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Issues Relating to Pre-adjudication of Industrial Disputes

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ABSTRACT

In Malaysia, parties to industrial disputes are not free to file their cases directly to the Industrial Court. They have to first adhere and observe certain requirements of pre adjudication process. This is because Malaysian laws and policies viewed industrial disputes as having serious ramifications on the industry if they are not properly handled. Thus before disputes are to be adjudicated by the Court, they need to undergo certain processes such as conciliation. Conciliation is part of the Alternative Dispute Resolution mechanism and it has been widely used in the settlement of industrial disputes. Even the executives (represented by the Minister) have the power to sieve the cases before they reached the Industrial Court. This article thus discusses three main issues of pre adjudication process, namely, conciliation, the power of the Minister to refer a case or otherwise to the Industrial Court and his reasons, if any, for not referring a case to the Court. All three issues are coherently analysed into a single theme, namely, the pre adjudication process of industrial disputes.

ABSTRAK

Di Malaysia, pihak-pihak kepada pertikaian perusahaan tidak mempunyai kebebasan untuk memfailkan kes mereka terus ke Mahkamah Perusahaan. Mereka hendaklah terlebih dahulu mematuhi dan menurut keperluan proses pra adjudikasi. Ini adalah kerana undang-undang dan polisi Malaysia melihat pertikaian perusahaan mempunyai kesan yang serius ke atas industri jika ia tidak ditangani dengan betul. Justeru, sebelum pertikaian diadjudikasikan oleh Mahkamah, ia harus melalui beberapa proses misalnya konsiliasi (perdamaian). Konsiliasi adalah sebahagian daripada mekanisme Penyelesaian Pertikaian Alternatif dan ia telah digunakan dengan meluas dalam penyelesaian pertikaian perusahaan. Malahan, pihak eksekutif (diwakili oleh Menteri) berkuasa untuk menyaring kes sebelum ia sampai ke Mahkamah Perusahaan. Oleh itu, makalah ini membincangkan tiga isu utama proses pra adjudikasi, iaitu konsiliasi, kuasa Menteri untuk merujuk kes ke Mahkamah Perusahaan atau tidak, dan alasan beliau, jika ada, untuk tidak merujuk sesuatu kes ke Mahkamah. Ketiga-tiga isu tersebut dianalisis secara bersepadu ke dalam satu tema, iaitu, proses pra adjudikasi pertikaian perusahaan.

INTRODUCTION

The Industrial Relations Act 1967[1] (IRA) provides several steps or mechanisms for parties to a dispute to embark on before resorting to adjudication. The IRA provides among others conciliation process whereby the Director-General for Industrial Relations (DGIR) is empowered to resolve a dispute in an adjudicatory manner. The DGIR, if he fails to resolve such a dispute, will refer it to the Minister to decide whether the case should be referred to the Industrial Court or otherwise, and the Minister ought to give reasons if he refuses to refer the case to the Court. All these matters and the issues resulted from them are carried out before the adjudication process that would be carried out by the Industrial Court. This article discusses the issues in relation to the pre-adjudication process of industrial disputes in Malaysia by focusing on conciliation, reference of disputes and duties of Minister to give reasons.

CONCILIATION MECHANISM – COMPOSITION AND WORKINGS

Conciliation can be defined as a process of resolving a dispute between disputing parties by a third party who is called a conciliator. Conciliation proceedings are not as technical as court proceedings and they are not bound by any rules of evidence. This process has been adopted to resolve industrial disputes and in Malaysia, the IRA provides for its mechanism. There has not been much critical analysis on the conciliation mechanism in Malaysia either pertaining to its composition or operation.[2] The reason could be that the executives who are entrusted to carry out the conciliation process are endowed with wide discretionary powers. And in carrying out their task they are not governed by any legal rule or procedure, and they are even not duty-bound to submit any report to the Parliament. Thus, it is not far wrong to say that to a certain extent their duties as conciliators are shrouded with 'mystery'. This scenario is very much expected, as the conciliation mechanism has to operate privately as what transpires during the conciliation is only a process towards achieving a compromise or settlement, and it even cannot become evidence in the court of law. If the conciliators were to be bound by a set of rules — legislation or Common Law — they would not be able to function effectively as regulations or rules have the tendency to cause the process to be too technical. However, a too secretive conciliation process will give rise to a static or non-developed mechanism. This is because many quarters do not have knowledge on the

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1 Act 177.

2 However see Ashgar Ali Ali Mohamed, 'Alternative dispute settlement: With reference to cases relating to dismissal without just cause or excuse under the Industrial Relations Act 1967' [2005] 1 *ILR* I.

operation of the conciliation process or what actually transpires in practice. If no comment or criticism is made on the conciliation mechanism, suggestions for its reform would be very slow.

ITS COMPOSITION

The composition of the conciliation establishment in Malaysia is fairly simple. The IRA assigned the duty to conciliate to the DGIR and the Minister[3]. Although the designation refers to the head of the establishment however in practice it is the officials of the Industrial Relations department who carries out the conciliation. The IRA gives the powers to conciliate to the DGIR under section 8(2) pertaining to complaints on victimization relating to trade union activities; section 9(4A) that relates to union recognition; section 13(6) relating to refusal to bargain; section 18 relating to trade disputes generally and section 20(2) for unjust dismissal. Likewise, the Minister is also given the power to conciliate under section 19A.[4] In Malaysia, there is no such independent Council to oversee the administration and workings of the conciliation machinery. There is no independent council represented by various parties of the industry of a tripartite nature to oversee the working of the machinery. The conciliation machinery in Malaysia is government-sponsored machinery.

A question that arises here is whether the conciliation machinery in Malaysia is not independent and whether being independent is crucial in the administration and process of the machinery? It is noted that conciliation is not arbitration or a process of adjudication. Thus it can be argued that being independent is not vital or crucial to the conciliation process. As the process of conciliation is an endeavour to resolve the disputes, thus it is submitted that the requirement of observing the rules of natural justice is not required. Therefore it is submitted that whether the conciliation body is a government department or not does not have any bearing or implication in terms of its outcome to the disputed parties. On the other hand, it can be argued that a conciliation body independent of the government, in particular the Ministry of Human Resource, would be better in the eye of the industry especially the disputed parties. Independence or the perception of it is important in any administration of justice even though at the conciliation stage.

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3 The Industrial Relations Act 1967, section 19A.

4 Unlike in other countries such as England, the officials in charge of conciliation in Malaysia are public servants. In England, the Advisory Conciliation and Arbitration Service (ACAS) is a body independent of the government, in particular independent of the Department of Trade and Industry, and appoints its own staff. The composition of ACAS is governed primarily by the Trade Union and Labour Relations (Consolidation) Act 1992. It is directed by a Council consisting of a chairman and between nine and fifteen members (three or four representing employers, three or four representing unions and the rest 'independents').

Further, the existence of a Council, such as ACAS in England, would enable it to oversee the workings of the conciliation machinery. A council whose membership constituted, among others, by representatives from the employers, trade unions and independent persons exemplifies the participation of the members of the industry in the dispute resolution system. Although the present set-up in Malaysia does not give rise to any serious problem, it would be better if the machinery operates independently of the Ministry. However, this suggestion of promoting independence is subject to my further argument that the outcome of the conciliation may be made binding on the parties concerned, subject to certain conditions fulfilled. It also submitted that the establishment of a Council whose members consist of representatives of the industry would be in tandem with the principles of labour administration internationally which works on the basis of tripartism[5]. The Council would also be able to give input in terms of opinion and suggestions towards the further development of dispute resolution machinery that includes conciliation.

ITS WORKINGS

As indicated above, the power of the DGIR conciliate derives from sections 8(2), 9(4A), 13(6), 18(2), 18(3) and 20(2). The conciliation regime under the IRA may be grouped into two broad categories, namely collective conciliation and individual conciliation.[6] Conciliation under sections 18 and 13 can be categorized under the former; and conciliation carried under sections 9 and 20 can be placed under the latter category. The methods and approaches of conciliation carried out either in collective or individual conciliation are not much different, except that it would be more rigorous in collective conciliation because one of the parties is a trade union.

The main function of the DGIR or his representatives in the conciliation process is to conciliate the disputes between the parties.[7] The term 'conciliation' connotes a process of mediation, negotiation and advice. Conciliation or mediation is a concept and method of dispute resolution that has been well recognised in various legal systems globally[8]. In the Malaysian scene, the operation of conciliation in cases of industrial disputes are as provided under

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5 The practice of using the tripartite system is well recognized in the ILO operation; see Betten, Lammy, *International labour law, Selected issues*, Kluwer, 1993, pg. 13, 412-414.

6 In England, the same distinction is made between collective and individual conciliation, see Deakins & Morris, *Labour law*. pg. 97; Smith & Woods, *Industrial law*, pg. 97-99.

7 See Ashgar Ali Ali Mohamed, 'Alternative dispute settlement: With reference to cases relating to dismissal without just cause or excuse under the Industrial Relations Act 1967', pg. 8.

8 See Palmer, M & Roberts S, *Dispute processes, ADR and the primary forms of decisions making*, Butterworth, 1998; Golberg et.al, *Dispute resolution, negotiation, mediation and other processes*, Aspen, 1999; Brown H & Marriott A, *ADR principles and practice*, Sweet & Maxwell, 1999.

the IRA.[9] A wide discretion is given to the DGIR in relation to the methods and approaches in conducting the conciliation proceedings. The expression commonly used in the Act is "he may take such steps as may be necessary or expedient', which exemplifies discretion employed by the conciliator. It suffices to mention here the manner adopted by the conciliator in the conciliation proceedings as observed in *Minister of Labour and Manpower v. Wix Corporation South East Asia Sdn. Bhd.*[10] Syed Othman F.J. said:

> ... the Act does not impose any duty on the Director-General or his representatives to decide or determine questions of any kind and to ascertain the law and facts. He is merely required to deal with the situation in the way he thinks best to get the employer and employee to settle the dispute. ... Any meeting convened is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and settle the dispute themselves. It is not a forum for discussing rights and the law.[11]

In *Allianz Golfcar (Mfg) Sdn. Bhd. v. Chan Siew Foon & Anor.*,[12] K.C. Vohrah J. observed that, 'we should be reminded of the words of the Federal Court that courts should not be concerned with what transpired at the conciliation proceeding and where there is no settlement, they need only concern themselves with the fact that there is no settlement.'[13]

Can the conciliator intervene or express his view or give his advice during the conciliation proceedings? As indicated above, there are no regulations or procedures pertaining to the method of conducting conciliation. The conciliator is basically free to adopt his own style and wisdom in conciliating. As such there is likelihood that the conciliator would intervene, interject, express his view or even to the extent of giving advices to the parties or one of the parties. As observed by Syed Othman F.J. in the 'Wix Corporation's case, the conciliator is not prevented from expressing his views on any matter which arises for the benefit of either party, having regard to his experience in similar situations and

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[9] See Aun, WM, *The law of industrial relations in Malaysia*, pg. 193-256; Siti Zaharah Jamaluddin, *Pengenalan kepada undang-undang perhubungan perusahaan di Malaysia*, Penerbit Universiti Malaya, Kuala Lumpur, 2000, pg. 101

[10] [1980] 2 MLJ 248.

[11] Ibid., pg. 250.

[12] [2002] 5 MLJ 130.

[13] Ibid, pg. 137. Likewise, in India, the role of the conciliator is similar. In *Royal Culcutta Golf Club Mazdoor Union v. State*, the Court observed that, "the duty of a conciliation officer is not judicial but administrative. He has to investigate the dispute and do all such things as he thinks fit for the purpose of inducing the parties to arrive at a fair and amicable settlement of the dispute". And along the same vein an author, G.M. Kothari said that, "the conciliator is not concerned with the content of the settlement. He should make an objective analysis on the strengths and weaknesses in the positions of each party and then exert pressures where they will be more effective".

industrial relations in general.'[14] Similarly, the conciliator might do so ruthlessly if required; the type of conciliation would depend on the issues in controversy, in matters of principle, his task is the toughest, while in matters of individual grievances, it may be easiest.[15] The exertion of pressure and its channelization, would therefore, depend on the nature of the dispute, and other surrounding circumstances.[16]

The most pertinent issue here is the outcome of the conciliation. In Malaysia, in the event that the parties succeed in reaching a settlement, the conciliator will draft a 'memorandum of settlement' stating the facts and figures that they have agreed upon. However, the memorandum is not binding on the disputed parties. This is because there is no provision in law that gives legal binding effect on the memorandum. The parties are expected to honour the settlement reached between them but in the event that one of the parties does not observe it, the dispute will return to its original position. It is about time that the law of conciliation in Malaysia, in particular the effect of conciliation, is reformed. But before we discuss the proposed reform on the effect of the 'memorandum', there are several related issues that need to be addressed.

First, the application for conciliation is made directly to the Industrial Relations (IR) Department.[17] In Malaysia, a party has to first apply to the IR Department for conciliation, and at this stage the Industrial Court is not involved at all. It has been advocated that the present system of making a direct application for conciliation to the IR Department would have repercussions in that the disputes would be administered without the knowledge and supervision of the Industrial Court.[18] In the case of a long delay in conciliation, the Court would not be able to take an appropriate action, for example in advising the appropriate authority to send the case to the Industrial Court. This, according to the argument would prevent delay of disputes at the conciliation stage.

However, this suggestion is difficult to implement. The Industrial Court itself is already bogged-down with a substantial number of back-log of cases and to expect the Court to oversee the conciliation operation or its delay would be a tall order. Further, the present system in Malaysia is peculiar in the sense that conciliation is entirely an administrative matter and judicial intervention even in the degree of advising the case to be remitted to the court would be

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[14] Ibid.

[15] See Edger L. Warren, Mediation and fact finding, Chap. 22 in Kornhausser (ed.), *Industrial conflict*, quoted in GM Kothari, *A study of industrial law*,

[16] Ibid.

[17] In England, when a complaint or claim is presented to an industrial tribunal under the provisions of any enactment providing for conciliation a copy is sent by the Secretary of Tribunals to the conciliation officer. Deakins & Morris, *Labour law*, pg. 97.

[18] See Lobo B, 'Industrial Relations Act – Evaluation of the Industrial Court in industrial relations' [1986] *CLJ* 148.

considered as against the very principle of conciliation and the discretion vested to the executive. It must also be remembered that the failed conciliation will be remitted to the Minister and the Minister will either refer the case to the Industrial Court or not. In this context, the power of the Minister to refer a case which in fact gives the jurisdiction to the Industrial Court, not otherwise. Thus it is inconceivable to accept a suggestion that the Industrial Court should have the power to oversee the operation of the conciliation machinery and process.

Second, there is no time limit under the IRA to complete the conciliation process. This situation might result in lengthy duration taken to complete the conciliation and hence consequent delay in the process.[19] This is a marked difference from the Indian law where a report must be submitted within 14 days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the government, and the time for the submission may be estimated by such period as may be agreed upon in writing by all parties to the dispute.[20] However, if conciliation proceedings are allowed by the authorities to be protracted beyond the prescribed period, they are not rendered invalid under the Act.[21] It is submitted that the Indian position has better advantage compared to our IRA, as the requirement for the report to be lodged to the authorities concerned would ensure that the conciliation proceedings would not be delayed. Or at least the authorities would be able to oversee the position of the conciliation process, in terms of duration taken to accomplish it. It is argued that although the process would not guarantee the speedy disposal of the case complained of, at least there is stock-taking of the proceedings processes to ensure that there would not be any unnecessarily delay.[22] Delay in conciliation processes will defeat the purpose to achieving a speedy settlement of industrial dispute resolution, which is the basis and spirit of the IRA.

Under the Malaysian IRA, a successful conciliation only brings to an agreed memorandum of settlement that has no binding effect.[23] As such this situation

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19 See Dr. Anwarul Yaqin & Dr Nik Ahmad Kamal Nik Mahmod, 'Ministerial discretion to refer a dispute to the Industrial Court: Some issues of reviewability [2002] 4 *MLJ* clxviii. The authors referred to a working paper by N.Sivabalah, 'Section 20 Reference' presented at the Workshop on Industrial Adjudication Reforms organized by the Bar Council's Industrial Court Practice Committee, Bar Council Auditorium, 11 May 2002. Sivabalah suggested that section 20 need to be amended that where conciliation has not been possible within a specified period, the representation should be referred to the Industrial Court for an award. The suggested period is three month.

20 The Industrial Disputes Act 1947, section 12(6).

21 See *State v. Andheri-Marol-Kurla Bus Service*, AIR 1955 Bombay 324.

22 See article in the New Straits Times on 21st July 2003 entitled 'System plagued by delay'. In it, Roy Rajasingham suggested that a time frame should be set for every stage of the dispute settlement process. He further said that if conciliators cannot solve a matter in six months, it should be sent to the Industrial Court without referring to the Minister.

23 In India, under sections 12 and 18 of the Industrial Disputes Act 1947, a settlement is binding on the ground that it was arrived at in the course of conciliation proceedings. Once a written

might cause problems as there is a possibility that one of the parties might not honour the agreed settlement. It would be better if the position in Malaysia were to be amended so as make the agreed settlement binding on the parties.[24] It is argued that there are advantages if the outcome of the conciliation binds the parties.

Firstly, there will be finality to the memorandum of the settlement. After a long drawn endeavour of conciliation by the conciliator and the participation by the parties, it would be a waste of time and public expenditure if the agreed settlement has not been honoured or delayed in honouring it. If the memorandum of settlement is final,[25] then it can be enforced either by the conciliation department or the courts and this can bar any future proceedings of the disputes concerned.

Secondly, the role and perception of the conciliator and the disputed parties will be somewhat different as all of them would bear in mind that the outcome of the conciliation will have the force of law. It is not to say however, that the present system of conciliation is not viewed or taken seriously by all the parties. But it is submitted that the atmosphere is different when the outcome of the conciliation will have the force of an agreement binding on the parties. The issue of expecting the parties to honour the memorandum, as presently practiced, will not arise. Along the same vein, the conciliator will also have an active role to play in the conciliation proceedings. He would have to, at least ensure that the weak party in the dispute would have fully understood the repercussions of his agreement towards any offer made by the other party. However, this will put a considerable strain on the officers as they will have to advise the employees on the possible disadvantages if they agree to and accept certain terms that are actually not to their advantage. This is because it would not be prudent if the unrepresented employees were to be denied advice when the outcome of their agreement to certain terms will be binding on them.[26] One possible suggestion to overcome this predicament is to allow the employees to seek independent advice during the course of the proceedings, either from a lawyer or an organisation.[27]

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settlement is arrived at during the conciliation proceedings, such settlement has a binding effect not only on the signatories to the settlement but also on all parties to the individual disputes'

[24] The Industrial Relations Act 1967 (in particular sections 18 and 20) could be amended along the line of sections of 12 and 18 of the Indian Industrial Dispute Act 1947.

[25] However, there will be parties who will argue that rendering finality to the outcome of the conciliation process would be against the very spirit of the conciliation itself.

[26] See L Dickens et al, 'Dismissed: A study of unfair dismissal and the Industrial Tribunal System', pg. 180; see also Graham and Lewis, 'The role of ACAS conciliation in equal pay & sex discrimination', Manchester, 1985.

[27] In England, in 1987 the Justice Report proposed that advice agencies such as Citizens' Advice Bureau and Law Centres should be funded to provide advice to applicants at the conciliation stage. Thus, the same suggestion should be put forward as a law in Malaysia.

Tables 1 and 2 demonstrate the number of trade disputes and dismissal cases that were dealt with by the Industrial Relations Department from the years 2000 to 2004. Trade disputes here refer to complaints made via section 8 and 18 of the IRA whereas claims under dismissal were made via section 20. Table 1 below demonstrates that conciliation was very successful in the case of trade dispute between employer and trade unions where over 80% of cases were resolved. However, for claims for reinstatement under section 20 (Table 2) quite a big number of dismissal cases were not resolved. Thus, cases referred to the Industrial Court were quite high. For example in 2003, there were 2774 dismissal cases resolved by way of conciliation; 1742 (about 63%) were referred to the Minister and out that number, 1581 were referred to the Industrial Court and the Minister did not refer 161 cases to the Industrial Court.

TABLE 1. Trade disputes dealt with for the years 2000-2004

Particular		2000	2001	2002	2003	2004
Brought forward from previous year	No.	451	400	474	538	570
Reported	No.	436	378	432	378	321
Dealt with	No.	887	778	906	916	891
Cases resolved	No.	487	304	369	346	324
	Percentage	54.9	39.1	40.6	37.8	36.4
Method of settlement						
i. Resolved through conciliation	No.	399	264	316	247	257
ii. Referred to Industrial Court	No.	86	40	44	92	66
iii. Not referred to Industrial Court	No.	2	0	8	4	1

REFERENCE OF DISPUTE

It is peculiar that in Malaysia the Minister is empowered to refer a case to the Industrial Court. For industrial disputes, either collective or individual, there is no direct access by disputed parties to the Industrial Court. The Minister acts as a filter to the dispute resolution mechanism. Reference by the Minister is extremely crucial as it is his reference that clothes the Industrial Court with jurisdiction to adjudicate the case. The question is, why is this system being practiced in Malaysia? The industrial dispute mechanism is an important part in the entire system of industrialization and economic development of a country. Disputes and their resolution mechanisms are viewed as having considerable impact on such development. Thus there is a need to inject an element of paternalism in the system with powers given to the Minister to have a final say in deciding whether a particular case can be referred to the Industrial Court or not for adjudication. The power vested to the Minister in this resolution mechanism is similar to the power given to other executives in administrative

TABLE 2. Claims for reinstatement by method of settlement for the years 2000-2004

Method of settlement	2000	2001	2002	2003	2004
Resolved through conciliation					
1. Reinstatement	257	241	246	247	239
2. Payment of compensation					
Amount of compensation	1,484	1,476	1,684	1,554	1,259
3. Claims Withdrawn					
4. Cases Closed (claimants absent)	RM10,782,772.60	RM10,394,254.83	RM14,353,750.86	RM10,957,358.31	RM13,741193.42
Others					
1. Referred to Industrial Court	1,235	970	1,395	1,581	4,643
2. Not referred to Industrial Court	167	350	405	161	193
Total	3,992	3,874	4,741	4,516	7,116

Source: Department of Industrial Relations, Ministry of Human Resource, Malaysia

matters; under the ambit of administrative law.[28] Further, the Minister would be able to refuse reference of a particular case to the Industrial Court if he is of the opinion that there is no merit in the case. In other words, this exercise will weed out 'frivolous or vexatious' cases from being referred to the Court. This exercise will certainly reduce the number of unwarranted cases going to court and at the same time will reduce the burden of the court in its adjudication duty.

The powers vested on the Minister to refer or not a case to the Industrial Court is discretionary in nature. For example, it is provided under section 20(3) that "upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award". Similarly, under section 26(2), it is provided that the Minister may ... upon receiving the notification of the Director-General under section 18(5) refer any dispute to the Court if he is satisfied that it is expedient to do so. The discretionary nature of the power of the Minister is embedded in the expression used in the sections such as 'may', 'if he thinks fit', and 'if he is satisfied'. Similarly, section 8 (complaint of trade union discrimination) states that: the Minister may, if he thinks fit, refer the complaint to the Court for hearing. A number of authors[29] and case law have on many occasions echoed the effect of such discretionary power. Suffice to reiterate here the observation made in the case of *Secretary for Education v. Thameside Metropolitan Borough Council*, 'the very concept of administrative discretion involves a right to choose between more than one possible course upon which there is room for reasonable people to hold differing opinion as to which is to be preferred.' The Malaysian Courts have adopted and applied the English courts' principles on administrative decision.[30] The Malaysian IRA does not give any guidelines as to the manner the discretion is to be exercised.[31] Literally it seems that the Minister discretion is very wide and he may resort to several options in reaching his decisions. However, judicial activism in response to this particular discretionary power seems not to allow the Minister to stretch his power too far to the extent of being unfettered. The Courts at all time are ready to review the decision of the Minister and in effect have propounded a number of principles that limit the power of the Minister.[32] In short, the power of the Minister is unfettered and his decision can be challenged on several grounds.

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[28] See M.P Jain, *Administrative law of Malaysia and Singapore,* 1999, Chap. Ixxx.

[29] See for example, V. Anantaraman, *Malaysian industrial relations law and practice*, pg. 219; Kamal Halili Hassan, 'Trade unions, state discretionary powers and judicial control', Terbitan Tak Berkala, FUU, UKM, 1998, pg. 1.

[30] See M.P. Jain, *Administrative law of Malaysia and Singapore*, Chap. Lxxx.

[31] See Ashgar Ali Ali Mohamed, 'Alternative dispute settlement: With reference to cases relating to dismissal without just cause or excuse under the Industrial Relations Act 1967'.

[32] See Dr. Anwarul Yaqin & Dr Nik Ahmad Kamal, 'Ministerial discretion to refer a dispute to the Industrial Court: Some issues of reviewability'.

One of the criticisms leveled against this system is the use of the Ministerial discretionary power to refer or not to refer a case to the Industrial Court. It was said that such a mechanism was an added governmental bureaucracy and has on several occasions delayed the presentation of the case to the Industrial Court. The problem was identified in a paper presented by a practitioner in a workshop when he showed that on average, it took about two and a half years from the date a representation is made to the Industrial Department until the time when a reference is made, if at all.[33] It has further been shown that many representations have been pending for more than two years, some even for more than three years.[34] There are two reasons proposed for such delay. First, is the increasing number of cases of disputes that have been referred to the Industrial Relations Department and second, the time taken at the conciliation stage as well by the Minister to make his decision. Thus it is suggested that this system should be reviewed or reformed, either by scrapping the ministerial power to refer or not a case to the Court altogether, or by limiting the time taken in making such a reference by the Minister.

The Bar Council has suggested that the power of the Minister to be abolished.[35] A lot of time can be saved if the power of the Minister is scrapped and the power to make such a decision is instead given to the Director General who may form his opinion at the end of the conciliation proceedings. After all, the minister who makes the decision in fact relies on the documents prepared and submitted by the officers of the Industrial Relations Department who is headed by the Director General. It is submitted thus that the requirement of the Minister to act as another filter in the whole mechanism has outlived its original purpose. It is interesting to note that recently, looking at the statistics of 2004 (Table 3.2), the majority of cases were referred to the Industrial Court. 4,643 cases were referred to the Industrial Court compared to only 1,581 in the year 2003 and 1,395 cases in 2002. This beg a question whether it is going to be a norm where the Minister would take a safe route by referring most cases to the Court rather than not referring them and being challenged by aggrieved parties by way of judicial review.

DUTY OF MINISTER TO GIVE REASONS

The duty of the Minister to give reasons for his decision arises when he refuses to refer a case to the Industrial Court. The Court will enquire as to the decisions of the Minister in relation to whether they are justified or otherwise. It is noted that there is nothing in the provisions, either section 20 or 26 of the IRA, which

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[33] N Sivabalah, 'Section 20 reference'.

[34] Ibid. See also article by Dr Anwarul Yaqin & Dr, Nik Ahmad Kamal, 'Ministerial discretion to refer a dispute to the Industrial Court: Some issues of reviewability'.

[35] Bar Council's views to the Industrial Court Practice Committee, 2002, unpublished.

requires the Minister to give reasons for his decision not to refer the case to the Industrial Court. If we were to say that the intention of the Legislature is as reflected in the provisions of the Act, then the same position applies that is, it is not the intention of Parliament to require Minister to give reasons in this particular duty. The underlying philosophy is that the decision made is grounded on administrative action, not judicial. Thus the Minister is not duty-bound to offer reasons for his decision, which is administrative in nature. This philosophy is indeed rooted in Common Law tradition where reasons are invariably not given in administrative decisions. Even the Common Law courts, historically, are not bound to give reasons for their decisions. In this context, De Smith, Woolf and Jowell have stated that:

> It has long been a commonly recited proposition of English law that there is no general rule of law that reasons should be given for administrative decisions. On this view, a decision-maker is not normally required to consider whether fairness or natural justice demands that reasons should be provided to an individual affected by a decision. This is because the giving of reasons has not been considered to be a requirement of the rules of procedural propriety. The absence of a duty to give reasons has sometimes been explained as following from the fact that the courts themselves are not obliged at common law to give reasons for their decisions.[36]

However, over time the English Courts have now taken the progressive view that the courts should give reasons for their decisions. The English courts have modified the Common Law's stance and the courts are now obliged to state detailed and clear reasons for their decisions. Grifith LJ in *R v. Knightsbridge Crown Court, ex p. International Sporting Club (London) Ltd. & Anor*,[37] ruled that if the judges do not give reasons for their decisions, the higher court may order them to give reasons or may quash their decisions for want of reasons. The court observed:

> It is the function of professional judges to give reasons for their decisions and the decisions to which they are a party. This court would look askance at the refusal by a judge to give reasons for a decision particularly if requested to do so by one of the parties...it may well be that if such a case should arise this court would find that it had power to order the judge to give his reasons for his decisions.[38]

However strong the above statement is, confusion may still arise where there is no provision in a particular statute requiring the administrator to give reasons for his decision. For this, an implied obligation may be imposed on the administrator or Minister. Speaking in the case of *Doody v. Secretary of State*

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[36] De Smith, Woolf and Jowell, *Judicial review of administrative action*, London, 1995, 5th Ed, pg. 457.

[37] [1982] QB 304.

[38] Ibid., pg. 314.

for the Home Department,[39] Lord Muskill of the House of Lords, while considering whether the public decision-maker had a general duty to give reasons in English Administrative law, stated that:

> I accept without hesitation...that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied.

Even years before the decision of the *Doody's* case, the Court in *Breen v. Amalgamated Engineering Union*[40] insisted that the public decision-makers should give reasons for their decisions where their decisions affected the peoples' rights, interest and legitimate expectation. The Franks Committee in England in its report in 1957 insisted that there should be a general practice for the administrative decision-makers to give reasons for their decisions. The suggestion had found its legislative force in the form of section 10 of the Tribunals and Enquiries Act 1992 which requires specified tribunals and Ministers acting under this Act to give reasons for their decisions, if requested by the parties, unless national security is involved. In short, the requirement of public decision-makers in England to give reasons for their decisions are clear that they are duty-bound to give reasons if required by legislation, and implied to do so where their decision would have effect on the peoples' rights, interest and legitimate expectation.

What is the position in Malaysia then? The Malaysian courts seem to subscribe to two different views especially in the light of two convincing decisions by the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal*[41] and *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*.[42] Before we proceed to discuss these two cases, it is instructive to observe the Malaysian courts' decisions before *Hong Leong's* case. In *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v. Kam Gin Paik & Ors*,[43] the Federal Court held that in cases under the Land Acquisition Act 1960, the Collector is not obliged to give reasons for his award of compensation. However in *Government of Malaysia & Ors v. Loh Wai Kong*,[44] Suffian LP while holding that a citizen has no fundamental right to leave the country, seemed to support the view that an administrative authority in whom Parliament confers a discretion ought to give reasons that would stand up to objective scrutiny when it makes a decision in the exercise of that discretion.[45]

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[39] [1993] 3 All ER 92.
[40] [1971] 2 QB 175.
[41] [1996] 1 MLJ 481.
[42] [2002] 3 MLJ 72.
[43] [1983] 2 MLJ 390.
[44] [1979] 2 MLJ 33.
[45] Suffian LP followed the minority decision in *Satwant Singh Sawhney v. D Ramarathnam*, AIR 1867 SC 1836. See *Hong Leong Equipment's* case.

The Federal Court in *Pahang South Omnibus Co Bhd v Minister of Labour and Manpower & Anor*[46] also seemed to support the view that reasons should be given by the Minister when making a decision. The Court alluded to one of the English authorities that *if it gives no reason – in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion.*[47]

In *Hong Leong's* case, the Court of Appeal took a very strong stance in that the Minister is obliged to give reasons if his decision would have effect on the claimant's 'right to livelihood'. However, the requirement to give reasons by public decision makers was modified or even changed by the Federal Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan.*[48]

In the *Hong Leong's* case, Gopal Sri Ram JCA mentioned an important policy consideration that set the Malaysian judicial duty apart from that of England that the English courts are under no obligation to give reasons for their decisions. In Malaysia, according to his Lordship, beginning with the case of *Balasingam v. PP*[49] which required the subordinate courts to give reason in criminal cases, followed with judicial policy which was given sanction by the introduction of the Judges' Code of Ethics[50] and later incorporated in the Federal Constitution in Article 125(3), the Malaysian judges have to give reasons for their decisions. But that is the duty of the judge and it is argued that we should not strictly compare the judicial duty with that of the administrator or the Ministerial duty. It is submitted that it is too simplistic a view to say that because the judges have a duty to give reasons for their decisions then the public decision-makers are also under the same obligation to do so, and the argument seems to point that the requirement is in fact more on the latter, as they seem to act in an inferior capacity when compared to the judges. In this respect, it is submitted that the Common Law views and the observation made by Gopal Sri Ram JCA in *Hong Leong's* case are quite puzzling. Undoubtedly, that either the courts' judges or the executives ought to act fairly in their decisions, which in this context might include the duty to give reasons, but to conclude that just because judges are required by law to give reasons for their decisions, the executives are compelled to do likewise, it is submitted that such argument is not that strong. It must be understood that the policy consideration that the executives

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[46] [1981] 2 MLJ 199. The Court applied with approval the judgment of Lord Denning MR in *General Electric Co Ltd v. Price Commission* (1975) ICR 1.

[47] See *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997. On the other hand, the cases of *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor* and *Minister of Labour, Malaysia v. Chan Meng Yuen & Anor* seemed to advance a principle that the Minister was not under a duty to give reasons for his decisions; Gopal Sri Ram JCA in *Hong Leong's* case however did not agree with these two decisions.

[48] [2002] 3 MLJ 72. (The discussion that follows centres on the difference of these two cases).

[49] [1959] MLJ 193.

[50] Azmi L.P., 'Rukun keadilan or principles of justice' [1971] 2 MLJ xliii.

operate within is different from that of the judges, especially in the Malaysian context.

Gopal Sri Ram JCA strongly held the view that the Minister owes a duty to give reasons for his decision especially if such a decision affects the 'right to livelihood' of the claimant. "Right to livelihood" in the context of employment includes the right of workers to security of tenure. This right in employment was considered by his Lordship as a fundamental right; one of the fundamental liberties guaranteed under Part II of the Federal Constitution. His Lordship alluded to the expression of "life" in Article 5 of the Federal Constitution which according to him was wide enough to encompass the right to livelihood.[51] It is without doubt that employment is a fundamental right and as such the argument advanced (on the 'right to livelihood') by Gopal Sri Ram JCA is indeed very sound.

However, in 2001, the Court of Appeal in *Joseph Puspam v Menteri Sumber Manusia, Malaysia & Anor*[52] interpreted *Hong Leong's* case differently by saying that the latter case did not actually subscribe to the idea that the Minister should be compelled to give reasons for his decision. The issue that arose was whether the Minister could be compelled to give reasons for his refusal to refer the appellant representation to the Industrial Court under section 20(3) of the IRA. The Court of Appeal in *Joseph Puspam* relied on the words of Gopal Sri Ram JCA in Hong Leong that: "It is a matter of prudent that the Minister is required to give reasons for his decision". It also referred to the words of Siti Norma Yaakob JCA: "there is no statutory duty to give reasons, but in the modern climate of administrative law, such an omission may no longer be justified". By quoting the statements of the judges, mentioned above, Mokhtar Sidin JCA (on behalf of the Court) concluded that *Hong Leong's* decision did not in fact subscribe to the view that the Minister should gives reasons for his decision. It is true that Gopal Sri Ram JCA and the other judges did not overtly say that the Minister should give reasons for his decision but if one were to digest and appreciate the wordings and nuances of the decision, it certainly points to the principle that the Minister should give reason for his decision.

In 2002, the Federal Court dealt with the same issue in *Sugumar Balakrishnan*. The facts of the case are as follows. The respondent who is a Negeri Sembilan born Malaysian went to Sabah to work as a teacher. Later, he qualified as a lawyer and has been practicing law in the state under a work pass issued to him under regulation 16(1) of the Immigration Regulations 1963. As he is not a person belonging to Sabah under section 71(1) of the Immigration Act 1959/63, he is required to obtain a pass to enter and remain in Sabah. Sometime in 1995, he applied for an entry permit that was granted to him for a

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[51] See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

[52] [2001] 4 AMR 4181.

period of two years. However about six weeks before the expiry of the two year period, the respondent was served with a notice of cancellation of entry permit. The respondent applied to the High Court for an order of certiorari to quash the decision of the Director and obtained it. The case proceeded to the Court of Appeal and ended up in the Federal Court. One of the issues that arose in this case was whether, in the exercise of the powers conferred upon the state authority by section 65(1)(c) of the Act to give any directions, it is required to give reasons. The Federal Court held that "in considering the words in section 65(1)(c), it is clear that there is no express statutory duty imposed on the state authority to give reasons to the respondent". Although the court agreed with the Common Law trend towards giving reasons by public decisions takers, however it considered the present case to be on the exception. In interpreting that particular section, the Court opined that the provision does not confer the state authority to deal directly with the respondent but with the Director of Immigration. It was observed by the Court that since the state authority was not expected to give reasons to the Director of Immigration it followed that the Director could not also be expected to provide reasons to the respondent; this is because the Director was merely carrying out the directions of the state authority.

What is the difference then between *Sugumar Balakrishnan* and *Hong Leong Equipment*? It is submitted that the difference lies on the issue of 'right to livelihood'. Whereas this issue was paramount in *Hong Leong'* case, it was not so in *Sugumar Balakrishnan* when the court deliberated on the point of the 'duty to give reasons'. By implication, the right to obtain an entry permit (that will give the opportunity to the respondent to work in Sabah) was not parallel to the right accruing from an act of dismissal, as occurred in *Hong Leong*. On that score, it is submitted that the right to give reasons was considered not pertinent in *Sugumar Balakrishnan*. Interestingly however, the Court considered the 'right to livelihood' when it deliberated on the issue of the right to be heard, not to include the duty to give reasons. The meaning of 'life' in this case was viewed not as dynamic as in *Tan Tek Seng, Hong Leong* and *Rama Chandran*[53] in fact the Court adopted the meaning of 'life' and 'personal liberties' as held in the case of *Loh Wai Kong*[54] and said that the words 'personal liberty' should be given the meaning in the context of article 5 of the Constitution as a whole. In other words, the meaning of 'personal liberty' is not as wide as possible to include the right relating to immigration law. Unfortunately, the Federal Court in *Sugumar Balakrishnan* did not discuss the effect of the decision of *Hong Leong's case* particularly the duty to give reasons by the public decision-takers. In the light of the foregoing cases discussed, it can be concluded that the duty of the Minister or the executive to give reasons for his decisions (to a certain degree it is also the right of citizens to know) is still unclear.

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[53] *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.
[54] [1979] 2 MLJ 33.

CONCLUSIONS AND RECOMMENDATIONS

On the conciliation mechanism and process, it was submitted that there has not been much literature available in Malaysia. However, the success of the conciliation system has not been very encouraging as it was reported that only about 36% of cases (dismissal cases) were settled via this mechanism. There were 8,280 cases referred to the Industrial Court. The present author has mooted several suggestions in the foregoing discussion. One of them is a suggestion to reduce the delay in the conciliation process. Mont, if not years have been taken to settle certain disputes. This may be because there was no time limit for a particular conciliation to be completed. Although we understand that parties should not be pressured to settle their disputes within a time frame, nevertheless a time limit ought to be set up so that the process will not delay the whole resolution process. It is suggested that if within a certain time limit the conciliation has still not been completed, it should be referred to the Minister or sent straight to the Industrial Court. The latter suggestion is worth considering as it is felt that the failed conciliation should be referred straight to the industrial Court without having to go to the Minister first. It has been submitted that the time taken by the Minister to decide whether to refer the case to the Industrial Court or otherwise has somewhat delayed the resolution process. In fact is the Minister decides that the case should not be referred to the industrial Court, his decision may still be challenged by way of judicial review. And the prolongation of the case still ensues. It can also be proposed that a special scheme of mediation or arbitration be set up to handle some cases that could not be settled via conciliation, instead of referring it to the industrial Court. This proposed scheme would be less technical compared to the Court and it would also, to a considerable extent, be able to reduce the workload of the Court.

On the duty of the Minister to give reason, it was submitted that Gopal Sri Ram JCA has advanced a rather convincing argument in *Hong Leong* that the Minister should give reasons especially if his decision affects the livelihood of the claimant. However, the decision in *Joseph Puspam* and *Sugumar Balakrishnan* seem to point to the principle that it is not incumbent on the Minister to give reasons. The livelihood of the claimant appears to be the determinant factor. Now it looks like that employment is a matter of livelihood of a person, but matters relating to the right to entry permit is not. Although the judicial opinion in *Hong Leong* was somewhat radical, nevertheless the principle that the Minister should give reasons was not supported and adopted by other judges. Policy considerations especially in the Malaysian context seem to be rather persuasive in the judicial mind. The thinking seems to be that expecting the public decision makers to give reasons for their decisions would not be that in line with the very nature of public administration. Furthermore, confidentiality is a necessary element of public administration, hence the promulgation of the Official Secret Act 1972. Perhaps it could be difficult for the administration to

function smoothly if their prerogative powers are frequently subject to judicial scrutiny.

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