso shall be deemed to affect the powers of a police officer to release the child arrested on bail in accordance with the Criminal Procedure Code. According to section 2 of the CA, the term ‘grave crime’ involves: (a) the offences of murder, culpable homicide not amounting to murder or attempted murder; (b) all offences under the Firearms (Increased Penalties) Act 1971 [Act 37]; (c) all offences under the Internal Security Act 1960 [Act 82] punishable with imprisonment for life or with death; (d) all offences under the Dangerous Drugs Act 1952 [Act 234] punishable with imprisonment more than five years or with death; and (e) all offences under the Kidnapping Act of 1961 [Act 365].

Pursuant to section 84(3)(b) CA, it is in the best interests of the child arrested to remove him from association with any undesirable person and reject the release of the child on bond or bail. An illustration is that of a child who has been influenced by gangsters and his life would be endangered if he were released pending his trial. A further example would be when the child is a victim of incest where it would be inappropriate to release him on bail or bond. Section 84(3)(c) of the CA states that where it would defeat the ends of justice if the child were released pending his trial and one such instance would be when the child has absconded from a remand home or approved school and is arrested subsequently thereto.

The Court for Children can detain a child in a place of detention until trial, wherein the child is not released on bail.<sup>26</sup> If the child is a girl, she should be detained or conveyed or be waiting under the care of a woman.<sup>27</sup> Thus, the rights and safety of a female offender is also considered in the CA. In addition, if any child is detained or is being conveyed to or from the court, he must not be allowed to associate with an adult who is not his or her relative and who is charged with an offence.<sup>28</sup> The separation of the child from adult offenders is vital as this prevents undue influence and psychological stress among children.

Parents or guardians are required to attend the Court for Children during all the stages of the proceedings unless it is unreasonable to do so.<sup>29</sup> Failure to comply with this provision would result in a fine not exceeding RM5,000 or to imprisonment for a term not exceeding two years or to both.<sup>30</sup> The Court for Children may require parents or guardians to withdraw from the Court in the best interests of the child.<sup>31</sup> The Court for Children is under a duty to explain to the child in simple language relevant to his age, maturity and understanding the substance of the alleged offence. The duty to explain may be taken by the defense counsel acting for the child or any other responsible person determined by the Court for Children.<sup>32</sup>

After the alleged offence has been explained to the child, the Court will ask the child whether he admits to the facts constituting the offence. If the child admits to the offence, the court shall ascertain that the child understands the nature and consequence of his admission and the court will record a finding of guilt.<sup>33</sup> If the child does not admit to the facts constituting the offence, the Court shall then hear the evidence of the witnesses. At the close of the evidence in chief of each witness, the witness may be cross-examined by or on behalf of the child. Unless

<sup>23</sup> S. 84(1).

<sup>24</sup> S. 84(2).

<sup>25</sup> S. 84(3)(a), (b), (c).

<sup>26</sup> S. 86 and S 87.

<sup>27</sup> S. 85(b).

<sup>28</sup> S. 85(1).

<sup>29</sup> S. 88(1).

<sup>30</sup> S. 88(2).

<sup>31</sup> S. 89.

<sup>32</sup> S. 90(1), (2).

<sup>33</sup> S. 90(3), (4).

the child is legally represented, the parents, guardians, relatives or any responsible person shall assist the child in his defense. Conversely, if the child is not legally represented or assisted in his defense, then the Court for Children may put to the child such questions as may be necessary in order to bring out or explain anything in relation to the assertion of the child and shall then put to the witness such questions as the court thinks necessary on behalf of the child.<sup>34</sup>

If it appears to the court that a prima facie case has been made out, the court shall explain to the child the substance of the evidence against him and in particular, any points in the evidence which are specifically against the child or requires his explanation.<sup>35</sup> Under this circumstance, the child shall be allowed to give evidence upon oath or affirmation<sup>36</sup>. This provision did not specify whether the child is given an option to remain silent unlike the freedom given to adult offenders under the Criminal Procedure Code. Thus, the interests of the child seem to be given lesser consideration in the CA.

If the Court for Children finds the child not guilty, the court shall record an order of acquittal.<sup>37</sup> On the other hand, when the court is satisfied that the offence is proved, the child shall put forward any extenuating circumstances or mitigation factors before the Court for Children.<sup>38</sup> The Court for Children shall also consider the probation report before deciding the manner in which the child shall be dealt with.<sup>39</sup> The probation report contains information on the child such as the general conduct, home surroundings, school record, medical history and any other particulars relevant to the best interest of the child.<sup>40</sup> The Court for Children may raise any questions related to the probation report. When an offence is proven, the Court for Children has the power to:

- (a) admonish and discharge the child;
- (b) discharge the child with a bond of good behavior to comply with such order as may be imposed;
- (c) order the child to be placed in the care of a relative or any other fit and proper person for a period specified by the court and with conditions imposed by the court;
- (d) order the child to pay a fine, compensation or cost;
- (e) make a probation order under section 98;
- (f) order that the child to be sent to an approved school or Henry Gurney School;
- (g) order that a male child be whipped not more than ten strokes of a light cane within the court premises and in the presence of parent or guardian, if the child so desires; or
- (h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to section 96(2), any term of imprisonment which could be awarded by a Sessions Court.<sup>41</sup>

The words 'conviction' and 'sentence' shall not be used in relation to a child dealt with in the Court for Children. Further, a conviction is construed as 'a finding of guilt' and a sentence is an order made upon the finding of guilt.<sup>42</sup>

The CA stipulates some restrictions on media reporting and publication. Any person who contravenes this position can be fined a maximum of RM10,000 or imprisonment not exceeding five years or to both.<sup>43</sup> The restrictions imposed on the media are with respect to reporting on children in the following circumstances:

- (a) any child involved in a criminal act or omission, whether at the pre-trial, trial or post-trial stage;
- (b) any child who is taken into custody under Part V;
- (c) any child who has committed an offence under the First Schedule of the CA; and,
- (d) any proceedings under Part VI (section 15(1)(a) to (d)).

The media shall not reveal the name, address or educational institution or any particulars that could lead to the identification of any child. The said section covers situations where action is being taken against the child or where the child is a witness to that action. The media shall not publish a picture of such a child or any other person that may lead to the identification of that child.<sup>44</sup> The only way the strict requirement under section 15(1)

<sup>34</sup> S. 90(5), (6), (7), (8).

<sup>35</sup> S. 90(9)(a).

<sup>36</sup> S. 90(9)(b).

<sup>37</sup> S. 90(10).

<sup>38</sup> S. 90(11).

<sup>39</sup> S. 90(12).

<sup>40</sup> S. 90(13)(a).

<sup>41</sup> S. 91(1)(a) to (g).

<sup>42</sup> S. 91(2).

<sup>43</sup> S. 15(4).

<sup>44</sup> S. 15(2).

may be dispensed with is where the Court for Children is satisfied that it is in the interest of justice to do so and in the case of an application by or with the authority of a protector which is defined as:

- (a) the Director General;
- (b) the Deputy Director General;
- (c) a divisional Director of Social Welfare, Department of Social Welfare;
- (d) the State Director of Social Welfare of each of the States; or
- (e) any Social Welfare Officer appointed under section 8(2).

Generally, the provisions stressed the urgent need placed by the authority to protect the interest of children and the CA reflects the government's commitment to do so.<sup>45</sup>

## The common law duty of care

The law stipulates that schools owe a duty of care to students. By reason of the special relationship of teacher and pupil, a teacher is deemed to owe a duty to the pupil to take reasonable care for the safety of the pupil.<sup>46</sup> The duty has been aptly described as one that requires a teacher to take reasonable care for the safety of the pupils, rather than a duty of insurance against harm.<sup>47</sup> The duty arises primarily from the common law duty of care. A student plaintiff has to prove four elements under the tort of negligence in order to succeed in a claim for damages against a school for negligence. These elements includes a duty of care owed to the student by the school; breach of the duty; damages suffered by the students; and, causation.<sup>48</sup> However, schools have a defense when it can show that it has acted in a reasonable manner to prevent the damage. To protect themselves against the risk of litigation, schools must prove that due care has been adopted. Usually, cases on school negligence involved aspects such as the condition of the school premises, safety in the classroom and on the playing field, first aid facilities and medical issues, supervision, responsibility for students before school commence, and student's safety.<sup>49</sup>

## School excursions and supervision

In *Chen Soon Lee v. Chong Voon Pin & Ors*,<sup>50</sup> the defendants were the principal and two teachers who had accompanied some students to a picnic by the sea. While participating in a game in waist deep water, some of the students moved to a depression and found themselves in difficulty. One of the students drowned. The administrator of the deceased took an action against the defendants for negligence. The court considered two issues, that is: whether the teachers owed a duty to the deceased or her father to provide supervision, and, on the assumption that they owed such a duty, whether they were negligent. The picnic was held on a Sunday due to the initiative of the students. The court opined that the teachers could refuse to accede to the student's request to accompany them for the picnic. It applied the principle in *Camkin v. Bishop*<sup>51</sup> where Lord Goddard stated that 'students, though young, should not be treated as if they were infants at creches and no master is obliged to arrange for constant and perpetual watching out of school hours.' In the case, the headmaster was not negligent as there was no duty owed to provide for supervision of the boys during their half-holidays. In adopting this argument to the first issue, the court decided that the principal and teachers did not owe a duty to the deceased or her father to provide supervision. No evidence exists to show that anyone was aware of the danger that the students were in when they were playing in that particular area of the beach.

As for the second issue, the court considered that should there be a mistake and the teachers indeed owed such a duty, the question that arises would be whether they were negligent. It accepted the proposition of law laid down in *Williams v. Eady*<sup>52</sup> that a schoolmaster's duty towards his pupils is similar to that of a 'careful father'. It also applied this standard in the case. Nevertheless, it found that the defendants had done all they could to

<sup>45</sup> S. 15.

<sup>46</sup> See *Ricketts v. Erith Borough Council* [1943] 2 All E.R.629.

<sup>47</sup> See *Richards v. State of Victoria* [1969] VR139. See generally, Ruff, A. (2002), *Education law: text, cases and materials*, Butterworths, London.

<sup>48</sup> See generally, Cambron-McCabe, N.H., McCarthy, M.M. and Thomas, S.B. (2004), *Public school law: Teachers' and students' rights* (5th ed.), Pearson Education, Inc., Boston, MA; Harris, N. (1995), *The law relating to schools*, Tolley Publishing Company Limited, Kent.

<sup>49</sup> See, generally, Gold, R. and Szemerényi, S. (1996), *Running a school: Legal duties and responsibilities* (2nd ed.), Jordan Publishing Limited, Bristol; LaMorte, W.M. (1999), *School law: Cases and concepts* (4th ed.), Allyn & Bacon, Boston, MA; Stewart, D.J. and Knoot, A.E. (2002), *Schools, courts and the law*, Pearson Education Australia, Frenchs Forest, NSW.

<sup>50</sup> [1966] 2 MLJ 264.

<sup>51</sup> [1941] 2 All E.R.713.

<sup>52</sup> (1893) 10 T.L.R.41.

ensure that the students obeyed their instructions; the students had obtained the permission of the principals; the principal had prepared a circular for each student to inform the parents of the trip; the students were divided into three groups with each group under the supervision of two teachers; three teachers were spread out in the deeper part of the water with the principal farther away in front; and, the students were under supervision during the game. Thus, the teachers and principal had done all they could to ensure the safety of the students. The court rejected the claim for negligence as the teachers had done more than was necessary, with the students under continuous supervision.

### The degree of classroom supervision

The issue of what amount to reasonable classroom supervision was considered in *Zazlin Zahira Hj. Kamarulzaman v. Louis Marie Neibe & 2 Ors.*<sup>53</sup> The first defendant was a music teacher whereas the second defendant was the head master of the school. The teacher was teaching a topic on movements similar to that of a train when the music was played. The pupils were at Year One of primary school. Instructions were given to the pupils to walk around the classroom, while placing their hands on the shoulder of their friends, according to the music. The pupils were instructed not to run nor push. After walking one round, the pupils were at the initial starting position when one of them fell and broke her arm. The defendant took the pupil to the hospital with another teacher while the head master informed the parents. An operation was performed on the plaintiff's hand. The parents sued for negligence, alleging that insufficient instruction or warning was given to the pupils not to push, run, or move out of the line. They claimed that the teacher did not provide adequate supervision. The court applied the principle laid down in the case of *Government of Malaysia & Ors v. Jumat bin Mahmud & Anor*<sup>54</sup> where His Honour Raja Azlan expressed that a school teacher owes a duty to the pupil to take reasonable care for the safety of the pupil. The duty arises due to the special relationship between a teacher and the pupil. Nevertheless, the duty must commensurate with the opportunity and ability to protect the pupil from damage that is known. There is a duty to take reasonable care for the safety of the pupil. The risk of injury should be reasonably foreseeable. The plaintiff's argument that the defendant did not provide any instruction to prevent the pupils from running or pushing was rejected. The court opined that the pupils were not involved directly in the use of the radio and cassette. Neither were they involved in the use of any dangerous or harmful equipment. Under such circumstances, the defendant was not required to provide such instructions each time the music class was conducted. There were various factors that need to be considered when class supervision is carried out. The court applied the principle in the case of *Mohamed Raihan bin Ibrahim & Anor v. Government of Malaysia & Ors*<sup>55</sup> where the degree of supervision is influenced by factors such as the age of the pupils and the type of activities they participated in. A teacher is under a duty to take reasonable steps to ensure the safety of pupils involved in activities that are likely to cause injuries. The court rejected the plaintiff's allegation of negligence as it held that the teacher had provided sufficient supervision.

In *Government of Malaysia v. Jumaat bin Mahmud*,<sup>56</sup> the court considered whether the risk of injury to the plaintiff was reasonably foreseeable. The class teacher had given written work to the class consisting of 40 pupils. A pupil pricked the respondent's thigh with a pin. The shock caused the latter, aged 11 years old, to turn around in pain and his right eye was injured by the sharp end of a pencil. The eye had to be removed. At the High Court, the respondent and his father succeeded in the claim for damages. The learned trial judge held that the class teacher had failed to exercise sufficient or reasonable supervision at the material time. Her breach of duty which constituted negligence had resulted in the injury. The appellants appealed to the Federal Court. There were two issues considered, namely: whether the risks of injury were reasonably foreseeable; and, whether the appellants took reasonable steps to protect the respondent against those risks. A critical question was the degree of supervision required of a teacher in a classroom to protect pupils from molestation and other risks of injury. The court stressed that the duty of care does not amount to a duty of insurance against harm. It is a duty to take reasonable care for the safety of the pupil. It adopted the duty that was expressed by the Chief Justice of Victoria in *Richards v. State of Victoria*<sup>57</sup> where the duty of care owed by the teacher extends to taking measures that are reasonable to prevent physical injury to pupils. The class teacher knew of the pupil's propensity to wander about in class and had immediately asked him to return to his desk which he did. There was no evidence to draw a logical and reasonable inference that due to the teacher's momentary inattention, the injury to the plaintiff was reasonably

<sup>53</sup> [1994] 4 CLJ 637.

<sup>54</sup> [1977] 2 MLJ 103

<sup>55</sup> [1981] 2 MLJ 27.

<sup>56</sup> *Ibid.* at 53.

<sup>57</sup> *Ibid.* at 47.

foreseeable. In terms of the question of causation, the teacher did not carelessly expose the plaintiff to injury of the type that could reasonably have been foreseen. The court allowed the appeal.

### Supervision and instruction when using dangerous equipment

In *Mohamed Raihan bin Ibrahim & Anor v. Government of Malaysia & Ors*,<sup>58</sup> the plaintiff student was accidentally hit on the head by a hoe during practical gardening lesson wielded by a classmate. He sued the school for damages claiming that the school failed to provide proper supervision and instruction on the proper use of the agricultural implement. The High Court dismissed the suit holding that proper instructions and warnings were given to the students. On appeal, the Federal Court did not agree with the decision of the lower court. The defendants were held to be negligent as they had failed to take reasonable steps to prevent injury to the plaintiff who was under their care. The teacher did not give proper instruction as to the use of the implement. The students were left to their own devices with general instructions rather than to follow the instructions issued by the Ministry of Education. The court opined that a warning given by the teacher to be careful does not amount to be proper supervision when the age of the students was considered. The teacher had failed to examine the tools and taken steps to see that the students were positioned within a safe distance between each other as to avoid injuries. The Federal Court distinguished this case from *Government of Malaysia v. Jumaat bin Mahmud*<sup>59</sup> and held the defendants to be negligent in failing to take reasonable steps to prevent injury to the plaintiff.

### Safeguarding the rights of teachers

In Malaysia, the teaching profession is considered to be a part of the public services under the Federal Constitution.<sup>60</sup> Every member of the education service holds office during the pleasure of the King, and except as expressly provided by the Constitution of the State, every person who is a member of the public service of the State holds office during the pleasure of the Ruler.<sup>61</sup> The Federal Constitution stipulates that no member of the education service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.<sup>62</sup> The provision does not apply when a member of the service is dismissed or reduced in rank where a criminal charge has been proved.<sup>63</sup> The principle of procedural fairness must be strictly adhered to when arriving at a decision affecting the employment of teachers. In Malaysia, the development of this principle was strongly influenced by English common law. The development of this area of jurisprudence was based on the rules of natural justice, namely the two maxims of *nemo iudex in causa sua* (no man shall be a judge of his own cause) and *audi alteram partem* (both sides must be heard). A teacher has a right to continue in employment and can be removed according to a fair procedure.<sup>64</sup>

Besides the Federal Constitution, the conduct and employment teachers is also governed by the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 (hereinafter referred to as the 'General Orders'). Under General Orders 3, the term 'convicted' includes a finding or an order involving a finding of guilt by a criminal court. General Order 4(2)(d) prohibits conduct that brings the public service into disrepute. A teacher must be informed in writing of the grounds on which action is taken before dismissal or reduction in rank. A reasonable opportunity of being heard must be provided.<sup>65</sup>

In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor*,<sup>66</sup> the appellant was the headmaster of a primary school. He was entrusted with a sum of money belonging to the Education Department. It was the unpaid salary of the school's gardener who had failed to turn up for work. He failed in his obligation to return the money when asked to do so by the Education Department and was charged for criminal breach of trust.<sup>67</sup> The Sessions

<sup>58</sup> *Ibid.* at 54.

<sup>59</sup> *Ibid.* at 53.

<sup>60</sup> See generally, Art. 132(1)(h) Federal Constitution.

<sup>61</sup> Art. 132(2A) Federal Constitution.

<sup>62</sup> Art. 135(2) Federal Constitution.

<sup>63</sup> Art. 135(2)(a) of the Federal Constitution.

<sup>64</sup> Art. 5(1) of the Federal Constitution. The term 'life' has been interpreted as referring to more than mere existence. It includes the right to seek and be engaged in lawful and gainful employment, and a right to a fair procedure. See generally, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

<sup>65</sup> General Order 23; See generally Jain, M.P. (1997), *Administrative law of Malaysia and Singapore* (3rd ed.), Malayan Law Journal, Kuala Lumpur; Kevin, T.Y.L. and Thio, L. (1997), *Constitutional law in Malaysia and Singapore*, Butterworths Asia, Singapore.

<sup>66</sup> [1996] 1 MLJ 261.

<sup>67</sup> S. 409 Penal Code.

Court found him guilty, convicted him and imposed a sentence of six months' imprisonment. An appeal was made to the High Court of Muar. The court affirmed the finding of guilt. However, it made an order to set aside the conviction and imprisonment. Instead, it made an order to bind the appellant over to be of good behaviour for a period of three years in the sum of RM5,000.00 without sureties.<sup>68</sup> The Education Department wrote to the Education Service Commission recommending that the appellant be demoted in rank and salary. Nevertheless, the Commission dismissed the appellant.<sup>69</sup>

Subsequently, the appellant sought an order from the Johor Bahru High Court to declare the dismissal null and void. The arguments were: (i) since he was not convicted of a criminal offence, the dismissal under the General Orders was null and void; (ii) the respondent had breached the rules of natural justice as there was no reasonable opportunity of being heard pursuant to Article 135(2) of the Federal Constitution; and, (iii) the decision of the respondent was harsh and unfair. However, the Johor Bahru High Court upheld the dismissal. A further appeal was made to the Court of Appeal. The Court of Appeal allowed the appeal in part. It made an order that the appellant be reduced in rank. The court opined that the protection afforded by Article 135 of the Federal Constitution was withdrawn. The appellant was not entitled to a hearing before his dismissal since the word appearing in the proviso is 'proved' and not 'convicted'. Thus, it held that the earlier decision of the Johor Bahru High Court was correct. A member of the public service that is bound over<sup>70</sup> may be subject to disciplinary punishment of either dismissal or reduction in rank.<sup>71</sup> The disciplinary authority need not afford the public servant an opportunity to be heard because the right is lost by the operation of Article 135(2)(a) of the Federal Constitution. However, the disciplinary authority must act reasonably and fairly when meting out a punishment. The order of dismissal was too severe.

It is pertinent to note that the court attempted to extend the protection under the provisions of Article 5(1) of the Federal Constitution to employment by treating employment a part of 'life' and 'liberty'. This represents a significant development in employment law jurisprudence, and especially in the protection of teachers' right to employment. The Court of Appeal in *Tan Tek Seng*<sup>72</sup> is a case of summary dismissal of a headmaster. It held that: 'the expression "life" appearing in art 5(1) of the Federal Constitution 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 ... it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.'<sup>73</sup> The right to livelihood and to gainful employment is one of the fundamental liberties guaranteed in the Federal Constitution and a teacher cannot be dismissed without just cause.

## Conclusion

The implementation of the Child Act 2001 represents a significant legislative effort to safeguard the rights of students in the course of legal proceedings. Close co-operation among the various individuals involved in the actual enforcement of the provisions ensure that initial difficulties encountered would be minimised. Additionally, the right of students to study in a safe and conducive environment is also provided for under the common law duty of care. Conversely, the court's authoritative approach to ensure that the fundamental constitutional right afforded to teachers in respect of employment is upheld at all times is indeed laudable.

<sup>68</sup> S. 173A(ii)(b) of the Criminal Procedure Code (FMS Cap 6).

<sup>69</sup> The decision was based on General Orders 33 and 33(1) of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980.

<sup>70</sup> S. 173A of the Criminal Procedure Code.

<sup>71</sup> This was expressly stated under General Orders 33 and 35 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980.

<sup>72</sup> *Ibid.* at 66.

<sup>73</sup> *Ibid.* at 288.