

## Misconduct in Public Office: An Appraisal of Legal Perspective in Malaysia

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### Abstract

*Misconduct in public office or known as MIPO is a common law offence of which reference is made to any wrongdoing or misbehavior committed by public official. The MIPO does not confine to any specific offences as it covers all sorts of wrongdoings either minor or major. The public official who commits any offences of MIPO shall be liable for criminal, civil or disciplinary action. This paper analyses the offence of MIPO under the common law and Malaysian law perspective. The objective of this paper is to provide an insight into the legal mechanism applied in Malaysia in relation to the misconduct committed by public officials. It shall also provide a preliminary view on the extent to which the existing laws are able to deter misconduct amongst public officials. This is a doctrinal research whereby analysis is purely based on documents i.e. legal text and doctrine, thus no empirical data is used for discussion. The findings revealed that it is vital for the existing laws to be amended accordingly so that the MIPO could be addressed effectively and efficiently.*

**Keywords:** Misconduct; Public office; Public official; Offence

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### INTRODUCTION

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Misconduct in public office is one of the issues that require considerable attention in redressing wrongdoing committed by those who hold public office. It was reported that misconduct in the form of corruption amongst civil servants was rampant and made up 46.3% of 4,860 persons arrested for graft offences from 2014 till 2019.<sup>1</sup> Even though the number seems to be small compared to the total numbers of civil servants to wit 1.71 million<sup>2</sup>, such facts are adequate to badly tarnish the image and reputation of government institutions.

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<sup>1</sup> Dawn Chan, "MACC: Graf Rampant Among Civil Servants", *New Straits Times*, 19 August, 2019

<sup>2</sup> Azura Abas, "1.71 Million Civil Servants on Government Payroll as of March 2019", *New Straits Times* 30 April 2019.

A survey by Global Corruption Barometer 2020 shows that 71% of Malaysian view government corruption as a big problem.<sup>3</sup> Out of all public institutions, the members of Parliament, Police and government officials ranked the highest for perception of corruption with 36%, 30% and 28% of Malaysians surveyed respectively.<sup>4</sup> Commenting on the statistical report and news on the arrest and investigation by the Malaysian Anti-Corruption Commission (MACC) towards civil servants as appeared on mass and social media, Tan Sri Mohd Sidek Hassan, the Chairman of Enforcement Agency Integrity Commission (EAIC) was of the view that, the integrity of civil servants nowadays seems to be low and frightening.<sup>5</sup> He also was of the opinion that the increasing number of exposure to errant public officers by mass and social media signifies that the public's awareness and intolerance towards corruption have increased.<sup>6</sup>

The issues of ineffectiveness, weakness, non-compliance in managing programs, projects and activities under various ministries or public departments or agencies are amongst the issues that have been disclosed in the Auditor General's Annual Report.<sup>7</sup> Nonetheless, nothing seems to change over the years despite multiple recommendations given to improve the situation.<sup>8</sup> For instance, the auditor's report revealed the lack of efficiency of the Royal Malaysian Customs Department in distributing shoes has caused losses to the government. The shoes were purchased for the Customs Department uniformed personnel in 2009 but not distributed even till the audit's finding in 2012. By that time, the purchased shoes that were valued at RM602,089 were already damaged and had to be disposed of. This has resulted in a loss to the government which was significantly due to the inefficiency and negligence of the officer responsible in the procurement and distribution of the shoes.<sup>9</sup> Hence, the punishment that could be imposed upon the errant officer for causing such a big loss to the government should be a stern one and not merely a warning.

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<sup>3</sup> Transparency International-Malaysia (TI-M), "Global Corruption Barometer 2020: Citizens' View and Experiences of Corruption", <[GCB Asia 2020 Report \[WEB\].pdf \(transparency.org.my\)](#)>

<sup>4</sup> Ibid.

<sup>5</sup> Mohd Saufi Hassan, "Penjawat Awam dan Rasuah Sangat Menakutkan", *Harian Metro*, 18 April 2021.

<sup>6</sup> Sairien Nafis, "Growing Intolerance of Corruption Reason for Skyrocketing Reports: EIAC", *The Vibes* 4 May 2021.

<sup>7</sup> Syafiqah Salim, AG's Report 2018: The Auditor General Highlight Issues on Weaknesses, Ineffectiveness in Managing Projects, *The Edge*, 14 July 2020.

<sup>8</sup> Bernama, "2016 Auditor General's Report Still Contains Element of Corruption – AG", *New Straits Times*, July 17, 2017.

<sup>9</sup> The Editor, "#AG's\* Reports 7,600 Pair of Shoes had to be Destroyed", *The Edge*, 1 October 2013.

Given that, this article shall examine the offence of public official misconduct under the common law. Following that, an analysis shall be made on the offence of misconduct in public office as found in the Malaysian legislations. It is therefore expected that the article will be able to provide an insight into the legal mechanism applied in Malaysia in relation to the misconduct committed by public officials. It shall also provide a preliminary view on the extent to which the existing laws are able to deter misconduct amongst public officials. This article shall answer three research questions namely 1) What is the common law offence of public office misconduct? 2) What are the laws governing misconduct in public office in Malaysia? 3) Are the laws sufficient to redress public office misconduct in Malaysia?

## **METHODOLOGY OF THE STUDY**

This study is a qualitative research of which it is purely based on document analysis. It is a doctrinal research of which does not require any empirical data for discussion. The data were collected from relevant documents concerning public office misconduct such as articles from journals, magazines, newspaper cuttings, reports, legislations and legal cases either in Malaysia or abroad. The data were then analyzed and discussed accordingly so as to determine the extent to which the Malaysian laws were applied in relation to the misconduct in public office. The findings shall then be used to answer the questions mentioned above.

## **AN OVERVIEW OF THE COMMON LAW OFFENCE OF MISCONDUCT IN PUBLIC OFFICE**

The offence of misconduct in public office (hereinafter referred to as “MIPO”) is a common law offence which has been in existence for hundreds of years.<sup>10</sup> It was established through case law rather than legislation and can only be tried by indictment. The offender of the MIPO shall be punished to the maximum sentence of life imprisonment. The reported cases of MIPO can be traced back to 1783. For example

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<sup>10</sup> Law Commission, Appendix A The History of the Offence of Misconduct in Public Office <[https://www.law.com.gov.uk/wp-content/uploads/2016/01/apa\\_history.pdf](https://www.law.com.gov.uk/wp-content/uploads/2016/01/apa_history.pdf)>

the case of *R v Bembridge*<sup>11</sup> where the fraudulent behavior of an accountant who worked at the office of paymaster of the armed forces was accused of concealing from a government auditor some omitted entries in the public accounts of which he had knowledge about it.

Since the common law offence of MIPO is not defined in any statute, it could not be confined to specific categories of misbehavior. So long as the misconduct is done by someone who holds public office, he shall then be caught by the MIPO. Lord Manfield in *R v Bembridge*, held as follows;

*“Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country”*<sup>12</sup>

The above case provides that there are two types of action that can be taken against the public official for any misconduct committed in the public office i.e. criminal action or civil action. For criminal action, it shall be brought by the government against the accused person and in the case of civil action; it can be taken by any person under the law of tort for damage suffered due to the misconduct of the public official in his public office.

## **Definition and Scope of the MIPO**

As mentioned earlier, the offence of MIPO encompasses any category of misconduct committed by a public servant or official. It is also referred to as misdemeanor in public office, misfeasance in public office, misbehavior in public

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<sup>11</sup> (1783) 93 ER 679

<sup>12</sup> Ibid, at pg 681

office, official misconduct, breach of public trust or abuse of public office. In Russell on Crime, the MIPO is defined as follows;<sup>13</sup>

*“Where a public officer is guilty of misbehaviour in office by neglecting a duty imposed upon him either at common law or by statute, he commits a misdemeanour and is liable to indictment unless another remedy is substituted by statute. The liability exists whether he is a common law or a statutory officer; and a person holding an office of important trust and of consequence to the public, under letters patent or derivatively from such authority, is liable for indictment for not faithfully discharging the office.”*

Given that, the offence of MIPO apparently covers all categories of wrongdoing committed by public officials and not limited to bribery or any other criminal offences such as theft, extortion etc. It also covers any misbehavior of a public official committed within his public function of which renders the person to be criminally liable for the act. The imposition of criminal liability upon such a person is due to the fact that public officials are fiduciaries, who owe duty of loyalty to the public and any failure to comply with the fiduciary standard of behavior on any matter of public concern shall be treated as public wrong.<sup>14</sup> Based on that reason, the same liability might not be imposed upon a person in a private sector in the event of similar wrongdoing is being committed by the person unless it is clearly provided as such by statute.

In some countries such as Hong Kong, the common law offence of MIPO has been widely applied and considered a key weapon in the fight against corruption.<sup>15</sup> It has become a powerful tool in tackling corruption and is beneficial when there is some lacuna in the existing laws of bribery. This is because the common law misconduct in public office has much wider scope as it encompasses any serious misuse of power or position by public officials regardless of whether bribery is involved in the commission

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<sup>13</sup> JW Cecil Turner, *“Russel on Crime 12<sup>th</sup> Edition”*, (United Kingdom, Sweet & Maxwell, 1964), 361

<sup>14</sup> David Lusty, “Revival of Common Law Offence of Misconduct in Public Office”, *Criminal Law Journal*, vol. 38, no. 6, (December 2014) : 338

<sup>15</sup> Wynne Mok and et al. “Hong Kong: Revisiting the Offence of Misconduct in Public Office” In *Business Ethics and Anti-Corruption:Asia Pacific Insights*, *Norton Rose Fulbright*, Issue 8, (January 2016): 14

The ‘catch-all’ wrongdoings or offences under the MIPO nevertheless have been viewed by many to be a lack of clarity and precision which creates opportunities for misuse and injustice. This is because the MIPO does not make any separation between serious forms of misconduct and civil and disciplinary penalties or less serious misconduct of which cases do not require serious criminal sanction.<sup>16</sup> As such, the MIPO covers all sorts of wrongdoings committed by public officials of which include nonfeasance, misfeasance, frauds, deceits, malfeasance and oppression.<sup>17</sup> In the case of *Attorney General's Reference No 3 of 2003*, the Court of Appeal tried to give clarification to the MIPO and had formulated it as follows i.e. the conduct of civil servant who willfully neglects to perform his duty or willfully conduct himself to such a degree as to amount to an abuse of the public trust in the office holder without reasonable excuse or justification.<sup>18</sup> Given that, few important elements must be fulfilled before indictment can be made against a person under the offence of MIPO namely 1) it is confined to the wrong done by civil servant in the course of performing his duty; 2) the wrong must be done willfully or deliberately as opposed to unintentionally or accidentally; 3) the extent to which the wrong is done must be amounting to an abuse of public trust; and 4) the wrong must be done with no reasonable excuse or justification.

The above case indicates that for a person to be indicted under the MIPO, the misconduct must be calculated to be an abuse of the public office of which would bring prejudice to the public interest. In other words, offence under the MIPO could be any kind of misconduct that can be construed as a breach of public duty or trust. The breach of public duty can either be in a form of commission or illegal omission but with evil motive or intention.<sup>19</sup> Nevertheless, it does not require any evidence of bad consequence or any prohibited result to flow from the misconduct in order for the doer to be criminally liable under the MIPO.

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<sup>16</sup> Law Commission, “Misconduct in Public Office”, (UK: William Lea Group, 2020), <[www.gov.uk/government/](http://www.gov.uk/government/) publications.>

<sup>17</sup> Simon Parsons, “Misconduct in a Public Office – Should it Still be Prosecuted?”, *The Journal of Criminal Law*, vol76 ,issue 2 (April, 2012)

<sup>18</sup> [2005] All ER 303; [2004] EWCA Crim. 868

<sup>19</sup> See *R v Dytham* [1979] QB 722; Law Commission, Misconduct in Public Office, Law Com. No 397

The definition of offence under the MIPO can also be seen in the case of *R v Quach*,<sup>20</sup> whereby the Victoria Court of Appeal in Australia has formulated elements of the MIPO as follows; 1) committed by public official; 2) in the course of or connected to his public office; 3) willfully misconduct himself; by act or omission for example by willfully neglecting or failing to perform his duty; 4) without reasonable excuse or justification; and 5) where such conduct is serious and meriting criminal punishment having regard to the i) responsibilities of the office and the officeholder, ii) the importance of the public object which they serve and iii) the nature and extent of the departure from those objects. Comparatively, there is not much difference between the elements of MIPO as stated in *Attorney General Ref No 3 of 2003 case* except this case provides an additional requirement of which regard shall also be had to the seriousness of the misconduct of which render the doer to be liable for criminal sanction.

The seriousness of the misconduct as one of the elements under the MIPO has been discussed in the case of *Sin Kam Wah v HKSAR*<sup>21</sup> where the Court of Final Appeal in Hong Kong ruled that the misconduct must be serious and not trivial having regard to the responsibilities of the office and the office-holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities. In *Attorney General's Reference No 3 of 2003*, the English Court of Appeal described the seriousness of the misconduct as an action that is a serious departure from proper standards and such a departure must not merely be negligent but amounting to an affront to the standing of the public office held.<sup>22</sup>

Due to non clarity and consistency in the operation of the offence of MIPO, the Law Commission of the United Kingdom recently has come out with a proposal for reformation with intention to provide greater clarity and to target the serious forms of misconduct in public office.<sup>23</sup> There are several recommendations made and amongst others are 1) to introduce two statutory offences i.e. offence of corruption in public office and offence of breach of duty in public office; 2) to provide definition for the position that amount to public office to include minister as well as Members of Parliament; 3) to clearly distinguish serious misconduct and less serious or minor

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<sup>20</sup> (2010) 201 A Crim R 522 at 535; see David Lusty, "Revival of Common Law Offence of Misconduct in Public Office", *Criminal Law Journal* vol.38, no.6 (December 2014): 342

<sup>21</sup> (2005) 8HKCFAR 192 at para 45

<sup>22</sup> [2005] All ER 303 at pg 56

<sup>23</sup> A report on Public Office Misconduct was published on 4<sup>th</sup> December 2020.

misconduct whereby the latter shall be governed under disciplinary proceeding instead of criminal. By having a clear demarcation of offences it is expected that the MIPO will be clearer in its operation and much easier to be understood. This may prevent any vexatious prosecution of the offences as well promote fairness and consistency in charging and prosecution practice.

Presently, many common law jurisdictions have codified the common law offence of the MIPO or are taking steps to codify it. For instance, most jurisdictions in Australia have codified the offences under its Criminal Code Act 1995 (No 12, 1995) into several categories namely unwarranted demand with menaces, bribery and abuse of powers. The Code provides a maximum penalty of imprisonment for 12 years and 5 years respectively for any public official who is found guilty of committing stipulated offences in relation to public office.<sup>24</sup> Similarly, the Criminal Code 2002 [Australian Capital Territory] has stipulated the offences in relation to the performance of public office function and upon conviction shall be sentenced to fine and imprisonment for 5 years or both.<sup>25</sup>

### **The Malaysian Law of Misconduct in Public Office**

As far as Malaysian law is concerned, the offences of MIPO can be found in two primary legislations namely the Penal Code [Act 574] and the Malaysian Anti-Corruption Commission Act 2009 [Act 694]. It is also found in Regulations made by the Yang di Pertuan Agong under Article 132 (2) of the Federal Constitution namely the Public Officers (Conduct and Discipline) Regulations 1993 [PU (A) 395]. The MIPO under the Malaysian Anti-Corruption Act 2009 (hereinafter referred to as the MACC Act 2009) concentrated on the offence of bribery and abuse of position and the Penal Code on the other hand provides multiple criminal offences including bribery and abuse of power. For disciplinary misconduct it shall then fall under the Public Officers (Conduct and Discipline) Regulations 1993.

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<sup>24</sup> See Parts 7.5/7.6, Division 139/142 of the Criminal Code Act 1995 [Commonwealth]

<sup>25</sup> Section 359 - Division 3.7.2 of the Criminal Code 2002



## The Offences of MIPO Under The Penal Code

The offences of MIPO under the Penal Code are mainly found in Chapter IX. In addition, there are few other provisions related to MIPO which can be found under Chapter X and Chapter XVII of the same law. The offences of the MIPO under Chapter IX concentrated on bribery that a public servant receives in relation to the performance of his official duty as government officials. Section 161 reads;

*“Whoever, being or expecting to be a public servant, **accepts or obtains, or agrees to accept or attempts to obtain,** (emphasis added) from any person, for himself or for any other person, **any gratification whatever,** (emphasis added) other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government, or with any member of the Legislature, or with any public servant as such shall be punished with.....*

The above section provides that an offence shall deem to be committed when a public servant accepts or obtains or attempts to accept or obtain gratification from anyone except his legal remuneration as a reward on account of something he does in relation to his duty as government official. Similarly in sections 162 and 163 whereby criminal liability is imposed upon a person who accepted gratification for inducing a public servant to do or to undo anything that would benefit the giver. On the part of public servant, if he complies with the request of the inducer without any lawful justification, he shall be considered of committing an abetment and shall be criminally liable under section 164 of the Penal Code. It is also an offence for any public official to take advantage in a way of accepting any valuable thing in the course of his public duty when consideration given for that thing is insufficient.<sup>26</sup>

Apart from bribery, the Penal Code imposed a criminal liability on public servant who disobeys direction of laws with intention to cause injury to any person or to

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<sup>26</sup> Section 165 of the Penal Code

avoid someone from punishment or property from forfeiture,<sup>27</sup> to prepare incorrect statement, record or writing in order to save someone from punishment or property from forfeiture,<sup>28</sup> engage in unlawful trade or unlawfully buying or bidding.<sup>29</sup> A public officer or its agent may also be criminal liability if he or his agent commits any breach of trust on any property that is being entrusted to him in his capacity as a public servant.<sup>30</sup>

Based on the above, the offence of MIPO under the Penal Code can be categorized as offence related to gratification and non gratification. Offences related to gratification are found in sections 161-164 of which require element of gratification to be received or obtained in the commission of the act for the public official to be criminally liable. Section 165 on the other hand prohibits any public official from taking advantage in a way of accepting any valuable thing in the course of his public duty when consideration given for that thing is insufficient. For non-gratification offences, the commission of the act does not involve any element of gratification but the public official shall be criminal liability for acting in a manner contrary to the law provided therein.

### **The Offences of MIPO Under The MACC Act 2009**

Part IV of the MACC Act 2009 prohibits anyone from accepting gratification as a reward or an inducement on account of anything done or undone by a person or a public official in relation to his official duty as government official.<sup>31</sup> Section 16 provides;

*“Any person who by himself, or by or in conjunction with any other person –  
(a) corruptly **solicits or receives or agrees to receive** (emphasis added) for himself or for any other person; or (b) corruptly **gives, promises or offers to any person** (emphasis added) whether for the benefit of that person or of another person,*

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<sup>27</sup> Section 166; section 217

<sup>28</sup> Section 167; section 218. See also section 219 in relation to public servant who corruptly or maliciously makes or pronounces a report, verdict or decision in a judicial proceedings in contrary to the law.

<sup>29</sup> Sections 168-169

<sup>30</sup> Section 409 of the Penal Code

<sup>31</sup> Sections 16, 17, 19, 20 and 21 of the MACC Act 2009

***any gratification*** (emphasis added) *as an inducement to or a reward for, or otherwise on account of:*

*(A) any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or*

*(B) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned, commits an offence”*

The prohibition is also extended to giving or accepting any gratification from foreign public official.<sup>32</sup> The MACC Act 2009 also prohibits any public official from using his office or position for gratification.<sup>33</sup> Apart from gratification, the Act also covers an act of using false, defective or erroneous documents by any person or his agent with intention to deceive his principal.<sup>34</sup>

In general, the focal point of the offences of MIPO under the MACC Act 2009 revolved around the gratification that is either given or accepted as an inducement or a reward for anything that is done or undone of which has benefited someone. Only one provision i.e section 18 provides for an offence of fraud which does not require an element of gratification. This means that in the case of any wrongdoing which does not involve any receiving or accepting gratification or if so involved but the evidence of receiving or accepting gratification in the doing could not be proven or does not fall under the elements provided by the law, the person including public official shall deem to have not committed an offence under any of the law mentioned above. In other words, if a complaint of wrongdoing made against a public servant is lodged with enforcement authority i.e. the Malaysian Anti Corruption Commission (MACC), such a complaint may not be liable for prosecution if the elements stipulated by the laws or the evidence required to be produced before the court failed to meet the legal requirement regarding the gratification. Instead, the MACC upon completion of investigation may make a recommendation to the organization or department or agency of which the public officer is serving to take a disciplinary action against the person involved in the wrongdoing.

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<sup>32</sup> Section 22 of the MACC Act 2009

<sup>33</sup> Section 23 of the MACC Act 2009

<sup>34</sup> Section 18 of the MACC Act 2009

Notwithstanding the limited type of offences of MIPO under the MACC Act 2009, the definition of public official stated therein is very broad as it refers to all categories of person either in a position of member, officer, employee, servant of a public body of which includes member of administration, member of Parliament, member of State Legislative Assembly, judges and any person receiving remuneration from public funds.<sup>35</sup> This is in fact very significant as criminal liability could be imposed upon anyone who holds the position of providing services to the public if he involves in a misconduct in the form of bribery or fraud.

### **The Offence of MIPO Under The Public Officers (Conduct and Discipline) Regulations 1993**

The offence of MIPO may also be governed under disciplinary proceeding apart from criminal. This shall be applied whenever the alleged wrongdoing is not stated in any of the legislations discussed above or if so stated, the enforcement authority is of the view upon investigation that it falls under disciplinary matter and recommended that a disciplinary action to be taken against the public official concerned. Sometimes, the alleged wrongdoing committed by public official is lodged internally i.e. to the management of which the accused public official is serving. Thus, the matter shall be decided internally and disciplinary action shall be taken accordingly after internal investigation has been carried out on the alleged wrongdoing.

The laws governing wrongdoing that falls under disciplinary matter are provided in the Public Officers (Conduct and Discipline) Regulations 1993 [PU (A) 395]. This Regulation governed disciplinary matters of public servant in relation to the conduct and behavior of them in relation to the performance of their public duty. Any member of the public service in the Federation shall be bound by the rules stipulated in the Regulations and any breach shall render the officer to be liable to disciplinary action. The disciplinary matter shall be tried by relevant disciplinary authorities of the agency, department or institution upon which the public servant is serving and no criminal sanction shall be imposed upon the offender.

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<sup>35</sup> Section 2 of the MACC Act 2009

Part II of the Regulations provides multiple misbehavior either general or specific such as being in a conflict of interest, negligence, lack of efficiency, irresponsible, dress etiquette, sexual harassment, absent without leave, involves in private employment without approval, drugs etc. If proven guilty, there are varieties of punishment or penalties that can be imposed upon the offender namely warning or fine or forfeiture of emoluments or deferment of salary movement or reduction of salary or reduction in rank or dismissal.<sup>36</sup>

It was reported that 1000 public officers have been taken action for flaws and weakness in performing their duties based upon the Auditor General's report from 2012-2018. Of the figure, 255 officers were penalized, 604 officers were freed and the remainders are in the ongoing proceeding. The types of punishments imposed were warning (141), suspension of salary movement (26), court sentence (2), fine (11), salary cut (10), fine and warning (9), surcharge (29), surcharge and warning (9), fine and surcharge (2), salary cut and fine (1), salary cut and warning (7), demotion (1) and demotion and warning (1).<sup>37</sup> Despite that, the Auditor General was of the view that the punishment meted out upon the public official for breach of duty or for being negligence is light and soft.<sup>38</sup> This is because by looking at the losses that the government suffered, the punishment should be a stern one so as to deter the wrongdoing. On the part of auditors, though they can make recommendation for improvement, they cannot intervene with the punishment since their function is to carry out audit work only.

Apart from the above punishment, the service of public officials may also be terminated in the public interest when the government finds it is desirable to do so.<sup>39</sup> This happens when a written report is forwarded by the Head of Department to the government or upon request by the government. The report shall contain particular relating to the work and conduct of the officer and a decision shall then be made accordingly.<sup>40</sup> The termination in public service may be carried out without the necessity of conducting disciplinary proceedings onto the official concerned.

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<sup>36</sup> Regulation 38

<sup>37</sup> "Action Taken Against 1,000 Officers over Auditor-General's Report 2012-2018." <https://www.astroawani.com/berita-malaysia>

<sup>38</sup> "A-G's Report: 255 Civil Servants Penalized Over 'Flaws, Weaknesses'", *Malay Mail*, July 14, 2020,

<sup>39</sup> Part VII of the Regulations.

<sup>40</sup> Regulation 49

Furthermore, the government is not required by the law to give any reason whatsoever to arrive at that decision. In the case of *Jalaluddin Ismail v Ketua Pengarah Perkhidmatan Awam Malaysia & Anor*,<sup>41</sup> Ramli Ali JCA said;

*“The Government may terminate the service of the officer if the government is satisfied it is desirable in the public interest to do so, after having regard to the conditions of the service, the usefulness of the officer to the service, the work and the conduct of the officer and all other circumstances of the case. The satisfaction relates to the satisfaction of the Government. It is for the Government to decide on the desirability of the termination. The Government is not legally obliged to give reason to any party as to what considerations have fulfilled its satisfaction or what is the degree of its satisfaction. The requirements for 'satisfaction' and termination of the service as required under reg. 49 had been complied with.”*<sup>42</sup>

The termination in public interest as provided under Regulation 49 is quite different from any other form of disciplinary proceedings whereby it does not give the officer involved an opportunity to be heard. Hence, the right to be heard as guaranteed under Article 135(2) of the Federal Constitution shall not be applicable to the officer concerned. This is clearly stated in the proviso of Article 135(2) of the Federal Constitution which provides that any termination of service in public interest under any regulation made by the YDPA under Article 132(2) shall not constitute dismissal, thus the person shall be excluded from the right to be heard. Despite the fact that a public official can be terminated his service under the Regulation 49 of the Public Officer (Conduct and Discipline) Regulations 1993, payment of pension can still be accorded to him if he is required to retire in the public interest by the YDPA. The YDPA on the other hand is conferred with the power under section 10(5)(d) of the Pensions Act 1980 [Act 227] to grant the pension payment to the public official whose service has been terminated under Regulation 49. The exercise of power by the YDPA is based upon Article 40 of the Federal Constitution which required the Royal Highness to perform his function in accordance with collective or individual ministerial advice. This shows that a public official is still entitled to pension payment regardless of the reason for the decision to terminate the service is made. Even if it is due to the misconduct or

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<sup>41</sup> [2012] 9 CLJ 183;

<sup>42</sup> Ibid; para 23

unsatisfactory performance of duty by such public official in relation to his office or it constitutes a punishment to him, the public official shall still be given pension as provided by the law to him.

### **The Offence of MIPO Under The Tort of Misfeasance**

A public officer who is involved in any offence under the MIPO may also be sued by the public under the law of tort of misfeasance. This is provided under the Government Proceedings Act 1956 (Revised 1988) [Act 359] of which allows any member of the public to sue a public officer for any wrongful act committed in his public office. Section 5 of the Act provides;

*“The Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government”*

The imposition of liability upon the government under the tort of misfeasance of public officers is based upon the premise of vicarious liability of which arises due to the relationship of employer and employee or principal and agent. Under the Malaysian law, the vicarious liability has been statutorily established in the Government Proceedings Act 1956. As such, any act or omission of public officials which lead to harm or damages suffered by anyone, a civil proceeding can be taken against the official and the government.<sup>43</sup> In *Tony Phua Kiam Wee v Government of Malaysia and Another Appeal*<sup>44</sup> the Federal Court ruled that the term ‘public officer’ under the Government Proceedings Act 1956 and for the tort of misfeasance of public officers shall include the Prime Minister and any ministers as they are holders of public office in the context of misfeasance in public office. As such, the tort of misfeasance in public

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<sup>43</sup> The liability however is subject to express provisos or other statutory provisions excluding such liability in specific circumstances.

<sup>44</sup> [2020] 1 CLJ 337

office which is based upon the common law principle shall be applied to all public office holders as they have been entrusted to exercise their public duty only for public good and not for any ulterior or improper purpose.

## CONCLUSION

As far as the offence of MIPO is concerned, it is a common law offence and it covers a wide scope of wrongdoing committed by public officials. The offences of MIPO are not limited to bribery or any other criminal offences such as theft, extortion etc. but cover any misbehavior of public officials which are committed in the performance of their public duty. The liability that can be imposed upon the officer concerned can be either criminal or civil. In the case of criminal liability, the government may take legal action against the officer concerned for committing misconduct while for civil liability, a private or individual person may sue the official under the law of tort of misfeasance for the losses or damages suffered as a result of the misconduct.

Under the Malaysian law, the offences of MIPO are found in statutes namely the Penal Code and the MACC Act 2009 whereby the public officer can be criminally liable for misconduct in the form of bribery or other wrongdoings as stipulated therein. For other types of misconduct such as negligence or breach of duty or other disciplinary matters, it shall be governed under the Public Officers (Conduct and Discipline) Regulations 1993. Despite the fact that the public official who commits the misconduct prohibited under the above mentioned laws can be made liable, the punishment imposed upon the offender sometimes does not commensurate with the wrongdoing. This is because the punishment depends upon the authority that tried the matter which is either the enforcement authority or disciplinary authority. With regard to criminal sanction, it can only be imposed upon public official for the offences of MIPO committed under the Penal Code and/or the MACC Act 2009 and the matter is brought to the attention of enforcement authority for prosecution. In the case of negligence or breach of duty or any other matters not provided in the above mentioned statutes, it shall then be governed by the Public Officers (Conduct and Discipline) Regulations 1993. The public official concerned shall be tried under disciplinary proceedings and shall be punished accordingly by the disciplinary authority of which the public official is serving.



As a matter of fact, there have been a lot of misconduct cases involving public officers which has resulted in financial loss to the nation. This can be seen in the Auditor General's Report indicating that the government had to incur huge financial losses annually due to negligence and breach of duty of its public officer. Since the negligence or breach of duty of public officials conventionally fall under disciplinary matters, it does not in fact provide strong punitive penalties against the offender. As highlighted by the Auditor General, the punishment meted out against officers for negligence or breach of duty is apparently soft and light. As such it is a high time for the misconduct in the form of negligence or breach of duty by public officials to be considered serious offence whereby criminal liability should be imposed upon the offender instead of disciplinary remedies. Thus, the MIPO in the form of negligence or breach of duty would then be considered as a serious misconduct that warrants criminal punishment so as to deter the wrongdoing. Nevertheless, if the law on the matter is to be amended and improved, several matters should be taken into consideration namely (1) the category and type of misconduct so as not to be redundant with one that falls under disciplinary action, (2) the gravity of the wrongdoing by which would harm the public interest, (3) the scope of public officers should be broaden by having a general and specific definition of person holding public office so as to include appointed or non-appointed official such as politician; and (4) any probable defense that could be put forward by the public official upon being prosecuted. In addition, legal actions must also be taken against those who abetted or attempted to commit such offences. By this, it will provide a clear and comprehensive law to be applied in the operation of the offence of misconduct in public office.

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