

NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (NAP-BHR) IN MALAYSIA: CURRENT STATUS AND FUTURE PROSPECTS FOR A GOVERNANCE TOOL

Nisar Mohammad Ahmad

Senior Lecturer, Faculty of Syariah and Law, Universiti Sains Islam Malaysia.

Email: nisar@usim.edu.my

Abstract

Business and human rights (BHR) agenda has significantly progressed over the last decade, particularly in the wake massive events of human rights violations perpetrated by business entities. In 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (UNGPR) to set a global standards for addressing and preventing human rights impacts associated with business activities. This article aims to analyse the initiative taken by the Government of Malaysia through various agencies in developing a National Action Plan on Business and Human Rights (NAP-BHR) based on UNGPR. At the onset, this article examines the overview of BHR issues in Malaysia in particular from legal perspectives. This is followed by the discussions on the development of NAP-BHR in Malaysia from its inception, current status and future prospects. This article uses qualitative methods through document analysis of books, journal articles, newspaper articles and other internet sources related to BHR in Malaysia. The study found that NAP-BHR is a useful governance tool that can help the Government to address BHR issues and serve as a complementary force towards achieving Malaysia's Shared Prosperity 2030 Vision.

Keywords: Business and Human Rights, National Action Plan (NAP), UNGPR, Malaysia.

INTRODUCTION

The debate on corporate accountability and social responsibility is now at the fore of business discussion as a consequence of significantly publicised corporate human rights abuses. Business entities and multinationals whose activities constitute the bulk of the cross-border economic trade directly and indirectly contributed to these. Malaysia, as a developing country, is at the crossroads of possibly trading-off pursuit of economic development with respecting the human rights of its citizens. Typically, social and human rights responsibilities are abandoned in favour of business' profit-making agenda. A growing number of business entities have come under fire in recent years for alleged human rights abuses. The mounting concern that economic, social and cultural rights, as well as civil and political rights are being violated has generated calls for viable mechanisms to control business behaviour - including how to legally regulate and voluntarily monitor their actions.

Human rights are generally expected as being a governmental imperative and obligation, hence there is little latitude to control business behaviour. They can be immune to liability and victims suffer without redress. It is the author's hope that this article raises awareness among relevant parties on business and human rights issues. The author believes in the importance of ensuring that business moves beyond mere profit-making entity to being a responsible organ of society that respects human rights of stakeholders within its sphere of influence. Humanising business through corporate contribution to social responsibility is key to achieving sustainable development and realising the national vision of shared prosperity.

This article is focusing mainly on the initiative taken by the Government of Malaysia through its various agencies in developing a National Action Plan on Business and Human Rights (NAP-BHR) (Suhakam 2015a). The NAP is formulated based on the United Nations Guiding Principles on Business and Human Rights (UNGPs) which was endorsed by the United Nations Human Rights Council in 2011. It is believed that by integrating the universal standards and values in UNGPs into the NAP-BHR in Malaysia, this initiative will facilitate Malaysia's commitment to recognising, promoting and protecting human rights throughout the conduct and operations of business activities in Malaysia.

BUSINESS AND HUMAN RIGHTS IN MALAYSIA: FROM HARD LAWS TO SOFT LAWS

The current settings of international and domestic laws recognise State actors and governments as the primary duty-holders for human rights. They are the subjects of international law who have the capacity to bear rights and duties under international law. Entities other than States and certain international organisations (such as the United Nations) are not considered subjects of international law. As subjects of international law, the States actors i.e. the governments will be deemed as in breach of their international obligations and thus will be held accountable if they violate human rights of the people within their territories. However, looking at the multidimensional character of business-human rights relationships these days, especially in the adverse impacts on human rights posed by business entities through their business operations, there is, to a certain extent, a strong argument to support the needs to hold business entities accountable for their human rights violations.

In Malaysia, violations of human rights by business entities are not uncommon. These events of violations may hardly be reported in the mainstream media, but internet-based media has been widely used by social activists and human rights NGOs to air the concerns and grievances of the victims to help them seeking for justice. In general, violations of human rights by business entities in Malaysia involve mainly the rights which fall under the cluster of economic, social and cultural rights which

include the issues of rights to land, poverty and inadequate standards of living i.e. inadequate access to basic needs such as nutritious food, healthcare, education, housing, clean and safe drinking water (Ahmad, 2015).

Plantation (mainly the palm oil) and logging industries constitute among the major business operations which are closely associated with reports of environmental and human rights violations. Tropical deforestation, biodiversity losses, water pollution, indiscriminate burning, decreased water quality and quantity, decreased forest-cover, air pollution and soil erosion are among the environmental impacts of these industries which have implications on the enjoyment of human rights (Awang Ali Bema et. al 2011). In addition, the business operations by business entities have also violated a number of employees' rights by providing unfavourable conditions of work such as unfair wages or unequal remuneration for work or unsafe and unhealthy working conditions.³¹

Unfortunately, the adverse human rights violations mentioned above do not seem to be properly addressed by the existing hard laws and legal frameworks. Apart from the international laws which only target State actors, the domestic laws in Malaysia do not offer a better alternative either. Malaysia has no specific government bodies and/or State agencies that are tasked with preventing, investigating, punishing or providing redress for business-related human rights abuses. Also, there are no specific laws in Malaysia that require business entities to avoid contributing to or causing adverse human rights impacts through their activities. The only possible avenues for protection of business-related human rights abuses are through a number of government agencies empowered by piecemeal legislation to cater for specific issues such as anti-corruption, labour rights, and environmental rights.

Acknowledging the fact that the existing international and domestic legal frameworks concerning the business and human rights interface suffer from major insufficiencies, there is a strong reason to support and complement such defects by exploring the use of soft law and voluntary-based human rights initiatives. Enhancing human rights compliance by business entities via the use of soft law will help them to reduce the risks of being the violators of human rights while undertaking their business operations. The NAP-BHR is one of the soft law initiatives which was made a key national agenda on business and human rights in Malaysia in recent years.

³¹ For details, *see* UN, International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3, entered into force Jan. 3, 1976. Article 7.

THE DEVELOPMENT OF NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (NAP-BHR) IN MALAYSIA

Recognising the importance of sensitising business enterprise on business and human rights and advocating for them to prevent and address adverse impacts of business activities on human rights, the Government of Malaysia has established several mechanisms in line with the UN Guiding Principles on Business and Human Rights, such as the FTSE4 Good Environmental, Social and Governance Rating that includes human rights criteria for companies listed at the Malaysian Stock Exchange. The Companies Commission of Malaysia has also issued a circular on corporate responsibility disclosure and reporting that highlights international corporate governance standards and tools that contain human rights principles and performance indicators (Ministry of Foreign Affairs, Malaysia 2021).

The UNGP is grounded in recognition of its core general principles, namely:- (i) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (ii) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and (iii) the need for rights and obligations to be matched to appropriate and effective remedies when breached (Keong, 2019). Based on these principles, the Government is preparing the Malaysia’s National Action Plan on Business and Human Rights (NAP-BHR), in close consultations with various stakeholders including government agencies, the Human Rights Commission of Malaysia (SUHAKAM), business leaders, investor organisations, regulators, foreign missions, academia, and civil society.

The following discussions will detail up the development on NAP-BHR in Malaysia in three phases, namely initial phase – strategic framework, current status and future prospects.

Initial Phase - Strategic Framework

SUHAKAM was the earliest agency in Malaysia to take initial step towards development of National Action Plan on Business and Human Rights (NAP-BHR). It noted that in some parts of the world, certain Governments, such as that of the United Kingdom, Denmark and the Netherlands, have introduced the NAP-BHP in order to implement and give effect to the principles under UNGP. Guided by the effectiveness and best practices of the above NAP-BHP, in 2014, the Commission and the United Nations Country Team (UNCT) in Malaysia collaborated in a joint project on ‘Promoting Business and Human Rights in Malaysia for Business Success and Inclusive Growth’ with the intention to formulate a plan of action for Business and Human Rights for Malaysia through the adoption of the UNGP by both State and non-

State actors. This project, which is funded by the Foreign and Commonwealth Office, commenced in July 2014 and completed by March 2015 (Ahmad, 2015).

In order to obtain information to formulate the said plan of action, the Commission has implemented several activities primarily to gather input and information on the current situation on business and human rights. Those activities include consultation and interview sessions with various stakeholders including corporations and GLCs, regulatory authorities, enforcement agencies, and related Government departments and NGOs (SUHAKAM 2015a). In March 2005, a Strategic Framework on a National Action Plan (NAP) on Business and Human Rights for Malaysia has finally been completed and presented to the Government of Malaysia (The Edge Markets 2015). It provides a policy direction for the formulation of an NAP on Business and Human Rights for Malaysia towards promoting greater respect for human rights by the State and Non-State actors including businesses, civil society and individuals and groups affected by adverse business-related human rights impacts (SUHAKAM 2015b).

Aiming to translate the UNGP into Malaysia’s context, the Strategic Framework articulates a set of policy objectives and related recommendations that the Government should consider when developing its NAP on business and human rights. It also serves as a resource document for accelerating understanding of how the UNGP may be used and implemented. Indeed, as far as the Malaysia’s context is concerned, the movement towards ensuring corporate respect and accountability for human rights is gaining prominence and will continue to progress. The Commission is of the view that the continued fostering of corporate respect for human rights in Malaysia and Association of Southeast Asia Nations (ASEAN) will boost Malaysia’s effort to become a fully developed nation and help achieve the successful implementation of sustainable development (SUHAKAM 2015b).

Moreover, having an NAP-BHR that is based on the UNGP is important to demonstrate Malaysia’s leadership of ASEAN as Chair of ASEAN in 2015. With the ASEAN Economic Community as the goal of regional economic integration in 2015, achieving sustainable economic development by reconciling economic goals with human rights protection will require regional cooperation and action. Also, integrating business and human rights into ASEAN’s agenda will ensure that regional economic integration advances the ASEAN Charter’s purposes of alleviating poverty, enhancing good governance and the rule of law, promoting and protecting human rights and fundamental freedoms, promoting sustainable developments, and providing equitable access to opportunities for human development and justice (SUHAKAM 2015b; ASEAN 2008).

Current Status

The Government of Malaysia has given serious attention in the process towards developing an NAP-BHR. This was evident when the Cabinet has approved the plan for NAP-BHR on 6 December 2019. This indicates the Government commitment to encourage business entities to comply with human rights standards which is also part of the Government's roles to disseminate and implement the principles laid down in the UNGP. Prior to this, on 20 June 2019, the Legal Affairs Division, Prime Minister's Department was given the mandate and responsibility as a focal agency to lead the process of developing an NAP-BHR in Malaysia. As one of its immediate initiatives, on 24 June 2019, the Division, in collaboration with SUHAKAM have co-hosted a National High-Level Dialogue on Business and Human Rights - “Towards A Malaysian National Action Plan (NAP) on Business and Human Rights” (Abudin 2020).

The other collaborating partners include the Faculty of Law, National University of Malaysia (UKM), the Malaysian Centre for Constitutionalism and Human Rights and the Institute of Malaysian and International Studies (IKMAS). This was considered the first-ever high-level national dialogue on business and human rights in Malaysia. The then Minister of Laws, YB Liew Vui Keong who was present on behalf of the Government in the event announced in his keynote address a cabinet decision to launch a process to develop an NAP-BHR which was based on Strategic Framework on a National Action Plan (NAP) on Business and Human Rights for Malaysia produced by SUHAKAM (DIHR 2019; Abudin 2020).

In addition, series of further discussions and capacity development have been implemented throughout the second term of 2019. This includes the dialogue sessions with embassies of Belgium and Netherlands which was held on 6 November 2019 to create awareness on the UNGP on Business and Human Rights and the importance of establishing a National Action Plan (NAP). It aims to understand what businesses and governments can and should do to ensure protection and respect for human rights in the workplace. Belgium and the Netherlands, which was the second country to adopt a NAP, have also shared their experiences and best practices on implementing the UNGP at a national level (Netherlandsandyou.nl 2019).

On 19 and 25 February 2020, the Legal Affairs Division has organised two seminar sessions to intensify its efforts towards the establishment of NAP-BHR as well as to enhance the awareness among the civil society, non-governmental organisations (NGOs) and officials from federal and state governments about the issues of human rights violations and the importance of the developing a national action plan. This seminar session was an important step and the beginning phase for the development of an NAP in Malaysia. Based on outcome from engagement sessions which have been

implemented, three thematic areas have been identified and will be studied in National Baseline Assessment (NBA) which will be collectively implemented by the Legal Affairs Division together with SUHAKAM and the United Nations Development Program (UNDP) (Abudin 2020).

Future Prospects

From 2020-2021, Government of Malaysia will accelerate the process of developing the Malaysian NAP, by first and foremost, establishing the governance structure and institutional mechanisms in order to facilitate cross-sectoral cooperation and coordination; as well as to ensure sufficient budget allocation and estimated timeline as government’s commitment to taking forward this important policy paper. The Government, as well as SUHAKAM, will continue to carry out more awareness programmes, engagement activities; as well as hold more targeted and technical stakeholder consultations which will inform and contribute to the drafting of the National Baseline Assessment (NBA). Recognising the importance of the NBA, which in turn will determine the important areas or most serious issues that Malaysia’s first NAP-BHR shall target to rectify and resolve; there is a need to ensure a comprehensive and extensive consultation with the wider community (Abudin 2020).

With this in mind, the Government, through the Legal Affairs Division of the Prime Minister’s Department, will work on forging trust and smart partnerships with various organisations (both international and local), with businesses and corporations, government departments, civil society organisations (CSOs) and academicians; to conduct risk analysis of various sectors, to identify where the need is highest, and henceforth design a combination of strategies that will form the core content of the Malaysia’s NAP zero draft. The development of the NAP-BHR is expected to be completed in 4 years (OHCHR 2019).

It is also important to highlight that based on previous experiences, the greatest challenge in the development and implementation of a national action plan is to align it and build upon other policy areas, where there might be overlaps on the same subject matter. On this note, the development of an NAP-BHR in Malaysia should not just build upon the existing national priority areas, but should align and support the implementation of other global development frameworks and initiatives such as the 2030 Agenda for Sustainable Development and Paris Agreement on Climate Change (Keong, 2019).

In the long run, the above initiatives reaffirm the Government’s commitment to recognising, promoting and protecting human rights throughout the conduct and operations of business activities in Malaysia. It is also the Government’s aspiration that the development of the NAP-BHR will be an impetus for action towards addressing BHR issues, provide a common platform for cross governmental policy

coordination, and serving as a complementary force towards achieving Malaysia's development goals and foster Malaysia's international business competitiveness (OHCHR 2019).

CONCLUSION

In a nutshell, the present discussion in this article acknowledges that the challenges and limitations that lie ahead in imposing liabilities on business entities for their human rights abuses are almost impossible to avoid. Hence, the use of soft law can pave the way in establishing platforms for possible improvements in the measures to ensure better human rights compliance by business entities. The United Nations Guiding Principles (UNGP) on Business and Human Rights endorsed by the United Nations Human Rights Council in 2011 has become a cornerstone in global human rights standards for business entities. One of the key initiatives evolved from the UNGP was the establishment and development of National Action Plan on Business and Human Rights (NAP-BHR) which was adopted by various countries including Malaysia.

In this article, the author has analysed the initial stage, current status and future prospects of the NAP-BHR as governance tool to enhance human rights compliance by business entities in Malaysia. This governance tool is very important owing to the fact that Malaysia is home to a significant number of business entities. Malaysia is uniquely positioned as a Southeast Asia's business hub, attracting more than 5,000 foreign corporations from 40 countries operating their businesses in many key economic sectors. In a more recent development, the World Bank has put Malaysia in the 15th spot among 190 economies worldwide in its Doing Business Report in 2019 (Keong, 2019).

Hence, adopting and implementing NAP-BHR will help facilitate the business entities in adopting socially-responsible, sustainable and environmental-friendly business operations with greater respect to human rights principles within their sphere of business influence. To this end, it is important for everyone to continuously create an open and interactive environment, where any segments of our society including businesses, large and small, who value human rights can come together to learn and share views and good practices from each other. This is in line with the Government's effort to achieve its Shared Prosperity Vision in 2030.

REFERENCES

Abudin, Roziah. 2020. Welcoming Speech in Conjunction with Workshop on Business and Human Rights - *"Fact Finding Consultation : Towards Malaysia's National Action Plan On Business And Human Rights (NAPBHR)"*. <

<http://www.bheuu.gov.my/pdf/ucapan/Teks%20Ucapan%20Datuk%20KP%20untuk%20Vitual%20BHR%20Fact%20Finding.pdf> (accessed 23 July 2021)

Ahmad, Nisar Mohammad. 2015. *Soft Law as a Method for Enhancing Human Rights Compliance by Multinational Corporations: A Special reference to Malaysia*. PhD Thesis, International Islamic University Malaysia (IIUM).

ASEAN. 2008. The ASEAN Charter. Articles 1(6), 1(7), 1(9) and 1(11). <<http://www.asean.org/archive/publications/ASEAN-Charter.pdf>> (accessed 9 July 2015).

Human Rights Commission of Malaysia (SUHAKAM). 2015a. 2014 Annual Report, Kuala Lumpur: SUHAKAM.

Human Rights Commission of Malaysia (SUHAKAM). 2015b. Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia, Kuala Lumpur, SUHAKAM.

Keong, Liew Vui. 2019, June, 24. Keynote Address – National High-Level Dialogue On Business & Human Rights: "*Towards A Malaysian National Action Plan On Business And Human Rights*" <<http://www.bheuu.gov.my/pdf/ucapan/TEKS%20UCAPAN%20YBM/Ucapan%20YBM.pdf>> (accessed 30 July 2021)

Ministry of Foreign Affairs, Malaysia. 2021. Malaysia's Candidature To The Human Rights Council Term 2022-2024: Voluntary Pledges & Commitments – News From Mission <https://www.kln.gov.my/web/usa_un-new-york/news-from-mission/-/blogs/malaysia-s-candidature-to-the-human-rights-council-term-2022-2024-voluntary-commitments-and-pledges> (accessed 23 July 2021)

Netherlandsandyou.nl. 2019. Business and Human Rights Dialogue: Towards a Malaysian National Action Plan - Lessons Learnt from Belgium and The Netherlands <<https://www.netherlandsandyou.nl/latest-news/events/2019/11/6/business-and-human-rights-dialogue>> (accessed 24 July 2021)

The Edge Markets. 2015, March 24. Suhakam launches framework for business and human rights action plan. <<https://www.theedgemarkets.com/article/suhakam-launches-framework-business-and-human-rights-action-plan>> (accessed 24 July 2021)