THE ROLE OF THE INDUSTRIAL COURT: PRESENT AND FUTURE

by


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Introduction

The Industrial Court constituted under Part VII of the Industrial Relations Act 1967 (the Act) is the adjudicatory body in the statutory regime of institutions, processes and regulations set up under the Act. In its preamble, the Act declares its object as "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 disputes or differences arising from their relationship and generally to deal with trade disputes and matters arising therefrom". It differs from the Industrial Court established under the Industrial Court Ordinance 1948, one of its two predecessors, in that the latter provided the mechanism for voluntary arbitration of industrial disputes. Its true precursor is the Industrial Arbitration Tribunal established by the Essential (Trade Disputes in Essential Services) Regulation, 1965 which provided for compulsory arbitration. In this paper the role of the Industrial Court will be examined by reference to its functions, powers and duties.

Function And Jurisdiction

The Industrial Court is a special court established by the Act to adjudicate upon disputes between employers and/or their associations on the one part and employees and/or their trade unions on the other which have not otherwise been resolved by prior processes of resolution and settlement involving negotiations and conciliation.

Parliament has devised a system of prevention and settlement of industrial disputes which culminates with adjudication before the Industrial Court. Where all processes prescribed by the Act have failed to bring the parties to an amicable settlement and the prospect of industrial action becomes real, the court is entrusted with the exclusive jurisdiction to determine the dispute and make an award binding upon the disputing parties. Adjudication by the Industrial Court is thus the final step in the statutory mechanisms for the resolution and settlement of industrial disputes.
The critical significance of the adjudicatory process in the pursuit of industrial harmony in the statutory scheme for resolution and settlement of industrial disputes is well-spelt out in Western India Automobile Association v. The Industrial Tribunal Bombay AIR [1949] FC 111, wherein at p. 115 Mahajan J, said:

We shall next examine the Act, to determine its scope. The Act is stated in the preamble to be one providing for the investigation and settlement of industrial disputes. Any industrial dispute as defined by the Act may be reported to Government who may take such steps as seem to it expedient for promoting conciliation or settlement. It may refer it to an Industrial Court for advice or it may refer it to an Industrial Tribunal for adjudication. The legislation substitutes for free bargaining between the parties a binding award by an impartial tribunal. Now, in many cases an industrial dispute starts with the making of number of demands by workmen. If the demands are not acceptable to the employer - and that is what often happens, - it results in a dismissal of the leaders and eventually in a strike. No machinery for reconciliation and settlement of such disputes can be considered effective unless it provides within its scope a solution for cases of employees who are dismissed in such conditions and who are usually the first victims in an industrial dispute.

Industrial adjudication in this regard represents the legislative authority’s prescription of the desired mode and forum for parties locked in an industrial disputes to settle their differences. It is the preferred alternative to industrial action, whether by means of strikes or lock-outs, which can disrupt the industrial peace and harmony prevailing in the country. In this regard, the proscription of industrial action by either party upon the reference of a trade dispute to the court adds a powerful disincentive to such action and plays a preventive role in ensuring industrial peace and harmony in society.

The necessity for creating a special court for industrial adjudication which has judicial functions, powers, culture and ethos distinct from the regular courts of law is seen in the succinct words of Mahesh Chandra in his book Industrial Jurisprudence (at p. 47) as follows:

These tribunals not only are not bound by the contracts of the parties, but also are not restricted by the ordinary law of master and servant, because if they were to be so bound and restricted, there could be no point or purpose in creating such separate tribunals and resorting to a different forum. It is to enable the workers to free themselves from contracts and obligations which were unfair and inequitable to them that the concept of social justice has been devised and new forums have been founded. These new forums have to do justice unrestricted by the contract between the parties or the law of master and servant and unhampered by purely technical and legalistic considerations which are apt to lead to rigidity or inflexibility.

**Adjudicatory Function**

The Industrial Court performs an essentially adjudicatory function in the resolution
Parliament has created three separate and distinct powers in respect of the same subject-matter and conferred each of them upon separate authorities. First, there is the conciliatory power vested in the Director-General whose sole function is to mediate and attempt to settle disputes as early as possible. It is no part of his function to ascertain the law or the facts or to make any determination upon either. If his attempts to reconcile the parties fails he merely notifies the Minister of this fact. See, Minister of Labour and Manpower & Anor v. Wix Corp. South East Asia Sdn Bhd [1980] 2 MLJ 248, 250. If it is found in any case to have done more than what the law permits, his action will be liable to be quashed on the ground that it is *ultra vires* the Act.

Second, there is the power vested in the Minister to refer representations made under s. 20(1). It is a power he must, by reason of the combined operation of the provisions of Arts. 5(1) and 8(1) of the Federal Constitution, exercise fairly.

Third, there is the power to adjudicate upon the same representations vested in the Industrial Court which, by the terms of the Act, is enjoined to act, *inter alia*, according to equity and good conscience when making its award.

The way in which the Act is constructed makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The two precedent powers, namely, the Director-General and the Minister cannot therefore assume a function expressly reserved to the third. It follows that, *prima facie*, considerations that are irrelevant to the Industrial Court’s decision-making process cannot be, and are not, relevant considerations *vis-a-vis* the referring authority.


> It exercises a quasi-judicial function. It gives a full reasoned judgment in the nature of an award (s. 30). Its functions comprise an investigation of the facts, an analysis of the facts, findings of facts, and lastly, the application of the law to those findings.

**Trade Disputes And Matters Within The Court’s Jurisdiction**

The general statement of the scope of the dominant function of the court is contained in s. 26 of the Act, i.e. to determine a trade dispute referred to it by the Minister of Human Resources. A trade dispute is defined by s. 2 of the Act as "any dispute between an employer and his workman which is connected with his employment or non employment or the terms of employment or the condition of work of such
workmen.” The court acquires jurisdiction over such disputes only after they have been referred to it for settlement by the Minister. The Minister may only refer a trade dispute to the Industrial Court either on the joint request in writing of the employer or an employers’ union and employees’ union who are parties to the dispute; or his own motion, if he is satisfied that it is expedient so to do.

The Industrial Court may also be called upon to adjudicate upon complaints of contravention of the protective rights of trade union and their members and of employers correlative duties and responsibilities. Breaches or contravention of these rights and duties may be referred to the court under s. 8 of the Act for settlement by the Minister of Human Resources pursuant to a notification from the Director-General for Industrial Relations that the same has not been resolved by his department.

The bulk of the Industrial Court’s case load today consists of representations of unjust dismissals made by a workman under s. 20 of the Act. These are generally no longer categorised as trade disputes under s. 26. Nevertheless, the same prior process of representations to the Director-General of Industrial Relations, conciliation proceedings followed by a notification to the Minister from the Director-General for Industrial Relations that the representation cannot be resolved by his department is prescribed.

The High Court determines any challenge to the validity of a dismissal or termination of a civil servant, i.e. a member of any of the public services or an employee of a statutory body. The scope of the inquiry of the High Court is the lawfulness of the dismissal or termination, i.e. whether there has been compliance with Art. 135 of the Federal Constitution and the general orders. The remedies sought by an aggrieved employee is a declaration that a dismissal is invalid and null and void in which case the employee is deemed to be still in the civil service and has to be reinstated.

The Industrial Court is, however, exclusively vested with the jurisdiction to decide upon complaints of dismissal which are alleged to be without just cause or excuse. The remedies which the court may award are an order for the reinstatement of an employee and/or for the payment of monetary compensation.

The most common form of trade disputes which are referred to the court consist of the failure of unions and employees to arrive at a mutually agreed collective agreement. It is here that the specialist function of the Industrial Court is particularly important and called upon. Complex issues as to the categories of workers and jobs covered within the scope of the Collective Agreement and disputes as to its contents, i.e. the terms and conditions of employment, in particular the rate of salary increases have to be adjudicated by the court taking into consideration the need to balance the interests of the parties, the impact on the industry and the economy of the country.

Where there is agreement the court may, pursuant to s. 16 of the Act take cognisance of, i.e. approve collective agreements deposited with it by the parties thereto. Such agreements, once taken cognisance of or approved by the court becomes not only binding on those parties but also are deemed to be awards of the court under s. 17 of the Act.
Under s. 33 of the Act the court may, upon the reference of the Minister, or at the request of any party bound by an award or agreement of the court render an interpretation of the same. Under s. 56 of the Act the court may entertain complaints alleging non-compliance with approved agreements or past awards, lodged by any person bound by the agreement or the award in question.

**Jurisdiction**

Unlike ordinary courts of law parties to a trade dispute cannot directly invoke the jurisdiction of the court to adjudicate upon their differences and grievances. The court derives its jurisdiction from the reference of the dispute by the Minister charged with the responsibility for human resources. The reference serves as the vehicle to carry the dispute into the court for a final and conclusive award by the process of adjudication after prior efforts at negotiation and conciliation have failed to resolve the same.

In *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115, Chang Min Tat FJ held:

> Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for mandamus.

Unless the matter referred to the court is beyond the power of the Minister to refer, the court is duty-bound to proceed to adjudicate upon the dispute. The court cannot decline jurisdiction in the absence of any jurisdictional defects in the reference. In *Kesatuan Pekerja-pekerja Kenderaan Sri Jaya v. The Industrial Court & Ors.* [1970] 1 MLJ 78, Suffian FJ said:

> When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so. The Scheme of the Act read as a whole is that once a dispute of this nature has been referred by the Minister to the Industrial Court, the court is at once invested with jurisdiction and is obliged to decide one way or another. That this is so is clear from s. 27 and s. 9. (Emphasis supplied).

The scope of the inquiry undertaken by the court must necessarily be determined by the reference of the Minister. In *Hochtief Gammon v. Industrial Tribunal* AIR [1964] LC 1746, a case which was cited with approval in *Wong Yuen Hock v. Sykt. Hong Leong Assurance Sdn. Bhd.* [1995] 3 CLJ 344; [1995] 2 MLJ 753 Gajendragadkar CJ speaking in the Supreme Court held:

> In dealing with this question, it is necessary to bear in mind one essential fact, and that is that the Industrial Tribunal is a Tribunal of limited jurisdiction. Its jurisdiction is to try an industrial dispute referred to it for its adjudication by the appropriate Government by an order of reference passed under s. 10. It is not open to the Tribunal to travel materially beyond the terms of reference, for it is well settled that the terms of reference determine the scope of its power and jurisdiction from case to case.
The instrument of reference is, however, worded in general terms which is sufficient to identify the identity of the disputants and the trade dispute which is being referred to the court for an award. The specific identification of the matters in issue within the trade dispute referred to the court will be undertaken when pleadings are exchanged pursuant to the Industrial Court Rules 1967. Thus in cases involving a representation that a workman had been dismissed without just cause or excuse the reference to the court by the Minister merely consist of a recital of the names and addresses of the parties, the date of the dismissal and the Minister’s intimation that he is of the opinion that the representation is a fit one for reference to the court. It is not necessary for the Minister to condescend upon other particulars of the dismissal inter alia, as to the manner of or the description of the dismissal, i.e. whether it be a direct, indirect or constructive dismissal.

**Powers**

The grievance and dispute resolution processes introduced by the Act are unique to the field of industrial relations. The procedures introduced and the remedies available are statutory in nature. It is thus to the statute that one should primarily look to for the purpose of ascertaining the rights of the workman to invoke the dispute resolution mechanisms contained therein and the powers of the court established thereunder. In this regard it will be useful to refer to the judgement of Hashim Yeop A Sani J in *Lee Wah Bank v. National Union of Bank Employees* [1981] 1 MLJ 169 who said:

> Since the Industrial Court is a creature of the IRA, its powers must be discovered only from the four corners of the Act expressly or by implications: see also *Baroness Wenlock v. River Dee Company* 36 Ch D 674, and *Attorney General & Ephrahim Hutchings v. Directors of the Great Eastern Railway Company* [1880] 5 App Cases 473.

The powers of the court are set out in ss. 29 and 30 of the Act. They relate to powers concerning matters pertaining to adjectival law of procedure and evidence and also to the substantive powers of the court pertaining to the disputes and matters referred to it for adjudication and award.

**Liberal, Practical And Realistic Interpretation For Social Legislation:**

It is important to note that the Act is a piece of beneficent social legislation which intends the prevention, and peaceful resolution of disputes between employers and their workers and the promotion of industrial harmony. Thus it should receive a liberal interpretation to achieve the legislative object (*Syarikat Kendaraan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 MLJ 336).

In *Dunlop Estate Bhd. v. All Malayan Estates Staff Union* [1980] 1 MLJ 243 at p. 246, Mohd. Azmi J held:

> In my view, having regard to the principles enunciated in the cases cited, the Industrial Relations Act, being a social legislation enacted with the prime object of attaining social justice and industrial peace, demands
Practical and realistic interpretation whenever necessary, for the purpose of maintaining good relationship and fair dealings between employers and workers and their trade union, and the settlement of any differences or disputes arising from their relationship.

**The Exercise Of The Court’s Functions And Powers**

Courts of law administer justice according to law. They apply the law to a set of facts to determine the matter in dispute. Occasionally, the dispute is a matter of pure law and the facts are not in dispute.

The Industrial Court works within the framework of the Industrial Relations Act 1967. Where questions of law arise, it has also to interpret and apply the law, essentially various employment legislation, to a set of facts and circumstances which constitute the dispute. It has also often to interpret the individual contracts of employment or collective agreement relevant to the dispute. However, the Act prescribes expressly that the court "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".

The scope of the inquiry of the court is not only confined to the law and the facts but also to broader aspects of social justice. In *Non-Metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Firebricks Sdn. Bhd.* [1976] 2 MLJ, Raja Azlan Shah commenting on the object of the Act had this to say:

> The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts.

Additionally, when making an award in respect of a trade dispute the court is specifically enjoined to have regard to the 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 probable effect in related or similar industries.

It is thus not only confined to the narrow partisan rights of the disputants as in a civil suit in the High Court but also to the wider consideration of public interest and also other macro economic aspects affecting both the industry and the economy of the country.

**Social Justice And Legal Justice**

The function of the court has often been described as the pursuit and advancement of social justice. In *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, Chang Min Tat FJ disabused the commonly held misunderstanding that industrial law and adjudication is concerned with the enforcement of contractual rights. It has very much to do with social justice. He cited with approval the judgement of Gajendragadkar J in *R.B. Diwan Badri Dass & Ors. v. Industrial Tribunal, Punjab, Patiala & Ors.* AIR [1963] SC 630:
The broad and general question raised ... on the basis of the employer’s freedom of contract has been frequently raised in industrial adjudications; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice ... .

The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice ... Industrial adjudication does not recognise the employer’s right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer’s right to hire labour; but social justice requires that the right should be controlled. Similarly the right to dismiss an employee is also controlled subject to well-recognised limits in order to guarantee security of tenure to (industrial) employees ... .

Mahesh Chandra in his book Industrial Jurisprudence (at p. 47) expounds on the meaning and objective of social justice and proceeds to demonstrate how it differs from legal justice as follows:

This concept of social justice is not narrow, one sided or pedantic and is not even limited to a particular branch of adjudication but it is more prominent and conspicuous in industrial adjudication. Its sweep is comprehensive and is founded on the basic ideal of socio-economic equality and it aims at assisting the removal of socio-economic disparities and inequalities of birth and status and endeavours to resolve the competing claims especially between employers and workers by finding a just, fair and equitable solution to their human relations problem so that peace, harmony and cooperation of the highest order prevails amongst them which may further the growth and progress of nations. It is not based upon mere contractual relations or principles of contract of service or the law of master and servant as it existed in not so far away past and is rather something outside these principles and is invoked to do justice without a contract to back it. Thus we can infer that while social justice does seek to do justice, it is not limited to doing merely legal justice; it is dispensing justice with bigger and higher objective in view in so far as social justice aims at doing justice between classes of the society rather than between individuals by a method which is new and unorthodox compared to the method of ordinary courts functioning under the civil law.

**Recognition And Creation Of New Rights And Obligations**

The most significant aspect of industrial adjudication in accordance with social and not legal justice is the proposition that the court has far wider powers and jurisdiction than the ordinary courts of law in the prescription, recognition and creation of rights, duties and obligations in industrial relations. In general, courts of law are bound to interpret or give effect to the contractual rights or duties or obligations of the parties. They have no authority to transform, alter or even create rights whenever the justice of the matter demands it. In industrial adjudication, this exceptional authority must exist were the Industrial Court to meaningfully perform the statutory function
entrusted to it in the realm of industrial relations, in particular in playing its role in resolving the tensions caused by conflicting interests and aspirations of the disputing parties.

The Supreme Court in *Bharat Bank Employees of the Bharat Bank* AIR [1950] SC 188 observed:

In settling the dispute between the employer and the workmen, the function of the Tribunal is not to confine to the administration of justice in accordance with law. It can confer rights and privileges on either parties which it considers reasonable and proper though they may not be within the terms of the existing agreement. It is not merely to interpret or give effect to contractual rights or obligations of the parties. It can create new rights or obligations between them which it considered essential for them for keeping industrial peace.

(Per Mukherjea)

In *Rothas Industries Ltd. v. Brijnandan Pandey* AIR [1957] SC 1 the court highlighted the distinction between commercial and industrial adjudication undertaken by the law courts and the Industrial Tribunal respectively as follows:

A Court of Law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect the legitimate trade union activities and to prevent unfair practices or victimisation.

In *Rothas Industries* (supra) the court, however, cautioned that the Industrial Tribunal’s discretion must be exercised in accordance with well recognised principles. It cannot "... ignore altogether an existing agreement or existing obligations for no rhyme or reason whatsoever."

**Industrial Jurisprudence: Norms, Standards, Practices And Principles**

The Industrial Relations Act 1967 besides making references in the widest terms possible to the concept of equity, good conscience, impact on the economy, etc. does not state with any specificity what are the matters which have to be considered in the light of these broad concepts. It behoves the court to search for norms, standards and practices which can be articulated in clear statements of principle which will apply in the resolution and determination of industrial disputes.

Awards of the court based upon sound principles consistently applied becomes the corpus of industrial jurisprudence which will govern the practice of industrial relations. This uniform body of principles developed out of actual cases provides a basic framework for employers and employees as well as their associations and unions respectively to adopt realistic positions when negotiating or resolving perceived grievances and is essential in the system of dispute avoidance and
Codes of conduct concluded between representative employer organisations and employee unions provide another relevant source of sound and acceptable norms and practices standards which can be applied in industrial adjudication.

**Adoption Of Code Of Conduct And Agreed Practices**

In 1975 a document intituled "Code of Conduct for Industrial Harmony" was signed between the Malayan Council for Employers Federation and the Malayan Trade Union Congress. The substantive areas of agreement are contained in a document intituled "Areas for Cooperation and Agreed Industrial Relations Practice."

It has been held that the Code has "no legal force or sanction" (Penang & Prai Textile Garment Employees’ Union v. Dragon & Phoenix Penang & Anor. [1989] 1 CLJ 802; [1989] 1 MLJ 481). The court has, however, received into its jurisprudence some of the Agreed Practices. In doing so, the court has to carefully develop principles for their application, the permitted departure therefrom and the consequences for any breaches of the practices. More vigorous adoption of other practices will go a long way towards creatively establishing more binding and effective norms and standards in the interest of industrial peace and harmony. The authority for their reception is found in s. 30(5A) of the Act which provides that:

In making its award, the court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.

**The Specific Duties Of The Industrial Court**

In the delivery of adjudicatory services in resolving and settling disputes and matters to it, the court hands down awards. The Act specifically states certain matters which ought to be taken into consideration by the court in the making of its awards. There are others which are more in the nature of duties implied by law or which are self imposed by the court. These are directed towards the end that industrial justice will be exercised fairly, openly and effectively.

**The Duty To Act Judicially**

The Industrial Court like all adjudicatory bodies has to conduct its proceedings and come to a determination of the dispute referred to it judicially. The basic and fundamental requirement is that it must comply with the basic rules of natural justice. However, as an adjudicatory forum constituted by statute which prescribes various powers with regard to procedure and evidence and with the greater extent of legal representation in its proceedings there has evolved in the court more formal adjudicatory procedures typical of regular court litigation. Notwithstanding the above observation, however, its decisions are arrived at taking into account the substantial merits of the case without regard to technicalities of laws of procedure or evidence.

**Procedure (Court Rules):** Very basic procedures are prescribed by the Industrial
Court Rules 1967 for the exchange of pleadings, service of processes and pleadings and production of documents.

**Evidence:** Although not bound to apply the strict rules of evidence in the Evidence Act 1950 the court takes cognisance of the principles underlying the provisions found in the Act.

**Proceedings:** Where lawyers appear, the proceedings at a hearing before the court resembles regular court proceedings. It often takes on a familiar adversarial character. However, where one or both of the parties are unrepresented it behoves the court to adopt a more inquisitorial approach to ensure that the unrepresented party has his day in court in meaningful terms.


> The technicalities of the procedural law, i.e. the Code of Civil Procedure or the Evidence Act, do not apply to industrial adjudication. But fundamental principles of procedural law cannot be given go-by - whether called the rules of natural justice or by any other name.

**The Duty To Render An Award Expeditiously.**

Section 30(3) of the Act reads as follows:

> (3) The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under s. 20(3).

Additionally, and as a necessary adjunct to s. 30(3) the court is empowered under s. 29(g) to "... generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it."

The overly optimistic expression of legislative desire that disputes are determined within thirty days reflects the anxiety of Parliament that grievances arising from trade disputes are not left to fester longer than is necessary by prolonged adjudication. The problem of delay and backlog has plagued every system of administration of justice in various degrees and is the bane of court administrators everywhere. It is universally recognised that justice delayed is justice denied.

**The Duty To Render A Reasoned Decision**

Although there is no expressed statutory obligation on the court to provide reasons for its awards, the practice is for the court to hand down a reasoned award. The duty may be implied by law. In *MG Panse v. S.K. Sanyal* [1980] Lab IC 534 (MP) (DB) GP Singh CJ held that there is an implied statutory obligation to give reasons in support of the conclusions of fact and law reached by an arbitrator in his award. The arbitrator is not required to write a lengthy judgment, like a court. However, he must briefly indicate the working of his mind showing the processes of reasoning which
led him to decide the dispute referred to him the way he did.

The utility and desirability of such a reasoned award is expounded by Dutta J in the case of Rohtas Industries Ltd. v. Their Workman AIR [1967] Patna 224 as follows:

> It is, no doubt true that a reasoned order is a desired condition of judicial disposal as this provides a check upon arbitrary, unscrupulous or slip-shod decision and also enables an appellate court to make effective review of the decision by considering whether it is duly supported by evidence on record. Moreover, this also gives an assurance to the parties that the decision had been arrived at on basis of the evidence adduced by them.

**The Duty To Act Justly And Not Legalistically**

Section 30(5) of the Act provides as follows:

> The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

The Industrial Court is not a court administering justice according to law. Legal rules, whether of substantive or adjectival law, must give way to common sense notions and commonly held principles of equity and good conscience. A case must be decided on its substantial merits.

In adjudicating the reference of a complaint of an employee under s. 20 of the Act, the issue is whether a **dismissal** is for just cause or excuse. An employer may not seek to justify a termination of the services of a workman by invoking his contractual power of termination. Any such a termination will be treated as a **dismissal** and the court’s function is to decide whether the same is for just cause or excuse. Likewise, an employee will not succeed in establishing his claim for unjust **dismissal** merely on the grounds that his employer had breached a term of the collective agreement or in his contract of employment mandating a due inquiry before he is dismissed for misconduct if the latter can prove to the court that he had just cause or excuse for dismissing the former.

Technicalities, whether based upon procedural or evidentiary rules, found in ordinary civil litigation will not be permitted to divert the court from its duty to determine the matter before it on the substantial merits. Exclusionary rules found in administrative law which bars a person from seeking recourse to judicial review will not apply in industrial adjudication. A workman who has not sought his recourse to the internal grievance procedure prescribed by his employer is not barred from invoking the jurisdiction of the court to inquire into his complaint that he had been dismissed without just cause or excuse.

**The duty to take into account the public interest and the impact on the industry and the economy of the country**

Industrial adjudication, unlike adjudication in ordinary civil litigation does not only
involve the process of adjudicating between the competing interests of the parties to the dispute before the court. The court is required to take into account wider societal and national interests. Thus s. 30(4) provides as follows:

(4) In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also the probable effect in related or similar industries.

In Arab Malaysian Development Berhad v. Perak Textile & Garments Manufacturing Union [1987] 1 ILR 118 (Award 45 of 1987), the Industrial Court after emphasising the intricate balancing role in doing justice to the interests not only of the employer but also of the employees went on to observe as follows:

... the fixing of a wage structure is always a delicate task, because a balance has to be struck between the demands of social justice which require that the employees should receive their proper share of the national income which they help to produce, with a view to improving their standard of living, and the depletion which every increase in wages makes in the employer’s profits, as this tends to divert capital from industry into other channels thought to be more profitable.

The Duty To Render An Award Which Is Comprehensive, Complete, Effective And Enforceable

Section 30(6) provides as follows:

In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s. 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purposes of settling the trade dispute or the reference to it under s. 20(3).

Further to s. 30(6), the court is empowered by s. 29(a) to order that any party be joined or substituted. The combined effect of s. 29(a) and s. 30(6) and the general overriding duty of the court expressed in s. 30(5) to act in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities and legal form gives the court the authority and duty to make a decision which completely and comprehensively settles the dispute or matters referred to it as the nature of the case permits. So that the court does not act in vain there is also the authority and the duty of the court to ensure that its awards are effective and enforceable.

With regard to the matter of addition of parties, Salleh Abbas FJ in Hotel Jayapuri Bhd v. National Union of Hotel, Bar & Restaurant Workers [1980] 1 MLJ 109 held:

Frankly, I find it difficult to accept the argument [that a party not named in the Minister’s reference cannot be added as a party to and be the subject of an Award of the court] because it means that [the] power of the
court to order any party to be joined or substituted or struck off would be meaningless. Subsections (5) and (6) of s. 30 of the Act should be a complete answer to the exercise in legal technicalities. In sub-s. (5) the court is required in the making of [its] award "to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form" whilst in sub-s. (6) the court is required to include "any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s. 20 (3)". These two subsections are wide enough to include power to make an award against a party added so long as such party has been given [the] opportunity of being heard; and this what s. 29(a) is for. They clearly show that the legislature enjoins the court to get on with the case before it without being encumbered by procedural technicalities and defects.

Industrial Adjudication: The Role Of The High Court

Parliament has in the exercise of its legislative authority created in the Industrial Court a special tribunal to make final and conclusive decisions on industrial grievances and disputes. In 1980, however, Parliament in an attempt to deal with the problem of industrial disputes becoming mired in protracted judicial review proceedings sought to bring the High Court, a court of law, formally into the process of industrial dispute adjudication. Thus, s. 33A of the Act introduced a mechanism for the reference of questions of law only which arise in the course of the proceedings before the Industrial Court.

After the initial years of its introduction, the said procedure has fallen into desuetude for several reasons. There appear to be far too many conditions to be satisfied. The applicant does not have a recourse to the procedure *ex debito justitiae*, the court retains the discretion to allow or to refuse the application. A not insignificant factor, however, appears to be the fact that the dissatisfied party has virtually unhindered access to the High Court in applying judicial review, principally the writ or order of *certiorari*. The High Court did not seem to find it necessary to adopt the position that since there is an exclusive remedy provided by the Act, there should be no attempt to circumvent the prescribed statutory remedy by applying for the prerogative writ of *certiorari*.

Judicial Review: The High Court’s Supervisory Jurisdiction

The conservative expression of the overriding supervisory jurisdiction of the High Court over the Industrial Court, and indeed over other adjudicatory tribunal or quasi judicial bodies, is that judicial review is concerned only with the decision making process of the tribunal and not the decision made by the tribunal (*Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1987] 2 CLJ 119 [1987] 1 MLJ 125). Judicial review jurisdiction is to be distinguished from the appellate jurisdiction of the High Court. When no appeal lies from a decision, judicial review cannot be resorted to as an *alter modus* for an appeal (*Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower* [1981] 1 CLJ 83; [1981] 2 MLJ 199).

Industrial Court decisions which did not exceed the court’s jurisdiction and which
complied with basic order or procedural propriety were virtually unassailable. The High Court will not look at the merits of the decision, only the decision making process. The High Court will not interfere where there is an error of law unless such an error of law went to jurisdiction. In the rare cases where the court’s award is impugned, the High Court’s decision will consist of an order quashing the award and a remission of the matter to the Industrial Court for the purpose of the court making an award in accordance with the law.

In a series of recent judgments, the court of Appeal and the Federal Court greatly expanded the scope and range of the authority of the High Court in judicial review of awards of the Industrial Court. The High Court may now exercise the power to quash an award not only on grounds of errors of law and failure of processual justice but also on the merits of the case.

The reviewing High Court may, pursuant to issuing an order of *certiorari* quashing a tribunal’s award, proceed to issue consequential relief which disposces off the matter. The High Court need not remit the matter back to the tribunal statutorily vested with jurisdiction over the dispute. The rationale for asserting this power is the avoidance of the hardship which would be imposed upon a litigant if the matter is sent back for rehearing and the prospect of a fresh challenge on the second award by way of judicial review.

The conservative approach retained the basic philosophy and logic of industrial adjudication by a special court. Having quashed an award, there is no longer any award. The matter in dispute reverts back to the adjudicatory forum established by Parliament to make a final and conclusive decision. The High Court does not therefore make a decision on the trade disputes as that is a matter which is exclusively within the jurisdiction of the Industrial Court. The essential features and integrity of the mechanism for resolution of industrial disputes by specialist adjudication is preserved.

**Industrial Adjudication And Jurisprudence**

Various concerns of both employee and employers and their respective representative organisations raised at various forum and also in the writings of academics and writers have subjected to scrutiny the delivery of adjudicatory services of the Industrial Court in the overall scheme of the Malaysian industrial relations system. V. Anantaraman in his recent book, *Malaysian Industrial Relations: Law and Practice* (at p. 45) raised *inter alia* the issue of the credibility of the Industrial Court as an impartial machinery for settling industrial disputes, the difficulty in the implementation of awards of the court, the backlog of cases and the rigidity of court proceedings. At a recent pre budget dialogue the Malaysian Employers Federation (MEF) raised the issue of inconsistent awards of the Industrial Court. It also questioned the non implementation of the Productivity-Linked Wage Reform System which had been adopted by the National Labour Advisory Council in August 1996.

Recent developments in the law have led to the announcement of the proposal for the establishment of an industrial appellate court. This in turn concerns the issue of the extent of the power of judicial review of Industrial Court awards by the High Court exercising supervisory jurisdiction and the consequential delay in arriving at a final
and conclusive award.

In this part of the paper, an attempt is made to address several key areas of concerns relating to the role of the Industrial Court as a principal component in the system of industrial disputes processing.

**Industrial Adjudication: Consistent Application Of Principles**

The consistent application of the principles of industrial jurisprudence is essential in ensuring that the court’s adjudicatory function are exercised judicially and not arbitrarily. The concern expressed about inconsistent decisions is innocuous unless the premise is that these decisions were in respect of cases where the facts and circumstances were essentially similar. What is a matter for legitimate concern, however, is the issue of conflicting principles. By way of example, this can be seen in the question of what is the standard of proof in disciplinary offences which are often referred to as "criminal misconduct", i.e. an employment misconduct which can also be the subject matter of criminal prosecution.

There have yet to evolve clear, sound and consistent principles in the award of monetary compensation. A systematic and coherent set of principles must first deal with the question what is the consequence in law of a finding that a **dismissal** is without just cause or excuse. Next is the question what is the purpose of making a monetary award and whether both pecuniary and non-pecuniary damage or loss are compensatable. There has also to be clear thinking on what is the just measure and basis of assessment of an award of monetary compensation taking into account the court’s duty to act in equity and good conscience. One can sympathise with the view that it is often difficult to advise on what is the appropriate measure of compensation that may be offered to settle a case of unjust **dismissal**.

**Industrial Adjudication: Balancing Competing Interests**

The court has the duty of balancing the sometimes conflicting interest of employees and employers. When the entire range of matters which come before the court for adjudication is traversed one sees the many points of conflict where the court has to sensitively yet sensibly balance the competing interests, expectation and rights of the parties. These can be seen at the most general level; thus, an employer’s management prerogatives must be balanced against his employees’ security of tenure. Again a business organisation’s interest in maintaining a profitable organisation by keeping its operating costs - of which wages is a significant element - manageable must be balanced against the interest of its employees to fair remuneration for their services in collective agreement disputes concerning "money matters".

At the more specific level, in retrenchment cases, a senior employee’s legitimate expectation of due consideration for his long service has to be balanced by his employer’s legitimate interests in maintaining effective operations in its establishment. The court strikes the balance by recognising that the Last In First Out (LIFO) rule might well be disregarded if the employer has sound and valid reason for departing from the rule, such reasons, however, being supported by substantive and reliable evidence of the relative capability, compatibility and suitability of the junior employee who is retained in preference to the retrenched senior employee.
The complex and difficult exercise of balancing conflicting interests and expectations between parties who adopt passionate and often antagonistic stances can only cause one or the other, and sometimes both parties, to be disenchanted when the balance is perceived to have been unfairly struck. Complaints of biasness are inevitable when the dissatisfied party harbours the subjective belief that the court has not given due weight to a principle which would have favoured his case and instead had given undue weight to another which favoured the opposite party.

**Judicial Review And Delays In Final Resolution Of Disputes**

Notwithstanding the finality provision in s. 33B of the Act and the availability of the statutory provision for references to the High Court on questions of law under s. 33A, the High Court has continued to assert an overriding supervisory jurisdiction over the Industrial Court by exercising its power of judicial review through the prerogative writs of *certiorari*, prohibition and *mandamus*.

Recourse to judicial review may lead to unwarranted delays in the final conclusion of adjudication of industrial disputes. These delays cause injustice to the parties, in particular to the workmen. There is always the prospect of an appeal to the Court of Appeal and thereafter the Federal Court. There is concern that the delays are exploited to deny the workmen the remedies which he has successfully obtained from the Industrial Court.

Denial of justice can result from the sheer pressure of costs which creates an impediment to the average workmen. There can also be a denial of the full rewards of a workman’s monetary award by sheer delay in that even if he were to finally succeed in the High Court, the value of his compensation would be diminished substantially by the effects of inflation. As the court is not empowered to award interest the workman would also have been kept out of the use of the monetary compensation awarded to him during the course of the judicial review proceedings.

In *Bharat Singh v. New Delhi Tuberculosis Centre* [1986] 25 SC 614, the Indian Supreme Court described the deplorable state of affairs wherein an employer is at liberty to abuse the judicial process to the detriment of workmen in the following graphic words:

> Instances are legion where workmen have been dragged by the employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in tribunals and courts, on account of the dilatory tactics adopted by the employer, workmen had suffered.

**Industrial Jurisprudence: New Norms, Standards, Practices And Principles**

The court bears the responsibility for incrementally developing a comprehensive and authoritative body of sound, coherent and equitable principles of industrial jurisprudence which will guide the parties in the management of the increasingly complex industrial relations aspect of human resources management.
Given the broad statutory formulation of the powers and discretion vested in the court by the Act, the court has to creatively develop the law and the principles of industrial jurisprudence which are consonant with its authority as well as the policy objectives of the Act. It may, and indeed it has, formulated principles on its own accord; or it may adopt the principles contained in the industrial jurisprudence of other jurisdictions ascertained from the legislation and the case law of other common law countries.

The parties to a dispute which is the subject of adjudication before the court plays an important role in the development of industrial jurisprudence. New and novel norms, standards and practices which are consonant with the broad policy considerations which the court is enjoined to take into account can be advanced by either party to a trade dispute. The principles applied by the court in claims for salary revision are not immutable. The maintenance and advancement of productivity in a business organisation is not only of interest to the relevant organisation but also a matter of vital concern to the national economy. It is open to any party to a trade dispute concerning salary increases to submit proposals for a salary scheme or adjustments which has a remuneration component based on productivity.

The outlines of such a productivity-linked remuneration system and some tentative models are contained in a document intituled Guidelines on Wage Reform System drawn up and adopted by the National Labour Advisory Council in August 1996. In the section referring to key elements of the system are contained some useful standards, norms and practices which might be usefully received into the jurisprudence of the court. However, the proponents of the system would have to put forward a compelling case that the system proposed would be fair just and workable and based upon a framework of clear, sound and coherent principles which are consonant with the policy objectives of the Act.

To some extent the productivity element is already incorporated in the salary structures of the plantation industry. Whether it can be extended to other sectors of the economy system would depend upon whether such productivity-linked wage systems are contained in the proposals which are placed before the court for its adjudication.

The High Court And Norm-Setting In Industrial Jurisprudence

Given the wide powers of judicial review assumed by the High Court over Industrial Court awards, the proposition that the latter bears the responsibility for developing authoritative principles in industrial jurisprudence has to be modified somewhat. The High Court’s power to inquire into merits of the decision by reference to the bench marks of rationality and proportionality must be accompanied by the duty to state sound, coherent and credible principles by which an award can be audited for their rationality and proportionality. The power to issue consequential relief in the form of directions or orders substituting the award of the Industrial Court imposes a similar correlative duty upon the High Court.

The like problem associated with the prescription of sound principles in the realm of industrial adjudication among various divisions of the Industrial Court can be found in this aspect of the High Court’s role. In some cases the search for clear and
coherent principles can be difficult. The High Court has yet to develop a framework of principles for the assessment of monetary compensation. There is also the problem of conflicting principles applied by different courts. One ready example is the issue whether a breach of the duty to conduct a due inquiry before dismissing a worker under the Employment Act 1955 renders the dismissal invalid and therefore without just cause. In a recent decision, the Federal Court appeared to have finally resolved the issue. However, doubts have arisen from an obiter dictum in the decision of another division of the said court.

The situation is clearly unsatisfactory. While on matters of pure law it is the Federal Court which must have the final say, there must be a forum which has the role of finally and authoritatively laying down the principles of industrial jurisprudence which will apply generally in the specialist field of industrial adjudication.

Towards Rationalisation

The concerns discussed above of delays caused by the lack of finality and conclusiveness of perceived bias, conflicting principles and errors in awards decisions and of the necessity for the systematic development of industrial jurisprudence have focussed attention on the need to provide an effective, speedy and cost-effective adjudicatory mechanism for auditing the awards of the Industrial Court which might have been wrongly decided. This mechanism must also be entrusted with the responsibility for authoritatively laying down a systematic and uniform body of principles which will constitute Malaysian industrial jurisprudence.

The reference procedure is unacceptably inaccessible by virtue of the many conditions imposed by s. 33A and the unnecessarily tight reign which the Industrial Court holds over the process. It is also inadequate as it is limited to hear questions of law only. It has as good as been abandoned and should be abolished. Parties dissatisfied with the decision of the court have general recourse to the High Court by way of judicial review. The issue, however, is whether a recourse to the High Court and subsequent appeals to the court of Appeal and the Federal Court is a suitable means for auditing decisions of the Industrial Court.

It would seem sensible that the very establishment of a special Industrial Court to adjudicate upon industrial disputes necessitates a specialist appellate court rather than a generalist High Court. Quite apart from the specificity of the subject matter, is the fact that the High Court is a court of law whereas the Industrial Court is statutorily enjoined to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Equally important, the court is required to have regard to the public interest and the effect which its decisions will have on the economy of the country and the industry concerned when deciding on a trade dispute.

An appeal procedure to an appellate body within a structure of industrial adjudication and appeals would ensure not only finality but a sound, just and equitable conclusion to industrial disputes in accordance with the ethos, logic and philosophy of the industrial relations system of Malaysia. Such an Industrial Appeals Court must, however, be permitted to function as the final arbiter of industrial disputes. Without the assurance that this forum will no longer be subject to judicial review, or further
appeals, except to the court of Appeal on questions of law, the creation of an industrial appeals court will only introduce another tier between the Industrial Court and the High Court. The vexation arising out of delays, cost and indefinite prolongation of industrial disputes will be thus aggravated. The right formulation of the statutory provision to achieve the result of a two-tier system of industrial adjudication with a reference to the court of Appeal on questions of law must be found to achieve this objective.

**Conclusion**

The Industrial Court plays a critical role in the regime of policies, laws and institutions governing industrial relations in the private sector which has been identified as the engine of growth in the Malaysian economy. The Industrial Court’s adjudicatory functions extend to all non-government employees and employers and their representative bodies. Corporatisation and privatisation which automatically converts government sector agencies and departments into private sector business or service organisations will inevitably result in heightened demands and pressures upon the adjudicatory services provided by the Industrial Court.

The concern of industry and the unions concerning the role of the Industrial Court must be addressed decisively as a part of the nation’s agenda for achieving the vision of a fully industrialised society which is founded on social justice.

**Endnotes:**
