

The International Labor Standard on the Elimination of Discrimination in Employment: Response and Prospect of Malaysia

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Abstract—Discrimination in employment has its wider social and economic consequences other than mere violating a basic human right. Discrimination involves treating people differently because of certain grounds such as race, color, or sex, which results in the impairment of equality of opportunity and treatment. As an essential part of promoting decent work, combating discrimination through the principle of non-discrimination has been established by the International Labor Organization (ILO) through the Declaration on Fundamental Principles and Rights at Work 1998. Considering elimination of discrimination in employment as a core labor standard, member states are expected to respect, promote and implement it to their national laws and policies. Being a member state, Malaysia has to position herself align with this international requirement. The author discusses the related convention together with Malaysia's responses on the matter. At the closing stage, the prospect of Malaysia is presumed taking into account of the current positions and reports submitted to the ILO.

Keywords—Discrimination, employment, international labor standard, Malaysia.

I. INTRODUCTION

THE UN Declaration of Human Rights 1948 (the Declaration) has set forth the idea of equality and non-discrimination to the international community. Article 7 proclaims that, "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". Supporting this idea, the International Labor Organization (ILO) has expressly pronounced elimination of discrimination in employment as one of its core labor standards in its Declaration on Fundamental Principles and Rights at Work 1998. Owing to this, the ILO has further adopted few core conventions and recommendations thus expecting the member states to ratify them. It is to note that ratification in this area would not only alleviate the state's own standard but convey an international image as a forward-looking country that accentuate on the vital areas of human rights. This paper looks into the most relevant convention and recommendation, namely the Discrimination (Employment and Occupation) Convention, No. 111 and Discrimination (Employment and Occupation) Recommendation, No. 111. As

a member state, Malaysia's response, position and prospect towards this convention and recommendation are examined. The findings would be based on the available legislative framework in Malaysia and reports on this respect to the ILO.

II. THE INTERNATIONAL LABOR STANDARDS AND THE CONVENTION ON ELIMINATION OF EMPLOYMENT DISCRIMINATION

The ILO has an exclusive responsibility towards social and labor matters thus striving towards the protection of the fundamental rights of workers[1]. Generally, the existence of the ILO is justified for three main reasons[2]: to promote for universal peace and harmony based on social justice; to improve injustice, hardship and privation in the conditions of labor; and to give a social effect internationally by adopting humane conditions of labor in the member states. All these are very much associated with the principle of equality or non-discrimination which has been one of the ILO's principal objectives since 1919.

The ILO which was founded on three basic structures, namely the International Labor Conference, the Governing Body and the International Labor Office, accomplishes its task by formulating the standards known as the International Labor Code or international labor standards. International labor as a standard is generally considered as part of labor law which has an international source[3]. According to Mah, labor standard is "the norms and rules that govern working conditions and industrial relations." [4] These labor standards take the form of conventions and recommendations.

Ratification to the conventions is recommendable but similar to other international treaties, while some others ratify and consider the conventions and recommendations as important sources for developing their laws and policies, some member states are reluctant to do so because of their own reasons. Regardless whether the member states ratify or not, they are still subject to being scrutinized by the ILO in terms of the implementation; or at least their readiness towards it, particularly when it involves the fundamental principles. Considering the ILO Constitution, Art 19 requires member states to report the position of their laws and practices in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or proposed to be given, to any of the provisions of the Convention and stating the difficulties which prevent or delay the ratification of such Convention. Art 22 further requires each member states to

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make an annual report to the International Labor Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party.

It is a prime motive of the ILO to give great consideration to the protection of basic human rights inclusive of freedom from discrimination. The ILO therefore strongly recommends member states to ratify the fundamental conventions or core labor standards i.e. the core principles from which the issues of human rights in the world of work are derived from. Accordingly, the International Labor Conference (ILC) approves the Declaration on Fundamental Principles and Rights at Work 1998 (the 1998 Declaration) and anticipates it to be applied to all member states whether or not they choose to ratify the core conventions. This is obvious when looking into one of the elements of the 1998 Declaration which is the reaffirmation of the obligation of all member states to respect, promote and realize the principles concerning the fundamental rights[5]. This is also in line with Art 2 of the Constitution which declares all member states are having an obligation, "to respect, to promote and to realize, in good faith and in accordance with the Constitution" even if they have not ratified the Convention in question. In this regard, it includes the convention on the elimination of discrimination in respect of employment and occupation[6].

On the principle of elimination of discrimination, the ILO has adopted the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958. This convention generally provides a policy for eliminating all forms of discrimination in employment and occupation whether in access of employment, during or after the employment including the terms and conditions of employment[7].

A. Discrimination (Employment and Occupation) Convention 1958 (No. 111)

Discrimination occurs in every stage of employment beginning from advertisements, selections, recruitments, hiring, promotions, trainings and even dismissal. Therefore, it is the specific objectives of the Discrimination (Employment and Occupation) Convention 1958 (the Convention) to promote equality and eliminate discrimination in every single level of employment be it at the pre-employment, during the employment and the post-employment. The Convention promotes equality by protecting all workers against discrimination based on race, sex, religion, political opinion, national extraction, social origin and other criteria as may be determined by the member concerned after consultation with representative employers' and workers' organizations[8].

The Convention defines 'discrimination' as including "any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". The terms 'employment' and 'occupation' embrace all sectors inclusive of access to vocational trainings, employment and any particular occupations, and also terms and conditions of employment (Art 1). As a core labor

standard, this Convention applies to all individuals in all forms of employment, private or public sector, whether they are salaried or independent[9]. Under the Recommendation, equality of opportunity and treatment should be given in respect of[10]:

- a) access of vocational guidance and placement service;
- b) access of training and employment of their own choice according to their suitability;
- c) advancement in accordance with their characters, abilities, experience etc;
- d) security of tenure of employment;
- e) remuneration for work of equal value;
- f) conditions of work including hours of work, rest periods, annual holiday with pay, occupational safety and health measures, social security measures, welfare facilities and other benefits that are related to employment.

For a practical approach and an effective implementation, the ratifying states need to develop and implement such policies at national level by ensuring the tripartite involvement. Supposedly, the measures taken would be more convenient and efficient as the state could plan the laws, rules and regulations that practical, suitable and achievable depending on their capabilities and abilities. Moreover, the states could identify the methods that are compatible and correspond with their cultural, political, social and economic demands. It is to be noted that, to ratify means to have new legislations, further guidelines, other policies, additional administrative bodies and so on, which all involve extra financial budget; the question that would cause social, political and economic impacts onto the states. Shall these be the reasons, the member states would, without a doubt, take such a long interval before accepting and ratifying the conventions.

Having said these, the positions of the developing countries which are mostly in the region of Asia, are expected to be the least willing to ratify compared to the other constituents although the "observance of core labor standards does not necessarily depend on a country's level of economic development," as in [4]. Even for those ratified, they had taken such a great interval between the time of adoption and ratification because they need to conform the countries' positions and situations to the requirements of the ratified conventions beforehand[11]. This has been evident to be the practices of Australia[12], France and many other countries.

III. MALAYSIA AND INTERNATIONAL LABOR STANDARDS

Generally, international law affects Malaysia through the Federal Constitution, the Civil Law Act 1956, membership in international organizations, ratification of treaties and conventions, acts of Parliament and judicial decisions[13]. It is nonetheless vital to note that international law does not automatically form part of the domestic law. Instead of the doctrine of incorporation, Malaysia adopts the doctrine of transformation that international law forms part of the domestic law if enacted by subsequent domestic legislation or incorporated by judicial decision[14]. Therefore, being a signatory to the international treaties alone does not affect Malaysia much in terms of its international law until and

unless the treaties or conventions are incorporated into the domestic law through the enacted legislation, as in [14]. The power to enact laws involving aspects of international law is enumerated in Article 74(1) that read with the Federal List of the Federal Constitution which includes treaties, agreements and conventions with other countries and all matters that bring the Federation into relations with any other countries, implementation of treaties, agreements and conventions under the international organizations.

A. Response Relating To the Convention on Elimination of Employment Discrimination

To date, Malaysia has ratified 14 conventions, including six core labor standards namely Convention No. 98 of Collective Bargaining, both Convention 29 and 105 of Forced Labor with the latter being denounced, Convention No. 100 on equal remuneration and both Convention No. 138 and 182 of child labor. Ratification, although is not a promise for the compliance and implementation of the laws, shows deference to the organization's objective. At this point, it follows the aim of the 1998 Declaration. In the case of Malaysia, instead of ratifying both conventions on the elimination of discrimination in respect of employment and occupation, namely the Convention No. 100 and the Convention No. 111, she ratifies the former, on equal remuneration, with an implementation only to the public sector employees. As a policy and in practice however, equal treatment has been claimed to be accorded to men and women workers, public or private, who are engaged in work of equal value[15].

The reason for not ratifying Convention No. 111 has never been made clear. However one can assure that the right to equality is pertinent in Malaysia via the Federal Constitution. The report served to the Supervising Body of the ILO explained that the principle of non-discrimination has been recognized in policy and practice whenever all Malaysians have been assured with equality of opportunity in employment sector. The recognition is based on the right to equality under Article 8 of the Constitution. While this statement is, in the first instance, deemed true as far as the idea of formal equality is concerned, the court's judgment may be questionable when it failed to recognize the essence of substantive equality[16] by virtue of the case *Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 2 C.L.J. 713 (The Federal Court of Malaysia).

Without explicit provision that offering the right against discrimination does not indicate a total denial to the issue when the Ministry of Human Resources (MOHR) and the courts of Malaysia have already prepared and taken notice of the complaints of discrimination, which according to them were scarce and unfounded, as in [15]. This fact is deemed to be aligned with the 2003 report to the ILO when the government of Malaysia admitted that the principle of the elimination of discrimination in respect of employment and occupation has been recognized in Malaysia. The only concern is the word "discrimination" which has never been made clear through any legal interpretation as to what it should be understood within the Malaysian context. It is neither defined

in the legislation nor judicial decisions. This statement was clearly in conflict with the report made a year earlier when the government was reported to describe that the Constitution "has clearly defined" the word "discrimination". Identified as "unable to ratify or no intention to ratify at present", the report in the year 2010 nonetheless stated that "much needs to be done before Malaysia is ready to ratify Convention No. 111 and it prefers to comply with the spirit of the Convention through administrative measures which allow greater flexibility, rather than ratify the Convention", as in [7].

Looking into this situation, the idea of substantive equality is yet to be achieved as far as employment discrimination is concerned. Indeed, being the only apparatus that asserts the idea of equality, the Federal Constitution may affirm the objective of Convention No. 111 if proper interpretation to the word "discrimination" is given as to make it in tune with the international legal instruments. It is however sadden when the current position has shown otherwise with the lacking of any explicit legal provisions to protect the rights of the victim employees. It is the role of the judiciary and court to consider the international conventions so as to make them as part of the interpretation. Otherwise it may undermine the application of international standard into the national law.

Ratification itself involves complex tasks. Therefore, further observation and contemplation on the state's part are required whenever the domestic and national laws need to be profoundly considered. Pertaining to this matter, perhaps the constitutional sovereignty, national policies and political as well as social grounds are the challenges for Malaysia's disinclination for a prompt adoption to Convention No. 111. This is attributable to the possibility of its conflict with the governmental affirmative action program that award special privileges to *bumiputra* (indigenous people). This is one of the challenges that admitted by Malaysian government in 2012 report to the ILO together with discrimination issues facing the migrant domestic workers[17]. The effort of Malaysia is nonetheless welcomed when the government indicated it would organize consultations with her partners, the Malaysia Employers' Federation (MEF) and Malaysia Trade Union Congress (MTUC) to consider to what extent this ratification could be realized, as in [17].

So far as developing countries are generally concerned, financial and technical matters are the other major obstacles. Here is where the follow-up to the 1998 Declaration comes in with the assurance of the ILO to offer technical assistance and advisory services to its members in attaining objective of full ratification to the fundamental standards. As far as Malaysia is concerned, the government has requested ILO support in organizing a workshop on the Declaration and its follow-up with a particular focus on unratified fundamental Conventions, as in [17].

Since Convention No. 111 is promotional in character that requires the declaration and pursuit of a specific policy rather than compliance to specific standards, it is more convenient for the government of the state to apply the appropriate policy at their discretion as long as the objective of eliminating discrimination at work is realizable. This may probably inspire

the Malaysian government to adopt and create their own laws and policies that suit the national environment. Tsogas argued that if the anxiety of influence of external culture is the reason for not ratifying Convention No. 111, it is not the culture of the country when someone is discriminating his colleague within the employment[18]. In the case of Malaysia, if prefers not to ratify, at least at this point of time, a kind of legislative provisions on the subject matter is expected so that any dispute arises can be properly addressed. An example can be seen in the case of the US when they opted not to ratify the ILO convention yet have their own legislations to deal with discrimination such as the Sex Discrimination Act and Race Relations Act. Therefore, it is time for Malaysia to mull over the matter seriously particularly to have own stand on the issue of core labor standard.

B. Malaysia's Prospect

Malaysia generally acknowledges the international labor standards as essential and significant. This is evident with the ratification of six out of eight core principles. With the implementation of the 1998 Declaration that reaffirms the duty of all member states to promote and respect core fundamental rights, it seems that Malaysia has no way of avoiding the observance to the employment discrimination convention. The report by the ILO in 2012 showed the Malaysian government's indication of possibility to ratify the Convention by having consultations with their social partners from the employers' and employees' sides. Accordingly, one may predict that Malaysia will, sooner or later, ratify Convention No. 111.

While it is not a mere question of disinclination, ratification requires implementation or else it would be in conflict with the ILO target. In the context of Malaysia as mentioned earlier, implementation is a complicated issue as it involves policy matters, political questions, constitutional sovereignty, social and cultural impacts. Having said this, Malaysia does not altogether disregard the principle of non-discrimination but owns scattered and selected laws that support the principle of equality, particularly the provisions of the Constitution itself. With respect to the explicit definition to the word 'discrimination', the government aimed to incorporate such a definition into the Constitution, which would require more time[19].

In addition to this, Malaysia has many other policies that can be associated with non-discrimination and equal employment opportunity principles, for example, with the implementation of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace which provide some guidelines to the employers on the prevention and eradication of sexual harassment; one of the types of sex discrimination. The effort to initiate the National Policy on Women under the Department of Women Affairs of the Ministry of Women, Family and Community Development Malaysia is seen as a right instrument accountable to women issues, among others, to eliminate all forms of adverse discrimination on the basis of gender. With these efforts to promote equality, particularly with regards to gender issues, it

is therefore anticipated that Malaysia is looking forward to ratifying Convention No. 111. Meanwhile, many considerations need to be taken into account in order to ensure its great implementation. Having mentioned this, gradual implementation is expected, starting from now.

At this point, lessons might be learned from Australian experience when the Minister of Labor (at that time) underlined the importance of ratifying the ILO conventions, as in [11], summarized as follows:

- a) It conveys a favorable international image as a forward-looking country which gives priority attention to vital areas of human relations;
- b) It emphasizes a support for the work of ILO as a tripartite institution;
- c) As a vanguard of countries taking action to foster and develop labor and social policies in accordance with accepted international standards;
- d) It stimulates for the improvement of own standards.

IV. CONCLUSION

The principle of equality has commonly been incorporated in many national Constitutions. The ILO, as an agent to the UN, plays an important role in promoting social justice in the world of work by acknowledging the non-discrimination principle as one of the core labor standards through the Declaration 1998. Since Malaysia has yet to ratify the Convention No. 111, gradual improvement and implementation is expected with due considerations given to the national sovereignty, political, economic, cultural and other constraints. A promising move can be seen when the government of Malaysia has amended Article 8 of the Constitution with the inclusion of the word "gender" to make it in line with the international agreement. In realizing the principle and right, the Government endeavors to organize discussions with the MEF and MTUC in considering of ratifying the Convention. With all these moves, it is prayed that the exertion would aim for attaining not formal equality alone but more importantly its substantive application and implementation. Moreover, it is not only the duty and role of government but other stakeholders in various sectors to not directly or indirectly condone discriminatory practices.

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