

**Malaysian Industrial Relations System:
Its Congruence with the International Labor Code
A background paper on the Seminar**

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International Labour Standards find expression in two forms: conventions and recommendations. The term "**International Labour Code**" is used to denote the whole body of convention and recommendation adopted by the international conference of the International Labour Organization [ILO] since 1919.

International Labor Standards reflect a consensus among employers as well as between them and governments and trade unions of member states. Moreover, they are prepared by technical experts on the basis of extensive study and survey of the best prevailing practices.

In distinguishing between conventions and recommendations, it should be noted that international labour conventions are instruments explicitly designed to create obligations whereas recommendations serve to define non-obligatory norms, which essentially have the objective of orienting national action.

The member states that ratify the conventions implement them through legislation. When conventions are ratified by the national authority for making laws [Parliament] they become binding international obligations. The member states are required to submit reports to the ILO on both the ratified conventions and recommendations and the position of their law and practice every two to four years depending on their relative bearing on human rights. [1]

Evaluation On Congruence

In examining the extent to which industrial relations law and practice in Malaysia is congruent with the International Labour Code, we should compare the relevant international convention governing workers' rights with the statutory provisions of our labour laws and their practice as interpreted by the quasi-judicial and judicial authorities in Malaysia.

In addition corresponding to the international labour recommendations, which are non-obligatory, we should also look into the provisions of our Code of Conduct for Industrial Harmony and evaluate the extent to which they are reflected in industrial relations practice in Malaysia. This obviously leads us to consider the degree to which these code guidelines are taken into consideration in the awards of the industrial court under section 30 (5A) of the Industrial Relations Act 1967.

Among the numerous international labor standards, the relevant conventions and recommendations governing workers' rights to form and join a trade union and participate in its lawful

activities, the following are important: conventions and recommendations relating to freedom of association, the right to organize and protection of the right to organize, collective bargaining and enforcement of collective agreement. In addition, international labor standards regulating the termination of the worker's contract of employment are no less important.

(I)

Convention 87 of 1948: Freedom of Association and the Protection of the Right to Organize

The objective of this convention is to ensure workers' freedom to associate into organization of their own choosing. Pluralistic Industrial Relations cannot become a reality unless the workers have the freedom to join a trade union of their choice. The hallmark of industrial relations pluralist is bilateralism in the rule making process in the organization, that is joint determination of the terms of employment and conditions of work through collective bargaining. In addition, this convention stipulates that the trade union will be autonomous bodies with the right to draw up their own constitution and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. The public authorities are to refrain from any interference, which would restrict this right or impede the lawful exercise thereof. While article 5 of this convention recognizes the right to establish and join federation and confederations and these federations and confederations have the rights to affiliate with international organization of worker, article 4 stipulates that workers organizations shall not be liable to be dissolved or suspended by administrative authority.

In addition to the direct provisions of convention 87 of 1948, interpretation of this convention include the following issues concerned with freedom of association or protection of the workers' right to organize [2]:

- a. Seeking to provide for union security, this convention neither encourages or discourages union security arrangements like the closed shop or the union shop; it also remains neutral in providing check-off of union dues by the management;
- b. Freedom of association to workers to form and join trade unions of their choice may give rise to the negative consequence of multiplicity of unions in an undertaking and this is sought to be countered by providing for the employer's recognition of the sole bargaining agent for a bargaining unity;
- c. This convention recognizes the weakness of labour to find leaders among their ranks; but at the same time allowing outsiders like politicians, lawyers, journalist and self-serving individual is regarded as inimical to good labor management relations. While it does not favor a blanket restriction on outsiders, it also does not favor any qualification that trade union leaders, at the time of their election to have been engaged in the particular occupation or trade for more than year;
- d. This convention is not against unions' political affiliation or political activities. It is interesting to note that the Freedom of Association Committee of the ILO Governing Body has implicitly recognized that nothing would prevent unions in accordance with the will of their members from establishing relations with a political party or from other forms of legal political action in pursuance of the union's economic and social objectives. In fact, a general prohibition on political activities for unions would run counter the spirit of convention 87.
- e. Finally the freedom of association committee of the ILO Governing Body has also stressed the importance it attaches to good faith bargaining by both trade unions and management. This requirement will be dealt with in the section on collective bargaining in detail with reference to Malaysian experience.

Malaysian Experience

Convention 87 of the 1948 is basically addressed to the government of the member states because the requirement under this convention have to be translated into legislation by the national authority to ensure these basic workers' rights. [3]. It is needless to say that as in any other progressive countries, Malaysian Trade Union Act 1959 (T.U. Act) under section 21,22 and 24 guarantee unions immunity from criminal conspiracy and civil proceedings for damages consequent on the activities of trade union in contemplation or in furtherance in trade dispute.

Except for this positive provision to promote bilateralism in industrial relations, and freedom to join the registered union or not to join it, not only the statutory provision under the Malaysian Trade Union Act 1959 fall short of the freedom the convention envisages for workers but any claim that worker organization in Malaysia are autonomous bodies is a far cry from reality. In fact, since the Government of Malaysia finds traditional trade unionism as an obstacle to its developmental efforts, the control over worker organization in Malaysia is comprehensive in that extends to the internal affairs of unions besides regulating union-management relations.

Even cursory review of the statutory provisions of the Trade Unions Act 1959 would reveal that it contains extensive provision to control and regulate the unions over their name, time scope of its membership, its size, and time composition of its executives; in addition, the statutory provisions stipulate what should be the objects of the union, control the use and investment of union funds, prohibits its political activity and prescribe conditions for its affiliation to federations and consultative bodies abroad. [4A]

In advance countries trade union as autonomous bodies frame their own rules; but in Malaysia the Trade Union Act 1959 stipulates that (a) not only the trade unions should formulate rules on all matters included in the first schedule of the Act (b) but also the rules so formed must not contravene the specific statutory provisions governing these matters in the act itself. [5]

The Director General of Trade Union shall refuse to register a trade union if he is satisfied that the objects rules and constitution of the trade union conflict with any of the provision of the act of any regulation (section 38(1) of T.U Act 1959).

Trade Union Act 1959 is the Government's principal means of control over organized labour in Malaysia; and the epi center of this control is in the statutory requirement of compulsory registration of trade unions. An unregistered union is an unlawful body to be dissolved. Sweeping powers bestowed on he DGTU on register a new trade union of workmen and deregister an existing union provide the lever for him to exercise the control over its internal affairs. For example, the powers given to the Director General to refuse registration to anew union or deregister an existing union, if likely to be used for unlawful purposes is not only sweeping but in the absence of criteria determining whether a union likely to be used for unlawful purposes, it imposes on him "an improper duty of prophecy". Secondly, the power given to the Director General under section 12(2) of the Trade Union Act 1959 to prefer a new union existing one, if he is satisfied that would serve the interest of the workers is quite arbitrary since it should be the workers, not the director General of Trade Unions who should decide whether the union is in the workers interest or not.

It is interesting to note that while it is mandatory for the Director General to refuse registration on the stipulated grounds, it is only discretionary for him to deregister. This enables him to hold the threat of deregistration over the recalcitrant union without actually deregistering them. That is evident

from the fact that Director General is empowered to deregister a union on the grounds that it had contravened its own rules or objects or failed to comply with the statutory requirements under the Act. For example such grounds include (a) contravening section under 50 of the Trade Union Act 1959 which requires the union to file its annual returns by the 1st Oct of every year; (b) contravening its own rule by failing to hold general body meeting or elected union officers overstaying their terms of office; and (c) violating the provisions of the Act by undertaking illegal strikes.

If these requirements are enforced, great number of trade unions will have to be deregistered. For example, roughly 45 per cent of the unions in Malaysia fail to submit their annual accounts on time every year and this amounted to 206 trade unions out of the 510 in May 1998 (NST 1 Feb, 1999). The official attitude seems to be that it is better to have the defaulting unions subdued rather than deregistered.

Finally, it is to be noted that if the Director General is to cancel the certificate of registration given to a union on any one of the possible grounds, nothing can stop him from doing so. Of course under the law, the Director General is required to issue a show cause letter before canceling the registration, but section 15(4) of the Trade Union 1959 stipulates that the Director General may cancel the certificate of registration of a union (a) which has failed to show cause or (b) which having shown cause, has failed to satisfy him.

Instead of deregistering a union outright, the Director General may suspend a branch of a trade union under section 17 of the Trade Union Act if he is satisfied that it has contravened any provisions of the Act or its own rules. During the suspension, the branch union is virtually immobilized.

Similarly, under section 18 of the act the Minister for Human Resource with the concurrence of the Minister for Internal Security can suspend a union for a period of six months in the interest of public order or security in Malaysia.

Finally, the enormous powers conferred on the Director General of Trade Union to be exercised at his discretion is subject to appeal only to the minister whose decision is final and conclusive. Though the exercise of discretion by the executive authority is subject to the judicial review, it is difficult for the court to intervene when such discretion is conferred on it by using phrases like "is satisfied" or "in the opinion of" etc. when an authority is vested with such discretionary powers to be exercised according to its subjective satisfaction, the courts do not normally enquire into the merits of a discretionary action: when a competent authority has the power to act in prescribed manner when it is satisfied that given facts exist, or if in its opinion those facts exist, the opinion or satisfaction of that authority is usually accepted by courts as conclusive.

This brief review of the statutory provisions of the Malaysian Trade Union Act 1959 amply demonstrates that they are totally out of alignment with the labor standards under convention 87 on freedom of association. Specifically Trade Union Act Malaysia 1959 blatantly violates among others the following three articles of convention 87.

i. The public authorities shall refrain from any interference which would restrict the right or impede the lawful exercise thereof (article 3(2))

ii. Workers and employers organizations shall not be liable to be dissolved or suspended by administrative authorities and

iii. The law of the land shall not be such as to impair, the guarantees provided for in the convention.

Weakness of Malaysian Trade Union Movement

The weakness of the Malaysian Trade Union Movement was deliberately designed by the British Colonial Government to eradicate the subversive influence of the communists on the Malaysian Trade Union movement [6]. The government action against the communist trade union movement took the form of two amendments in 1948 to the basic trade union enactment of 1940: the existence of federation of general character was ended by the amendment which required the federations to be confirmed to trade unions catering for workers in similar trade, occupation or industries. The second amendment sought to drastically reduce the influence of outsiders who were using union for their own ends by requiring that trade union officials other than the secretary must have three years experience in the industry of their union.

It is of crucial importance to note that after Malaysia became independent, the Government of Malaysia, in consolidating the existing laws and regulations of trade unions not only retained these two amendments aforementioned but introduced a new definition of trade union: it defined a trade union as any association or combination of workmen ...within any particular trade occupation or industry within similar trades, occupation or industries. (section 2 of T. U Act). It should be emphasized that the interpretation of what should be considered as 'similar trades' occupation or industries for the purposes of the constitution of trade union comes within the competence of the Registrar of trade unions and in the final resort, the minister of labor. (Section 2(2) of the T.U Act.)

This provision limiting trade union membership to workers in similar trades etc has been responsible for small trade unions and the weak trade unions movement in Malaysia. It effectively preempted the emergence of large powerful national unions envisaged by the Malaysian Trade Union Congress (MTUC) and prevent the MTUC from being recognized as a federation of trade unions under the Trade Union Act 1959. [7]

The Director General of Trade Unions in different times refused to accept that food and drink industries or rail and road transport industries are similar. The persistence of the government in not allowing the national union of electrical workers to organize the electronic workers on the ground that they are not workers in the similar industries illustrates the government policy not to intimidate the electronic multinationals by allowing this powerful union to make inroads into the electronic industry.

The government frankly explained to the ILO that the national union of electrical workers with around 45, 000 workers, if allowed to organize the million electronic workers would have daunted the electronic industry and would have frightened foreign investors to leave the country creating the unemployment problem in its wake. The saga of organizing the electronic workers in Malaysia is well known and under the pressure of the ILO all that these workers could gain was to right to organize themselves into in-house unions in electronic establishment, which are still reluctant in accepting even this form of unionization for their workers. [8]

This is sad reflection on the efficacy of the ILO machinery to enforce the labour standards ratified by the member states. Arne Wangel, for example observed that 'ILO intervention did not achieve much except forcing the Malaysia government to enter into dialogue on the reason behind their industrial relation policy' [8]

While convention 87 relates to relations between the state and the parties to labour management relations, convention 98 addresses directly to the bilateral relationship between labour and management specifically in satisfying workers right. Finally when the Malaysian government looked East to Japan inspiration, it was enamored of reorganizing the Trade Union movement into enterprises unions, (called in-house unions in Malaysia), if necessary by fragmenting the national unions into in house-union. [9]

The Registrar of Trade Union in his enthusiasm in implementing this labour policy registered a in-house union for **Maybank** officers these officers belonged to the National Union of Bank Officers with affiliation from 16 commercial banks in Peninsular Malaysia. As stated earlier, under the law, the Registrar presumed he had the power to register a second union where one existed earlier, if in his opinion, it is in the interest of the workers. But in deciding whether it is in the interest of workers, the law requires him to consider the interest of the workers in the whole occupation of bank not the officers of a single establishment. When reviewing, court quashed the decision of the Registrar in certiorari proceedings,[10] the government without losing much time amended the definition of trade union to include workers not only in the same trade, occupation or industry but also in the same establishment.

The definition of Trade Union as it stands today is as follows: Trade union means any association or combination of workmen within any particular establishment, trade, occupation or industry within similar trades, occupation or industries. Though the government desisted from fragmenting any other national union, this amendment the definition of a trade union is an enabling provision to break up the strong national unions, and hangs as a democles sword on the national unions in Malaysia.

To sum up, we may sad that Malaysian trade union movement is not strong. it has been so designed is evident from the fact that only 10 unions out of 517 unions have more than 10,000 workers. In fact, the top five with the largest membership do not belong to the manufacturing sector where the multinationals are involved (WU Min Aun, 1995).

The definition of trade union has not only denied the MTUC the status of a federation of trade unions under the Trade Union Act 1959 but has effectively preempted the emergence of large powerful workers organizations.

Finally the introduction of the word, "*establishment*" in the definition of Trade Union in 1989 amendment to the Trade Union Act 1959 is an enabling provision to break up national unions by organizing in-house unions in establishments. Till 1980 the law stipulated that trade union officials must have minimum of three years experience in the industry of their union. it is of interest to note that the Government through an amendment Section 29 (1b) to the Trade Union Act 1959 reduced the minimum period from three to one year to speed up the process in-house formation in new enterprise, not to conform to the labour standard.

(II)

Convention 98 of 1949: The Right to Organize and Collective Bargaining

The Right To Organize

While convention 87 relates t relations between the state and the parties to labour management relations, convention 98 addresses directly to the bilateral relationship between labour and management specifically in satisfying workers right. In safe guarding workers' right to organize themselves in to trade union, the international labour standards seek to protect the workers against unfair labour practices and victimization for trade union activity and to ensure the independence of the union from

employers influence, control and dominance [11]. It redounds to the credit of the Malaysian industrial relations system that its laws and practice in so far relate to the right to organize are in perfect harmony with the International Labour Code.

Section 8 of the Employment Act 1955 and the section 5 of the Industrial Relations Act 1967 prescribe the inclusion in the individual worker's contract employment any condition restricting the rights of workman to organize, and join a union and participate in its lawful activities; section 5 and 7 of the Industrial Relation act 1967 list Unfair Labour Practices such as intimidation, dismissal or threat of dismissal for joining a trade union or becoming an office bearer, discrimination against a union member in regard to employment, promotion, condition of employment and working conditions.

Finally section 4 of the Industrial Relations Act 1967 seeks to prohibit formation of 'company union' by stipulating against employer interference in the establishment, administration or functioning of a union including extending financial support with a view to controlling or influence the trade union of workmen.

Victimization as an unfair labour practices is seriously viewed in Malaysia [12]. Victimization may be an action on the part of the employer prejudicial to the workmen on some pretext other than the real reason. Here, we are concerned with victimization for trade union activities. Under the Malaysian law, while the employer can refuse to employ a person and to promote or suspend, transfer, lay-off or dismiss a workman for a proper cause, if he does any of these because of the worker's lawful trade union activities, he is said to be victimizing the workers. (s 5(2) of I.R. Act)

Victimization cases principally under section 4,5 and 7 of the Act are handled through referral to the industrial court under section 8 of the Act. Termination of service of all kinds including dismissal or retrenchment under the guise of victimization come under section 20 of the Act. A proven act of victimization is a punishable offence, and the industrial court is empowered not only to order reinstatement with back wages but also to enforce its order by treating non-compliance with its order as a further offence calling for more severe punishment in terms of a fine or a prison term or both. (Section 59 of IR Act).

The right of Collective Bargaining

Collective bargaining is generally reorganized as the keystone of organized labour management relations. Convention no 98 of 1949 on the right to organize and collective bargaining closely followed the historical Philadelphia Declaration calling for the promotion of programs which will achieve the '*effective recognition of the right to collective bargaining*'. Convention no 98 it self calls for measures appropriate to national conditions to be taken ... *to encourage and promote the full development and utilization of voluntary negotiation between employer and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.*

A cornerstone of collective bargaining is the obligation on both the parties to bargain in good faith or bargain with sincere desire to reach an agreement, the freedom of association committee of the ILO governing body has stressed the importance it attaches to good faith bargaining by both trade unions and management but stopped short of prescribing behavior standards indicative of bad faith bargaining in order to enforce this obligation. [14]

The obligation on the part of the parties to collective bargaining to negotiate with a sincere

desire to reach an agreement is implied (though not explicitly stated) in the in the definition of ‘collective bargaining’ under section 2 of the Industrial Relation Act 1967, where the Act defines it as “negotiating with a view to the conclusion of a collective agreement”.

Malaysian law does not provide for any special machinery like the National Labour Relations Board in America (NLRB is an independent tripartite authority) either to spell out behaviors indicative of bad faith bargaining or to enforce the statutory obligation of good faith bargaining between the parties. [15]

However the Industrial Relations Act 1967 sought to prevent two of the NLRB’s bad faith behaviors under trade dispute;

i. Refuse by the employer to respond to the invitation by the union to bargain within 14 days leads to a trade dispute under section 13(4) of the Act.

ii. Refusal to commence bargaining within 30 days after employer’s acceptance of union’s invitation also gives rise to a trade dispute under section 13(b) of the Act.

There was no need to spell out other bad faith behaviors such as failure of the employer to send for bargaining session person with authority as required by the labour standards [16] or parties engaging in delaying or dilatory tactics since the Industrial Relation Act 1967 provides for an party to report to the Director General of Industrial Relations of failure to reach an agreement. When conciliation by the Director General fails on its notification, the Minister may refer the Dispute to the industrial court for a binding award. (vide section 18 and 26 or the IR Act)

In the context of effective conciliation and arbitration provisions in the Act, the pressure on the parties to bargain in good faith is evident because in the absence of it, ultimately the industrial court would impose its own award on the parties. Hence under the Malaysian law there is no need for any specialized machinery to enforce the obligation to bargain in good faith.

Scope of Collective Bargaining

The subject matter of collective bargaining under industrial relations pluralism or bilateral relationship between union and management is essentially a compromise between the domain of collective bargaining and that of management prerogatives.

The paradigm shift in industrial relations from unitarism to bilateralism in America has witnessed a trend toward a gradual erosion of management prerogatives. Generally speaking, the scope and ambit of the rights of prerogatives are dynamic and in state of permanent flux for it depends on the relative bargaining power and the relative strength of the parties.

The international labour standards (the collective bargaining convention 154 1981 [17] indicated broadly the bargainable issues or negotiable items but desisted from spelling out non-negotiable issues. Specifically, this convention calls for negotiations to: determining working conditions and terms of employment; regulate relation between employers and workers; and regulate relations employers or their organizations and workers’ organizations. Thus international standards clearly include ‘relational matters’ as well as ‘economic issues’ as appropriate for bargaining.

Such relationship matters could encompass agreement on trade union representation at the work place, grievances and disputes adjustment procedures (including no strike and no Lock-Out provisions), disciplinary rules, redundancy procedures, and a host of other matters limited only by the imagination and interest of unions and management.

Under the Malaysian Industrial Relation Law, the scope of collective bargaining has been included in the definition of the collective agreement under section 2 of Industrial relations act 1967: “*it is in agreement... relating to the terms and conditions of employment and work of workmen or concerning relations between such parties*”.

It is needless to say that this wide ranging definition is fully reflective of the spirit of International Labour Standards in that could easily accommodate;

- i. Bargaining demands relating to terms of employment such as wages, hours of work, fringes and benefits
- ii. Bargaining demands relating to the conditions of works including matters of its safety and physical comfort; and
- iii. Relationship between the parties regulating matters such as discipline, lay-off and retrenchment.

However the wide scope of collective bargaining was curtailed by the ‘management prerogative clause’ viz section 13(3) introduced in the Industrial Relation Act in November 1971:

- i. This management prerogative clause specifically precluded a trade union from raising any bargaining demand concerning the recruitment, transfer or promotion of workmen, his retrenchment by reason of redundancy or reorganization, his dismissal and his reinstatement or allocating of his duties and tasks.

In other words, this clause is restrictive because it removes ‘personnel matters’ from the scope of collective bargaining, even though all these matters fall within the meaning of the statutory definition of collective bargaining.

- ii. While section 13(3) of the Act specifically prohibits a union from raising any demands on these personnel matters, nothing in that section prevents an employer from negotiating on prohibited personnel matters in the interest of harmonious industrial relations. According to Wi Min Aun , “there are instances when such negotiations have taken place to maintain goodwill and industrial relation harmony”

- iii. Moreover, the prerogatives given to the management under section 13(3) of the Act are not absolute but very much qualified. For example, while dismissal of a workman due to misconduct is a management prerogative, if it is not for just cause or excuse, the union or workman may raise a dispute under section 20 of the Act. Similarly while retrenching workmen is its right, if it is not due to redundancy or reorganization, a dispute can be effectively raised under the Malaysian law governing management prerogatives.

Nevertheless, it should be noted in passing that in the opinion of K.T Raja [19] Settlement of Negotiation Disputes

Collective bargaining disputes may arise from two sources: one (1) when one party may refuse

to bargain on a demand made by the other party, if it questions whether that particularly demand falls within the meaning of the statutory definition of collective bargaining. Second (2) since obligation to bargain in good faith does not imply a compelling necessity for the parties to reach an agreement, even with good faith or obvious sincerity to reach an agreement, negotiation could be deadlocked. Both parties bargaining to an impasse is quite common on interest disputes like wages and benefits, which affect the interest of a large number of workmen.

The settlement of the aforementioned negotiation dispute is central to the Industrial relation Act 1967, and the standards process involves conciliation by the government machinery and arbitration by the quasi-judicial authority. Specifically arbitration in Malaysia is sad to be voluntary when both the parties jointly request the Minister to refer the dispute to the industrial court, failing which compulsory arbitration may ensure at the discretion of the Minister when he refers the dispute to the industrial court under section 26(3) of the Act.

Industrial action by any party may not be the recourse to force a settlement since it is illegal when the dispute is referred to the industrial court and parties are informed of it.

Contract Administration

Contract administration under the industrial relation law refers to enforcement of the collective agreement. In implementing the contract two types of disputes may arise: (a) interpretation disputes and (b) breach of contract disputes.

Interpretation disputes: At the time of writing up collective agreement the union and the management may have been confident that they both agreed on the management of a particular clause of the agreement. However when it is time to implement this part of the agreement, it may become evident that the parties do not agree on what should be the correct interpretation. [20]

The collective bargaining recommendation no 163 of 1981 as well as recommendation no 91 of 1951 of ILO both deal with disputes arising out of the application or interpretation of collective agreement. The latter instrument provides that such disputes “should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations”. [21]

This is another domain of union-management relations where the procedures for settlement of interpretation disputes under the Malaysian law are in complete conformity with the requirements of the International Labor Standards. Specifically it is mandatory under section 14(2) (d) of the Industrial Relation Act 1967 that the parties incorporate into the collective agreement a procedure to deal with both interpretation and implementation disputes. Furthermore, section 33 of the Industrial Relations Act 1967 includes all the statutory provisions governing settlement of interpretation disputes.

In other words Malaysia industrial relation system provides the parties to collective agreement to settle interpretation disputes either through voluntary arbitration by a third person of their mutual choice under section 14 of the Act or through settlement of the dispute in the industrial court under section 33 of the Act.

Since the parties are not quite ready to resort to voluntary arbitration to settle these categories of disputes. Typically collective agreement fulfill this legal requirement by stating “*any dispute relating*

to interpretation and implementation of this agreement shall, unless settled by negotiation between the employer and the union, be referred to the industrial court for decision”

Under section 33(1) of the Industrial Relations Act 1967 interpretation disputes may be referred to the industrial court either by the Minister of Human Resource or any party bound by the agreement or award, and in settling interpretation disputes, the court is empowered under section 33(2) to vary the terms of the agreement solely removing any ambiguity or uncertainty.

Sometimes section 33(5) creates problem since for interpretation the industrial court; according to this section should have the same quorum as the one which one made the original award or a court specifically constituted under section 22 of the Act. In one case (22) the president of the court which gave the original award was no more available, and therefore the same quorum could not be ensured; nor a court could be specifically constituted under section 22 related to trade dispute, not interpretation dispute. [23]. However the High Court while agreeing that the industrial court should be specifically constituted for the interpretation, held that section 52(2) of the Act states that the provisions of the act relating to the trade dispute shall apply to any matter referred to or brought to the notice of the industrial court under the Act an application for interpretation of an award under section 33(1) of the Act is a matter referred to or brought to the notice of the industrial court under the Act. The conclusion is that specifically constituting a court under section 22 of the Act to interpret an award is valid even though interpretation dispute is not a trade dispute. This eminently illustrates how interpretation of a statute by the superior court could enable the resolution of a seemingly irresolvable issue and establish an industrial relations practice overcoming the inadequacy of a statutory provision of the Act.

Finally as if to add grace to beauty section 33(3) of the act states that in interpreting the agreement or the award the industrial court must afford the parties reasonable opportunity of being heard. In other words, the industrial court observing the principle of natural justice in discharging its interpretative functions is mandatory under his section of the Act.

Implementation Issues

It is well established that no legally enforceable contract results from the collective agreement. In common law the collective agreement is not a legal contract of service binding the individual workman and his employer because it is an agreement between the union and the employer. The mutual obligation between employer and workman always results from and individual contract of employment.

Whereas under the general law of contract the terms of a collective agreement do not automatically become part of the individual contract of employment, a workman would however be bound by such terms if it can be shown that they are incorporated into an individual contract by as statutory provision or express incorporation or implied incorporation.

Section 17(2) of the Industrial Relations Act 1967 makes the collective agreement meet the requirement of the general law of contract [24]. Specifically section 17(2) accordingly stipulates that the terms of the collective agreement are the implied terms contract between the workmen and his employer bound by the agreement, and the rates of wages to be paid and condition of employment to be observed under the individual employment contracts shall be accordance with the collective agreement. In sum, a collective agreement does not replace an individual contract of employment but only regulates it.

The significance of section 17(2) of the Act was made clear by the industrial court.[25]. The court observed that section 17 of the Industrial Relations Act 1967 is a mandatory section. It follows, therefore that if any term in an individual contract of employment is in consistence with the terms of the collective agreement, the terms of the collective agreement will prevail. However, the terms of a collective agreement will not prevail if they are less favorable to the employee than the terms prescribed by the employment act 1955. Again if the collective agreement is silence in respect of certain terms, then the provision of the employment act will prevail. This means that the terms and conditions of employment of workman under the Malaysian law shall be combination of (a) the individual contract of employment, (b) the collective agreement and (c) the employment act 1955. there is no need of any further guarantee to protect the term of employment and conditions of work of a workman in Malaysia. [26]

Be that as it may, by virtue of the sub section 17(1), collective agreement taken cognizance of by the industrial court shall be designed to be an award of the court. As such any breach of the collective agreement can be enforced as a violation of the award of the industrial court.

Complain of non-compliance can be made under section 56 the Act direct to the industrial court by the union or any person (workman or employer) bound by the contract. Non-compliance with the award or agreement is a punishable offence; conviction, the guilty party is liable to a fine of RM 2,000 or prison term of year or both, and a further fine of RM 500 for every day during which such offence continues.

It is needless to emphasize that compliance with the collective agreement or award is crucial for healthy industrial relations. However, salutary statutory provisions notwithstanding, there are many complaints of breach of contract by the employers. To put differently, enforcement of contract when there is non-compliance is difficult even when the industrial court orders compliance and non-compliance is a punishable offence. It is because punishment can follow only after conviction; but conviction follows prosecution by the office the Attorney General. The Attorney General cannot prosecute unless the police investigation gathers sufficient evidence of non-compliance. The Attorney General has no power over the police Department. Only on receipt of the Police Department the A.G.S office could prosecute the employer but that too only when it evaluates the evidence to be adequate to take action.

This difficulty in enforcing compliance was sought to overcome by the 1989 amendment to this section 56 of the act, which allowed claimants register the industrial court's awards as judgments of the High Court or Sessions Court, thus allowing better redress to the claimant since industrial court orders become enforceable as session's or High Court order. [27]

Nevertheless, Zainal Rampak, the MTUC president felt that it would be better to give punitive powers to the industrial court by way of fines and jail terms to make people comply, rather than taking it to the session's or High Court, which means the aggrieved party has to find the financial and legal means to get justice done [28]

It is to be noted that Zainal's proposal is based on Singapore practice where the industrial court has the same power to punish, as contempt of court, a failure to comply with an order of the court as possessed by the High Court.[29]. The fines and penalties for contempt of court are much heavier than those provided for other offences under the Act. It is the suggestion of this author that if the Government has some qualms about bestowing this punitive power on the industrial court. It could consider conferring it on the industrial appellate court when it materializes. [30]

Some argue that non-compliance of industrial court awards is not a serious problem: up to October 1987 the industrial court handed down 3206 judgments and of this number between 15 and 20 awards had yet to be implemented by the parties involved. In percentage terms between this is between 0.45 to 0.6 per cent of the total number of awards handed down by the industrial court.[31]

This view did not find favor with the Minister of Labor for he warned that the consequences of non-compliance would reflect on the credibility of the industrial court. The Supreme court also stated that “one of the higher interests of law is surely that an order of the court, and this includes the awards of the industrial court, must be obeyed otherwise, the system of justice will be thrown helter-skelter with grave consequences, leading to erosion of public confidence in it”[32].

Reference

1. The introduction note on ILO is taken from Alan Gladstone, “The Managers Guide to International Labor Standards” Management Development Series No 23, International Labour Office, Geneva, 1986.
2. Ibid Chapter 3. pp 14-20
3. Ibid Chapter 4 p21
4. Rudner, Martin, “Malaysian Labour in Transition: Labour Policy and Trade Unionism 1953-63,” Modern Asian Studies, 1978. 7 (1) pp 21-45
- 4 (a). A detailed account of all these constraints on Trade Unions can be found in Anantaraman, V. *Supra* n 5 pp. 62-67

However a word about trade union’s political activity is called for:

While it is the constitutional right of every citizen, including a trade union leader, to contest elections to the national legislature under the agis of any political party, it is against law for him to occupy position in any governing or policy-making body of any political party. Zainal Rampak’s action in resigning his party position in Semangat 46 in order to retain his position as the president o MTUC illustrates the enforcement of this stringent provision against the political activity of any union leader.

5. V. Anantaraman, *Malaysia Industrial Relations: Law and Practice*, Penerbit UPM 1999 p 65-66 For example while the first schedule requires union constitution to include the objects of the union, these objects formulated by the union should conform to the objects of the union spelt under section 2 of the Trade Union Act. Failure to do so would entail refusal to register the union by the Director General of Trade Unions.

Secondly, while the first schedule requires the union rules to cover election of members of the union executive, they must conform to the eligibility criteria for such membership stipulated under section 28 of the Act.

Thirdly, while the first schedule lists matters on which decisions must not be taken without a secret ballot, section 40 of the Act again incorporates the list of such matters. Furthermore while the first schedule requires union rules to cover the procedure for the conduct of secret ballot, section 40 of the Act contains elaborate provisions to ensure its proper conduct.

Such a comprehensive control of union rules y statutory provisions of the legislation governing trade unions is quite extraordinary and make mockery of ILO requirement of union autonomy.

6. V. Anantaraman, *Supra* n 5 pp 3-5

In 1947 the communist dominated ‘general labour union’ established in Singapore in October, 1945 was renamed the Pan Malaysia Federation of Trade Unions (PMFTU). At that time, it was estimated that of the 289 unions with a total membership of nearly 200,000, 117 unions with about half the total

membership were under communist control effectively exercised through the PMFTU.

7. It is well known that the MTUC could be registered only under the Societies Act and the long range objective of the MTUC to eliminate multiplicity of unions and held unions to group themselves into 14 National Industrial Unions covering such section as plantation, mining road transport, railways, factories, commercial workers, government services, professions etc could not be realized because of this 'similarity' provision of the Act.

8. V. Anantaraman, Supra n. 5

vide section on "The Issue of the Electronic Workers" pp. 13-14; 21-23; 221

9. Grace, Elizabeth. K.P. "Looking For a Way out by Look East Policy", *Kajian Malaysia*, 8(2) (1990) p.8

10. *Persatuan Pegawai-Pegawai Bank Semenanjung, Malaysia v Minister of Labour Malaysia*, 91989) 1 MLJ 30

11. Supra n 1, Chapter 4 pp. 20-23

12. *K.F.C Technical Service Sdn. Bhd. v Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan*. Award no. 83 / 1989 and *KFC Technical Services Sdn. Bhd. v The Industrial Court Of Malaysia*.

Regardless of whether or not the industrial courts are very much alive to deal with alleged victimization, the reviewing courts have not spared even the multinationals for victimization o workmen. For example, he High Court declared the closure of KFC Technical Services Sdn. Bhd. as real as Mala Fide and therefore its retrenchment of 19 trade union members unlawful and upheld the decision of the industrial court decision to order punitive compensation of two months salary for each completed year of service since reinstatement (after closure) could not be ordered.

The second celebrated victimization case is that *Harris Solid State (M) Sdn. Bhd. v Bruno Gentil & 21 others* (1996) 3 MLJ 489. In this case, the industrial court had dismissed the claims of the 21 members of the union that they had been victimized for legitimate trade union activity. The Court of Appeal considered this case as case of an employer who had chosen to dismiss his workmen purely because of their trade union activity; in fact, it stated that there could be no clearer case of victimization and unfair labour practice.

In reviewing the industrial court decision the court of appeal went into the merits of the case quashed the decision of the industrial court, substituted its judgment to that of the industrial court and moulded the consequential relief without sending the case back to the industrial court. In the circumstances of the case, the Court of Appeal did not consider compensation as the proper remedy, 'for otherwise', observed the judge, '*employers will be encouraged to terminate the service of their unionized workmen, confident in the expectation that all they have to face is an award of compensation – a small price to pay for being rid of trade unionist*'.

13. Supra N. 1 p.7

In the 1994 the International Labour Conference met in Philadelphia and adopted the "Declaration of Philadelphia and incorporated it in the ILO constitution. The declaration laid down two basis principle: First that it must be the central aim of national and international policy to achieve conditions in which all men and women can pursue their material well being and their spiritual development in freedom and dignity, economic security, and equal opportunity; and second that all national and international efforts should be judged in the light of whether or not they help to further this aim. Declaration can be said to have reformulated the ILO's original mandate in more comprehensive and positive terms. [Its original objective was to gain international agreement for regulations of labour conditions so that employers in all countries would face the same cost obligations by establishing minimum living and working conditions through out the world].

14. Supra P.

15. V. Anantaraman, Supra 5 pp. 107-108

For the NLRA indices or behaviors as reflecting absence of good faith, refer to section on bad faith bargaining disputes on p. 107-108

16. Supra n. 1 p 29

Another point particular importance stressed by the collective bargaining recommendation 163 of 1981 is that bargaining representing both the parties should be those with appropriate status and responsibility so as to be able to commit their sides.

17. Supra n. 1 pp. 28-29

18. Wu Min Aun, "The Industrial Relations Law of Malaysia" Longman, Kuala Lumpur 1982 p 70

19. K. T Raja "Industrial Relations And management Rights," Malaysian Management Review, 13(2) 1978 pp 22- 28

20. Aminuddin Merilyn, "Malaysian Industrial Relations" Mc Graw Hill, Singapore, 1990

This description of an interpretation disputes is not only succinct but the case illustration given by this author is also perfect. Here illustration is a Malaysian case,"

[Award no 223 of 1998].

In this case, the disputed clause of the collective agreement stated that 'with effect from 1st March 1998, all the employees within time scope of the award shall be given a pay rise of 5 % to their last drawn salary as at 28th Feb 1988 rounded off to the nearest higher dollar'. The union argued that every employee should get the 5 % pay rise, including those whose salary was on the maximum of their scale. The company disagreed with this viewpoint. The industrial court in this case upheld the management viewpoint by stating"

1. Supra n. 1 p 35

2. V. Anantaraman, Supra n 5 pp 201-202

In the Federal Hotel Sdn. Bhd. v National Union of Bar and Restaurant Workers (1983) 1 MLJ 178, Judge Abdoolcader ruled that when the requirements under section 33(5) are not satisfied, the industrial court has no power to assume jurisdiction under section 33 on the grounds that it was inappropriately constituted.

However the High Court in Association Of Bar Offices, Peninsular Malaysia v Malayan Commercial Banks Association (1992) 1 MLJ 240 resolved the issue.

1. Section 22(1) to the Industrial Relations Act 1967 stipulates that " For the purpose dealing with any trade dispute referred to it, the court... shall be constituted of the President and two members selected by the President, one from each of the panels specified in section 2(1).

2. Wu Min Aun Supra n. 18 p 72

3. Award no 215 of 1984

4. Anantaraman, V. Supra n. 5 p 99

5. Section 56(4) of the Industrial Relations Act 1967. Also see Anantaraman, V. Supra n. 5 pp 148-150

6. News Straits Times, 15 December 1987.

7. V. Anantaraman, Singapore Industrial Relations System, McGraw Hill, Singapore 1990 pp 142-243

8. V. Anantaraman, Supra n. 5 p 158

9. News Straits Times, 4 December 1987

10. Sunday Times, 20 September 1987