



THE RECOGNITION PROCESS OF TRADE UNION IN
MALAYSIA: THE NEED FOR LEGAL REFORM

BY

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ABSTRACT

The trade union recognition process is a pre-requisite to the collective bargaining action of a trade union. The recognition process is important to ascertain the competency of the trade union and the acceptance of the trade union members to represent them in the collective bargaining action with the employer. However, the ambiguities of the existing legislations and the trade union recognition process in Malaysia are currently depriving the workers of their rights to negotiate for better working conditions. Hence, the objectives of this study are; to explore the current legal framework and policies of the government on the trade union recognition process in Malaysia and to identify the weaknesses in the system; to examine the relevant laws governing the trade unions internationally and the best practices of recognition process from other countries to be adopted by the Malaysian government in order to ease the recognition process and to recommend a reform to the recognition process in Malaysia. The present study analysed the laws and practices concerning the trade union recognition process in Malaysia. The study is conducted using a qualitative method. The qualitative method applies the traditional legal approach by analysing and critically evaluating the available literature and views of the industrial practitioners on the legal framework of the trade union recognition process. The findings in this research identifies the weaknesses and lacunas in the provisions governing the trade union recognition process under the Industrial Relations Act 1967 and the Industrial Relations Regulations 2009 of Malaysia. These weaknesses and lacunas can be overcome through a series of reformation made to the recognition procedures under the Industrial Relations Act 1967 and the Industrial Relations Regulations 2009. Therefore, the reform of the trade union recognition process is necessary to benefit the trade unions, particularly for the trade unions to experience a better trade union recognition mechanism and indirectly to ease the path to collective bargaining action.

خلاصة البحث

عملية الاعتراف بالنقابات العمالية شرط أساس في المفاوضات الجماعية للنقابة، وتعدُّ مهمة للتأكد من كفاءة النقابة وقبول أعضائها تمثيلهم في المفاوضات الجماعية مع صاحب العمل، ولكن؛ هناك غموض في التشريعات الحالية وعملية الاعتراف النقابي في ماليزيا، مما يحرم العمال في ماليزيا من حقوقهم في التفاوض من أجل ظروف عمل أفضل، وعليه؛ يهدف البحث إلى استكشاف الإطار القانوني الحالي وسياسات الحكومة في عملية الاعتراف بالنقابات العمالية في ماليزيا، وتحديد مكان الضعف في النظام، ودراسة القوانين المنظمة للنقابات على الصعيد الدولي، وتحري أفضل ممارسات عمليات الاعتراف في البلدان الأخرى التي يُمكن للحكومة الماليزية اتباعها لتيسير عملية الاعتراف، وأيضًا التوصية بإجراء إصلاحات لعملية الاعتراف بالنقابات العمالية في ماليزيا، وقد تناول البحث القوانين والممارسات في عملية الاعتراف النقابي في ماليزيا، واستُخدم البحث النوعي في المنهج القانوني التقليدي بوساطة تحليل المقالات والأفكار المتاحة للممارسين التجاريين وتقييمها فيما يتعلق بالإطار القانوني لعملية الاعتراف بالنقابات العمالية، وقد حدّدت النتائج مكان الضعف والثغرات في الأحكام التي تحكم عملية الاعتراف بالنقابات العمالية بموجب قانون العلاقات الصناعية لعام 1967، ولوائح العلاقات الصناعية لعام 2009 في ماليزيا، ويمكن التغلب على تلك المكانم والثغرات من خلال سلسلة من الإصلاحات المدخلة على إجراءات الاعتراف في إطار القانونين المذكورين، فإصلاح عملية الاعتراف بالنقابة ضروري لمصلحة النقابات؛ لتحصل على أفضل عملية اعتراف، وتيسير الطريق إلى إجراءات المفاوضات الجماعية تيسيرًا غير مباشر.

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DECLARATION

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Workplace Relations Act 1996 (Australia)
Fair Work Act 2009 (Australia)
Fair Work (Registered Organisation) Act 2009 (Australia)
Industrial Conciliation and Arbitration Act 1894 (New Zealand)
Employment Contracts Act 1991 (New Zealand)
Employment Relations Act 2000 (New Zealand)
Trade Unions Act 1908 (New Zealand)
Incorporated Societies Act 1908 (New Zealand)
Canada Labour Code (Canada)
Canada Constitution Act 1982 (Canada)

LIST OF ABBREVIATIONS

A.C.	Appeal Cases
A.L.J.R	Australian Law Journal Reports
A.L.R	Australian Law Reports
A.M.R	All Malaysian Reports
C.J.	Chief Justice
e.g	for example
etc	(et cetera) and so forth
DGIR	Director General of Industrial Relations
DGTU	Director General of Trade Unions
DIR	Department of Industrial Relations
DTUA	Department of Trade Unions Affair
GDP	Gross Domestic Product
i.e	that is
I.L.J	Industrial Law Journal
ILO	International Labour Organisation
I.L.R	Industrial Law Report
IRA 1967	Industrial Relations Act 1967
IRR 2009	Industrial Relations Regulations 2009
I.R.L.R	Industrial Relations Law Reports
ibid	(ibidem) in the same place
J	Judge, Justice
MCP	Malayan Communist Party
MECS	Managerial, Executive, Confidential, Security
MEF	Malaysian Employers Federation
MGLU	Malayan General Labour Union
MTUC	Malaysian Trade Union Congress
PMGLU	Pan-Malayan General Labour Union
M.L.J.	Malayan Law Journal
Mal. L.L.R.	Malaya Labour Law Reports
Mal. L.R.	Malaya Law Review
n.d.	no date
n.p.	no place, no publisher
P.B.U.H	Peace Be Upon Him
Para./paras	paragraph/parapgrahps
TUA 1959	Trade Union Act 1959
TUR 1959	Trade Union Regulations 1959

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

A trade union is an association of workers formed to protect the rights and interests of the workers at the workplace. Most democratic countries appreciate the role of the trade union by allowing them to exercise their rights and freedom. One of the rights of the trade union is to bargain with the employer for better terms and conditions in the workers' employment contracts. This takes place in the form of collective bargaining. However, before a trade union can represent the workers in the collective bargaining process, the trade union must obtain recognition.

In Malaysia, trade unions must be registered in order for them to enjoy their rights and powers. One of the rights of trade unions that is allowed by the Malaysian government is the right to negotiate with their employers in the form of collective agreements. However, Malaysian trade unions have been struggling to participate in the collective bargaining action with their employers because of the difficulties posed by the recognition process in Malaysia. This is because despite the trade union being legally registered, the registration per se means nothing until the trade union has obtained recognition from the employer. The recognition process is a serious issue, as the current legal framework is inadequate for the key players in Malaysian industrial relations to enjoy a fair and expedient process. With the plethora of cases of anti-union practices by employers to prevent the trade union movement, trade unions in Malaysia are currently deprived of their rights to collective bargaining.

1.2 STATEMENT OF THE PROBLEM

Trade unions are currently facing a great challenge in obtaining recognition from employers in order to participate in the collective bargaining action. Recognition claim applications by trade unions are often rejected by employers or not ordered by the Minister on various grounds. This is because the trade union is often perceived by the employer and the government as responsible for reducing a country's economic competitiveness in the global market.¹ The statistic of recognition claims made by the trade union in Malaysia will be described as follows:

Table 1.1: Statistic of Recognition Claims in Malaysia (2012-2016)²

Outcome	2012	2013	2014	2015	2016
Recognition granted voluntarily by the employer	10	9	15	6	2
Recognition granted by Minister's decision	29	30	25	18	17
Recognition not ordered by Minister	25	15	29	30	17
Recognition rejected/withdrawn/ union not eligible/fault	43	43	40	51	32

Table 1.1 shows that between 2012 and 2016 the number of recognition claims being awarded to trade unions in Malaysia has dropped. Only two employers agreed to recognise the trade union in 2016 and in the same year, it is recorded that the Minister had awarded recognition to only seventeen applications, which is the lowest number of recognition claims given by the Minister to the trade union in five years.³ Besides that, a decline in the number of recognition claims applications made by the trade union is also observed. Recognition claims applications had dropped to 68 in 2016

¹ Nagiah Ramasamy, "Perceived Barriers to Trade Unionism in Malaysia," (Ph.D. thesis, University Putra Malaysia, 2010), 123-126.

² "Statistic and Key Indicators", Department of Industrial Relations, Malaysia, <http://jpp.mohr.gov.my/sumber/penerbitan> (accessed 3 January, 2016).

³ Siti Suraya and et al, "Trade Union Recognition in Malaysia: Legal Issues", *UUMJLS*, vol.9, (2018): 27-30.

from 105 applications in 2015. Based on the above statistic, it can be seen that the only in few cases where the trade unions had successfully be recognised. The recognition process of the trade union has therefore become the main obstacles for the trade union to enjoy their right to collective bargaining. This can be seen by the declining number of collective agreement that has been given cognizance in Malaysia as in the following table.

Table 1.2: Statistic of Collective Agreements in Malaysia (2015-2018)⁴

Year	2015	2016	2017	2018
Collective Agreement that has been cognizance by the Industrial Court	267	308	226	166
The number of workers covered under the Collective Agreement	121,470	133,753	60,593	32,543

Despite the fact that freedom of association is guaranteed under the Article 10 of the Federal Constitution of Malaysia, the Federal Constitution has posed a limitation to the freedom of association when it relates to labour⁵. As a result, various restrictions have been imposed on the trade union’s exercise of rights. In the context of the recognition process of trade union, the restrictions can be seen when the trade unions are subjected to a lengthy and complex recognition procedure. According to the existing legislations, it takes minimum period of nine months to settle a recognition claim by the trade union.⁶ However, in majority of the recognition claims cases, it took one to two years to settle.⁷ These unnecessary delays resulting from the

⁴ “Statistic and Key Indicators”, Department of Industrial Relations, Malaysia, <http://jpp.mohr.gov.my/sumber/penerbitan> (accessed 3 January, 2016).

⁵ Article 10(3) of the Federal Constitution.

⁶ According to the maximum period stated under the procedures of Industrial Rules and Regulations 2009.

⁷ This issue shall be discussed in Chapter Six.

existing practices of the trade union recognition process has deprived the trade union in Malaysia from enjoying their rights to collective bargaining with the employer.

Another factor that is hindering the trade union's right to participate in the collective bargaining action is the anti-union tactics in the recognition process. Unsuccessful recognition claims are often caused by the application of capitalist principles by the government and employers against the trade unions. These anti-union practices of the employers are visibly rampant when trade unions submit their recognition applications, as the employers are reluctant to bargain with their workers. Among the employer's anti-union practices to avoid successful recognition of the trade union are threats to dismiss the trade union members, dismissal of trade union members, restructuring the company resulting in the retrenchment of the union members, transferring the workers into a subsidiary company where there isn't any work available, offering promotions to the trade union members resulting in their disqualification as trade union members, forcing the union members to resign their union membership, repeatedly filing for judicial reviews against the applications and establishing an in-house union with the motive of disqualifying the trade union.

In one instance, since 2003, one employer known as Sabah Forest Industries has consistently filed for judicial reviews on various grounds in its attempt to avoid the recognition claim made by the trade union.⁸ In another case, Nichicon Sdn Bhd deliberately refused to assist the Department of Industrial Relations⁹ in their investigation as part of the recognition process of the trade union. Despite numerous requests from the DIR for the employer to furnish a list of the workers for the purpose

⁸ "Report", International Trade Union Confederation, <http://www.refworld.org/docid/5799aa66c.html> (accessed 1 January, 2017).

⁹ Hereinafter referred to as 'the DIR'.

of determining capacity, the employer did not take any action to assist the process.¹⁰ As a consequence of these anti-union practice, the trade unions in Malaysia are having difficulties to bargain with the employer.

Due to this untenable situation, the majority of workers are no longer interested in unionisation efforts and this has eventually weakened the trade union movement in Malaysia. The Department of Trade Union Affairs¹¹ statistics shows that in 2017, only 875,193 or six percent of the 14.5 million workers in the country, are currently union members. Besides that, the trade union membership in the private sector has declined, dropping from 433,702 in 2009 to 359,206 in 2017.¹² According to the International Labour Organisation report, the trade union density in Malaysia decline from 9.2% in 2014 to 8.8% in 2015. In 2016, the trade union density remain constant at 8.8%.¹³ It is reported that the restrictive rules and regulations imposed on the trade union recognition legal framework is the reason for the decline in the trade union density and the membership in Malaysia¹⁴.

1.3 RESEARCH OBJECTIVES

The objectives of this research are as follows;

- 1) To explore the current legal framework and policies of the government on the trade union recognition process in Malaysia and to identify the weaknesses in the system.

¹⁰ The employer, Nichicon Sdn Bhd refused to grant recognition to the Electronic Industry Workers' Union.

¹¹ Hereinafter referred to as the 'DTUA'.

¹² "The State of Labour Movement in Malaysia", Malaysia Kini, <https://www.malaysiakini.com/news/402157> (accessed 1 December, 2017).

¹³ "Trade Union Density Rate", ILO, https://www.ilo.org/global/topics/collective-bargaining-labour-relations/WCMS_408983/lang-en/index.htm (accessed 21 January, 2017).

¹⁴ Ong Sin Rua and et al, "Understanding the Declining of Trade Union Density: Literature Review and Conceptual Framework", *Sains Humanika*, vol.2, no. 2 (2014) :25–30.

- 2) To examine the relevant International Labour Organisation¹⁵ Conventions and the best practices of recognition processes from other countries to be adopted by the Malaysian government in order to ease the recognition process.
- 3) To recommend a reform to the recognition process in Malaysia.

1.4 RESEARCH QUESTIONS

This study aims to answer the following questions;

- 1) Whether there are any weaknesses in the current legal framework and policies of the government on the trade union recognition process in Malaysia?
- 2) What are the relevant ILO Conventions and the best practices of recognition processes from other countries to be adopted by the Malaysian government?
- 3) What are the changes that should be made to the trade union legal framework to reform the recognition process in Malaysia?

1.5 RESEARCH HYPOTHESES

The hypotheses in this research are as follows;

- 1) The inadequate legislations governing the trade union recognition process has contributed to the weakness in the system.
- 2) The Malaysian government should ratify the relevant ILO Conventions and adopt the best practices of trade union recognition processes from other countries.

¹⁵ Hereinafter referred to as 'the ILO'.

- 3) The laws relating to trade union recognition should be amended in order to improve the trade union recognition process in Malaysia.

1.6 SIGNIFICANCE OF THE STUDY

The freedom of association is an important tool for a trade union movement to engage in collective action in a state. As the Malaysian government has some restrictive policies on the freedom of association,¹⁶ this study is therefore significant to assist the government to appreciate the principles of freedom of association and to reform the trade union recognition process. By analysing the various international instruments that protect labour rights, this study will assist the Malaysian government, as a state member of the ILO, to adhere to the fundamental labour rights promoted under the ILO Conventions.

The findings of this study will benefit the trade unions in Malaysia considering that the recognition process will determine the eligibility of the trade union to participate in the collective bargaining action. The great demand of the workers to have a better working condition justifies the need for a more effective trade union recognition process. Thus, the list of reforms derived from this study will enhance the chances of the trade unions to enjoy an effective recognition process and indirectly will promote the principles of industrial harmony in Malaysia.

The study in this thesis is also significant since there is not yet a comprehensive research to revamp the trade union recognition process in Malaysia. Through the analysis of the existing legal framework and the policies of the government relating to the trade union movement, the weaknesses in the trade union

¹⁶ Rabiun Sani Shatsari and et al, "Constitutional Protection of Freedom of Association for Trade Purpose", *Malayan Law Journal*, vol. 1, no. I (2007):10.

recognition process can be highlighted. This thesis therefore will propose a series of reforms that should be done to revamp the trade union recognition process in Malaysia.

1.7 RESEARCH METHODOLOGY

In order to achieve the abovementioned objectives, the legal research in this thesis adopts the qualitative approach. The researcher applies the doctrinal analysis and non-doctrinal component for the purpose of this study.

The doctrinal legal research is carried out using library-based research resources. These are in the form of legal books, law journals, legal reports, online internet databases, and the use of search engines on the recognition process of trade unions in Malaysia and other jurisdictions. The nature of the study includes both descriptive and analytical aspects of the trade union recognition legal framework.

The first stage of research is confined to the historical legal research method involving the compilation of data and material on the development of trade union recognition in Malaysia by studying the history and background of the relevant laws involved in that process. The second stage of research is the conventional or legalistic method by interpreting or clarifying laws dealing with the matter. This stage will involve the use of textbooks, relevant statutes, international conventions and agreements, articles for journals, seminar papers, law reports, yearbooks and research publications. The researcher also refers to mass media such as newspaper articles and reports and the social media in the course of the investigation. The thesis will be relying on case law, judicial precedents and legal philosophy derived from judicial reasoning that form a significant rule in revealing the practical application of the law on the recognition process in Malaysia.

This thesis is a socio-legal research as it analyses the area of law and sociology. The effects of social and economic policy to the trade union recognition process in Malaysia is analysed. The researcher applies a non-doctrinal analysis in this study by conducting semi-structured interviews to test the hypothesis of this thesis. Interview is a proper medium to achieve the objectives of this thesis in order to understand the impressions and experiences of the respondents in more detail and will allow the researcher to expand or clarify responses of the respondents during the interview session. A semi-structured interview is chosen by the researcher to obtain the data where a pre-determined set of questions are prepared and the researcher will add or drop relevant questions during the interview session with the respondents.

Fieldwork in the form of research interviews with the practitioners of industrial relations law, trade unions, officers from the Industrial Relations Department Malaysia and Trade Unions Department Malaysia are conducted to collect the relevant information. The purpose of the interviews is to get the opinions of the respondents and their experiences in dealing with the trade union recognition process in Malaysia. Interviews responses were noted in writing or recorded during the course of the discussion. The interviews were conducted from October 2017 to October 2018 in Malaysia in the respondents' workplaces.

The researcher arranged the appointment with the respondents by making calls and sending cover letter, together with the certification letter from the university and the questions for the interview. The set of questions that is given to the respondents before the interview session is attached in Appendix I. During the face-to-face interview session, the respondents were required to sign the consent form, which had informed them that the data collected might be published in the thesis or journal articles where their name will be confidential. The interview sessions were recorded