

## NOTES & COMMENTS

---

# Rights of Migrant Workers under Malaysian Employment Law

---

Zuraini Ab Hamid\* & Siti Fazilah Abdul Shukor\*\* & Ashgar Ali Ali Mohamed\*\*\*

*Labour migration is an important global issue that largely affects the labour market. Malaysia is among the popular destination countries for labour migration in Asia. The number of migrant workers that consist of documented and undocumented workers is increasing every year due to rapid economic development that captivates job seekers from undeveloped countries. In this regard, migrant workers frequently fall into the trap of unscrupulous employers who exploit them for their own interests. These employers do not pay their wages as promised and deny them their employment rights. This case is basically treated as 'forced labour' or 'human trafficking' by the Malaysian authority. This paper identifies the Malaysia's legal framework of the employment of migrant workers. In addition, how to address the infringed rights of migrant workers is discussed in this paper. Although the framework deems comprehensive, it further recommends a stringent and fair law enforcement to combat exploitation towards migrant workers.*

### Keywords

Migrant Worker, Forced Labour, Human Trafficking, Exploitation, Malaysia

\* Assistant Professor at International Islamic University Malaysia ("IIUM"). Ph.D. in Law (IIUM). ORCID: <https://orcid.org/0000-0001-7829-8714>. The author may be contacted at: [zurainihamid@iium.edu.my](mailto:zurainihamid@iium.edu.my) /Address: Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 50728 Kuala Lumpur, Malaysia. This research was supported by the International Islamic University Malaysia Research Initiative Grant Scheme (RIGS17-015-0590).

\*\* Ph.D. candidates at International Islamic University Malaysia; Lecturer at Universiti Tunku Abdul Rahman. MCL (IIUM). ORCID: <https://orcid.org/0000-0003-3504-4102>. The author may be contacted at: [sitifazilah@utar.edu.my](mailto:sitifazilah@utar.edu.my) /Address: Faculty of Business and Finance, Jalan Universiti Bandar Barat, 31900, Kampar, Perak, 31900, Malaysia.

\*\*\* Professor at International Islamic University Malaysia. Ph.D. in Law (UPM). ORCID: <https://orcid.org/0000-0003-3468-0115>. The author may be contacted at [ashgar@iium.edu.my](mailto:ashgar@iium.edu.my) /Address: Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 50728 Kuala Lumpur, Malaysia.

DOI: <http://dx.doi.org/10.14330/jeail.2018.11.2.05>

## 1. Introduction

Migration is an important global issue that largely affects the labour market. With rapid economic growth, rising number of migrant workers from developing and undeveloped countries seek employment in developed countries.<sup>1</sup> They are looking for better opportunities to improve their lives and stay out of poverty by working in developed countries which have a high demand for unskilled or semi-skilled labours.<sup>2</sup> Such ‘migrant workers’ refer to the individuals who are engaged or have been engaged in remunerated activities without Malaysian nationality.<sup>3</sup> In other words, they are foreign workers who are not citizen of the country where they are hired to work. In Malaysia, migrant workers are among the major contributors in the country’s economic development for decades due to its promising employment prospect.

According to the Department of Statistic Malaysia (“DOSM”), the number of labour participation rate in April 2018 is 68.2 percent, an increase of 0.5 percent compared to April 2017. In 2017, the total number of foreign workers in Malaysia were 1.78 million<sup>4</sup> out of 14.89 million labour force.<sup>5</sup> Home Ministry’s statistics of foreign workers in Malaysia recorded a total number of 728,870 migrant workers from Indonesia, 405,898 from Nepal, 221,089 from Bangladesh, 127,705 from Myanmar, 114,455 from India, 59,281 from Pakistani, 56,153 from the Philippines, 29,039 from Vietnam, 15,399 from China, 12,603 from Thailand, 5,964 from Sri Lanka, 5,103 from Cambodia, and 39 from Laos.<sup>6</sup> They can be found in various sectors such as construction, agriculture, manufacturing, food, electronic, textile, domestic, and entertainment.

Migrant workers are classified into legal (documented) and illegal (undocumented) workers. Legal migrants hold the necessary and valid documents before entering the country, while illegal migrants do not have any valid documentation before

<sup>1</sup> ILO, International Labour Standards on Migrant workers, available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang-en/index.htm> (last visited on Nov. 12, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> G. A. Res. 45/158, ¶ 5, U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx> (last visited on Nov. 10, 2018).

<sup>4</sup> M. Kaur, *Home ministry: 1.78 million foreign workers in Malaysia*, FREE MALAYSIA TODAY, July 27, 2017, available at <http://www.freemalaysiatoday.com/category/nation/2017/07/27/home-ministry-1-78-million-foreign-workers-in-malaysia> (last visited on Nov. 12, 2018).

<sup>5</sup> Malaysia Employer Federation, BNM Annual Reports and Ministry of Human Resources, available at <http://www.mef.org.my/kc/statistics.aspx> (last visited on Nov. 12, 2018).

<sup>6</sup> *Supra* note 4.

entering the country or the documentation has expired or confiscated. Illegal migrants usually roam around the country looking for jobs to survive. It is estimated that approximately 60 percent of illegal migrants flood the domestic labour market in Malaysia.<sup>7</sup> Legal and illegal migrant workers are vulnerable to exploitation and subject to deplorable working conditions akin to slavery due to poverty, indebtedness, and debt bondage which make it impossible for them to leave the host country. According to Global Slavery Index 2016, about 45.8 million people are subject to modern slavery in this world.<sup>8</sup> Besides, 58 percent of the living slaveries come from five countries namely India, China, Pakistan, Bangladesh, and Uzbekistan.<sup>9</sup>

Under the Universal Declaration of Human Right (“UDHR”) 1948, migrant workers are actually entitled to certain human rights and protections in regards to their vulnerable status.<sup>10</sup> However, they are often subject to inequalities in the labour market, enjoy very little protection, and typically being exploited and trafficked.<sup>11</sup> Migrants workers in Malaysia are entitled for employment protection under the Malaysia employment laws which include the Employment Act (“EA”) 1955 (West Malaysia), Sabah Labour Ordinance, Sarawak Labour Ordinance, Workmen’s Compensation Act (“WCA”) 1952, Worker’s Minimum Standard of Housing and Amenities Act 1990, Children and Young Persons Act 1966, Industrial Relations Act (“IRA”) 1967, Trade Union Act (“TUA”) 1959, Occupational Safety and Health Act 1994, Wages Council Act 1947, Employment (Termination and Lay-Off Benefits) Regulation 1980, Employees Provident Fund Act (“EPFA”) 1991, Employees’ Social Security Act (“SOCSO”) 1969, Factories and Machinery Act 1967, and Minimum Wages Order 2012. In spite of all those legal frameworks, there are claims that the rights of migrant are not being protected by the authorities, government agencies, and corporations. They have become the subject of exploitation in forced labour and human trafficking cases.

This research will examine the available rights of migrant workers under the employment laws in Malaysia. In addition, how to address the infringed rights of

<sup>7</sup> Kong See Hoh, *60% of illegal foreign workers without permanent employment*, SUN DAILY, July 3, 2017, available at <http://www.thesundaily.my/news/2017/07/03/60-illegal-foreign-workers-without-permanent-employment> (last visited on Nov. 12, 2018).

<sup>8</sup> Malaysia is ranked the 167th country based on proportion. See *The Global Slavery Index 2016*, available at <https://www.globallslaveryindex.org> (last visited on Nov. 12, 2018).

<sup>9</sup> *Id.*

<sup>10</sup> See *The People’s Movement for Human Rights Education*, available at <https://www.pdhre.org/rights/migrants.html> (last visited on Nov. 12, 2018).

<sup>11</sup> *Supra* note 1.

migrant workers will be discussed in this paper. This paper is composed of four parts including Introduction and Conclusion. Part two will review forced labour and human trafficking cases. Part three will examine the remedial measures for migrant workers in forced labour.

## 2. Forced Labour and Human Trafficking Cases

Forced labour is known as ‘slavery’ (old term) or ‘human trafficking’ (new term). Labour trafficking exists in Malaysia in two manners, namely, exploitation and involuntariness which are essential in determining whether any activities involve recruitment, transportation, transfer, and receipt of individuals.<sup>12</sup> Other considerations in determining labour trafficking are the relationship between employer and employee, as well as danger and threat that exist in the working environment.<sup>13</sup> Forced labour focuses more on the pressure or force received by employees from employers regardless of the nature of job and legal or illegal status.<sup>14</sup> Without basic protection or rights such as physical safety, security, and access to necessities such as healthcare, food, water, and accommodation, it is ‘forced labour.’

On the other hand, forced labour includes the vestiges of slavery or slave-like practices and various forms of debt bondage. The human trafficking (modern-day slavery) has been defined in the recent decades in relation to poor working and living conditions contrary to human dignities.<sup>15</sup> In this regard, the International Labour Organization (“ILO”)’s Forced Labour Convention 1930 (No. 29) defines forced or compulsory labour as “all works or services exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.”<sup>16</sup> Besides, Article 1 (3) of the Forced Labour Protocol explicitly reaffirms the definition

<sup>12</sup> M. Ajis, K. Askandar & S. Awang, *International Migration and Human Trafficking in Malaysia: A Study on Illegal Immigrants*, 11:25 *ASIAN SOCIAL SCI.* 125 (2015).

<sup>13</sup> *Id.*

<sup>14</sup> ILO, *A Global Alliance against Forced Labour*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (2005), available at <https://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf> (last visited on Nov. 10, 2018).

<sup>15</sup> ILO, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, Report of the Committee of Experts on the Application of Conventions and Recommendations (2012), available at [https://www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS\\_174846/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS_174846/lang-en/index.htm) (last visited on Nov. 10, 2018).

<sup>16</sup> ILO, What is forced labour, modern slavery and human trafficking, available at <http://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm> (last visited on Nov. 10, 2018).

through the insertion of three important elements, namely: (a) work or service which refers to all types of work occurring in any activity, industry, or sector including the informal economy; (b) menace of any penalty which refers to a wide range of penalties used to compel someone to work; and (c) involuntariness which refers to false promises which leads employee to accept the offer.<sup>17</sup>

Forced labour is closely related to human trafficking in which both are considered as a form of human exploitation. In Malaysia, Section 2 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (“ATIPSOM”) 2007 defines ‘exploitation’ as any forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activities, or the removal of human organs. It also cover various forms of coercion prohibited by international instruments of human rights and labour standard such as slavery, or institutions and practices similar to slavery, forced labour, trafficking in persons, and forced marriage.<sup>18</sup> Commonly, victims are under the forced labours being exploited or forced to marry or cannot refuse or leave due to threat, violence, deception, coercion, or abuse of power.<sup>19</sup>

Suhana Saad and Salman Ali argued that women are more vulnerable to human trafficking in Malaysia in which female victims would be typically promised with good-pay jobs and being brought illegally to Malaysia before they get tricked to work as prostitutes.<sup>20</sup> Furthermore, in 2017, Malaysia was ranked Tier-2 in the US annual Trafficking in Persons (“TIP”) report, which means the country does not meet the minimum standard to eliminate human trafficking but the effort was deemed significant.<sup>21</sup> According to the report, Malaysia has taken reasonable steps in combating human trafficking by strengthening the country’s rules and regulations. However, the latest report showed that Malaysia has slipped to Tier 2-Watch List in 2018 TIP report.<sup>22</sup> Law in Malaysia currently allows the fees initially paid by employers to be deducted from employees’ wages, leading to the forced labour where the employees are exploited to work in a poor working condition with rights being neglected.

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* note 8.

<sup>19</sup> *Id.*

<sup>20</sup> S. Saad & S. Ali, *Government Policy and the Challenge of Eradicating Human Trafficking in Malaysia*, 10:6 MALAY. J. SOC’Y & SPACE 69 (2014).

<sup>21</sup> Gan Pei Ling, *Malaysia launches special court for human trafficking*, MALAYSIAN INSIGHT, Mar. 28, 2018, available at <https://www.themalaysianinsight.com/s/45497> (last visited on Nov. 12, 2018).

<sup>22</sup> F. Muhyiddin: *Malaysia has slipped in 2018 human trafficking rating*, STAR ONLINE, June 30, 2018, available at <https://www.thestar.com.my/news/nation/2018/06/30/muhyiddin-malaysia-has-slipped-in-2018-human-trafficking-rating> (last visited on Nov. 12, 2018).

### 3. Remedies for Migrant Workers in Forced Labour

#### A. *International Law*

The UN defines human rights as “the rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status, which include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more, and everyone is entitled to these rights, without discrimination.”<sup>23</sup> Human rights is also known as a norm or moral principle held by human beings. These basic rights belong to all human beings in the world from their birth to death.

UDHR states that every human being is given inherent dignity, equal and inalienable rights of freedom.<sup>24</sup> Individuals from any countries should not be treated as a slaves or forced labours by either the citizens of the same county or other countries and no one is above anybody in this world. Therefore, oppressing weaker individuals from poor country is an inhumane activity which violates their basic rights. Everyone is entitled to perform any acts as they wish, move to any place, and work in any region without being maltreated.<sup>25</sup>

#### B. *Malaysian Law*

The flood of legal and illegal foreign workers in Malaysia occurs as a result of industrialization. The supply of cheap and unskilled workers is more elastic in developing economies. They are easily be obtained due to extreme poverty. Those migrants are forced to accept any types of work in return of any amount of wages. However, it gives a wrong perception to employers so that they tend to treat migrants or foreign workers unjustly by reducing their wages and increasing their working hours. Recently, Malaysia has outlined its employment law for the benefits and protection to all employees, but some employers still neglect their employee’s basic rights to protection especially for migrant workers. This basic employee’s rights to protection have often been neglected in labour trafficking regardless of their

<sup>23</sup> UN, Human Rights, available at <http://www.un.org/en/sections/issues-depth/human-rights> (last visited on Nov. 12, 2018).

<sup>24</sup> UDHR pmb1. It provides: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

<sup>25</sup> UDHR arts. 3, 5, 7, 13 & 23.

Table 1: Summary of Human Rights Protection and Its Violations under UDHR

No.	Art.	Content of Article	Example of Violation
1	3	Everyone has the right to life, liberty and security of person.	Personal liberty of an individual has been restricted. The objective is to violate migrant rights to live. The migrant passport, money, phone and personal item been confiscated by the syndicates so called employer. <sup>26</sup>
2	4	No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.	No one is allowed to treat unjustly or oppress against another in any form of life and working environment. The migrant being treated as slave where no salary been paid, house arrest and no proper food being provided. <sup>27</sup>
3	5	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.	It is against humanity to punish or torture any human unlawful. The migrant been forced and threat by employer to eat pork and bathing dogs which is against Islam <sup>28</sup> and been being abused such as beaten by using broom, rattan, kicked and slapped. <sup>29</sup>
4	7	All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.	Every human should be treated equally without any discrimination of nationality. Generally, migrants be treated unjustly in terms of working hours where work more than 8 hours per day and without rest day. <sup>30</sup>
5	13	(1) Everyone has the right to freedom of movement and residence within the borders of each State; and (2) Everyone has the right to leave any country, including his own, and to return to his country.	Every human is eligible to move freely from one place to another without being control by anyone unless due to regulation requirement. In this situation, the migrant important documentation such as passport and personal property been seized by employer which restrain migrant workers to move freely in Malaysia or return back to their country. <sup>31</sup>

<sup>26</sup> *Supra* note 20.

<sup>27</sup> *Supra* notes 12 & 20.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Z. Hamid & K. Mokhtar, *Human Trafficking: The International, Malaysian Legal Framework and Sharia Perspectives*, 21:2 IIUM L. J. 292 (2013).

<sup>31</sup> *Id.* See also *supra* note 20 & 30.

6	23	(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, (2) Everyone, without any discrimination, has the right to equal pay for equal work, (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection; and (4) Everyone has the right to form and to join trade unions for the protection of his interests.	Everyone are entitled to receive equal rights and better social protection in employment working conditions. The migrant workers been lured for good job and pay but once reached they are been forced to prostitution or sexual exploitation by agency. <sup>32</sup> Mostly, migrant workers will be paid with low or no salary, poor living condition and benefit. <sup>33</sup>
7	24	Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.	Everyone have rights to holiday with relaxation and no one can refuse or deny to sanction their rest or vacation. Generally, migrant workers been discriminated for their right to equal pay and social protection in Malaysia.

Compiled by the author.

employment status, types of exploitation, and legal status.<sup>34</sup> Such victims of labour trafficking in Malaysia work in several sectors such as agriculture, construction, domestic service, food service, manufacturing, entertainment, plantation, mining, and quarry. Labour trafficking victims often work in cheap labour sector where they are hired illegally without any health and security insurance.<sup>35</sup> Indirectly, it shows the labour trafficking victims as ‘forced labour’ whose rights are neglected due to poverty via physical or emotional abuse.

## 1. Federal Constitution

The Federal Constitution of Malaysia denotes basic human rights of person living in Malaysia. Article 6 states that no person shall be held in slavery and all forms of forced labour are prohibited in the federation. Article 8 indicates that all persons

<sup>32</sup> *Supra* note 20.

<sup>33</sup> *Supra* note 30.

<sup>34</sup> K. Richrads, *The Trafficking of Migrant Workers: What are the Links Between Labour Trafficking and Corruption?*, 42:5 INT’L MIGRATION 147-68 (2004).

<sup>35</sup> K. Bakirci, *Human Trafficking and Force Labour: A Criticism of the International Labour Organization*, 16 J. FIN. CRIME 160-5 (2009).



are equal before the law, entitled to a fair protection of the law, and shall be in no discrimination against anyone on the grounds of religion, race, descent, and place of birth or gender in any law or in the appointment under employment. Everyone is equal before law and should be treated equally regardless they are Malaysians or non-Malaysians.<sup>36</sup> The word, ‘person’ means “human being as an individual.” It does not signify only one nationality.<sup>37</sup>

Thus, whoever lives in Malaysia is entitled to obey and exercise Malaysia supreme law which is the Federal Constitution. No one should be treated unjustly in the form of employment in Malaysia regardless they are the citizens or non-citizens of Malaysia.<sup>38</sup> Everyone should be given the same treatment in the employment and no one should be held in forced labour.<sup>39</sup> Slavery and force labour are an offence under the Malaysian Penal Code. Section 374 of the Code, for example, provides: “Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.”

However, there are several cases reported of migrant workers’ rights being infringed in Malaysia. The tragic death of migrant workers in construction and manufacturing area in Malaysia<sup>40</sup> shows that the rights of migrants have been exploited and no social protection is given by the authority. The exploitation of migrant workers corrupts Malaysian societies and makes other countries condemn Malaysia for the lack of protection it gives to the migrant workers.

## 2. Employment Act 1955

Theoretically, the Employment Law in Malaysia does not discriminate migrant workers. In practice, however, the rights of migrant workers are not adequately protected. Usually, these workers are abused and entrapped into debt bondage and forced labour. In response to this, there are actually minimum benefits stated in EA 1955, Sabah Labour Ordinance and Sarawak Labour Ordinance for migrant workers. All three statutes are similar in terms of provision of relevance and benefits for migrant workers. The statutes are concerned with monetary benefits such as annual leave, sick leave, maternity allowance, and overtime work. Therefore, EA 1955 is of

<sup>36</sup> Malay. Cons. art. 8(2).

<sup>37</sup> M. Rahel, & T. Chowdhury, *Migrant Workers under the Domestic Law and International Labour Organization (ILO) Convention in Perspective of Malaysia*, 7 INT’L J. BUS. & TECHNOENTREURSHIP 153 (2017).

<sup>38</sup> Malay. Cons. art. 8(2).

<sup>39</sup> *Id.*

<sup>40</sup> See *We need to strengthen protection for migrant labour in Malaysia*, MALAYSIAN INSIGHT, Feb. 12, 2018, available at <https://www.themalaysianinsight.com/s/37517> (last visited on Nov. 12, 2018).

compelling nature so that failure to provide any of those benefits is an offence and employers could be prosecuted in court if they fail to adhere.<sup>41</sup>

EA 1955 is a legal guideline for employees. In accordance with Section 2, ‘foreign employee’ is not a citizen, while ‘employee’ is any person or class of persons: (a) included in any classification in the First Schedule to the degree determined in that; (b) in respect of whom the Minister makes an order under subsection; or (3) or Section 2A. In the First Schedule, Item 1 describes the first category of workers as follows:

Any person, regardless of his occupation, who has gone into an agreement with the administration with an employer under which such individual’s wages does not surpass one thousand five hundred ringgit a month.<sup>42</sup>

Item 2 describes the other category of workers covered by the Act as follows:

Any person who, regardless of various wages he acquires in a month, has gone into an agreement with the administration with an employer incompatibility of which.<sup>43</sup>

The interpretation of employees denotes that any person who enters into an agreement with an employer to perform any occupations should be entitled for wages, regardless the person is a Malaysian or non-Malaysian. In addition, Section 60L states that discrimination is prohibited and equality should be practiced by employers towards their employees irrespective whether the employees are local or migrant workers. It means that the Director General of Labour of Malaysia has the right to investigate and interrogate any complaints made by either local or migrant workers against employer’s discrimination in workplace.<sup>44</sup> EA 1955 also gives protection to local workers for retrenchment issues. In the case of retrenchment, for example, employer should first terminate migrant worker in the same capacity with local worker before terminating local worker.<sup>45</sup>

EA 1955 further states that employer should not terminate local worker in order to employ migrant worker which is primarily intended to protect Malaysian from

<sup>41</sup> S. Othman & R. Rahim, *Migrant Workers in Malaysia: Protection of Employers*, 22(S) PERTANIKAJ. SOCIAL SCI. & HUMANITY 271-82 (2014).

<sup>42</sup> First Schedule of Employment Act (1955), § 1.

<sup>43</sup> *Id.* § 2.

<sup>44</sup> Employment Act 1955, § 60L.

<sup>45</sup> E. Devadason, & C. Meng, *A Critical Appraisal of Policies and Laws Regulating Migrant Workers in Malaysia*, J. CONTEMP. ASIA 8 (2014).

unemployment.<sup>46</sup> It gives a clear assumption that there is no equal protection given to migrant workers. Further, migrant workers are not being paid as per agreed in contract, salary being deducted and in certain sectors, no rest day being given by employer.<sup>47</sup>

Meanwhile, Section 60A of EA 1955 states that workers should work maximum eight hours per day inclusive of break, 48 hours per week, and every additional work beyond 48 hours is considered overtime which requires employers to pay extra wages. Long working hours with little wages has infringed employees' rights under this Act. Furthermore, according to Sections 91 and 92 of this Act, it is an offence if employers do not pay wages for more than a month and they could be prosecuted in that case.<sup>48</sup> ATIPSOM 2007 also highlights that employers could be prosecuted for the offence of not paying wages more than three months or cutting more than 70 percent of wages. This is regarded as a form of forced labour.<sup>49</sup> Next, Part XIIB of EA 1955 contains general provisions regarding foreign employees, but is silent on the migrant workers' right to protection.<sup>50</sup>

EA 1955 aims to give protection to both local and migrant workers. Nevertheless, protection has not entirely been exercised equally to migrant workers as per stated in the Act. There is a lack of supervision from the authority to enforce the rights of migrant, so that it opens floodgates for employers to treat employees unjustly. On top of that, the authority does not take any actions or attempt to seriously combat the issues. Early in 2018, a case of domestic worker abuse leading to death was reported in Penang.<sup>51</sup> A domestic worker was constantly treated as a slave and abused by her employer. She died tragically due to organ failure after being relentlessly beaten by her employer. The employer heartlessly let the maid slowly die at the house porch with the family dog.<sup>52</sup> This is a usual case of modern-day slavery, where employees experience exploitation, violation, and many forms of abuse such as no salary being paid for months, salary deduction, lack of food provided, poor living and working condition, sexual and physical abuse, no rest days for months or years, long working

<sup>46</sup> *Id.*

<sup>47</sup> P. Pattison, *Workers for McDonald's in Malaysia say they were victims of labour exploitation*, GUARDIAN, Nov. 28, 2016, available at <https://www.theguardian.com/global-development/2016/nov/28/workers-for-mcdonalds-malaysia-claim-labour-exploitation> (last visited on Nov. 10, 2018).

<sup>48</sup> *Supra* note 12.

<sup>49</sup> *Id.*

<sup>50</sup> *Supra* note 41.

<sup>51</sup> S. Indramalar, *Domestic workers continue to be abused until tougher laws can protect them*, STAR ONLINE, Apr. 6, 2018, available at <https://www.star2.com/family/2018/04/06/domestic-workers-will-continue-to-be-abused-until-there-are-tougher-laws-to-protect-them> (last visited on Nov. 12, 2018).

<sup>52</sup> *Id.*

hours, and confiscation of personal document such as passport by employers.<sup>53</sup>

### 3. Employment Provident Fund Act 1991

EPFA 1991 was adopted to provide social security in terms of retirement benefit for employees. The Employment Provident Fund (“EPF”) is a compulsory saving scheme for local workers. However, migrant workers may choose to contribute into the scheme if they so desired. Part VIIA of EPFA 1991 contains provision related to non-citizens of Malaysia’s contribution to EPF. If migrant workers intend to contribute, 11 percent of their wages will be deducted and employer should pay a maximum of RM5 after the year 1998 and before the year employer must comply with 12 percent payment.<sup>54</sup> However, employers are not allowed to force migrant workers to make EPF contributions because EPF scheme is not compulsory for them. Compulsion of payment for migrants is known as forced labour. Besides, EPF contributions for migrant workers are similar to local workers. If there is any difference of amount payable by employers they are not allowed to register nominees for their fund.<sup>55</sup> There is an indirect discrimination between local and migrant workers even though EA 1955 and the Federal Constitution prohibit discrimination against any individuals. Conversely, discrimination among workers are not allowed under UDHR, in which everyone has the right to fair rewards regardless of nationality. EPFA 1991 seems to neglect the fair rights of migrant workers during employment.

### 4. Workmen Compensation Act 1952

WCA 1952 was enacted to provide protection to employees from any accidents occurred in the course of employment or occupational diseases. The purpose of WCA 1952 is to furnish compensation to employees who suffer from any types of damage in workplace. This Act is only meant for foreign workers, while local workers are protected under SOCSO 1969. Employers should be responsible for any payment of compensation to migrant workers such as medical or rehabilitation fees as per stated in this Act.<sup>56</sup> In addition, foreign workers are entitled to a half of monthly wages or RM165 for temporary disablement, while local workers are entitled to a minimum of

<sup>53</sup> *Id.*

<sup>54</sup> *Supra* note 45.

<sup>55</sup> *Id.*

<sup>56</sup> Workmen Compensation Act 1952, § 4 (1). It stated: “If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, save as hereinafter provided, be liable to pay compensation and any expenses incurred in the treatment and rehabilitation of such workmen under section 15 in accordance with the provisions of this Act.”

RM10 and a maximum of RM78.67 per day.<sup>57</sup> In the case of permanent total disability, migrant workers are entitled to a compensation capped at RM 23,000 which varies with age of workers, while local workers are entitled to a minimum of RM10 and a maximum of RM88.50 per day.<sup>58</sup> However, the amount difference shows that migrant workers' compensation is considered lower than local workers.' According to Article 23 (3) of UDHR, every person has the right to live and be granted with better remuneration, but migrant workers' rights are infringed by authority considering various amount. In any sense, every human life is precious and entitled for equal protection. No person should be discriminated by one and another in any forms of marginalisation and unreasonable unequal treatment.

Moreover, employers are required to insure workers' liabilities for any injuries suffered during the employment and workers are entitled to claim compensation duly from employer.<sup>59</sup> At the same time, workers are not eligible to claim compensation without valid insurance.<sup>60</sup> However, WCA 1952 has no assurance that migrant workers are entitled to claim compensation for the injury, while SOCSO is claimable by local workers. Employers fail to compensate migrant workers accordingly as the regulation is vague regarding the welfare of migrant workers. Thus, this could lead to exploitation towards migrant workers as some employers may refuse to pay medical fees or provide a better medical treatment. Indirectly, the neglected welfare of migrant workers may be a way for employers to avoid exercising the rights of migrant workers.

## 5. Industrial Relation Act 1967

IRA 1967 aims: (i) to promote and maintain industrial harmony; (ii) to provide a form of regulation of the relationship between employers, workmen, and trade union; (iii) to prevent or solve any differences or disputes arising from the relationship; and (iv) to generally deal with trade disputes and matters arising therefrom.<sup>61</sup> In general, employees and employers are given rights to sort out their differences by referring to IRA 1967. Migrant workers have the right to access for justice against their employers. They are allowed to lodge complaints against the employers to the Labour Department and alert the Labour Court or Industrial Relation Department to

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Industrial Relation Act 1967, pmbl.

be heard at the Industrial Court.<sup>62</sup>

Nevertheless, IRA solely focuses on solving disputes between employers and employees, without specific provision to protect the rights of migrant workers. Section 4 of this Act denotes the rights of workmen and employee that give more focus on the formation of trade union. However, these problems depend on their employment visa or work permit that used to be abused by their employers via the cancellation of documents which leaves them as illegal migrants.<sup>63</sup> Documented migrants are entitled to get access for justice, while undocumented migrants lose their rights forever. In this case, the majority of migrant workers are undocumented due to exploitation by employers. Therefore, they do not have an opportunity to file cases for unjust treatment against employers. Migrant workers without document have difficulties to access for justice when being abused or exploited by employers because the regulation is silent in terms of providing access to migrant workers. Thus, a specific regulation is required for a fair treatment of migrant workers just like local workers.

## 6. Trade Union Act 1959

TUA 1959 is to provide social protection and rights of union members. According to EA 1955 and IRA 1967, migrant workers can join to be part of trade union at any workplace in Malaysia.<sup>64</sup> Besides, there is no specific definition of employees and workmen which solely focuses on Malaysia. The definition indicates any person including the locals and migrants. Section 8 of EA 1955 states that nothing in any contract of employment restricts any individuals from joining the trade union, participating in any activities held by the trade union, and being associated with any trade union. It clearly emphasises that local or migrant workers are free to be part of any trade union at their respective workplace and no one can refuse their participation in trade union.

Moreover, Section 4 of IRA 1967 indicates that no person shall interfere any workmen or employee with retraining or coerce to exercise their rights in trade union, administration and function of trade union, and acting on behalf and influence any workmen and employee of any trade union. Ultimately, it gives full rights to workmen or employee by not allowing anybody to interfere in the formation and administration of trade union regardless employers or outsiders or other union because it could lead to disputes. On the other hand, however, Section 28(1) of IRA

<sup>62</sup> *Supra* note 37.

<sup>63</sup> *Id.*

<sup>64</sup> Employment Act 1955, § 8; Industrial Relations Act 1967, § 4.

1967 states that migrant workers are disqualified for the elections of any executive position in trade union. Indirectly, migrants are discriminated from holding any executive position in trade union which in fact violates the rights under Article 8 of the Federal Constitution. Migrant workers' voices in trade union are insufficiently heard of and mostly their membership is being rejected by unscrupulous employers.<sup>65</sup> In this regard, migrant workers have neither the right to participate in trade union, nor get protection under the Act.

## 4. Conclusion

Both legal and illegal migrant workers have always been subject to exploitation in Malaysia. They could either become the victims of human trafficking and forced labour, or being exposed to physical and emotional abuses. Thus far, Malaysia's existing legal framework has already highlighted the protection for the migrant workers. However, there is room for improvement, especially in regard to protecting the victim's interest.

Most importantly, several provisions of Malaysian employment law need to be tightened and amended to avoid vagueness and ambiguity. The equal protection should be awarded accordingly to migrant workers regardless of their nationality or status of occupation. Provision on the part of equality appears to be ambiguous or silent in such laws as WCA 1952, IRA 1967, TUA 1959, EA 1955, and EPFA 1991. The compensation amount payable to migrant workers are lower than local workers. A fair calculation of compensation is needed in the pursuit of fair treatment towards both migrant and local workers. Lawmaker should consider in details the rights of 'undocumented migrants' to file claim for unjust treatment in IRA 1967. Those migrant workers are not willingly subject to exploitation, but the employers would coerce, force, or threaten them. Therefore, the provision for maltreated victim should be compulsory to compensate the loss and hardship suffered.

Additionally, lawmaker should adopt the provision to strengthen the migrant workers' membership in trade union in a more official manner. This is significant for migrant workers to voice their opinion and stand for their rights. Furthermore, authorities should frequently monitor the welfare of migrant workers such as adequate wages for occupation, standard working hours, overtime pay, decent

<sup>65</sup> *Supra* note 45.

living and working environment, etc. They should consider revising payment of RM5 as EPF contribution for migrant workers. An equal payment should also be given to migrant like the locals for EPF contribution. Meanwhile, migrant workers should be given rights to nominees for their contribution because it is considered as their hard-earned money. Their beneficiaries should automatically be entitled to the contribution. The government should provide a fair and equal treatment to everyone under international law, regardless citizens or non-citizens in order to achieve tranquillity and harmony with other country.