

Title : MIGRANT WORKERS AND INTERNATIONAL LAW (THE ISSUE OF EXPLOITATION MIGRANT WORKERS IN MALAYSIA)

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**FINAL ASSIGNMENT: MIGRANT WORKERS
AND INTERNATIONAL LAW (THE ISSUE OF
EXPLOITATION MIGRANT WORKERS IN
MALAYSIA)**

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The Issue of Exploitation Migrant Workers in Malaysia

INTRODUCTION

Recently, if we were looking at the statistic of the labor import ranking, the top importer of labor in Asia has now emerged in Malaysia. The tendency of imports of foreign labor in the last few decades has increased rapidly over local Malaysian workers' unwillingness. However, the real issue here that stems in our country was abuse and exploitation in Malaysia's society brought to light than the trend towards migration. There were some reports that many migrant workers have to work every day without leave in a week. Some of them are worse off, especially women who are often subjected to sexual harassment and assault, including rape, verbal and physical abuse is widespread. This inhuman act or criminal violence towards migrant workers is prohibited under the law, and if found guilty, the convicted person might be held fine or imprisonment according to the local statutes.

Generally, slavery is prohibited worldwide because everyone is protected to their fundamental liberties of human rights. Therefore, all kind of any forms that led to slavery is not permitted against the law. To support, as refer to the supreme law of the land, be known as Federal Constitution particularly in Article 6(1) and (2) declared that all type of forced labor and slavery is prohibited in the territory of Malaysia.¹ To precise, Article 6 (1) states specifically that 'no one is held in slavery.' This article shows that 'no person' means no slavery or any kind of oppression between local or foreign workers.

¹ Article 6 of Federal Constitution

The term 'migrant workers' explains the legal claim of a group of foreign people to work in a country in which they are formally recruited. The Employment Act 1955 (Act 265) defined migrant worker as non-Malaysian citizens. Besides, the United Nations Convention on the Rights of Migrants and Their Families also provides a clear provision of the migrant worker as a 'the person that must, engage in or has been involved in a remunerated activity in a country he or she is not a nationality'. To sum up, these two interpretations can be summarized as an individual who works in a country where he or she is not a citizen.

Besides, we have to understand the nature and purpose of why migrant workers came to another country. For the typical reason, migrant workers travel in the foreign country with great hope to have a better life and fulfilling their basic needs, and earn a decent living. However, the unexpected problems they have encountered from the moments they arrived in the foreign country. For instance, violation of their human rights, restriction of movement by seized their document from the recruitment agents or local employers, and life with dangerous working conditions. In this case, migrant workers should not be treated like this because they also human beings which entitled to enjoy their basic rights as declared in the Universal Declaration of Human Rights (UDHR) 1948 and other international human rights instruments.

If we were looking at interpreting the word 'exploitation', it might lead to much treatment for migrant laborers working in Malaysia. In the past ten years, most cases have been reported that migrant workers have exploited the world, and Malaysia is in the top highest ranking in the Southeast Asia region about that issue. Generally, migrant workers are vulnerable to employers in a foreign land, and they tend to become constipated to follow the decision or command of the employer. This was happening due to limited legal

protection, weak recruitment regulations, and vulnerability to exploitation by irresponsible employers and recruitment agents.

Then, this paper will be undermined the list of issues that can be found from the topic and will discussing further in the discussion part. Other than that, this paper will also analyze Malaysia's currently existing law and the international legal framework that governs to protect the migrant workers living in Malaysia. In addition, Malaysia is a country that upholds the security of the country as its main priority. The issue of exploitation migrant workers had contributed to detrimental impacts on Malaysian integrity and security. Consequently, the government had to be firm and strict by undertaking this issue smartly in protection against exploitation against migrant workers in Malaysia.

CURRENT ISSUES

Some issues can be categorized to dismantle this case smartly and smoothly. Firstly, the main issue is whether migrant workers are entitled to respect for their fundamental rights. Then, the sub-issue, in this case, is in what situation that conducted to migrant workers can be fall under a form of exploitation. Next, Malaysia's existing law is sufficient to protect the migrant workers living in Malaysia, such as Immigration Act 1959/63, The Employment Act 1955 (Act 265), and Passport Act 1964. Lastly, looking for consideration of international legal framework that applies to a person who sought for protection of basic human rights apart from his or her country, such as International Convention on the Protection of The Rights of All Migrant Workers Members of Their Families (ICPMW), Universal Declaration of Human Rights (UDHR) 1948, and International Labour Organization Conventions.

DISCUSSION OF THE ISSUES

For the first issue, it is vital to study first whether the migrant workers are entitled to respect for their fundamental rights. First, we consider which Malaysia itself is a member of the United Nations (UN). Therefore, Malaysia has to follow UN Charter and uphold the principle as laid down under some conventions or declarations, either they are state parties or not. To relate with this case, migrant workers naturally are human beings, so they have to be treated equally without any discrimination. To support, the Universal Declaration of Human Rights (UDHR) is a landmark international legal framework that recognized human rights internationally, and many of its rules are deemed binding on all states to reflect customary international law or *jus cogens*. For instance, the list of rights provided by the UDHR including that everyone has the right to life, liberty, and security; to a fair and public trial; to equality before the law without discrimination; to freedom of torture and cruel, inhuman, or degrading treatment or punishment; and the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care.²

In addition, after a brief explanation above about the fundamental human rights as mentioned under UDHR, we can conclude that migrant workers are entitled to their human rights in every aspect of life even though they are outsiders from his or her origin country. They should not be mistreated and using them as an advantage in our country. Besides, regarding undocumented migrant workers, they are also protected against all abuse from the employer who is irresponsible taking this matter seriously. This is because, according to the International Convention on the Protection of the Rights of All

² Universal Declaration of Human Rights 1948

Migrant Workers and Members of Their Families, this convention sets forth basically that all migrant workers, whether documented or not, shall be granted human rights protection.

To support, the provisions state that migrant workers have the right to protect fundamental rights such as the right to life, the right to freedom of torture, the right to medical care urgently required, and the right to equal treatment. Therefore, an international non-governmental organization that mainly niche in upholding human rights is called Amnesty International. Regarding this issue, Amnesty International urges the Malaysian government to uphold migrant workers' fundamental human rights in order to prevent any abuse of powers by employers or degrading treatment to migrant workers in all aspects.³ The best measure to ensure this could be happening is by ratifying the Migrant Workers Convention and implement its provisions effectively.

Besides, the next issue is questioning what situation conducted to migrant workers can fall under a form of exploitation. If we put our position as migrant workers, the most important and valuable document is our passport. We could not move freely anywhere because we were afraid that the police of the local authority would detain us if we did not bring a passport with us as legal identification. Generally, the lives of migrant workers in most situations appear to be hard because their passports are being taken from the employers in order to keep employers from moving anywhere. Following a legal perspective which is the domestic law, this act is prohibited under the Passport Act 1964 and other local regulations relating to migrant workers.

³ Amnesty International, 'Trapped the Exploitation of Migrant Workers in Malaysia' (Amnesty International Publications, 2010) <<https://www.refworld.org/pdfid/4bb05b812.pdf>> accessed 12 June 2021.

Migrant workers are human beings which means they also have fundamental rights to free movement and even the right to change the job. However, in Malaysia, this is not happening. This is because the employees always refuse to let a foreign worker due to change jobs from his or her workplace to another company. If a migrant worker wishes to change the job or the employer, he must go to the foreign ministry's office to obtain permits that are quite difficult for a migrant worker. This is because the process will take a lot of time, and it must be free for the workers to do so because they do not retain their passports. Other than that, the migrant worker also needs to fulfill their basic needs such as medicines, foods, or others and often arrested by the police in favor of valid documents to verify. As the list of situations above, we can sum up those migrant workers were being deprived of his life to move freely in our country due to withholding passports from their employers. They always believe that their life in the power of their employer, and they can do nothing beyond the employer's consent. Therefore, this is free movement exploitation for foreign labor as the employers abusing the powers in detaining migrant workers' passports.

Next, when we analyze the exploitation of migrant workers in Malaysia, it is crucial to refer to the legislative framework existing in Malaysia related to this subject matter. Malaysia is a country that upholds the security of the country as its main priority. In light of this, it is essential to highlight specific rules and policies passed by the legislature with authority and power among the three main bodies of government; executive, legislature, and judiciary. To support, the Immigration Act 1959/63 (Act 155) forms the cornerstone of the Malaysian immigration system. Generally, this Act has not covered the protection of the rights of the migrant worker. The Act mainly covered the

issue of a legal permit to enter Malaysia, which is stated under Section 10.⁴ Therefore, he must be in the position where he possesses a valid pass issued to enter Malaysia. However, if the person failed to fit the requirement, they will be subjected to an illegal entry and subject to specific detention procedures.

Other than that, regarding the case of exploitation migrant workers, some factors lead to their exploitation, such as their status as illegal immigrants. This is because their condition as illegal immigrants make them vulnerable to be exploited by irresponsible employers. Therefore, this is necessary for a clear definition of illegal immigrants under Malaysian law. To support, according to the case of *Public Prosecutor v Sumon Khan & Anor*⁵ for a clear definition of illegal immigrants under the Malaysian law. The court of appeal, in this case, centralizes the entry permit amount to the visa stated under the Immigration Act. The court held to dismiss the charge and emphasis that the 13 Bangladeshis passports entry contains valid Malaysia single entry visas. Thus, their entry is not access but following the law. The judges' referred law was on Section 10 and Section 6.

It is essential to understand that according to Section 15, a person shall not stay in Malaysia if the permits are canceling by referring to declaration stated under Section 14(4) as to the holder of the permit who made a false or misleading material statement for the application of the permit. Therefore, with the Director-General's declaration, the person shall be declared a prohibited immigrant, which then Section 15 shall apply to them. To sum up, the case indicates that Malaysia's existing law should be specific requirements that the public prosecutor needs to establish for the migrant or foreigners to

⁴ Section 10 of Immigration Act 1959/63

⁵ [2019] 2 MLJ 215

declare that Malaysia's stay is illegal. Lastly, the comprehensive provisions indicate that Malaysia had covered the crucial part of curbing individuals' unlawful entry from other countries.

Concerning the issue of exploitation migrant workers, we have to acknowledge that employing an illegal immigrant is an offense under the Act. To support, as refer to Section 55B of Immigration Act 1959/63 it states that employment if the illegal immigrants whereby the person who works for the employer, such as a person or company does not obtain a valid Pass for the employee.⁶ Therefore, an illegal immigrant's status is mostly like giving advantages to the employer in exploiting the undocumented migrant to become forced labor due to the situation. The unlawful act has strictly imposed the liability to the employer if found guilty to a fine of not less than RM 10,000 but no more than RM 50,000 or imprisonment for a term not exceeding 12 months or to both for each employee. For instance, according to the case of *Public Prosecutor v Sim Kay Chay*⁷, the appellant was charged under Section 55B of the Immigration Act 1959/63 as he employed two females Indonesians. The court had affirmed that he had committed an offence and shall serve a sentence. Based on the case, the law provided will strictly deter the employer's situation who willingly employed the illegal immigrants working for them.

Furthermore, the Employment Act 1955 is also a local statute that serves as the main employment legislation in Malaysia. This Act was enacted for the protection of the minimum rights of workers. The rights of local and foreign workers were protected, excluding domestic workers in Malaysia, respectively. To support, the minimum workers' rights include worker's proper wage, overtime and payment charges, maximum daytime

⁶ *ibid.*

⁷ [2007] 5 MLH 309

working hours, all types of leave, and holidays each year. In addition, this Act also included the prosecution against employers with the court proceedings if the employers fail to give all these advantages to the worker, which through the Labor Court.

Next, we move to the last issue: to analyze the international legal framework that applies to a migrant worker who sought to protect basic rights in another country of his origin. Generally, our country is not a party to many of the key international human rights instruments. Therefore, Malaysia did not provide any specific legal protection to a migrant who came into Malaysia for a particular purpose. In the international context, we can only refer to customary international law. All States acknowledged having the duty to protect all persons from any deprivation of his life and be denied access to his fundamental rights. To support, the UDHR is the best tool to apply to the migrant worker on which they also serve as human beings who are entitled to live freely, equally, and in dignity. The Declaration is applicable as universal protection in protecting the rights of every individual everywhere. Other than that, it also provides the basis for developing an abundance of other legally binding human rights treaties and is now become a clear benchmark in universal human rights norms that all states ought to promote and maintain. Therefore, in this case, we can conclude that Malaysia has to enhance its responsibility in protecting the migrant workers who their employers have exploited from accessing basic rights such as freedom of movement or risk for being torture and degrading treatment.

Furthermore, Malaysia also a Member State of the International Labour Organization (ILO). As it refers to the ILO Constitution and its root purpose, the institution affirms promoting social justice and recognizing international labor and human rights, pursuing its root mission because labor peace is essential to prosperity. Therefore, the rights of foreign workers are obligatory for all state signatories to the organization.

As a signatory Member State of ILO, Malaysia consistently made an enormous effort to safeguard migrant workers' rights to a healthy labor migration system through their policies and international labor standards.

The general principles between the ILO and UN conventions are too broad; it is just an interpretation of some concepts such as equality at work, freedom of forced labor, freedom of movement, medical treatment, rights of a trade union, and others. Then, as Malaysia affirms their stand to ensure the basic rights of migrant workers being protected under the Federation, there are some local statutes passed by the Parliament related to basic rights for migrant workers and in line with international legal standards. The legislation said the Employment Act 1955 (Act 265), Trade Union Act 1959, Industrial Relations Act 1967, and Workmen's Compensation Act 1952.

COMMENTS AND CRITIQUES

Regarding the first issue pertaining to whether the migrant workers are entitled to respect for their fundamental rights, it is shown that they are entitled to enjoy the basic human rights as enumerated under the UDHR principles. Migrant workers are also considered human beings in nature even though their situation is that they migrate to another country to improve their living conditions. Even though they did not have a nationality as citizens of Malaysia, they cannot be mistreated by their employers, such as degrading treatment, forced labor, discrimination, etc. This is because the UDHR serves to be a universal declaration that urges all states to acknowledge the basic human rights of every person everywhere, as mentioned under Article 2.⁸ As we live in a peaceful and harmonious country, we cannot accept any degrading treatment or violence of torture or cruel against any person who was still living regardless of his or her background, identity, race, and religion. Until today, many reported and unreported cases regard inhuman acts against the migrants by the authorities. To support, trafficking immigrants have been violated by their employers, committed labor rights violations, forced confinement, and victims of physical and sexual abuse. Thus, the employers have to be responsible for tackling this issue because they are the main actors in exploiting migrant workers that keep increasing the number of cases.

Besides, to ensure the basic rights of the migrant workers being protected, there is needed for our country to ratify the main instrument for the protection of migrant workers, which is the International Convention on the Protection of The Rights of All Migrant Workers Members of Their Families (ICPMW). This legal framework exercises

⁸ Article 2 of Universal Declaration of Human Rights 1948

its function for legal protection in most aspects of the situation to both documented and undocumented migrant workers, including protecting human rights.

Other than that, for the comments and critiques of the next issue, from my point of view, the element of action that may constitute a form of exploitation of migrant worker is the logical situation where a human being could understand that the act is right or wrong in the first place. This is because, as we discussed above of the issue fundamental rights of the migrant workers which he entitled or not, this is a connection to this issue. This is because, generally, the UDHR applicable to all persons universally and can enjoy their basic human rights such as freedom of life, freedom of movement, freedom of speech, and others. Therefore, any activities by the employers that lead to any inhuman, torture or cruelty, or degrading treatment may fall under exploitation migrant workers in Malaysia.

Moreover, social awareness is also essential to tackle this issue smoothly in the social aspect. Suppose the community is aware of the problems. In that case, it will be easier for the migrant workers to work in our country to earn a living without any discrimination or degrading treatment by the employers. Therefore, awareness is vital to ensure that each of us plays an essential role in ensuring our country's peace and prosperity. To support, society must participate in a non-governmental organization to promote its seriousness instead of promoting it in the human sense. Although human rights are cornerstone elements in society, thus it is a duty for us as the local community to show our empathy to the foreigner who comes here to work. For instance, if we saw something suspicious at public sight or the employer itself misconducted their response to his migrant workers, we shall report to the local authority such as police immediately.

Hence, if the local people cooperate with the legal authority, it is easier to cater to the issue as the Malaysian citizen made an immediate report when they saw the inhuman act.

Next, according to the third issue, there should be a new amendment to our local legislative framework relating to the rights of migrant workers. In this case, the main statute here is the Employment Act 1955, which should be amended to include the full protection for domestic workers because the existing provision did not cover the rights for the domestic workers.⁹ The basic rights are included in terms of maternity protection, rest days, legal working hours and conditions of service.¹⁰ Therefore, it is necessary for our country to bring this issue to the Parliament for amending the Act for a new provision for giving the full protection to all workers including the domestic workers. In addition, there was a good effort made by the government in the past years which in 2014 and 2019, Malaysia's Human Resources Ministry suggested to improve a better quality for protection and rights for domestic workers. Consequently, it led to the proposal of the Employment (Domestic Employee) Regulations 2019.¹¹

Besides, in my opinion, I believe that to tackle the issue of exploitation migrant workers apart from suggestion to amend the existing law and create society awareness, it is crucial also to impose balance power between the employer and employee. This is because, if we looking at the existing policies, there are imbalance power between them which leads in the form of labor to exploitation. The employer-led renewal process, for

⁹ Tengku Nur Qistina Petri, 'It Is Only Right That Migrant Workers Should Get Full Protection' (*NST Online*, 25 January 2021) <<https://www.nst.com.my/opinion/columnists/2021/01/660160/it-only-right-migrant-workers-should-get-full-protection>> accessed 12 June 2021.

¹⁰ *ibid.*

¹¹ *ibid.*

instance, obstructs employee's freedom to change job in the case of abuse for fear of illegally.¹²

Moreover, in legal aspect, the regulation could provide stronger accountability for employers if they fail to comply with administrative process to ensure migrant workers remain documented and lawful. In other situation, the issue of withholding passport by the employer is also a core issue that faced by the migrant workers in the event of poor enforcement of legislation. Therefore, my suggestion is to urge government to amend the Passport Act 1964 by implementing rules to deal with current loopholes arise here which the enforcement of the passport retention. For instance, a provision for imposing higher fines and more serious consequence for repeat offenders could also help deter the practice of passport retention.

Lastly, in international perspective, the measures can be taken by the government of Malaysia to reduce and eliminate the potential of exploitation migrant workers is by ratifying the ILO Force Labor Protocol. It is important to make sure Malaysia maintain in practice as the same par with the international legal norms which comply with ILO conventions. If Malaysia ratify this supplementary Protocol, as much it will give impacts to our country to its obligation to suppress force labor. This protocol can be seen as complimentary provisions on steps to reduce force labor, protect victims, international cooperation, and access to legal remedies. Notwithstanding the need to improve the functionality and applicability of this Protocol. Furthermore, by ratifying this Protocol, the government's efforts to strengthen its policies, regulations, and practices in this issue

¹² Sharmin Jahan Putul and Md Tuhin Mia, 'Exploitation of Migrant Workers in Malaysia and Protection under Domestic Laws', *Proceedings of the International Law Conference* (SCITEPRESS - Science and Technology Publications 2018)
<<https://www.scitepress.org/DigitalLibrary/Link.aspx?doi=10.5220/0010054801250131>> accessed 12 June 2021.

will also become internationally visible. To sum up, the responsibility in taken the good measures are falls on everyone; government, civil society, recruitment agencies, and employers. The efforts to protect migrant workers is significant to upholding the fundamental right of all person to make sure everyone live in peace, safe and prosperity country.

CONCLUSION

In conclusion, this paper had thoroughly covered the issue of protection of the migrant workers' rights and type of exploitation migrant workers that has been the core of problem. Moreover, throughout this paper, it can be observed that the legal framework of domestic legislation and international conventions serves as the law, and policy to protect the basic rights of migrant workers. However, these regulations mostly only laid down the basic rules and it is not covered in depth because there is no full protection given to the migrant workers and its only limited. Regarding to the case, since Malaysia is not a signatory parties to International Convention on the Protection of The Rights of All Migrant Workers Members of Their Families (ICPMW), therefore the rights of migrant workers sometimes be abuse and they be exploited to force labor from their employer. This international instrument is a main framework which regard to protection for the migrant workers against any kind of discrimination and others as prescribed under the law.

Apart from that, as we discussed above that Malaysia is the largest foreign labor importer in Southeast Asia region, thus Malaysia should pay greater attention on migrant workers in terms of proper recruitment, admission, management, law making, and law enforcement.¹³ It is time for the government to regulate a more concise and reliable law about the rights of migrant workers that capable of being applied universally in all situations related to his rights might occur in the future. Lastly, small steps ensure to be achieved and it is important to note that, to reduce and curb this problem, not only involves the effort and laws regulated by the government as the recruitment agencies,

¹³ *ibid.*

local society along with the citizens must also play their role in cooperating and complying with the law that are regulated to maintain the peace and prosperity of our country.

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