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Should the Industrial Court not be allowed to be what it was intended to be?

by

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This is the second time that I am delivering a keynote address since my appointment as Chief Justice, but the first in Malaysia. The first was at New Delhi exactly three weeks ago. It looks as if India beats you at it. But, still you get the first in Malaysia, for whatever it is worth!

Frankly, when Mr. Syed Ridhwan Alsree contacted me to invite me to deliver this speech, I was quite reluctant to accept it. However, I made a mistake in allowing him to come and see me. He was very persuasive. Even then, I did not agree immediately. I told him the reason for my reluctance which I must also tell you now because it is important. The reason is this. It is my policy to accept an invitation to speak only when I think I have something worthwhile to say. But, the danger is that, if I say what I would like to say here, later on, some parties may take objection to my hearing an appeal involving an Industrial Court award on the ground that I have expressed my opinion publicly on the subject.

It had in fact happened to me once. I attended a Bar Council Annual Dinner soon after Tun Mohamed Dzaiddin was appointed Chief Justice. Tun Mohamed Dzaiddin gave a speech at the dinner. I was a mere listener. He spoke about the need to check the spiraling awards for libel cases. At my table were the then Speaker of the Dewan Rakyat, the late Tun Mohd. Zahir and the Dean of the Law Faculty of the University of Malaya. While Tun Mohamed Dzaiddin was speaking I commented "I don't think he should say that here." They agreed.

A few months later, I was scheduled to hear an appeal in a libel suit. To my horror, one of the parties, I think it was the Respondent, filed an application to disqualify the panel because we were at the dinner when Tun Mohamad Dzaiddin delivered the speech on the ground that we would be influenced by it. My photograph was exhibited in the affidavit, even though there was no video clip.

However, I don't know for what reason the application was withdrawn on the morning of the hearing of the appeal. In spite of that, I felt very disheartened

and did not attend any Bar Council dinner for a few years after that. Now you know why.

But, now I have decided that I am not going to be perturbed by such applications. Otherwise, I would not be able to accept any invitation to speak except to thank and to praise everybody.

In any event, I am not going to say more than what I have said in my judgment in Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor (2002) 3CLJ 314 (C.A.) and, instead of stating my view, I shall pose a question. And the question is: "Should the Industrial Court not be allowed to be what it was intended to be."

Ladies and Gentlemen,

The history of the Industrial Court started very early. As early as 1940 we already had the Industrial Court Enactment of the Federated Malay States, the Industrial Court Enactment of Kedah and the Industrial Court Ordinance of the Straits Settlement. But, due partly to the Second World War, these statutes were never implemented. When the Federation of Malaya came into being in 1948, these statutes were replaced by the Industrial Court Ordinance 1948 – See B. Lobo: Industrial Relations Act 196: Evaluation of the Industrial Court in Industrial Relations (1986) 1 CLJ 148. This Ordinance was replaced by the Industrial Relations Act 1967 which is still the law today.

What does it mean? It means that even as early as 1940 when the courts of law (I am using the term to mean the courts in the judicial system) were still not clogged with cases and when judicial review was still unheard of, it was already thought that the courts of law were not suitable to deal with employment disputes. We know too well that an adversarial system used in the courts of law, applying common law based principles and procedure are too technical, expensive and the trials are protracted thus causing delay to the disposal of the disputes. That is not good for the employers, workmen, the industry, the economy and the country.

We shall now look at the Industrial Relations Act 1967. The long title states as follows:

> "An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefore."

Note that the objectives are quite general and wide. They include "the regulation of the relations between employers and workmen and their trade unions" and "the prevention… of any differences arising from the their relationship." These are matters not within the function of the courts of law.

Section 30(3) provides that the Industrial Court shall make its award without delay and where practicable within thirty days from the date of the reference to it of the trade dispute or of a reference to it under subsection 20(3). It shows that speed is the essence. There is no such provision in any law governing the courts of law, because it is simply not possible to achieve.

Section 30(4) requires the Industrial Court, in making the award, to have regard to public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the effect in related or similar industries. Those are not the kind of considerations a court of law will give in deciding a case. A court of law decides according to the law as it is and, as is sometimes said, even if "heaven may fall."

Furthermore, section 30(5) makes it mandatory for the Industrial Court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Nothing can be clearer than that as to how the court should function.

In making the award, the court may also take into consideration an agreement or code relating to employment practices, not the subject matter of the dispute - section 30(5A). This is not the kind of thing a court of law may take into consideration in deciding a case.

In making the award, the Court is not restricted to the specific relief claimed by the parties but may include any matter or thing which it thinks is necessary or expedient for the purpose of settling the dispute - section 30(6). In other words, the court is given a broad choice of reliefs to be given. This too is peculiar to the Industrial Court.

Section 29(3) (a) of the original Act provides:

> "(a) Subject to this Act, an award of the court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any court of law."

So, looking at the provisions of the Act, perhaps it is not wrong to say that the Industrial Court was intended to be a court of arbitration that was not required to pay too much attention to legal technicalities but to settle disputes speedily on broad principles of equity, good conscience having regard to public interest implications and its effects on the economy of the country. Even in making the award it was not restricted to the specific relief prayed for. There was no appeal, no judicial review. In other words, the matter ended there. This is reaffirmed by the Labour and Manpower Report 1983/1984 of the Ministry of Labour and Manpower which says, inter alia:

> "…the Court's role is to bring about an expeditious settlement of all disputes referred to it in order to contribute towards industrial peace and harmony."

In late 60's, judicial review reached our shores. In the early cases, applications were made for the order of prohibition to stay proceedings in the Industrial Court - see Kesatuan Pekerja2 Kenderaan Jaya v. Industrial Court and Ors.(1969) 2 MLJ 27.

It is also interesting to note in one of the early cases, it was the Attorney General who applied for an order of certiorari to quash the order of the Industrial Court, inter alia, on the ground that the Industrial Court had no jurisdiction to adjudicate on the dispute although referred to by the Minister. Alternatively, the Industrial Court had acted in excess of its authority in adjudicating on the question. Abdul Aziz J. dismissed the application. The case is Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Anor.(1971) 1 MLJ 38,

From then on, applications for judicial review kept coming to the High Court to quash the awards of the Industrial Court. Even the decision of the Minister not to refer the representation to the Industrial Court for an award under section 20(3) of the Act became the subject matter of such applications. Once a matter reaches the High Court, though not through an appeal, it is not going to end there. From the High Court normal appeal comes in, to the Court of Appeal and even the Federal Court. So, what had started without even an appeal to the High Court, had through judicial review, becomes appealable even, to the Federal Court. Bear in mind that even a case that begins in the Sessions Court is not appealable further than the Court of Appeal. On the other hand, an Industrial Court award that begins in the Industrial Court which is not even appealable to the High Court, having come to the High Court through judicial review, is appealable right up to the Federal Court. That is really an irony. What was intended to be settled speedily now takes longer time than a normal suit that begins in the High Court and think of costs.

However, during that period, the High Court would only intervene on the narrow ground of error of jurisdiction. South East Asia Fire Bricks Sdn Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. (1980) 2 MLJ 169 (P.C.) was the celebrated authority. In that case, the Privy Council held, inter alia:

> "Even assuming that the award contained one or more errors upon its fact, the error or errors did not affect the jurisdiction of the Industrial Court and section 29(3)(a) of the Industrial Relations Act, 1967, effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings."

While Fire Bricks' case (supra) was being fought, the Industrial Relations Act was amended. Sections 33A and 33B were added: Section 33A(7) provides:

> "(7) A decision of the High Court under subsection (5) shall be final and conclusive, and no such decision shall be challenged, appealed against, reviewed, quashed or called in question in any other court or before any other authority, judicial or otherwise, whatsoever."
> Section 33B(1) provides:
> "33B(1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act [including the decision of the Court whether to grant or not to grant an application under section 33A(1)] shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court."

These amendments came into force on 30 May 1980. But, they were of no effect. In 1984, for example, the Federal Court, in Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar and Restaurant Workers & Anor. (1984) 1 CLJ (Rep.) 155 F.C., in a judgment written by George Seah F.J., held:

> "(2) Such a clause as contained in section 33B(1) of the Act does not have the effect of ousting the inherent supervisory power of the High Court to quash the decision of the Industrial Court by *certiorari* proceedings if it had acted without or in excess of jurisdiction or had done or failed to do something which rendered its decision a nullity."

Please note that in making the ruling on section 33B(1), the Federal Court had in mind only jurisdictional error and nullity as the grounds for quashing the decisions of the Industrial Court.

One question that crossed my mind in the course of writing this speech is that those judgments on ouster clause were decided prior to the amendment of Article 121 of the Federal Constitution which, inter alia, provides:

> "… and the High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law."
> This amendment came into force on 10th June 1988.

I wonder whether in view of the amendment to Article 121 of the Federal Constitution the earlier judgments on sections 33A and 33B can still stand. I express no view on it.

It is interesting to note that, even in 1981, the Federal Court was still of the view that where no appeal lies from a decision, "judicial review cannot be resorted to as an alter modus for an appeal by way of circumventing or repairing that omission." The words came from no other than Abdoolcader J., delivering

the judgment of the Federal Court in Pahang South Union Omnibus Co. Bhd. V. Minister of Labour and Manpower (1981) 2MLJ 199 .

But, even this view too could not last long. Soon, it was forgotten.

By 1985,we have started hearing voices to the effect that the Supreme Court might prefer to adopt the view of Lord Denning in Pearlman v.Harrow School (1979) 1 QB 56 – see Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor. (1985) 2 CLJ 305 per George Edward Seah SCJ. One year later, Mohd. Azmi FCJ in Enesty Sdn. Bhd. v. Transport Workers Union & Onor. (1986) 1 MLJ 18 F,C. said:

> "Perhaps the time has time for the this Court (i.e. the Federal Court) to consider the views expressed by Lord Diplock in the House of Lords in Re Racal Communications Ltd. and thereby open the way for the acceptance of Lord Denning's suggestion in Pearlman v. Harrow School in discarding the distinction between an error of law which affected jurisdiction and one which did not. There is no degree of nullity and if there is an error of law on which the Industrial Court's award depends the remedy of certiorari should not be excluded by section 33B(1) of the Industrial relations Act, 1967."

In the meantime, the scope of jurisdictional error was widening. See, for example, Malayan Banking Bhd. v. Association of Bank Officers Peninsular Malaysia & Industrial Court (1988) 1 CLJ (rep.) 183 (S.C.) where it was held that jurisdictional error includes a decision which is perverse and devoid of plausible justification that no reasonable body of persons could have reached it. What it means is that the High Court would be entitled to scrutinize the evidence in order to decide whether the decision of the Industrial Court is perverse or not. How else?

Then, in 1995 came the judgment of the Court of Appeal in Syarikat Kenderaan Melayu Kelantan Bhd. V. Transport Workers Union (1995) 2 CLJ 748 C.A. The main judgment was written by Gopal Sri Ram JCA. I read part of his judgment.

> "An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law and it is no longer of concern whether the error is jurisdictional or not. Such a distinction ought no longer to be maintained. If there is an error of law upon which the award of the tribunal is founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. It follows that the decision of the Board in South East Asia Fire Bricks v Non-Metallic Mineral Products

> Manufacturers Employees Union & Ors. [1981] A.C. 363, and all those cases approved by it, are no longer good law. By the same token, the cases of Kannan v Menteri Buruh dan Tenaga Rakyat [1974] 1 MLJ 90 and Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors [1974] 2 MLJ 41, though disapproved or overruled by the Board, must now be taken to have always correctly stated the law.
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> Since the inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause, however widely drafted. The ouster clause in s. 33B(1) of the Act, therefore, does not disable the High Court from exercising its judicial review of awards of the Industrial Court.
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> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But an error of law would be disclosed if the decision maker asks himself the wrong question, or takes into account irrelevant considerations, or omits to take into account relevant considerations, or if he misconstrues the term of any relevant statutes, or misapplies or mis-state a principle of the general law".

Two years later, came the judgment of the Supreme Court in R. Rama Chandran v The Industrial Court of Malaysia (1997) 1 MLJ 145. The judgment of the court was written by Edgar Joseph Jr. FCJ. In that case, it was held, inter alia:

> "(10) Per Edger Joseph Jr. FCJ) A decision susceptible to Judicial review is not only open to challenge on the ground of procedural propriety but also on the grounds of illegality and irrationality; and, in practice, this permits the court to scrutinize such decisions not only for process but also for substance."
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> (13) (Per Edgar Joseph Jr. FCJ) Having reviewed the Award of the Industrial Court for substance, members of this Court who comprised the majority that upon the un-contradicted affidavit evidence of the Employee, he had been dismissed from service without just cause or excuse. Furthermore, in lieu of reinstatement, they were satisfied that the Award of the Industrial Court was flawed on grounds of *Wednesbury* unreasonableness."

The Court, by a majority, made a consequential order i.e. granting the employee compensation for loss of employment. Wan Yahya FCJ dissented on this issue. Wan Yahya FCJ was of the view:

> "(26) (Per Wan Yahya FCJ) The discretion as to whether to award compensation in lieu of reinstatement was an issue to be decided by the Industrial Court. In the present case, the Federal Court would be performing its original and appellate but not its supervisory jurisdiction if it were to proceed to determine the issue on the Employee's compensation."

As far as I know, this was the first case in which the learned Judge, Edgar Joseph Jr. FCJ gave "an additional judgment" (I call it a "rebuttal judgment") rebutting the dissenting judgment of Wan Yahya FCJ on the second issue. Fortunately, Wan Yahya FCJ did not reply. Had he done so, there might have been a further reply or rebuttal.

I think I need go no further. Even stopping there, we see what had happened to the Industrial Court over the last forty years. It was conceived to be a court of arbitration, not required to pay too much attention to legal technicalities, to settle disputes speedily on broad principles of equity, good conscience having regard to public interest implications and its effects on the economy of the country and with no appeal to the court of law. True, until today there is no appeal to the High Court from the decision of the Industrial Court. But, what is not allowed through an appeal passes through judicial review, in spite of its clear prohibition by statute. And, once it gets to the High Court, the normal appeal process sets in. At first, judicial review was applied only on the ground of jurisdictional error and the court of law would only look at the decision making process and not the decision itself. But, the meaning of jurisdictional error itself kept expanding. Error of law, whether or not it goes to the jurisdiction became sufficient for the court of law to intervene, not only on procedural impropriety but also on merit to see whether the decision falls within *Wednesbury* unreasonableness. Regarding technicality, Telekom Malaysia Kawasan Utara (supra) is a good example. The issue was whether the Industrial Court was correct to apply the "balance of probability" test instead of the "beyond reasonable doubt" test with regard to the theft of the company property which the employee was alleged to have committed and for which he was dismissed.

You may proudly look at what had happened as development of Malaysian Administrative Law. Some may even claim to be the champion. You may look at it as getting lost in the legal jungle and forgetting your original destination. I pass no comment, not until October, when I retire. In any event, I do not think any lawyer would ever try to persuade the Federal Court to retreat. Academicians will be disappointed if that were to happen: they will have to rewrite their textbooks and lecture notes.

Short of intervention by the Legislature (again I pass no comment whether it should or should not be done), that position is there to stay. Administrative Law is the in-thing and no legal system would like to be left behind. It is now the test of a respectable Judiciary. But, while the "development" of our Administrative Law, generally, may be in tandem with the development in other Commonwealth countries, the question that arises in my mind is, in applying the developing

principles of Administrative Law to awards of the Industrial Court, had we paid sufficient attention to the provisions of the Industrial Relations Act? Had we lost sight of what the Industrial Court was intended to be?

What are the side effects? Delay and expense. How do we solve these problems? I would like to hear your views.

Thank you.