

Commentary on the Industrial Relations Act 1967 and Trade Unions Act 1959 (amendment)

**MTUC/ILO National Workshop on ILO Conventions
and Labour Law Amendments in Malaysia**

**16- 18 March 2011,
Genting Pahang**

1. Introduction

- The aforementioned two Bill introduced for debate in June 2007 is lopsided and regressive in nature - at least as far as employees status are concerned. It is also contrary to our Constitution and Human Rights law as enshrined in the UN Charter and in our own Human Rights Act (Commission) Act 1999 ("HRA") and International Law.

- Malaysia is a member of the UN Human Rights Council **(1)** as reported in the NST 31/7/07 the ASEAN Charter (including human rights) is in for approval in October 2007.
- 2. I propose to deal with the repugnant provisions of the aforementioned Bills in the order (clauses) they are enumerated in the Bills.
- **(NB** *Only the main offending amendments are commented upon in this Paper).*

PART A - Industrial Relations Act **1967 (IRA)**

- **3.1 Clause 4(c) (Section 2A) – (page 2)**
- The vast powers vested on the Director General (“**DGIR**”) can be delegated to a mere (lowest) lower ranking “*officer*”. This will make them “*little kings*” despite their lack of experience in Industrial Relations. They can exercise the wide powers (especially on Recognition of Trade Unions) vested in the DGIR.

Clause 6 (Section 5)

- (a) Although there is an occupational bar to trade unions embracing “.... *executive*” and “*security...*” employees - this amendment gives room for abuse by a mere “appointment” (not “promotion”) on paper of an active trade unionist – especially in a fledging trade union. I believe the amendment is contrary to Article 10(1)(c) of the Federal Constitution (“**FC**”).

- (b) It is not a “*restriction*” in the interest of “*security*” or “*public order*” envisaged in Article 10(2)(c) of the FC.

(c) It is also not within the enabling purview of the restriction on the right “*to form*” associations in Article 10(3) of the FC. See **Dewan Undangan Negeri Kelantan (1992) 1 MLJ 69**. The case decides that Article 10(1)(c) implies a right to the citizen to “*disassociate*”.

See Malaysian Bar Statement dated 17/7/07 on the web.

- (d) Hence any occupational classification (existing or new) is contrary to Article 10(1)(c) of the FC. The situation is worse under the amendment.
- (e) Therefore the amendment is **VOID** under Article 4(1) of Federal Court.

4. **Clause 8 (Section 9) - page 4**

- (a) The “*deeming*” provision in the new subsection 9(4) is unwarranted and without any basis. It does not provide for any time period to “*report*” but only a threshold period. It will lead to abuse.

Clause 8(f) (Section 9 (4A))--
page 5 (*new sub-section*)

- (a) Currently the DGTU has two modes of ascertaining percentage of “*membership*” of a trade union in the 1959 Regulations and (Part VI) “*competence*” is now changed to 1 mode in the Act i.e. by Secret Ballot. Read with the amendment (deletion) to Section 26(3) of the TUA (See clause 8) the DGTU is no longer involved in recognition matters. Power is vested in one man, and one Department and of course as I said, a junior “officer”.

- (b) Promised provisions to modify it by Regulations will be met with the Interpretation Act - which forbids any inconsistent Regulations once a matter is in the main Act (amendments).
- (c) The best method of verification of the membership is by the “**Register**” maintained by law. Its contents is conclusive under the Trade Unions Act (Section 7(2)). Hence why this unique power now vested in one man/one Department? The criteria the DGIR has to use to “ascertain” “*competence*” (new Section 9(4A)(a)) is absent. Dictatorial powers to an “officer”.

- (d) If the verification is by secret ballot, the employer can “*inflate*” the number of non union members by a large number of “*temporary*” or “*fixed term contract*” labour recruited for the purpose. These workmen will be excluded at the whims of the DGIR/officer. Litigation is bound to follow on this abuse.

- (e) Immediately after the secret ballot the employee can (“dismissal”) be terminated with impunity. No action can be taken for this because of the new Section 10(2)(c) - which removes the prohibition against dismissing employees during pendency of recognition claims.

- (f) I submit that the amendment is contrary to Article 10(1)(c) of the FC and therefore void, since it makes the right “to form” a Trade Union illusory. It is not a restriction under Article 10(2)(c) of the FC, since it has nothing to do with “security” or “public order” or “morality” in that Article 10(2)(c).

(g) Article 10(3) of the **FC** must be read subject to Article 10(2)(c) (relating to grounds for restrictions).

4.2 Clause 9 (Section 10(2)) - page 6

- (a) The *new sub-section* 10(2)(c) relating to “*fixed term contract*”, and other acts of the employer is unwarranted. There is no provision for abuse prevention.
- (b) This new sub-section is contrary to Article 2(2) of the International Labour organization (“ILO”) Convention No. 158 of 1982 and its supplement - ILO Recommendation 166 of 1982. (replacing ILO convention No 119 of 1963).

- (c) Although Malaysia has not ratified the convention, the aims and policy of the convention can be taken into account by our Courts. See for example - Maxwell “on Interpretation of Statutes” 12th ed. page 183.
- (d) This is especially so in view of the Constitutional status of the right - to associate in Article 10 of FC. Any legislation contrary to the FC is VOID under Article 4(1) of the FC. The subsection places *contractual* stipulations above the constitution.

- (e) Our Human Rights Commission Act of Malaysia 1999 (“**HR Act**”) elevates inter alia Article 10 FC rights into “***Human rights***” status. See Section 2 of the said Act. Section 4(4) of the said Human Rights Act gives cognition to the Universal Declaration of Human rights (“**UDHR**”) as human rights. Article 20(1) of the UDHR provides the right to freedom of association and makes it a “Human right”. And under our HR Act it is another “Human right”.

- (f) Article 29(3) of the UDHR incorporates the UN charter and requires that the rights UNDHR should not be exercised contrary to the purposes/principles of the UN.
- (g) Malaysia being a member of the U.N is bound by its **Charter. Article 1(3)** of the Charter requires its members to
- “...*promote and encourage Human Rights...*” and “*fundamental freedoms*”.

- (h) In fact under the 2nd Preamble to the Charter, the member countries have pledged to
*“.... reaffirm faith in fundamental **human rights**, in the **dignity** and worth of the **human being**.....”*

4.3 **Clause 15 (Section 19B) -** **page 8**

- (a) The new sub-section (1)(a)(i) i.e. “.....*duly authorized employee*....” has room for abuse. It will open the floodgates for “*consultant employees*” and “*Directors*” (appointed for the purpose) to represent Companies with a RM2/= monthly “salary”. It has already happened.
- (b) This is so since the word “employee” has not been defined in the amendment.

- (c) Added to this an inexperienced “officer” performing the DGIR functions will make matters worse. Corruption can creep in.
- (d) The words “.... *duly authorized*” Is absent in the next sub-section on “employee” of a trade union of workmen. Is it significant? I think so. The rest is for your imagination.

4.4 Clause 16 (Section 20) page 9

- (a) The new Section 20(b)(a)(iii) and (b)(iii) provides for “officials” of an organization of “employers” or “workmen”.
- (b) The word “*official*” is not defined in the Act. Neither is the word “*organization*”.
- (c) The word “*organization of workman*” cannot include an organization of trade unions (MTUC).

- (d) Even if it can be so included, the “*official*” referred to in the sub-sections is not defined in the Act or the Societies Act 1966.
- (e) If one looks at the Constitution of the MTUC the word “*official*” is used to refer to the (only) Principal office bearers as defined in Rule 7(2) of the Rules. Hence “employees” and other members of the G. Council are excluded under this Section.

- (f) However, even if only the ordinary GC members are excluded, by Section 20(b) the duties of the principal “*officials*” are in Rule 10 of the MTUC Rules. The Principal officials are part of the GC. Hence if these “**Principal officials**” act because of the new sub-section their action will be *ultra vires* the MTUC Constitution.

- (g) Further Rule 12(2) of the MTUC Rules forbids the General Council from taking part in “*trade disputes*”. A dismissal under Section 20 is a “trade dispute”. See **Dr. Dutts case.** Section 4(1) of the Industrial Relations Act also forbids “any person” from interfering with the lawful activities of a TU.

- (h) Hence Section 20(6) appears to sanction a breach of the Rules of the MTUC (if MTUC is interpreted as an “organization of workmen”). It is also contrary to Section 4(1) of the IRA itself.
- (i) Breach of the Rules of MTUC (Society) is ultra vires the Societies Act 1966. (See Section 7(3)(e) read with Schedule 1 of the Societies Act).

4.5 **Clause 16 (Section 20(9)) - page 10**

- There is room for abuse. There is no provision for registered letter to invite employees for conferences. Who determines what is “reasonable excuse”? Is it the “officer”? If so, room for abuse?

4.6 **Clause 20 (Section 27 (2)(c)) -** **(page 10)**

- (a) The word “*official*” in the unamended (existing) Sections 27(2)(c) will face the problems referred to in paragraph 4.4 above.
- (b) At best, it will mean that only the principal officials of the organization (MTUC or MEF) can represent parties in the Industrial Court.

4.7 Clause 21 (Section 29) (page 11)

- (a) The new Section 21 gives powers akin to a Civil Court to the Industrial Court. It is open - ended. The Industrial Court can for flimsy reasons “strike off” a reference (to reduce the “backlog”?) No guidelines are given. The provisions of Section 29(d) seems to contradict this amendment.. International law does not condone the amendment.

- (b) The amendment appears to also be in conflict with the (new) *preamble* to the Act. i.e. “.... *to promote and maintain industrial harmony....*” Striking off cases will not promote industrial harmony. It will sweep it under the carpet to rear its “head” later. Therefore it is contrary to the Preamble of the IRA.

4.8 Clause 22 (Section 30) - (page 11)

- (a) The new mandatory sub-section (6A) ties down the hand of the Court. It is a fetter on the discretion of the Court. See the Hotel Jaya Puri case (1981)
- (b) The term “back wages” is not defined. It leaves room for abuse by a mere labels. It invites judicial review in the High Court (and - delay - contrary to the policy in Section 30(3) of the Act). The right to full wages an reinstatement is not clarified.

- (c) The Second Schedule referred to therein is contrary to the express provisions of Article 8 and 10 of the ILO convention 158 of 1982 and Article 8 of the UDHR (on right to an “*effective remedies*”). Therefore this right is a “human right”. It has been infringed under the amendments. One cannot put a value of “24 months” or “12 months” wages to a fundamental constitutional human right recognized as such in our Human Rights Act and in International law!!

- (d) It is also contrary to Article 23 of the UDHR relating to “..... *right to work*....” and “....*protection against unemployment*...” It is a “human right” under our Human Rights Act.
- (e) Our Federal Court has held (R. Ramachandran) that Article 5(1) of the FC protects the right to livelihood i.e. against unjust dismissal. It is reflected in Section 20 of the IRA. If the *Second Schedule* purports to put a statutory monetary “value” to that right, it is VOID under Article 4 (1) of the FC.

- (f) For unjust dismissals on ground of alleged “redundancy” the *Second Schedule* is contrary to Article 12(1) of the ILO convention abovementioned.
- (g) In the case of “*probationers*” the *Second Schedule* is contrary to Article 2(3) of the ILO convention abovementioned.
- (h) Therefore the comments in paragraph 4.2 above will apply. In other words the *Second Schedule* is VOID under Article 4(1) of the FC.

5. **Clause 28 (Section 54) - page 17**

- (a) The new sub-section 54(4) effectively precludes Affidavit evidence in the High Court when challenging a decision of the Minister not to refer a case to the Court.
- (b) This makes the “officers” dealing with pre-reference matters little “Dictators”. This is especially so since a mere IRO can perform the functions of the DGIR under the Act (see commentary in paragraph 3.1 above on the amendment in clause 4(c) of the Act).

6. Some pressing Reforms needed to the IRA

- 6.1 The amendments have not addressed the following matters :-
 - (a) The primary right to reinstatement with full back pay and benefits monetary or otherwise.
 - (b) The check-off system
 - (c) The delay in handing down and enforcing Awards – especially the absence of a specialist Appellate Court.

- (d) The appellate process required under ILO convention No. 158 of 1982 (Article 8 to 10).
- (e) The requirement that the body adjudicating should be “impartial” (Article 8 to 10). Our Industrial Court Chairman are appointed by the Minister (not “independent”) and on fixed term contract (no security of tenure hence can be infringement on “independence”)

PART B - TU ACT 1959 (TUA)

- 7. **Clause 8 (Section 26(3)) - page 3**

(a) This deletion of Section 26(3) of the TUA must be read with clause 8(f) of the proposed amendments to the Industrial Relations Act (new Section 9(4A) - page 3 above).

(b) The position under the amendments is that instead of simplifying and speeding up the procedure for recognition (as promised in the NJLAC), the procedure is now 2 stage :-

Stage 1

- (i) The DGIR conducts a secret ballot on the wishes of members to join a T. Union (new Section 9(4A) IRA).

Stage 2

- (ii) The DGIR has to “..... ascertain....” (new Section 9 (4B) IRA) the competence of a T. Union to represent the workman.

- (c) Thus the amendment in effect **lengthens** the recognition process and makes it more difficult to get recognition by the 2 stage process.
- (d) The DGTU is excluded from a job for which he is most suited (statutorily under the TUA) to do!!

- 7.1 In this connection, I repeat (as in paragraph 4.1(f) of my comments on IRA) that this amendment makes the Constitutional right (under Article 10(1) FC) to form a T. Union illusory. Therefore the amendment is **VOID** under Article 4(1) of the FC.

- 8.1 If the NUNW principle is implemented, power to remove members will be in one person (Civil Servant's) hand. It leaves room for abuse as has happened already - despite statutory recognition in many Collective Agreements for many years!! In fact when this happened in the U.K. the European Court of Human Rights has held in **Wilson v United Kingdom 2002 IRLR 568** that even if U. K. law allows employers to cease to recognize trade union and abandon collective agreements, such law is contrary to human rights in the European Convention of Human Rights - Article 11. This Article is similar to the UDHR Articles - Articles 20 & 23 of the UDHR.

- (a) Such ostensible power is contrary to the principle in MIEU case (1982) on powers of the DGTU to remove members - even in cases of an illegal strike.
- (b) The sub-section 26(1A) is contrary to Article 10(1) of the FC. It is therefore **void** under Article 4(1) FC.
- (c) The sub-section is also in breach of fundamentals of the ILO convention 158 of 1982 and Human Rights law.

- **Existing Section 26(1A) TUA**
(No proposal to amend)
- (a) This current section has been interpreted by the Federal Court in the **NUNW** case (2000) to enable the DGTU to **remove** existing members from membership despite recognition being granted for them many years ago.
- (b) The power to do so is ostensibly on a reading of Section 26(1A) with Section 4A of the TUA.

- (c) The principle in the NUNW case has already been used by the employer to initiate action of “derecognizing” and removing certain classes of workmen from membership. It is now under challenge in the High Court, so further comment will be inappropriate.

- 8.1 If the NUNW principle is implemented, power to remove members will be in one person (Civil Servant's) hand. It leaves room for abuse as has happened already - despite statutory recognition in many Collective Agreements for many years!! In fact when this happened in the U.K. the European Court of Human Rights has held in **Wilson v United Kingdom 2002 IRLR 568** that even if U. K. law allows employers to cease to recognize trade union and abandon collective agreements, such law is contrary to human rights in the European Convention of Human Rights - Article 11. This Article is similar to the UDHR Articles - Articles 20 & 23 of the UDHR.

- (a) Such ostensible power is contrary to the principle in MIEU case (1982) on powers of the DGTU to remove members - even in cases of an illegal strike.
- (b) The sub-section 26(1A) is contrary to Article 10(1) of the FC. It is therefore **void** under Article 4(1) FC.
- (c) The sub-section is also in breach of fundamentals of the ILO convention 158 of 1982 and Human Rights law.
- (d) Sections (26)1A and (4A) of the TUA should be appropriately amended.

9. **Clause 20 (Section 20 ?) - page 7**

- (a) This validates and gives legal status to hitherto illegal “*In House*” Unions e.g. the union in Sime Tyres which has been in existence for many years prior to legalizing them in 1969 by addition of the word “*establishment*” in the definition of a “*Trade Union*” in the TUA.
- (b) It is in furtherance of the ‘silent’ policy of the DGTU to encourage such in house unions - very often in breach of existing provisions of the IRA and Section 15(2) of the TUA.

10. **Some Reforms needed to the TUA**

- (a) Section 26(1A) and (4A) should be appropriately amended/removed
- (b) The word “*establishment*” should be removed from the TUA.

11. Conclusion & Possible solutions

- (a) It will be seen that both the amendments to the IRA and the TUA involves rights protected by Part II of the Federal Constitution (Article 5(1), 10(1)(c).
- (b) Apart from Article 1(3) of the UN Charter (which requires a member like Malaysia to promote human rights), it will be seen that our local law (Human Rights Act) incorporate the *Universal Declaration of Human Rights 1948* into our domestic law. (Section 2, and 4(4)). Therefore the amendments are contrary to the Human Rights Act and International law.

- (c) Our case law (**R. Ramachandran**) lays down that the right to livelihood i.e. rights against unjust dismissals are protected by Part II of the FC. Therefore the amendments deal with the supreme law of the country. The amendments are inconsistent with the supreme law - therefore **void** (Article 4(1) FC).
- (d) This cannot happen on Malaysia's 50th birthday or even as Malaysia grows older.

Action 1

- (e) Hence one solution is to urge the Minister not to act contrary to our supreme law, our Human Rights Act and International law. He should also be told not to embarrass Malaysia in the International Forum - especially since Article 1(3) of the United Nations Charter is compromised.

11.1 If the Minister does not listen, three options are open :-

- If the Bill is passed as law :-
Action 2
- (a) *Challenge the amendments in Court as being violative of the FC;*
- *Action 3*
(b) Take the matter up at the International forum (ILO) as being in violation of the U.N. Charter and ILO standards. (The Minister is a member of the Governing body).

Action 4

(c) If all else fails - initiate a complaint to the Human Rights Commission (Sections 12 of the HR Act) for appropriate action (Section 13 of the HR Act).

11.2 Since MTUC may not be a “*person*” or “*group of persons*” (Section 12 Human Rights Act), a trade union or even a member can initiate action under the Human Rights Act.

Thanks