

PERSPECTIVE

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Labour Discrimination in Malaysia: Passage Out of the Gridlock?

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EXECUTIVE SUMMARY

- Labour discrimination recurs in Malaysia’s public and political discourses, and will likely feature in election campaigns to come. Unfortunately, reactive, accusatory and polarizing rhetoric predominates, perpetuating gridlock on legislative and policy fronts.
- The situation calls for clarity and coherence in thinking about discrimination, to precisely define and detect negative discrimination and guide anti-discrimination law enforcement, and to set terms of reference for positive discrimination and workforce diversity initiatives.
- With clearer and more systematic frameworks in place, legislation and policy can then be crafted for monitoring and curbing negative discrimination and for facilitating positive discrimination and diversity.
- The magnitude of these challenges – in mindset, legislation and policy – call for broad consultation, coalition building and national consensus.

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LABOUR DISCRIMINATION: A CONTENTIOUS – AND GRIDLOCKED – PROBLEM

Labour discrimination poses complex, prickly and necessary questions for Malaysia. With widespread discontent over graduate unemployment and limited job opportunities, it looks set to be a campaign issue in the country's 14th General Elections, due by mid-2018 but expected earlier.¹ Allegations of racial discrimination recur in popular discourses, fuelled by assertions that racial identity excludes some from getting interviewed, hired, or promoted. The rhetoric polarizes. Opposing sides stake out unyielding positions, select evidence that reinforces preconceived notions and assert one group as the victim and the other as the culprit. Commonly, Malays decry discrimination in the private sector, while non-Malays retort by claiming discrimination in the public sector. Both positions have their merits and biases, but talk past each other and perpetuate a stalemate.

For Malaysia to progress out of this gridlock, it will need to address three aspects of this problem. First, labour discrimination is a complex and contentious issue that demands coherent thinking and broader scope. This entails going beyond the more apparent issues of negative discrimination, to recognition of labour market signalling, the prospects for pursuing diversity as a national value, and the question of positive discrimination, or affirmative action. Second, Malaysia must establish a systematic legal and policy framework, for overseeing negative discrimination and establishing terms of reference for monitoring and enforcement authorities, and for promoting fairness and diversity. Third, in view of the deep-seated anxiety and acrimony surrounding discrimination, a political settlement will be necessary for defining and pursuing fair employment across both private and public sectors.

CLARITY AND COHERENCE IN THINKING

Misguided tendencies in public discourse

Handling labour discrimination and promoting ethnic interaction and integration require a perspective that more precisely detects negative discrimination and mediates the contentions between fairness, equality and preference. The discourse on discrimination in Malaysia is poorly served by three misguided tendencies.

First, substance and tone are overly reactionary, fractious and selective. Perceived unequal treatment, whether or not constituting racial discrimination, are quick to be labelled racist, which stokes antagonistic public exchanges, particularly in social media.² Impulsive and

¹ Invoke Malaysia, a research and advocacy unit aligned with the opposition coalition Pakatan Harapan, has proposed legislation to promote workplace diversity and combat discrimination (“Invoke moots fair work, career law to tackle racial discrimination in workforce”, *TheMalayMailOnline*, 17 May 2017, <http://www.themalaymailonline.com/malaysia/article/invoke-moots-fair-work-career-law-to-tackle-racial-discrimination-in-workfo>).

² Allegations of racial discrimination, or testimony of aggrieved parties, undoubtedly belong in the public sphere. However, claims of racism – loaded and damning accusations – are often made with

vociferous reactions to research findings by Lee and Muhammed (2016)³, which methodically and objectively found differential treatment of comparably qualified Malay and Chinese job applicants, illustrate the challenge of critical, constructive debate.⁴ Discrimination, especially by race, undoubtedly is and will remain an emotive issue. So, disseminating more coherent thinking and facilitating more informed dialogue can help steer emotional and mental energy towards mitigating discrimination and monitoring fairness in the labour market.

Malaysian discourse around discrimination easily slips into adversarial tones along communal lines, with rivals shifting blame and closing ranks. In August 2016, a public spat – interestingly, between national executive committee members of the Malaysian Chinese Association (MCA) and the United Malays National Organisation (UMNO), partners in the Barisan Nasional (BN) ruling coalition – exemplified such conflict.⁵ UMNO supreme council member Tajuddin Abdul Rahman contended that Chinese businesses discriminate against Malay job applicants, while denying that discrimination occurs in the public sector. MCA central committee member Koh Chin Han countered by replicating the argument with the parties switched: Chinese business do not discriminate, it is the Malay-dominated public sector that does. Thus, verbal exchanges reach an impasse, and policy action is held hostage by demands to fix another domain of interest as a prerequisite for applying rules to one's own domain. Such posturing is illogical; discrimination in one sector does not in any way negate the possibility that it can occur in another sector. Discrimination can, and does, prevail in both; and so, legislative and policy responses must address both.

A second tendency in public discourses stems from failure to distinguish ability from identity traits, and in selective fault-finding of labour market practices. Attributes that feature in selection processes – notably, language proficiency requirements and preference for an ethnic group – are often castigated as racial discrimination, when the underlying issues can be more complex. The appearance in job advertisements of Mandarin as a

undue haste. This is not to deny the veracity of experiences of racism and racial discrimination, but to point out the lack of enquiry and corroboration of such conclusions. For example, a media report recorded employees' observations of disparity in job offer and salary, but did not even specify that job applicants were similarly qualified or that the unequally paid personnel held the same job ("The truth: Racism is rife in Malaysia", 22 August 2010, www.freemalaysiatoday.com).

³ Lee, Hwok-Aun and Muhammed Abdul Khalid (2016) "Discrimination of high degrees: Race and graduate hiring in Malaysia", *Journal of the Asia Pacific Economy* 21 (1): 53-76. An earlier version is available at: http://repository.um.edu.my/91447/1/Lee%26Muhammed2013_Degrees%20of%20discrimination_grad%20hiring%20in%20Malaysia.pdf.

⁴ Media reportage, based on seminars where the findings were presented, contributed to public awareness and spurred dialogue, but in some cases misrepresented and sensationalized the findings, with headlines such as "Malaysian employers practice bigotry" (*The Malaysian Insider*, 2 November 2012). Public discourses have detracted from constructive engagement by misrepresenting and distorting the study, failing to grasp its methods, specific results and limitations, and occasionally casting aspersions on the authors. Erroneous and self-serving reference to the study has sprung both from parties denouncing the findings and from others misappropriating the findings for ethno-nationalist agendas.

⁵ "Where's proof Chinese firms discriminating Malays, MCA asks Tajuddin", <http://www.malaysiakini.com/news/351567>, 8 August 2016.

requirement or advantage has been repeatedly chastised, including by prominent figures such as Najib Razak who, in May 2006 as then Deputy Prime Minister, deemed this a discriminatory practice.⁶

However, language proficiency can be a legitimate job requirement. Indeed, allegations of discriminatory job ads, vented over social media, are wont to overlook other job requirements that give clues on the reasons for Mandarin proficiency, such as the need to communicate with regional affiliates.⁷ Moreover, the absence of objection to stipulations of English, Malay, and Arabic requirements, while fixating on Mandarin, reflects selective and slanted predispositions. Outright preference for persons based on identity clearly violates fair practice and amounts to negative discrimination. But it is also unhelpful to label such expressions as ‘racist’, dismissing other possible motives for employers seeking out a particular composition of their workforce – saliently, to increase diversity.⁸

The third tendency in discourses revolves around the lack of recognition of job market signalling for matching employers with job seekers, and for broader objectives such as diversifying the workforce. Job advertisements inform prospective applicants about the type of employees needed, in the hope of tapping into a wider pool and finding a good match. By and large, it is understood that listing skills, knowledge and experience as requirements fulfils this role – and is viewed not as a filter to exclude some but as an outreach to those who fit the criteria. Language proficiency can be seen in this light, and should be acceptable. Signalling that certain population groups are sought out is more contentious – but at times such preferences are motivated by an interest in diversifying the workforce. Malaysians need to broaden perspectives toward devising legislation and policy that prohibits negative discrimination but allows for certain signalling for acceptable purposes.

On a more positive note, we have also witnessed increased vigilance toward observed discrimination, and measured handling of the matter. Social media enable monitoring of discriminatory practices, most notably the appearance of discriminatory language in job ads. Coherence and consistency are still lacking, underscoring the need to work toward a national consensus on the terms of reference. A statutory body must be the arbiter of disputes and enforcer of laws, with social media possibly playing an informant role and other means of support. Media have steadily reported on discrimination, noticeably striving for balance. A recent online article, also referencing Lee and Muhammed (2016), exemplifies the diligence

⁶ “Mandarin demand is discriminatory”, *The Star*, 31 May 2006.

⁷ See, for example, a popular blog: <http://www.rockybru.com.my/2013/10/proof-of-private-sector-discrimination.html>.

⁸ An episode surrounding an Old Town White Coffee job posting stands out. Its stated “preference given to Malay/Chinese” unleashed reactions on the Internet, for discriminating against Indians. Subsequently, it was revealed that the ethnically Indian manager was looking for non-Indian workers to add to his predominantly Indian work crew. The language of the job ad is undeniably offensive, and the company apologized and withdrew the advertisement, while promising an internal investigation (“Oldtown White Coffee: We are investigating ad alleged to be discriminatory”, *The Star*, 22 September 2014). Such ad hoc responses are insufficient. This episode underscores the need for a clear framework and a public authority to enforce regulations and investigate cases.

and prudence required for moving forward, and among the voluminous responses was a sizable number that averted reactionary rhetoric.⁹

Insight from academic research

Academics, lawmakers and policy makers should take the lead in fostering clearer and more coherent thinking. A brief summary of Lee and Muhammed (2016) may be helpful at this juncture. They conducted a field experiment by sending fictitious Malay and Chinese résumés to actual job openings and observing whether one group is significantly more likely to be called for interview. The résumés are fictitious in that names and contact information are invented, but resemble real applicants. The methodology allows researchers to control for the quality of applicants and to observe the decisions of employers, rather than surveying self-declared attitudes and intentions, which are likely to be biased and incomplete.¹⁰ A total of 3,312 job applications, with equal numbers of Malays and Chinese, were sent to 753 openings in engineering jobs – predominantly in manufacturing companies – and accounting jobs located across the spectrum of industries.

Lee and Muhammed (2016) found evidence of discrimination. On the whole, for every 1,000 Chinese job applicants, 221 were called for interview, compared to only 41 out of 1,000 Malay applicants. In other words, Chinese were 5.3 times more likely than comparably qualified Malays to get called. This differential substantially exceeds the corresponding results of similar field experiments – saliently, in the US, India, France, Sweden, Australia – where the ratios range from 1.2 to 2.0. These findings robustly indicate that private sector employers discriminate in favour of Chinese fresh graduate applicants and against their Malay counterparts. This is not surprising, although the magnitude exceeded expectations. Even top-of-the-class Malays, graduating with CGPAs above 3.6 from more reputable local universities, are considerably less likely to be called for interview than Chinese graduates with below-par academic qualifications.¹¹

⁹ “Are Malay Graduates And Job Seekers Being Discriminated In Malaysia? Yes, They Are.”, Suraya Zainudin, 26 October 2016 (<https://vulcanpost.com/591984/malay-graduates-job-seekers-discrimination-malaysia/>). UMNO Youth leader Khairy Jamaluddin has highlighted a job posting that stated “strictly non-bumiputera will be selected and we encourage them to apply” (6 June 2014, <http://www.malaysiakini.com/news/264922>). In subsequent Twitter conversation, and in response to an alert of other job advertisements, he also deemed “Bumiputera are encouraged to apply” as wrong. Such impartiality is welcome, but the episode reinforces the inadequacy of ad hoc interventions. The difference between “for Bumiputera only” and “Bumiputera are encouraged to apply” was overlooked, and as it turns out, the job ad reportedly morphed from “non-Bumiputera encouraged to apply” to “Bumiputera encouraged to apply”, without further public outcry (“MD: 'Non-bumi' job ad an honest mistake”, www.malaysiakini.com/news/264956, 6 June 2014)

¹⁰ In responding to surveys, it is reasonable to expect employers to be guarded against revealing ethnic group presumptions, prejudices and preferences that influence the decision to call for interview. The field experimental methodology holds out a major strength of covertly observing the actual decisions made. To further inform the decision-making process, however, research will need to interact directly with employers. Job seekers can share their experiences, but unavoidably lack the fuller picture – chiefly, the characteristics of competing applicants – and thus are limited in informing discrimination in selection for interview.

¹¹ The Cumulative Grade Point Average (CGPA) indicates a student’s overall academic score, with a maximum of 4.0.

The study, being focused on the incidence and patterns of discrimination, did not generate data to conclusively explain the underlying causes for the disconcerting results. Emphatically, the outcomes cannot be simplistically reduced to stereotypes, prejudices and bigotry – although such attitudes surely affect the differential treatment. Plausible reasons for discriminating in favour of Chinese over Malay applicants include linguistic and cultural compatibility (between job seeker and company, and with prospective colleagues), doubts about the veracity of Malay graduate qualifications, and pro-Chinese preference as a counterweight to pro-Malay preference in the public sector. The study also confounds stigmas against certain companies and caricatures of Chinese companies shunning Malays, by showing that Malay-controlled companies also stipulate Mandarin as a requirement, and that the advantage of being a Mandarin speaker applies to Malay applicants, not just Chinese.

Importantly, the study underscores the importance of anchoring discrimination discourses on its principle feature: treating preferentially what should be treated equally. It is the selection process, not organizational profile, that matters. A broader grasp of such concepts can help forestall acrimonious and misguided rhetoric that, for instance, smears ethnically homogenous organisations as discriminatory. A national dialogue must strive to clarify: (1) job relevant criteria – distinguishing identity traits like race and ethnicity, as well as gender and other background aspects, from skills, abilities, qualifications and performance; and (2) fair employment practices, including the pursuit of diversity and possible ways to allow labour market signalling.

LEGISLATION AND POLICY

What constitutes legitimate job requirements and what violates fair principles and qualifies as discrimination? The challenge is twofold. First, clarity on detecting discrimination; second, defining and monitoring unfair or negative discrimination. The Federal Constitution prohibits discrimination and enshrines the principle of equality – with qualifications. Article 8 (1) firmly establishes equality in its opening tenet: “All persons are equal before the law and entitled to protection of the law”. But 8(2), in fleshing out the application of that principle, issues an exemption: “except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender...” Article 153, with its provision for pro-Malay and pro-Bumiputera reservation, clearly authorizes preferential treatment in public sector education, employment, and licensing, and must be part of legal and policy deliberations.

The Constitution furnishes scant reference for detecting and monitoring discrimination, and little basis for prosecuting discrimination or promoting fair employment.¹² The Labour Department reportedly is able to take action against discriminatory acts, but it is not

¹² The Persons with Disabilities Act 2008 safeguards equal access to, *inter alia*, education, information, public transport, cultural life, and employment. Its article 29(1) reads: “Persons with disabilities shall have the right to access to employment on equal basis with persons without disabilities”. This is a landmark and necessary law, but obviously its application is confined to persons with disabilities, while its ambit is also not specific enough with regard to labour market practices.

empowered by any particular legislation.¹³ Malaysia therefore needs constitutional clarity – as a foundation and precondition for establishing any enforcement agency.

Two initiatives on this front have been conceived, then smothered. An Equal Opportunity Commission envisaged by the New Economic Model (NEM)¹⁴ in 2010 was, like most articles of that policy document, jettisoned after some time in the wake of vehement Malay ethno-nationalist protest hinged to the perceived loss of pro-Malay preferential treatment. The National Unity Consultative Council (2013-2015) proposed a trio of so-called Harmony Bills, ostensibly to replace the Sedition Act that Prime Minister Najib had promised to repeal. Among the proposals was a National Harmony and Reconciliation Commission to oversee matters such as discrimination. The mandate, however, was too broad and legislative terms of reference too thin. In any case, with the retention of the Sedition Act, these unity laws were cast into oblivion. The foreclosure of these initiatives might be viewed as unfortunate, but both institutions would be prematurely born, given the absence of rigorous dialogues on discrimination and firm commitment to application in both private and public sectors, and consideration of the complexities at hand.

The formation of legislation and policy demands a high-level and broad-based¹⁵ consultative process and extensive debate, but a few key elements can be outlined here. First, it must provide guidelines, appropriate to the Malaysian context, on detecting and overseeing discrimination, and for promoting fair practices, with recognition of the different manifestations across sectors, particularly education, employment, and business dealings. Labour discrimination warrants its own legislation, tailored to the Malaysian context, lending clarity to issues such as the legitimacy of language proficiency as a selection criterion¹⁶ and the pursuit of positive discrimination in the public sector and promotion of diversity in private sector. Of course, the law must encompass the range of discrimination dimensions, including race and ethnicity, but in no way relegating the importance of gender, religion, disability, and other pertinent identity traits and background characteristics. It must also encompass the range of labour market engagements, from job application to remuneration, dismissal, promotion, and more.

Second, it must apply across both public and private sectors, forming a broad coalition in the process. Deliberations will need to bring clarity and terms of reference for positive discrimination in the public sector and diversity initiatives in general. The possibility for permitting job ads to stipulate that certain language speakers are encouraged to apply, or to signal intent by declaring that the employer subscribes to diversity, can be considered, while

¹³ “Ministry monitors private sector employment trend”, *The Star*, 30 July 2010.

¹⁴ National Economic Action Council (NEAC) (2010) *The New Economic Model – Part 1*. Putrajaya: NEAC.

¹⁵ Advocacy for anti-discrimination has been sustained over the years, but stems from a narrow base and lacks commitment to its realization across all sectors. Groups representing Malay interests have pressed for such legislation – implicitly, with a predominant if not exclusive application to the private sector (“Malay economic council wants anti-discrimination law in employment”, <http://www.malaysiakini.com/news/330932>, 18 February 2016).

¹⁶ More specific rules and guidelines also warrant consideration, such as a rule that jobs stipulating a language requirement must also clarify the scope or tasks that necessitate proficiency in that language.

clearly outlawing explicit statements that an ethnic group is preferred. Certain codes can be agreed upon – such as, notification that the employer is committed to diversity – to enlarge the pool of applicants sought out for a legitimate purpose. Before employers can be held accountable, rules, guidelines and areas of discretion need to be more clearly framed. This is a monumental challenge, but it is the only way for fair employment to have credibility and any prospect for wide reception.

Concurrent with such legislation, the creation of a public oversight and enforcement authority, such as a Fair Employment Commission, can be revisited with more integrity than in the past. This body should be empowered a wider mandate than ‘equal opportunity’, given that it needs to oversee both the public sector and the private sector. Adjudication of negative discrimination cases, and oversight of existing affirmative action or group preferences, must fall within this body’s purview. It should also have a role in promoting awareness, appreciation and practice of workplace diversity, from the benefit of society and potentially for companies’ enhancement.

CONCLUDING THOUGHTS

Considering the Malaysian context and its complexities, broad coalition-building and national consensus involving political and societal institutions will be required for the necessary changes in mindset, legislation and policy to see the light of day. The impasse on this issue runs deep.

There are fears of being targeted as perpetrators – especially on the part of non-Malay owned business – and anxieties among Malays of ‘losing out’ in the public sector. The concerns are real and valid, and in need of assurance that the benefits and costs will be managed reasonably, transparently and effectively. More attention to the problems of discrimination, whether spurred by electoral contest or other factors, is timely and important, but that is only the start of a long and arduous journey. Effective and legitimate resolution of Malaysia’s complex labour discrimination problems entails nothing short of a courageous, comprehensive and systematic national endeavour.

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