TEXT: Introduction

The purpose of this article is to explore some issues and problems arising from the recent announcement which proposes to recruit civil servants under express employment contracts. The article will examine and consider some difficulties, both of legal and policy nature, and will briefly suggest in what ways the issues thus identified might be properly approached.

Employment of civil servants in Malaysia has always been by way of appointment subject to certain probationary period and confirmation in service to acquire the permanent status as civil servants. In some cases, civil servants are appointed under fixed-term or rolling contracts. The Chief Secretary to the government, Datuk Abdul Halim Ali has recently said that the government may look into the system of employing civil servants under contract. In response, the President of the Malaysian Trade Unions Congress, En Zainal Rampak, objected to the proposal saying that the system can be easily abused. On the same issue, the Secretary-General of the civil servants association (CUEPACS), Mr N Siva Subramaniam, said that CUEPACS is against the move because, among others, officers on contracts would not be able to commit themselves and give their best to the people. This proposal might affect the core status of the relationship between civil servants and the government as employer bearing in mind that their employment is governed by the Federal Constitution ('the Constitution'). Employing civil servants under contracts would undoubtedly attract some significant constitutional questions.

The position of civil servants under the Constitution

Essentially, the proposal involves some crucial ambiguity between the general practice of employment contracts on the one hand and the position of civil servants under the Constitution on the other. Article 132(1) of the Constitution provides that civil servants hold office at the pleasure of the Yang di-Pertuan Agong and the state rulers. It would appear that employing civil servants under express contracts or for a specified period of time will be contrary to the Constitution as the contracts would serve as a clog on the power of the Crown to dismiss summarily. On the other hand, if such contracts are recognized, the contractual terms will not be enforceable against the government or that the power
to dismiss at pleasure has become an implied term of the contract. Nonetheless, it is common practice in Malaysia and
in many other countries that governments do hire civil servants on contractual basis. The courts are however divided on
the issue whether such contracts are enforceable.

In *Hj Ariffin v Government of Pahang* n4 Suffian FJ seemed to suggest that a civil servant could be appointed
under a contract of service whose termination could be subject to a termination notice or payment in lieu of notice and
this was not inconsistent with the Constitution. The issue of limiting the power of dismissal at will was also raised by
Suffian FJ and he opined that although such contractual stipulation would clog the power to dismiss at pleasure, the
dismissed civil servant would not be able to claim damages for a failure to give notice of dismissal. It has to be noted
that the power to dismiss at pleasure is subject to some procedural safeguards, one of which is the reasonable
opportunity to be heard. n5 Therefore, it is still an open question as to whether or not a civil servant would be entitled
to damages from the government if the government was to decide to terminate his services in breach of the contractual
stipulation of a notice. n6 Such termination may amount to 'dismissal' under art 135(2) and the civil servant would be
entitled to a reasonable opportunity of being heard and a failure to provide that would entitle him for a constitutional
remedy of declaration. Would he then be entitled for damages for breach of contract? This is most unlikely as the courts
have constantly rejected a plea for damages for loss of office by civil servants n7

**Is the relationship contractual in the absence of an express contract of employment?**

On the other hand, is the relationship contractual? In *Government of Malaysia v Rosalind Oh Lee Pek Inn* n8 the
Federal Court suggested that the relationship between civil servants and the Crown was contractual but that contract
was of a special kind. Once appointed, the government servant acquired a status, and his rights and obligations were no
longer determined by consent of both parties but by statute or statutory or administrative rules made by the government.
This proposition was further extended in *Rajion bin Hj Sulaiman v Government of Kelantan*. n9 Applying the*Rosalind
Oh* decision, the Federal Court went on to allow the alteration of the service condition to impose a new requirement of
service for the applicant. Both Wan Suleiman FJ and Raja Azlan Shah FJ concluded (Suffian LP concurred) that a civil
servant's conditions of service could be changed unilaterally by administrative rules and this was consistent with the
principle of service at pleasure of the rulers.

Therefore, it is clear that the relationship between civil servants and the rulers are contractual even in the absence of
a specific form of express contracts of employment. What would be the case if the relationship is specified under
express or fixed-term contracts? Would the implications be different? Looking at the perspectives of the Federal Court
in *Rosalind Oh* and *Rajion*, civil servants under express or fixed-term contracts would be unlikely to escape the impact
of the principle of 'holding office at pleasure'. Civil servants who are hired under contracts would not enjoy the full
benefits of a job security afforded by the contractual terms.

**Employment contracts and dismissal at pleasure -- an uneasy union**

As seen in *Hj Ariffin v Government of Pahang*, n10 there is nothing -- whether under statute or in contract -- that
can serve as a clog to limit the full effect of the power of the ruler to dismiss at pleasure, statute or contract. It would
seem that if the government decides to hire some civil servants under express or fixed-term contracts, the civil servants
will still be subject to the power to be dismissed at will before the end of the contractual term and the civil servants
would not be entitled for damages for breach of contract even if the dismissal is not in accordance with the terms of
contract.

The question that arises is when does termination of contract is considered a termination and when does a
termination amount to a dismissal? If the government terminates the employment contract of a civil servant, the
ordinary rule of contract applies. The government would, under the contract, be obliged to give termination notice or
payment of salary in lieu of notice. If there is a failure to observe any of these requirements, it would appear that a civil
servant can sue for damages for breach of contract. n11 On the other hand, the government can argue that it is
exercising its power to dismiss at pleasure and no notice is required. Then again, the civil servant would be protected by
art 135 where any dismissal should subject to the opportunity of being heard. Since no hearing is given, the civil servant is improperly dismissed and he or she would be entitled for a declaration that the dismissal is invalid.

Therefore, a hassle-free termination would be to provide notice or payment in lieu of notice to end the civil servant's contract. Even if a hearing is given with a view to dismiss the civil servant, the government may decide to use its power under the contractual agreement to terminate the contract with notice instead of dismissing the civil servant. Either way, the civil servants would be deprived of the constitutional protections in art 135 which is primarily intended to provide them with some forms of job security.

Government of Malaysia v Lionel n12 and its implication

The full impact of the distinction between termination and dismissal was thoroughly highlighted by the Privy Council in this case. The government has terminated the service of the respondent through the Chief Police Officer ('the CPO') by the payment of one month's salary in lieu of notice. This was the requirement of his term of employment. Before the notice of termination was issued, a disciplinary proceeding was undertaken against him. He was required to exculpate himself but his representations were not accepted and the CPO informed him by letter that in effect he had failed to exculpate himself and that it had been decided to terminate his service. One of the questions before the court was whether the civil servant was dismissed or his service was terminated.

The Federal Court decided that the respondent was dismissed and that dismissal was invalid. The Privy Council stated that the respondent must establish that he was dismissed. Viscount Dilhorne said that under the laws of Malaysia, the distinction existed between termination and dismissal and there is nothing in the Constitution which affects the right of the government to terminate temporary employment in accordance with the terms of the engagement. Therefore, after the respondent failed to exculpate himself, it was not obligatory to impose a punishment or penalty or to dismiss the respondent. In this case, his employment was terminated and it was not necessary to consider whether he was actually dismissed and that dismissal was invalid.

It will appear that the distinction between termination and dismissal remains, but as far as civil servants are concerned, the after-effect will be the same. Whether he is dismissed by virtue of the power given to the rulers in art 132 or whether it is an exercise of the right to terminate in the contract, the civil servant cannot expect any form of substantive safeguards to secure his or her job. The only question left is on the issue of remedy.

Express contract and how it may affect the present status of civil servants

As established by the cases, civil servants' contract of employment is not like an ordinary contract. Therefore, would civil servants under express contracts likely to have a different status, namely that they are excluded from the power of the rulers to dismiss at will? Would the contractual relationship be reciprocal in nature? These are some of the questions that need to be discussed and to a certain extent, the solutions need to be presumed as the proposal is still at its preparatory stage. If the intention of the government is to create a separate type of relationship with civil servants under express contracts, it is difficult to exclude them as civil servants as provided by the Constitution. Unless the relevant provisions on the subject is amended, this type of civil servant remains as 'civil servant' under the Constitution and subject to the same rights and obligations. Would it be desirable to have two types of civil servants governed by the same rules and regulations? There is nothing significant about different categories or types of public servants in many countries anyway. Nonetheless, would it be easier to dismiss a civil servant under express contracts? So long as the requirement of notice is followed, any employer has the right to terminate an employee under contract. What if it is a dismissal? Would the civil servant be entitled to the right to be heard under art 135? It all depends upon whether the civil servant status remains the same under the Constitution.

The key points therefore are: firstly, do officers under express contracts remain as civil servants in the constitutional sense? Secondly, if they do, there is a serious need to consider whether the power to dismiss at will should be excluded and whether their employment should be strictly governed by the law of contract. Are we now
entering into the realm of distinguishing the employment of civil service between public law and private law? Is such distinction desirable?

In the past and present, issues on the dismissal of civil servants have frequently been on the application of the protections under art 135 especially the reasonable opportunity to be heard. If civil servants are governed by employment contracts, it is most unlikely that that protection would be relevant. This is because the government can always argue that the dismissal of civil servants is an exercise of the right of termination of contract. The fact that there is a distinction between termination and dismissal can be seen in the principle enunciated by the Privy Council in *Munusamy v Public Services Commission* n15 that dismissal amounted to an act of punishment. Lord Hodson said:

> Dismissal is treated as the penal consequence of charges meriting dismissal being established against an officer. Looking at the Constitution itself, the disciplinary interpretation of dismissal is reinforced by the language of art 135(3) which immediately follows the relevant article and contains the significant phrase ‘dismissed or reduced in rank or suffer any other disciplinary measure.’ This confirms that the punishment element is involved in both cases ...

n16 (Emphasis added.)

The effect would be that 'termination' of contract is not 'dismissal' within art 135 and the affected civil servant would not be entitled to a hearing. This is a far cry from the protection given by the Industrial Relations Act 1967 ('the Act') to other employees in Malaysia. Section 20(1) of the Act provides that where a workman considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director-General of Industrial Relations to be reinstated into his former employment. The Act is of general application as long as a workman is under a contract of service. n17 However, it does not apply to public servants by virtue of s 52(1) of the Act which reads:

> Parts II, III, IV, V and VI shall not apply to any Government service or to any service of any statutory authority or to any workman employed by Government or by any statutory authority.

Section 20 which falls under part VI of the Act is clearly excluded from applying to civil servants. *Dr A Dutt v Assunta Hospital* n18 established that under s 20, the distinction between termination and dismissal is irrelevant and what is necessary is for the workman to prove that the dismissal is without just cause or excuse. Therefore, for a civil servant who is employed under an express or fixed-term contract, a termination of contract by the government would leave him without the stronger constitutional or statutory protections. The remaining contractual remedies are not substantial.

The policy questions

How and where will the constitutional role of civil servants be recognized under the contractual regime? An important policy consideration is to see the rationale behind such a proposal. A similar exercise has started in the United Kingdom. Contractualization was introduced in the employment of senior civil servants in the sense of 'introducing explicit written employment contracts for members of the new senior civil service -- including the current grade 5[to] remove any lack of clarity in terms and conditions of employment for members of the senior civil service and would put them more on par with their counterparts in other walks of life.’ n19 This was done as part of the substantial reform in the United Kingdom civil service which involved 'the decentralization and financial restructuring of management, especially the management of employment ...[and] the reformulation of the constitutional principles dealing with the relations between governments and senior civil servants. n20

Certainly, the same rationale might apply in Malaysia if the present reform in the Malaysian civil service is as radical and substantial as that of the United Kingdom, New Zealand and Australia. We have reforms in the civil service but it has not reached the stage where senior civil servants are treated as managers with substantial measure of financial
and policy autonomies. Nonetheless, the Constitution has established clearly the status of civil servants in Malaysia. The courts have also decided that the relationship between the government and civil servants in Malaysia is contractual albeit a special kind of contract. Therefore, whatever agenda the government has in mind by introducing employment contracts for civil servants, these constitutional issues must be carefully looked into.

When employment contracts were mooted out in the United Kingdom, the trade unions, among others, voiced their concern about commitments of civil servants, especially senior officials who are hired under an express or fixed-term contract. A similar valid concern may arise in Malaysia. A civil servant, as servant of the ruler, owes an undivided loyalty to the Yang di-Pertuan Agong, the Constitution and the government of the day. If a civil servant is too concerned with whether his contract would be renewed or not, an equivocation of purpose will arise between his duty for the public interest and his own future well-being. The bottom line is either the civil servant performs well or the contract will not be renewed. Such consequence would naturally be very undesirable. On the other hand, employment contracts would be an impetus to show their management talents which would benefits the service as a whole. Contractualization coupled with performance pay and more managerial autonomy could provide more opportunities for civil servants to improve services and in the long run, public services would be better managed. However, this depends on whether top civil servants in Malaysia are given wide managerial autonomy similar with that of the New Zealand civil servants to the extent of making decisions pertaining to financial and personnel management policies. And one important aspect is whether civil servants on contract would be on par in terms of salaries and wages with the private sector employees.

Conclusion

The power to dismiss at will would run counter with the principles of reciprocal right in contract. Nonetheless, such power is established by the Malaysian Constitution and also a recognized principle of the common law. Then again, the full impact of the power is reduced by the requirement of a hearing. The introduction of express employment contracts would seem to be an attempt to controvert the constitutional protections and to govern the whole relationship solely on contractual basis. It would therefore appear that civil servants whose employment term is not contractual would have a better measure of job security compared to those with express employment contracts. If this is the intended objective for the sake of efficiency and quality, the whole concept of a neutral and independent civil service would be seriously jeopardized.

What is needed is a much clearer legal rights for this category of civil servants. If they are to be solely governed by the employment contracts, it has to be made clear whether or not they are civil servants within the meaning of the Constitution. If they are, the constitutional protections under art 135 will apply and that should not be controverted merely on the ground that the ending of the relationship is an exercise of contractual power and not a dismissal. Alternatively, some form of natural justice should apply to civil servants whose contracts are terminated which should satisfy the minimum requirement of art 135. If private employees are afforded protections by the Act under some forms of domestic enquiry, it is beyond our imagination that civil servants who are to serve for the good of the people have no security of tenure. Most importantly, the traditional element of constitutional loyalty to the government of the day should be maintained without the service being politicized or the civil servants being victimized.

Return to Text

FOOTNOTES:

n1 The Star, 11 April 1997 at p 3.

n2 Ibid, 12 April 1997 at p 10.
n3 The New Straits Times, 12 April 1997 at p 12.


n5 See art 135 of the Constitution.


n8 [1973] 1 MLJ 222 (FC).

n9 [1976] 1 MLJ 118 (FC).

n10 Supra n 4.

n11 In the light of the decisions in the Hj Ariffin, Mahan Singh and Hj Wan Othman, it would be likely that damages claimable is confined to the failure to provide notice or payment in lieu of notice but not for compensation for loss of office.


n13 Supra n 8

n14 See, eg Azman bin Abdullah [1977] 1 MLJ 263.

n15 [1967] 1 MLJ 199.

n16 Ibid at p 201. See also Hj Ariffin v Government of Pahang, supra n 4.

n17 See, eg Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297.


n20 Mark Freedland, ibid at p 225.
n21 Supra n 8.