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The Malaysian Soldier and the Doctrine of Pleasure

By
Fadzil Mokhtar

A year ago, many Malaysians were dismayed at the sacking of an Army Sergeant for his refusal to be vaccinated against COVID-19. This dismissal ended his 20-year unblemished career, and deprived him of a pension right that would have accrued 16 months down the line. Much concern was then expressed by those outside military circle at, what was perceived as, an appalling injustice done to the personnel who was purportedly exercising his constitutional right in refusing the vaccine, and whose request to be court-martialed was denied.

However, the criticisms levelled at the Malaysian Armed Forces (MAF) overlooked the peculiar features of the military whose members are governed by standards of discipline and terms of service markedly different from those of the other public services. Given the importance of good order and discipline to organizational effectiveness, the MAF are clothed with powers to summarily terminate the service of its members who fail to come up to scratch, especially those bringing the military into contempt or undermining the fundamental values critical to its operational success. There are various grounds for summary removal, also known as administrative discharge, of MAF personnel, including medical disability, unsuitability, unfitness, misconduct, and exigency of service.

The MAF's powers to administratively remove its members, before the expiration of their term of enlistment, are underpinned by Articles 132(2) and 135(2) of the Federal Constitution according to which MAF personnel hold office during the pleasure of the Yang di-Pertuan Agong, and enjoy no right to be heard prior to the termination of their service. These provisions incorporate the doctrine of "*durante bene placito regis*" ("during good pleasure of the King") - a common law principle that a public servant enjoys no fixed tenure but holds office at the absolute discretion of the Crown. The rationale behind this doctrine is public policy in so far as personnel whose continuance in office is undesirable to the interest of the State must not be allowed to remain in service. More importantly, prompt expulsion of those failing to measure up to expectations will contribute to the maintenance of discipline and enforcement of high behavioral standards both of which are essential for the building of a professional military force.

This Victorian era doctrine now firmly governs the relationship between the Crown and members of the armed forces of several common-law countries, including Malaysia. Based on the jurisprudence of the courts of these countries, the doctrine of pleasure lays the rule that military personnel serve at the will of the Crown and are liable to be dismissed at any time. Unless circumscribed by statutory laws, neither a notice of the allegation against a person, nor a pre-dismissal right to be heard, is necessary. Moreover, dismissal can still be effected in the absence of a reasonable cause. And even a bad or mistaken cause will not matter, for the doctrine vests the Sovereign with a right to dismiss at his liberty not fettered by any restrictions whatsoever.

Interestingly, disputes concerning administrative dismissal of military personnel, initiated under the doctrine of pleasure, have traditionally been held as non-reviewable by the courts. Once the existence and the scope of the prerogative power are established, judges have generally declined to interfere in its exercise, for it is purely within the unfettered discretion of the Sovereign outside the realm of the judiciary. This 'judicial hands off' attitude is driven by the imperative for effective command and control of military forces that could otherwise be undermined should personnel be allowed to sue their superiors in civil courts.

However, the practice of the doctrine of pleasure in some commonwealth jurisdictions differs from that of Malaysia. In the United Kingdom, for example, detailed procedures set forth for each of the various grounds of administrative discharge are mandatory. In a similar vein, the Australian and Canadian discharge process begins with a notification of the contemplated action to the affected member, who will then have 14 days to provide a written response prior to the taking of the final decision.

What is more, in all these countries, administrative discharge cannot ordinarily be initiated against a person whose conduct in question also amounts to an offence. In such a situation, disciplinary action should generally be preferred over administrative measure because the former will avail the personnel of the protections afforded in court-martial proceedings including a public trial, and an opportunity to be heard as well as to cross examine adverse witnesses.

In contrast, the doctrine of pleasure is not procedurally regulated in the Malaysian empowering legislation. The law is also silent on the course of action to be taken for conduct that constitutes a military or civil offence. In this instance, military commanders are free to resort to administrative discharge either in lieu of, or subsequent to, a disciplinary action.

Furthermore, notwithstanding their identical constitutional provisions, the interpretation of the doctrine of pleasure is more stringent in India than in Malaysia. Whereas non-justiciable in Malaysia, the Indian Supreme Court has maintained that judicial review is necessary for the court to be satisfied that the power of dismissal is exercised lawfully, and not motivated by mala fide or based on extraneous considerations, as the doctrine does not mean "a license to act arbitrarily, capriciously or whimsically."

It can accordingly be deduced that the dismissal of the Army Sergeant for defying the MAF's vaccine mandate was not unfounded. Inoculation of military personnel is a common practice the world over for the purpose of force protection which is necessary to prevent a repeat of the era before the Second World War during which infectious diseases surpassed combat casualties as the dominant cause of death among military forces. The Sergeant's conduct thus amounted to disobedience to a lawful order, an infraction of the military code that could subvert good order and discipline to the detriment of military effectiveness. His dismissal was therefore

grounded on a reasonable cause and in accordance with the deeply entrenched doctrine of pleasure.

Nonetheless, the precarious position of Malaysian military personnel is also apparent from his case. The doctrine of pleasure, in its absolute and unfettered form, only favors the State but affords those personnel no rights of any kind in their employment. While this employment relationship, with the government assuming no obligation to military personnel, had undoubtedly worked in the nineteenth century feudal set-up, it is difficult to be justified as a fair labor practice these days. To hold otherwise will mean disregarding minimum standards of fairness needed for the protection of human dignity and preservation of the morale of defense members.

It is therefore timely for procedural safeguards to be introduced to ensure that the doctrine of pleasure is invoked with solid basis rather than at the whim and fancy of the powers that be. The practice of the countries cited above could be replicated which entails balancing the need for an effective government of the MAF with the interests of its personnel. While the State's powers of dismissal will remain intact, the procedural safeguards will undeniably lead to fairer and more reasonable decisions.

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