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Considering Malaysian Occupational Health Law Vis-a-vis ILO Standards

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Abstract: The aim of this study is to examine the underlying principles of international labour standards relating in Malaysian occupational health. Researcher will first examine the ILO standards on occupational health and will subsequently discuss the position of the same subject under Malaysian law. It must be said from the outset that this study will not attempt a discussion on a strict comparative approach but rather to examine the impact that the ILO standards has on Malaysian law on this issue. The main concern is whether Malaysian law on occupational health is at par with the ILO standards or has lagged far behind. The discussion of this study is centred on a theme that the legal regime of occupational health either at the international or national level can be viewed from the preventive or rehabilitative perspective. The law is said to be preventive if it is aimed at avoiding the risk or hazard or accident from taking place or happening and it is rehabilitative if it is to compensate the victims.

Key words: Occupational health, law, ILO standards, conventions, Malaysia

INTRODUCTION

Interestingly, conventions on occupational health are one of the earliest adopted by the ILO (Kloss, 2010) and from time to time more instruments on related occupational issues have been adopted (Stellman and International Labour Office, 1998). This shows how important occupational health is in the eye of the ILO. However, its development in some developed and many developing countries are far from satisfactory (Elling, 1997; Koewenson, 2001). This can be seen from the small ratification by member states on some related conventions. Many weaknesses abound from limited legal protection, less awareness among workers and scarcity of data collection to under-reporting of the disease (Robertson *et al*., 2007; Muto *et al*., 2002).

In this connection Malaysia is no exception. At this juncture, it can be safely said that statistics on occupational accident is clear and available but not in the case of occupational disease. The researcher will examine the underlying principles of the ILO standards pertaining to occupational health in Malaysian related laws. Non ratifications by member states does not necessarily means that such ILO standards have no influence at all on the States. Instead as will be argued in this study that ILO standards do influence the formation and development of occupational health law. Whether the national standards are at par with the ILO standards or not is another issue which will also be examined. The ILO has lump together standards on occupational health with that of safety. The reason could be that it is the same employer who has to discharge duty in ensuring that no occupational injury or disease occur at the work place and usually it is not easy to distinguish and divide occupational duties or activities to be carried out by employers at a particular work place. The employers' two duties (safety and health) towards ensuring that the work place is to be without or minimized from hazard or risk are carried out concurrently regardless whether it is for the purpose of safety or health. However, this is not to say that there is no convention adopted by the ILO specifically on occupational health or disease. In fact there are conventions which are specific for occupational diseases and have great impact on the employee's health, especially chemical substances.

OUTLINING THE ILO STANDARDS

Undoubtedly, ILO has always given important attention to occupational health among member states. As recent as 2006, the ILO has adopted a convention pertaining to this matter, C 187 Promotional Framework for Occupational Safety and Health. In Article 2: each member which ratifies this convention shall promote continous improvement of occupational health to prevent occupational diseases. In Article 3, it can be summarized that each member shall promote a safe place and healthy working environment by formulating a national policy and the right of workers to a healthy working environment. This convention noted the significance of the earlier convention, Convention 1981, No. 155 and Recommendation 1981, No. 164. The ILO conventions do not refer, specifically or distinctively on occupational health except for Convention No. C161 Occupational Health Services Convention, 1985. As indicated,

standards on occupational health are mentioned and adopted together with safety or is indirectly provided in conventions relating to chemical substances. It is a fact that the use or exposure to chemical substances will inevitably affect the health of employees. After the Second World War, new standards provided enhanced protection against specific risks, related to health. (radiation (1960), benzene (1971), carcinogenic substances and agents (1974), asbestos (1986) and chemical products (1990)). In 1953, problems of preventing health risks in the work place were dealt with although, not all are adopted as convention but instead as recommendation. Those standards are contained in Recommendation No. 97 which not only lists down protective measures; it seeks more thoroughly to improve occupational hygiene as well and it establishes the basic rules for safeguarding people's health at work. It requires both that technical protective measures be taken (for example, analysis of atmospheric conditions) and that medical examinations and first aid be provided.

These provisions may imply recourse to specialists, engineers, doctors and hygienists in particular. Recommendations on the same matter were adopted later, 1959 (No. 112). In 1985, the ILO conference adopted the Occupational Health Services Convention No. 161 and Recommendation No, 171; the latter supersedes Recommendation No. 112. Convention No. 155 (supported by Recommendation No. 164) on occupational health and safety and the working environment (1981) lays the foundations of national policy. It lists the main spheres of action: the material elements of work, relationships between those elements and the persons who carry out or supervise the work the training' qualifications and the motivations of those in charge of workers. It determines the responsibilities of the authorities and of the workers and his representatives.

It refers to the worker's right not to return to work after having signaled that it presents an imminent and serious danger to his life or health. Recommendation No. 64 supplements the Convention. Greater flexibility was also introduced into the methods of applying an instrument; Convention No. 161 for example, provides that occupational health services may be established by law, by collective agreement or in any other manner approved by the authorities after consultation with the respective organizations or employers and employees concerned. In addition, Convention No. 148 and Recommendation No. 156 deal with the protection of workers from the occupational risks of air pollution, noise and vibrations at the workplace. Both instruments deal more with the type of measures to be taken against these risks: technical and administrative measures, organization of work, medical surveillance, etc.

ILO CONVENTIONS RATIFIED BY MALAYSIA

Malaysia has been a member of the ILO since, 1957 and to date has ratified twenty eight ILO Conventions. It is interesting to note that territorially Malaysia is divided into three main land: the Peninsular, Sabah and Sarawak. Due to its complex history, labour matters are also divided according to its history. For employment law, workers in Peninsular Malaysia are governed by the Employment Act 1955; Sabah and Sarawak enact their own Labour Ordinances. Workers from Peninsular Malaysia have to obtain work permit in order to work in Sabah or Sarawak even though these two states are under Malaysia. Other labour legislation, however are applicable throughout Malaysia. This is the reason why ILO conventions which are basically labour matters are ratified differently on each of the states although, some conventions are ratified for the whole of Malaysia.

Table 1 shows the different ratification on Peninsular Malaysia, Sabah or Sarawak. Malaysia has only ratified five conventions related to occupational health, directly or indirectly. Those conventions are: Medical Examination of Young Persons (Sea) Convention, C16, 1921 (Sabah and Sarawak), Equality of Treatment (Accident Compensation) Convention C19, 1925 (Malaysia Peninsular and Sarawak), Workmen's Compensation (Agriculture) Convention C12, 1925 (Malaysia Peninsular), Workmen's Compensation (Accidents) Convention C17, 1925 (Malaysia Peninsular) and Guarding of Machinery Convention C119, 1963 (Malaysia). With the exception of

Table 1: Conventions related to occupational health ratified by Malaysia

Conventions	Ratification	Date	Sources
Guarding of Machinery Convention 1957, No. 119	Ratified	6.6.1974	Whole of Malaysia
Minimum Age (Underground Work) Convention, 1965, No. 123	Ratified	6.6.1974	Whole of Malaysia
Minimum Age Convention 1973, No. 138	Ratified	9.9.1997	Whole of Malaysia
Medical Examination of Young Persons (Sea)	Ratified	3.3.1964	Sabah, Malaysia
Convention 1921, No. 16	Ratified	3.3.1964	Sarawak, Malaysia
Workmen Compensation (Agriculture)	Ratified	3.3.1964	Sarawak, Malaysia
Convention, 1921, No. 12	Ratified	5.6.1961	Peninsular, Malaysia
Workmen Compensation (Accidents) Convention 1925, No. 17	Ratified	11.11.1957	Peninsular Malaysia
Underground Work (Women) Convention, 1935, No. 45	Ratified	11.11.1957	Peninsular Malaysia

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Convention No. 16, the other conventions, however are indirectly relevant to occupational health; they are more suitable to govern cases of occupational safety. As a whole, Malaysia has failed to ratify many of the important ILO conventions on occupational health such as C No. 161, No. C No. 170, C No. 115, C No. 155 and C No. 187, among others. However, this is not to say Malaysia do not have the regulations pertaining to occupational health instead it has. But Malaysia will be more respected by the international community if it were to ratify those conventions. After all, Malaysia already has the laws and facilities to manage occupational health related matters.

THE RELATED MALAYSIAN LEGISLATION AND THE UNDERLYING ILO PRINCIPLES

The Malaysian legislation on occupational health can be divided into two broad categories: one, the legislation on prevention of disease and two, on retribution. The former refers to legislation such the Factories and Machinery Act 1967 (FMA) and the Occupational Safety and Health Act 1994 (OSHA); the latter refers to the Employees' Social Security Act, 1969 (ESSA) and the Workmen Compensation Act 1952 (WCA). As in other common law countries, legislations in Malaysia are also enacted with general provisions and the details are provided in regulations and orders (Rampal and Nizam, 2006). The same pattern does apply in occupational health legal regime where the details on occupational health or disease are provided in various regulations. There are codes of practice and guidelines issued by the Department of Occupational Safety and Health (DOSH) but they do not have the force of law. The duty of an employer pertaining to occupational health is provided in general terms of OSHA.

It provides that a general duty on the employer is to ensure as far as practicable that there is no risk on safety and health at the work place. The emphasis of such general duty seems to be placed on safety but the actual fact is such duty applies equally to health. The debate on the meaning of as far as practicable was never raised in the Malaysian higher courts and hardly discussed by local writers (Hassan). Because conviction or acquittal under section 15 of OSHA was never appealed to the High Court such phrase has not been judicially interpreted. If the courts were to interpret the meaning of as far as practicable, they will certainly refer to the elements stated in section 2 of OSHA, namely: since, there is no reported case so far in Malaysia explaining such meanings, it is very likely that the courts will seek guidance from common law cases as happened in other areas of law.

Although, the English precedents will only be persuasive on the Malaysian courts, their principles however will be able to assist the local courts in interpreting the actual meaning of the phrase as far as practicable. It is submitted that the clear understanding of this phrase is extremely important because it will determine the actual level or standard of duty of the employers. However, because of the seemingly subjectivity of such standard of duty, it is believed that the DOSH is not always ready to charge the wrongdoers under section 15 but will instead charge them under different legislation which are more prescriptive, such as the FMA or Penal Code. The FMA contains general provisions on health. S 22 requires an employer to maintain the workplace free from offensive effluvia, the work-room should not be crowded, adequate ventilation, suitable temperature, sufficient and suitable lighting and sufficient and suitable sanitary. All these necessities if not made available by the employer will affect the health of the employees. These requirements refer more to the physical design and structure of a work place that if not constructed properly will affect the health of the employees. Besides this premises' physical inadequacy, employees' health could also be affected by the use of chemical substance which are detailed out in regulations. There are several occupational health regulations in Malaysia related to the use of chemical substance. Admittedly, chemical substance can cause both injury and sickness or disease but the longer side effect of chemical usage is more of the latter. The ILO conventions have great influence on the Malaysian legislation in this area of concern such as the use of lead, asbestos and anthrax.

Such ILO influence can be seen from several Malaysian regulations made under the FMA related to the usage of chemical substance at the work place also pertaining to lead, anthrax, mineral dust and asbestos process. For example, on mineral dust, the 1989 regulations require every employee to take precautionary measures such as wearing protective clothing, respiratory protective equipment, use of changing rooms and lockers, report to the occupier any defect on such equipment and clothing. The regulation also states that sand blasting process shall not be used in any factory, except with the prior written approval of the chief inspector. Other than these main requirements, the regulations also provides other measures and instructions for the occupiers to observe in order not to put the employees at risk of mineral dust such as permissible exposure limit, exposure monitoring, methods of compliance, housekeeping, medical examinations, employee information and training and record keeping.

These provisions are important because exposure to mineral dust will adversely affect the health of the employees. The use of lead was the earliest occupational health related convention by the ILO. It did influence some countries to adopt the standards as expounded by the ILO convention including Malaysia. Malaysian regulation on lead was gazetted in 1984. The regulations on anthrax, benzene, noise exposure mirror quite similar requirements in the ILO convention. The more recent legislation, namely the OSHA also regulate occupational activities pertaining to chemical substance. The principal act does not deal directly with occupational health leaving the details spelt out in the regulations. However, there is no legislation dealing with issues of occupational health governance and management; the regulations deals with handling and packaging of chemical substance. As indicated, the occupational health legal regime can also be viewed from the retribution perspective in other words, there is law to compensate workers for illness or sickness suffered from occupational activities.

CONCLUSION

The Malaysian law through its Employees' Social Security Act 1965 provides benefits for employment injury and invalidity. The act also provides benefit to employees suffering from occupational sickness or illness. What are the categories of sickness or illness covered under the act? The schedule lists down various types of sickness. It means that to qualify for the benefits, the sickness or illness must be those that are listed in the schedule and related to the employees' work activities. These two conditions must be fulfilled by the employees otherwise SOCSO will reject the claim or will refer such claim to a dispute mechanism if the employees are not satisfied with the rejection. There are problematic issues relating to occupational health claim; it is believed that there is a huge number of under-reporting of occupational illnesses.

It is submitted that the number of claim is considerably small and there is even a disparity of occupational illnesses' cases compiled by SOCSO when compared with statistics on occupational illnesses issued by DOSH, the latter is much higher. There are several factors contributing to such under-reporting: lack of awareness among the workers and lack of legal knowledge among them, among others.

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