Introduction

Members of the legal fraternity are potently aware of the timeworn cliche 'justice delayed is justice denied'. Delay, which is the common reason for public dissatisfaction, invariably causes various hardship and loss to the disputants. Mediation is therefore considered as a viable alternative to speedy settlement of disputes. Mediation can be resorted in civil and commercial disputes, matrimonial and labour disputes, among others. Mediation is principally aimed at exploring options for settlement, and to facilitate negotiations between the parties for amicable settlement of the dispute. As it is generally known mediation is an effective and affordable complement to litigation and ensures speedy settlement of disputes. It is an excellent tool for the resolution of conflicts and for solutions that are invested in the parties who take part in the mediation. This paper will focus on the constraints in the conciliation/mediation of matrimonial and labour dispute, with emphasis on the latter. The paper will include the viable solutions for its effective implementation thereby directly assisting the disputants to re-establish trust and respect.

Conciliation/mediation in Industrial Court

A dispute emanating from the employer and employee relationship may be referred to the Industrial Court either through the Minister of Human Resources and Manpower or directly by the parties under certain circumstances. The Industrial Court is a quasi-judicial tribunal and its primary objective is to provide speedy, fair and just resolution to differences between parties to contracts of employment. Section 30(5) of the Industrial Relations Act, 1967 (the IRA) expressly provides for the proceedings in the Court to be conducted with as little formality, technicality, and form as the circumstances of the case permits, and dispensing justice expeditiously and equitably. Section 30(6) of the IRA further provides that the court is not obliged to limit the remedies specified in the contract of employment, but may award any remedy suitable depending on the facts and the circumstances of the case before it. Thus, the scope of the enquiry of the Industrial Court is not only restricted to the law, but to a broader aspect of equity and good conscience with the view of
promoting social justice.

In *Harris Solid State (M) Sdn Bhd & Anor v Bruno Gentil s/o Pereira & Ors* n1, Gopal Sri Ram JCA stated: 'Section 30(5) of the Act [IRA] imposes a duty upon the Industrial Court to have regard to the substantial merits of the case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience. Parliament has imposed these solemn duties upon the Industrial Court in order to give effect to the policy of a democratically elected government to dispense social justice to the nation's workforce. It is therefore, our bounden duty to ensure that the Industrial court applies the Act in a manner that best suits the declared policy of the elected government.

Social justice simply means that justice is not limited to a fortunate few, but takes into sweep the large masses of disadvantaged segments of the society. In the sphere of industrial law, social justice aims at resolving the competing claims between employer and employee and/or their trade union by finding a just, fair and equitable solution of their problems so that industrial harmony would prevail amongst them, hence, further the growth and progress of the nation.

**Adjudication of Labour Disputes in Malaysia**

In relation to labour matters, particularly involving dismissal claims, the dispute may be referred to the Industrial Court through the Minister of Human Resources and Manpower. The representation for dismissal without just cause or excuse must be filed with the Industrial Relations Department ('the IRD') for conciliation before the same can be referred to the Industrial Court. At the conciliation proceedings, only the parties and their authorised agents are allowed. The conciliation officer will offer advice and suggestions throughout the process. He will not take the side of either party to the dispute and remains impartial at all times; neither will he make a decision on the merit of the case or recommend any possible acceptable solution to the dispute. The parties retain the right to say whether they do or do not accept any suggested settlement.

Where the parties have amicably arrived at a settlement, a memorandum setting out the terms of the settlement is drawn up and signed by both the parties, or by their representatives. The legal effect of the agreed settlement is that it shall bind the parties, and any decision recorded in the memorandum of settlement becomes part of the contract of employment. If, however, the conciliator were unable to arrive at an amicable settlement, he would then submit a report of the dispute to the Minister, who will then decide whether the case merits reference to the Industrial Court n2. The court will only hear disputes referred to it by the Minister. There is no legal requirement that merely because representations are made to the Director General, they must automatically be referred to the Industrial Court.

Having said that, it would be worthwhile noting that the backlog of cases in the Industrial Court is increasing yearly and is mainly because the court has become comparable to a court of law of general jurisdiction. Often complaints are made that the court is overly legalistic, the presentation of the trials being adversarial in character, and cases are being decided judiciously, which is often time consuming. There is now formality of proceedings, and the procedural rules and evidence with which lawyers are accustomed to are, freely used in the court. The law on procedure and evidence commonly used in civil trials is freely followed in the court, such as subjecting parties to pleadings, requiring parties to submit bundles of documents, examination of witnesses and submission of the case, among others. The above is contributed largely by legal representatives who are freely allowed to represent the parties in the court largely contributed to the legalism. As a matter of interest, legal representation before the Industrial Court, unlike the civil court, is only a privilege and not a right.

Further, in theory, s 33B (1) of the IRA has immunised awards of the Industrial Court, in practice, being a quasi-judicial tribunal, its decision can be successfully challenged in the civil courts with the use of the remedy under public law of judicial review for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury. Where the court committed an error of law, this *prima facie*, enables the party affected by the award to seek remedy by way of a prerogative writ of certiorari to quash the Industrial Court's award.
It must be noted that the duty of a judge in a judicial review application is merely to enquire into the decision-making process to be satisfied as to the correctness, legality or propriety of any decision recorded or passed and as to the regularity of any proceedings of the Industrial Court. The reviewing court cannot interfere in the finding of facts of the inferior tribunal, because interfering with them may take away the advantages and the rational of the tribunal's adjudication.

However, the Federal Court in *R Ramachandran v Industrial Court of Malaysia*, had transformed the judicial review process by giving itself wider powers to intervene in the decision of the Industrial Court. The Federal Court in the above case went into the merits of the case and then proceeded to assess the remedy by awarding the claimant compensation in lieu of reinstatement and back wages.

It is the humble opinion of the writers that it is not the intention of Parliament to reduce the role of the Apex Court to the process of assessment of damages. Rather the Apex Court as intended by Parliament is to scrutinise whether there is any error of law or error in the decision making process and not so much the decision itself. The doctrine of the separation of powers must be observed. The supremacy of Parliament must always be maintained and respected. The courts must guard itself against the danger of usurping the powers of Parliament even given the noble intention of preventing abuse of power and the maintenance of natural justice.

If the meaning of the words as enacted in any statutory provisions is clear and unambiguous, even if at times it may appear unfair, it is the duty of the courts to carry out the intentions of the legislature. The court may comment obiter in their judgment and persuade the legislature to make changes in the law to suit the requirements of the changing circumstances. In the words of Diplock LJ 'In controversial matters such as that involving industrial relations, there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution, it is Parliament's opinion on the matter that is paramount'.

In our humble opinion, judicial review process of the award of Industrial Court by the civil courts is not keeping in tandem with the spirit of the Act to have a speedy disposal of the dispute. Apart from delay in the adjudication, the application for judicial review is not only tedious with cumbersome procedures, but more importantly it is an unequal legal battle. As succinctly stated by Eusoff Chin CJ in *R Ramachandran's* case, 'employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses'. This reinforces the view of an ordinary person that 'the law and our legal system are slow, expensive and unsatisfactory'. Ironically, it is in this very case of *R Ramachandran* that the finality of Awards in the Industrial Court becomes questionable. The floodgate has been opened for judicial review at the slightest dissatisfaction of the Industrial Court's Award. Is the poor workman's plight to avoid prolonged litigation mitigated or aggravated by the decision in *R Ramachandran's* case?

Therefore, it is respectfully submitted that other than an error of law or the *Wednesbury* reasonableness of the decision, the Industrial Court should be allowed to carry out its function without interference from the superior courts. The wishes and intentions of Parliament must be supported, and all the more so if the certainty of the law is to be maintained and upheld.

**Mediation in the Industrial Court**

In a bid to overcome backlog of cases, which is hindering justice for workers and employers, the Ministry [of Human Resources and Manpower] has proposed mediation process in the Industrial Court to be conducted by chairman. Unfortunately however, mediation in the Industrial Court is not made compulsory. It is only practiced on a voluntary basis and thus not often requested by the litigants unless suggested by the court.

The desire of implementing mediation in the Industrial Court before the case was listed for hearing is highly
desirable in settling trade disputes as it has the potential of reducing the backlog of cases, apart from being effective and affordable complement to litigation. It must be emphasised that the employer/employee relationship is ‘comparable with matrimonial relationship in that what matters between the parties is not who is right but what is right for their harmonious relationship to continue’ n7. Therefore, mediation is highly commended as it can assist the disputing parties to re-establish trust and respect, and help to prevent damage to an ongoing relationship.

However, one of the apparent obstacles of effective implementation of mediation in the Industrial Court is that the court has limited jurisdiction and powers. As noted earlier, the court derives its jurisdiction from the reference of the dispute by the Minister and the law does not require the Minister to refer every matter to the Industrial Court. Further, the court's contempt power is also very limited and with no power to order payment of cost of the proceedings. Therefore, suggestions for the effective implementation of mediation in the industrial justice system are provided as follows;

(i) *Mediation be made an integral part of the Industrial Court system:*

If the backlog in the Industrial Court is to be reduced and made manageable and if the alleged injustice by the Malaysian Employers Federation (MEF) over the formula for calculating back wages is to be overcome n8, it is submitted that the IRA be amended with a view of making mediation an integral part of the court system.

(a) **The IRA is to be amended to accommodate mediation process:** The Industrial Court is an appropriate place to provide mediation assistance because the Court is a place where apart from handing out an award has the overriding function of maintaining workplace harmony and promoting industrial peace. It would be a sad day for the Industrial Court to be turned into a place to make a small fortune through the adversarial mode. All over the world the court system are beginning to realise that litigation, as a means to finding solutions to disputes, is not fully achieving its desire objective of providing justice. For hundreds of years it has been accepted that litigation was the way to solve disputes. Arbitration came along to find an alternative. This process too has been found to be costly prolong and may perhaps only be more appropriate for commercial disputes. It is therefore suggested that section 20 of the IRA should be amended by making mediation process a prerequisite to adjudication by the Industrial Court. All dismissal claims should be referred directly to the Industrial Court. Further, the court should be empowered to strike-off any matter before it which it thinks frivolous or trivial. This can be made possible by having a pre-hearing review in the Industrial Court.

(b) **Practice Direction to refer disputes for mediation:** Alternatively, it may be possible by issuing a Practice Direction to require parties to refer disputes to mediation. The Directive must encourage the disputants to embrace mediation and to appreciate its true value especially in the areas of industrial dispute with the upper most objective of maintaining industrial harmony. We must strive to achieve if not better the success rate set by ACAS in England where more than 75% of cases referred to that body were successfully resolved.

(ii) *Period within which mediation to be conducted be ascertained:*

It is further submitted that the mediation among the disputing parties ought to be done as early as possible. The longer the parties are distant, the more difficult it is to bring them together. Therefore, there should be a fixed period for
mediation, for example between three to six months from the date of reference for mediation, which may be extended only in cases where the mediator considers that a settlement is very likely within a short additional timeframe.

(iii) **Industrial Court to be conferred the contempt power:**

Further, it has been suggested by some quarters that the Industrial Court, in its judicial capacity, should be allowed to hold the parties in contempt for non-appearance, without reasonable cause, for any mediation session arranged by the court. In other words, if a party has been served notice to appear for mediation and without reasonable cause fails to appear on the date fixed, such non-appearance shall be treated as a contempt of court and the court should be able to commence proceedings for contempt of court. The court may, in such proceedings, make an order of committal or impose appropriate fine. The court may exercise the power so long as the contemnor is given the opportunity of being heard, and the proceeding has complied with the procedural tenets of natural justice.

The above is currently being adopted in the Syariah Courts. For example, the Syariah Court Civil Procedure (sulh) (Federal Territories) Rules 2004, provides that where any party, to whom a notice for sulh (or conciliation) has been served fails to appear on the date fixed for sulh, without reasonable cause, such non-appearance shall be treated as a contempt of court and the court may commence proceedings for contempt of court in accordance with section 229 of the Syariah Civil Procedure (Federal Territories) Act 1998 n9. The court may, in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding RM2,000. The same is also being practiced in some western countries.

Although the power of holding parties in contempt for non-appearance in the mediation session might sound harsh at the outset, it is submitted that with the inclusion of the above, it would be transparent to the parties that the court is taking mediation seriously and thus it requires full commitment and co-operation from the parties. However, it is the view of the writers that mediation should be encouraged and that the positive value be made known to the disputants themselves without influence from their representative or counsels.

(iv) **Industrial Court to be conferred the power to award costs:**

Another school of thought had submitted that the court should also be conferred the power to order such cost as the court thinks reasonable. It is suggested that if the mediator, after evaluating the substantive complaint, were to find that either of the disputing parties are in the wrong, he should advise the defaulting party to amicably settle the dispute. If however, the defaulting party objects or refuses to settle, the mediator shall make a note that, should at the trial of the proceedings an award be made against him, the defaulting party shall be liable to pay the other party the cost of the proceedings. This is the practice currently in vogue in some States in Australia and the settlement rate has been found to be excellent. The representatives of the disputants have accepted this practice.

(v) **Adversarial 'hired-gun' mindset to be corrected:**

Apart from the above, the adversarial 'hired-gun' mindset has to be corrected. The law school curriculum must move away from the adversarial nature of teaching and training lawyers by integrating alternative dispute resolution systems. The law school curriculum must stress on lawyers' problem-solving (instead of problem-making) skills i.e., emphasis on dispute settlement as opposed to litigation.

The law students ought to be taught the basic concept of the alternative dispute resolution at the earliest stage of their legal education. The mediation/conciliation skills should be integrated into substantive law subjects and to be reflected in the curriculum, teaching and examination. By having such a programme it is hoped that the would-be lawyers should be imbued with a mindset of problem solving and not just acquiring the skill of advocacy in litigation.

(vi) **Members of the legal fraternity to promote mediation:**
Legal advisers must also play an important role in encouraging parties in dispute to consider the mediation option at the preliminary stages of a suit, as this would reduce the workload on the courts. Members of legal fraternity ought to place clients’ interests ahead of their own and have to discard their litigation mindset and promote mediation though it may lead to less revenue. Undoubtedly, individual lawyers - who earn living from the fee he/she charges the client - will be apprehensive that there will be a lesser role for them if mediation is implemented. The reduced role of lawyers if cases are resolved through mediation is not entirely correct. The ‘avant-garde’ approach today is that the court is the place where solutions to legal disputes are being found not necessarily through the traditional adversarial approach but through negotiation and mediation. Through this process more disputes can be resolved in lesser time and hence productivity increases.

(vii) Public awareness and knowledge of mediation:

Also to note is that mediation would be more effective if disputants could be made more aware of the better value that mediation can offer. The government must embark on a programme, like the United States government, where all federal departments are expected to resolve their dispute through mediation. Further, the public should be made aware of its beneficial effects such as cost savings of mediation and its potential for repairing relationships, among others. Therefore, necessary steps should be taken at the grassroots to increase public awareness and knowledge of mediation. This may be done through writing in the mass media or specific programmes organised by the legal fraternity. Through this mode, the disputants would be self-empowered to find better ways to deal with their dissatisfaction and needs.

(viii) Mediator ought to have the requisite skill and knowledge:

Last but not least, in ensuring the success of mediation, the role of the mediator must be emphasised. The mediator must guide the negotiation process, advising, listening, and helping parties to reach a win-win solution or one that all parties can live with. A mediator has to have the requisite skill and knowledge in terms of understanding the parties desire, collecting information, facilitating communication, facilitating agreement and ability to manage cases and documents, among others. His ability to be creative, to be able to deal with strong emotion, sensitivity, reasoning, emotional stability, analytical skills, interviewing techniques, and a sense of commitment to the whole exercise of mediation is equally important.

Reconciliation in matrimonial dispute (Reconciliation Tribunal)

Having considered mediation in the Industrial Court, it would be pertinent to consider reconciliation of matrimonial disputes. It would be worthwhile noting that in matrimonial disputes, pursuant to the Law Reform (Marriage and Divorce) Act 1976, s 55(1), the petitioner, before the presentation of a petition for divorce, shall have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged. Section 106 of the Act further provides that no person shall petition for divorce, except for dissolution by mutual consent (s 52) and under s 53, unless he or she has first referred the matrimonial difficulty to a conciliatory body known as a 'Reconciliation Tribunal'.

In other words, reconciliation is a prerequisite for the filing of a divorce petition in court. The dispute would be referred to a conciliatory body and the members of this body consist of laymen who are usually respectable members of the community. The body will initiate attempts to resolve the matrimonial difficulty to the satisfaction of the parties. If the body is unable to effect reconciliation, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit in relation to maintenance of wife and children, custody of the children (if any), on division of property, and other matters related to the marriage. Section 106(5)(c) of the Act provides that no advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

Unfortunately, however, the success rate of amicable settlement of matrimonial disputes in the Reconciliation Tribunal is not satisfactory. Recent figures show that the success rate of amicable settlement of the matrimonial disputes
are way below the satisfactory level. One wonders whether that tribunal is set up with a view to help resolve disputes between conflicting couples or is it just a rubber stamp to be obtained as one of the processes to be overcome before the dissolution of the marriage can be obtained. The reason why the tribunal failed to achieve its objective is largely because members of the tribunal who are either volunteers or appointed by the government, are not properly trained as marriage counsellors or mediators in reconciling the estranged couples. To engage untrained personnel to conduct counselling for reconciliation has shown that the effectiveness of the reconciliation tribunal has been minimal and much needs to be done to improve it.

It is submitted that the Reconciliation Tribunal is capable of playing an excellent role in helping to reduce the suffering of disputing couple by giving the conciliatory approach. It is therefore suggested that the task of reconciliation ought to be undertaken by trained personnel as counsellors or mediators. The Ministry having jurisdiction over the Reconciliation Tribunal should seriously consider training those panel members who sits on the tribunal so as to be properly equipped to handle those matrimonial disputes.

It is further suggested that the members of this tribunal should be recruited from those concerned citizen who would offer their services happily to chair the panel. As for the other members of the Tribunal, short courses can be conducted in conciliation and mediation to equip them to appreciate and handle those disputes more effectively. Apart from that, it is suggested that retired government servants be appointed especially those with backgrounds relevant to such task. Further, it would be worthwhile giving incentives to the Tribunal members by showing more appreciation for their successful efforts. Concerted efforts should also be taken to publicise the positive values of this Tribunal instead of reducing it into a mere rubber stamp. As stated earlier, at present the Tribunal acts more like a hurdle to be overcome to qualify estranged couples to file the divorce petition in court than a positive vehicle to enable disputing couples an opportunity to save the marriage.

Since the high divorce rate in this country and the instability caused to society from broken families, the Ministry should reconstruct the Reconciliation Tribunal, in light of the above suggestions, without further delay. They should take a cue from the Industrial Court where the culture being practised there is moving away from less adversarial to more conciliatory through the introduction of mediation with the ultimate aim of maintaining industrial harmony in the workplace.

Conclusion

In short, the move to make the mediation mandatory before the case could be listed for hearing is highly desirable in settling disputes because of its potential of reducing the backlog of cases. Unlike in a lawsuit, where there would be a winner and a loser, mediation helps the disputants to find mutually acceptable solutions. Mediation however, is not and should never be assumed to be a substitute for the judicial system. But it can play a very effective and rewarding complementary role. It is hoped that the parties would use mediation widely in the industrial justice system to resolve their dispute rather than directing it to the courts for a decision. It is hoped that more accredited mediators with non-legal background could offer their mediation skills to the public.

Return to Text

FOOTNOTES:

n1 [1996] 3 MLJ 489 at p 510 (CA).

n2 The conciliator merely notifies the Minister that there is no likelihood of settlement but he need not submit a complete report of the circumstances leading to there being no settlement.
n3 See Court of Judicature Act 1964, s 31.

n4 See Goh Keah Hock v Mahkamah Perusahaan Malaysia and Anor [2002] 5 MLJ 37 (HC).

n5 [1997] 1 MLJ 145 (FC).


n7 Per K.Somasundram, in 'Settlement of Trade Dispute' [1981] 1 MLJ lxxiv, at p lxxxvii.

n8 The current practice of the Industrial Court is the assessment of backwages is that, it is assessed from the date of dismissal to the last date of the hearing subject to the maximum of 24 months. However, since the Federal Court's decision in R RamaChandran v The Industrial Court of Malaysia and Anor, it has been observed from numerous awards of the Industrial Court, that the scale of backwages has exceeded the maximum of 24 months. It is humbly submitted that to allow claims exceeding 24 months due to delays disposal of the dispute for which no party is responsible would be contrary to s 30(5) of the Industrial Relations Act 1967.

n9 Section 229(1) of the said Act provides; 'The Court shall have the jurisdiction to commence proceedings against any person for contempt of Court and may, in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit'.