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Abstract

Ⅰ. Purpose and Scope of Research

□ Assessment of the prevailing issues governing migrant workers in Malaysia and South Korea are provided, along with introduction of important recent changes on legislation.

□ Analysis of legal framework and administration of foreign labor policy is conducted.

□ Suggestions for law and policy changes to strengthen labor migrant governance are stated.

Ⅱ. Contents

□ Laws on Migrant Workers in Malaysia

○ Malaysia is a top destination country for migrant workers in Southeast Asia with more than 3 million migrant worker population, while a half remain as undocumented. Widespread labor rights violations across various industries are reported.

○ Policies and legislation have generally remained ad hoc responding to immediate needs of labor.

○ Major issues of terms and conditions of work are regulated by the Employment Act and the Workman Compensation's Act, overseen by the Labor Department. Issues regarding relations between employers and workers are covered by the Industrial Relations Act, while labor unions are regulated by the Trade Union Act. No Foreign Workers Act or other similar law that unifies regulation of migrant worker issues in one law exists.

○ Labor laws generally apply to migrant workers without discrimination (except for domestic workers), including the right to join trade unions, yet the enforcement of employers' obligations may be pursued through lengthy court process that migrant workers may not utilize fully.

○ Memorandum of Understanding executed between countries control protections for foreign domestic workers.

○ Although Malaysian and International laws guarantee equal rights and treatments for migrant workers, findings show widespread abuse and exploitation of migrant workers.

□ Laws on Migrant Workers in Korea

○ Demographic of migrant worker population has changed to show larger population from Southeast Asia, as compared to the Korean-Chinese workers taking the majority in the previous years.

○ Not having ratified major international conventions for migrant workers, South Korea started to show homophobic tendencies towards

migrant workers. Need for domestic law guaranteeing equal protection and effective enforcement of the same arise.

○ The Act on the Employment, Etc. of Foreign Workers, the Immigration Control Act, the Nationality Act, and the Framework Act on Treatment of Foreigners Residing in the Republic of Korea are most relevant immigration laws for migrant workers, besides general labor laws that apply to migrant workers equally.

○ Starting from the definition of status and period of stay for foreigners, the Immigration Control Act is the basic, overarching law that governs foreigners in South Korea.

○ The Act on the Employment, Etc. of Foreign Workers provides procedure for recruiting, hiring, and management of migrant workers, and the law specifically prohibits discrimination against foreign workers.

○ Migration workers, when following the law, cannot meet the residency requirement for naturalization under the Nationality Law.

○ The Labor Standard Act, the Trade Union and Labor Relations Adjustment Act, and the Employment Insurance Act relates to migrant workers in their labor law aspects, generally providing equal rights as workers and guaranteeing protections of their rights with some exceptions, although protections and privileges granted by the law are not effectively enforced in their favor nor even explained to them.

○ Employment permit system builds unequal bargaining power between migrant workers and employers, not enabling workers to change employment freely, furnishing too much room for the employers.

□ Comparison and Conclusion

○ In Malaysia, fragmentation and lack of coordination, lack of regulation, and frequent policy changes are pointed as causes for failure in fair treatment of migrant workers.

○ In Korea, laws on migrant workers are centering on the notion of handling migrant workers as helping hands from foreign countries, not perceiving them as potential constituents of the society who would reside in the country. Policy makers should also realize that a holistic and appropriate migration policy and program and effective management of the migrant workers are an economic asset instead of a liability.

Ⅲ. Expected Effects

□ Understanding of legal system on migrant workers in both countries and of shortfalls of the policies and laws may lay foundation for the amendment and policy changes on migrant workers.

□ Possible suggestions for changes on laws and policies for both Malaysia and South Korea.

Key Words : Migrant Workers, Law, Malaysia, South Korea

Contents

Ⅰ. Introduction

A. Scope of Research

Over the last few years, an increasing number of reports have documented serious labor rights abuses against migrant workers in Malaysia, including cases of modern slavery, forced labor, and human trafficking. Responding to the concerns voiced by the international community and civil society organization, there have been a number of recent shifts in labor migration and anti-trafficking policies. In particular, several of the new measures announced in the Eleventh Malaysia Plan (2016-2020) in Malaysia may potentially improve the protections afforded to migrant workers in Malaysia, signalling progress towards a more coherent and rights-based governance framework.

Meanwhile, increasing number of foreign workers[1] induced the enactment of the Act on the Employment, Etc. of Foreign Workers in 2003 in South Korea, and it has been over a decade now since the law was passed; however, there are still many undocumented migrant workers. Also, regardless of the status of the migrant workers in South Korea, the employment conditions and the violation of their human rights have continued to be issues that need resolution.

This research project will assess the prevailing issues governing migrant workers, key recent changes made, and how they have been implemented in practice with the objective to provide recommendations and further

1) As of 2015, over 212,000 foreign workers are reported to have resided in South Korea in legal status. Statistics Korea: http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1501(last visited June 22, 2016)

strengthening the labor migration governance in Malaysia and South Korea through comparative study.

B. Purpose and Methodology of Research

Labor migration has become a well-established feature of ASEAN labor markets and a meaningful factor supporting the continued growth of the region. In many of the region's destination countries, significant labor shortages in agriculture, construction, fishing, domestic work, manufacturing and other industries have been mitigated by admitting migrant workers, often to fill jobs that are considered undesirable by the local nationals.

Malaysia is no exception and has benefitted greatly from the employment of migrant workers in several economically important sectors. During the last two decades, these workers have helped to provide the labor that has fuelled the country's emergence into an upper middle-income country. However, ensuring that migrant workers receive fair treatment continues to prove difficult, with reports of abuse in several major industries. In light of recent developments in international trade and greater scrutiny of global supply chains, there has been increased pressure from the international community to enact policy and institutional reforms that will better protect the rights of migrants.

South Korea, with the large foreign worker population mostly from South-Asian Countries, also benefit from the helping hands from overseas, yet the law regulating those migrant workers seems to not be as effective as it should be in protecting their rights as workers or as human beings. Securing work environment that provides adequate protection of the workers is important to continuously benefit from the migrant workers,

and reviewing the current laws and regulations to determine their effectiveness would provide guidance for such assessment and for producing suggestions.

The study aims to evaluate the current issues on foreign workers and labor migration in Malaysia and South Korea, and will suggest recommendations to strengthen and improved the management and governance of labor and migrant issues. This will include an analysis of the legal framework and administration of foreign labor policy in Malaysia and South Korea. A comparative analysis will be made between the two countries' positions with the intention of resolving and assisting approaches of an effective governance on labor policy issues.

As for the methodology of this study, a doctrinal research and analysis of secondary data collected from a variety of governmental and non-governmental sources, including the International Organization of Migration (IOM), International Labor Organization (ILO), local unions and association from Malaysia and South Korea will be adopted. In addition, the research will also adopt critical and comparative approach of a legal research.

This research was conducted as a part of the comparative research series performed by scholars of member institutes of Asia Legal Information Network (ALIN), where Korea Legislation Research Institute (KLRI) serves as the secretariat. In this research, Jiyeon Choi of KLRI took the lead on Chapter Ⅲ on Korean Law while Aishah Bidin of the National University of Malaysia Faculty of Law provided Chapter Ⅱ on Malaysian Law. Introduction in Chapter Ⅰ, Comparison and Conclusion in Chapter Ⅳ were jointly prepared by both scholars.

Ⅱ. Laws on Migrant Workers in Malaysia

A. Introduction and Background

Over the last decade, the number of international migrants has increased by more than 60% globally (150 to 214 million). Roughly 21 million people are victims of forced labor. Largely unskilled or low-skilled, migrants are commonly employed in the unregulated informal sector where they face increased risk of illness, infection, injury and abuse.[2] In Malaysia, an estimated 400,000 migrants reside in state of Selangor alone. Although there are no reliable statistics on the scope of labor rights violations in Selangor or Malaysia, recent reports document widespread labor rights violations across various sectors, including manufacturing, construction, agriculture, and domestic work. An analysis of cases of labor rights violations managed by sources from CSO[3] revealed that more than 90% experienced employment conditions different from what they had been promised and 96% had their wages reduced or withheld. Slightly more than half experienced some form of workplace violence and roughly one-quarter experienced a workplace injury.[4]

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2) Malaysia is a top destination country for migrant workers in Southeast Asia, with more than three million migrant workers (1–1.5million undocumented). Significant economic gains since the early 1990s (average annual rate of 6%) have been sustained by a constant influx of workers from poorer countries in the Association of South East Asian Nations (ASEAN) Region.

3) (Tenaganita - 2008-14)

4) Accordingly, the 2015 *Trafficking in Persons Report* noted that migrants are disproportionately represented among victims identified in Malaysia. Both the prevalence of labor exploitation, coupled with increased physical and mental health risks, illustrate the critical need to identify comprehensive and effective programs and policies for migrants workers globally.

Malaysia is a top destination country for migrant workers in Southeast Asia, with more than three million migrant workers (1 - 1.5million undocumented). Significant economic gains since the early 1990s (average annual rate of 6%) have been sustained by a constant influx of workers from poorer countries in the Association of South East Asian Nations (ASEAN) Region.

An estimated 400,000 migrants reside in Selangor State alone. Although there are no reliable statistics on the scope of labor rights violations in Selangor or Malaysia, recent reports document widespread labor rights violations across various sectors, including manufacturing, construction, agriculture, and domestic work.

As migration rates continue to rapidly increase in Malaysia, so does the need for high-quality data to inform evidence-based policy development and decision-making. The dearth of evidence that exists poses major barrier to the development of tailored programs and policies for this large, yet overlooked population.

B. Review on Legislative History and Literature of Relevant Laws

Policies to manage labor migration have generally remained ad hoc since they were first introduced as an “interim solution” to fill labor shortages over two decades ago. Prominent features of the policy framework have included a detailed quota system for entry of migrant workers and efforts to regularize migration through temporary amnesties. These measures have often been followed by bans on new admissions and large-scale law enforcement actions to detain and deport those migrants who do not register

with authorities. Although frequent changes have been made, the policies have been consistent in respect to admitting migrant workers only for the purpose of meeting the immediate labor needs of employers rather than allowing for longer term settlement.

The Malaysian Government has not readily accepted the role that migrant workers play in filling the demand for low-skilled workers (with a few notable sectoral exceptions such as in domestic work). For many years, targets have been set and policies introduced to reduce the number the country employs in order to encourage economic restructuring. The New Economic Model of Malaysia in 2010 and other policy documents have sought to reduce dependency on migrant workers through a variety of strategies, including charging a levy for their employment, introducing a minimum wage, raising the retirement age and increasing the number of women entering paid employment.

However, changing the composition of its labor force has proven difficult to achieve, with employers complaining of severe shortages in some industries when more restrictive policies have been applied. Pushback from the private sector has contributed to awkward policy shifts and incoherence in some cases, such as the abrupt decision to allow payment of the migrant worker levy to be transferred back to workers after instituting a minimum wage. The goal of capping employment of migrants at 1.5 million workers as of 2015 once again appears unrealistic and has contributed to a situation where as much as half of the migrant workforce are now thought to be undocumented. The Eleventh Malaysia Plan (2016-2020) maintains this objective, envisaging a limit on the employment of low-skilled migrant workers of 15 per cent of the total workforce by 2020.

Political and public discourse have regularly portray migrant workers as a potential threat to national security and detrimental to the country's long-term social and economic development. As a result, the Government has typically formulated labor migration policy from the standpoint of controlling immigration and maintaining public safety rather than labor administration, as evidenced by the authority granted to the Ministry of Home Affairs (MOHA) over migration issues. Recent years have seen the rise of increasingly virulent rhetoric against migrants within the popular media, blaming them for a host of social problems ranging from electoral fraud to increases in street crime. Scapegoating of migrants, regardless of the realities, has contributed to an environment where exploitation and abuse are sometimes viewed as acceptable.

C. International legal framework on migrant workers and ASEAN perspectives

Malaysia has signed the main four core Labor standards established by the ILO in its Declaration of Fundamental Principles and Rights at Work namely Freedom of Association and Collective Bargaining, The Elimination of Forced and Compulsory Labor, the Elimination of Discrimination in Employment, and the Abolition of Child Labor (ILO, 1998). In addition Malaysia also rectified the Abolition of Forced Labor Convention (no. 105) in 1990 but did not ratified the following Convention namely Discrimination (Employment and Occupation) Convention, 1958 (no. 111), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87) and Migrant Labors (Supplementary Provisions) Convention, 1975) (no.143) (ILO, 2013;. At the state level one state in Malaysia namely

Sabah has ratified the Migration for Employment Convention (revised), 1949 (no. 97). Within the context of ASEAN, Malaysia was also criticized for not agreeing to the legally binding ASEAN treaty namely the Declaration on the Promotion and Protection of the Rights of Migrant Labors (2007) as this would resulted in the country subjected to vulnerable complaints and lawsuits from other member states.

Although Malaysia is not a State Party to the 1951 UN Refugee Convention, Malaysia does have responsibilities towards certain members of the refugee and migrants workers population in Malaysia, arising from the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD), which apply regardless of nationality or immigration status. Furthermore, it is internationally accepted that the CRC demands that refugee children be seen and protected first as children, and imposes an obligation on State Parties to ensure that the best interests of the child is a primary consideration in all actions. It is therefore unfortunate that many refugee children, including unaccompanied minors, are being held in immigration detention centers, instead of placed in appropriate shelters.

While noting the roles of the Malaysian authorities domestically, concerted efforts are still required from the origin, transit, and destination countries in order to resolve the matter effectively. In 2015, Malaysia was the Chair of ASEAN, and therefore, was well placed to advocate for a regional approach to dealing with the refugee and migrant issue involving ASEAN Member States. Despite the gravity of the problem in the region, the refugee crisis was not even featured on the agenda of the ASEAN summit during the year, which the international community pegged as a

result of "limited official commitment to human rights in the region" coupled with a "traditional ASEAN policy of non-interference in Member States' domestic policies".[5)]

As a respected member of the United Nations Human Rights Council (UNHRC), the Government of Malaysia should seriously consider acceding to the 1951 UN Refugee Convention. This would place the Government on firmer footing with UNHCR in order to address refugee issues systematically, rather than continuing the existing ad-hoc approach. According to the International Labor Organization (ILO), out of approximately 232 million migrants around the world, it is estimated that half of them are workers. Migrant workers however remain among the most exploited workforce globally.

In executing the proposal, the Government should have in place policies and regulations, which are fair and equitable, taking into consideration principles of nondiscrimination and equality, in line with Article 23 of the Universal Declaration of Human Rights (UDHR). The protection of the rights of migrants is a growing human rights challenge, which calls for urgent and more concerted efforts by all stakeholders. Although Malaysia has yet to accede to the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, as a Member

5) James Bowen, 'Refugee Crisis Tests Limits of Southeast Asian Cooperation' (IPI Global Observatory, 15 May 2015) <https://theglobalobservatory.org/2015/05/asean-rohingya-refugees-myanmar/>;SeealsoJohnArendshorst,'TheDilemmaofNon-Interference:Myanmar,HumanRights,andtheASEANCharter'[2009],8Nw.J.Int'lHum.Rts.102;TheEditor,'Dearworld:Don'texpectsomuchfromASEANontherefugeecrisis',ThePhnomPenPost(21May2015)<http://www.phnompenhpost.com/analysis-and-op-ed/dear-world-dont-expect-so-much-asean -refugee-crisis>; Brian McArtan, 'ASEAN rights and wrongs', Asia Times Online (Southeast Asia, 28February 2009) <http://www.atimes.com/atimes/Southeast_Asia/KB28 Ae03.html>; Mathew Davis, 'TheRohingyaandregionalfailure',(NewMandala,16May2015) <http://asiapacific .anu.edu.au/newmandala/2015/05/16/the-rohingya-and-regional-failure/>

State of the United Nations, Malaysia has an obligation to ensure that discrimination, exploitation and other forms of human rights violations against migrants and their families have no place in the country.

The issue of migration in ASEAN has become one of the core issues of ASEAN, as stated in Article 2.6 of the ASEAN Charter, one of the purpose of ASEAN is "to create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labor; and freer flow of capital". Migration of people is viewed as the necessity for achieving its goal as a community.

Migration has also became one of the cross-cutting issues in the ASEAN Blueprints namely as follow:

- In its ***Political Security Community Blueprint***, ASEAN view itself as 'A Cohesive, Peaceful, and Resilient Region with Shared Responsibility for Comprehensive Security' which is translated into numbers of key issues and actions, including '*further strengthen criminal justice response to trafficking in persons, bearing in mind the need to protect victims of trafficking in accordance with the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children,…*'.[6)]

- The ***ASEAN Economic Community Blueprint*** includes 'Free Flow of Skilled Labor' as one of the key elements of ASEAN for becoming A Single Market and Production Base.[7)]

6) Characteristic and Elements of the APSC, ASEAN Political Security Community Blueprint, Roadmap for an ASEAN Community 2009-2015, ASEAN:2010 (pp.15)

7) Characteristic and Elements of the AEC, ASEAN Economic Community Blueprint,

- ***The ASEAN Socio Cultural Community Blueprint*** also stated that ASEAN is *'committed to promote social justice and mainstreaming people's rights into its policies and spheres of life, including the rights and welfare of disadvantaged, vulnerable and marginalised groups such as women, children, the elderly, persons with disability and* ***migrant workers****'*.[8)]

ASEAN's efforts to address and develop policies and instruments in addressing issues surrounding migration in the region cover not only issues on migrant workers, but also, among other issues, trafficking in persons, conflicts, and statelessness. ASEAN has established the ASEAN Forum on Migrant Labor as the regular venue for dialogue among stakeholders on the issue on migrant workers. In 2007, ASEAN has established the ASEAN Committee on Migrant Worker (ACMW) which is expected to draft an instrument for the protection of migrant workers. Unfortunately the negotiations among ASEAN member states have been very slow, and the instrument is yet to be finalized.

D. Analysis of Laws and Regulations on foreign workers in Malaysia

1. Legal framework

Major issues of terms and conditions of work are regulated by the Employment Act and the Workman Compensation's Act, overseen by the

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Roadmap for an ASEAN Community 2009-2015, ASEAN:2010 (pp.29)

8) Characteristic and Elements of the ASCC, ASEAN Socio Culture Community Blueprint, Roadmap for an ASEAN Community 2009-2015, ASEAN:2010 (pp.78, 79)

Labor Department. Issues regarding relations between employers and workers are covered by the Industrial Relations Act, while labor unions are regulated by the Trade Union Act. These laws are all overseen and implemented by the Ministry of Human Resources. A new Anti- Trafficking Act came into effect in 2008 and contains language that is in line with the standards set out in the UN Palermo Protocol (effectively criminalizing trafficking for forced labor) but implementation so far has focused primarily on cases of trafficking for sexual exploitation. However, there is no Foreign Workers Act or other similar law that unifies regulation of migrant worker issues in one law.

a. The Immigration Act 1959

The Immigration Act provides the rules for admission and stay of migrant workers in Malaysia and enforcement has been mandated to the Immigration Department and the Ministry of Home Affairs (MOHA). In response to a rapid increase in the number of undocumented migrants working within its borders, the law was amended in August 2002 in an attempt to control the flow of irregular migrants. The amended Act criminalizes migrants who do not comply with Malaysian immigration policies relating to entry, stay and work, making them subject to arrest if caught by authorities or the People's Volunteer Corps (RELA). It also introduced stringent punishments for both employers hiring undocumented migrants and irregular migrants themselves, including fines of up to MYR 10,000 (US$2,280), prison sentences extending to five years, caning and fast-tracked deportations. Application of the punitive aspects of the law are known to be deeply unequal between employers and migrants and have

had no clear impact on reducing the number of irregular migrants working in Malaysia.

b. The Employment Act 1955

The terms of employment and conditions of work for migrant workers are regulated by the Employment Act, which the Ministry of Human Resources (MOHR) has been tasked to administer. Legally speaking, the rights and protections accorded to employers of migrant workers in Malaysia are still ambiguous. The Employment Act 1955 and Industrial Relations Act 1967 clearly protect the rights and welfare of employees. The Employment Act 1955 is more concerned with monetary benefits such as annual leaves, sick leaves, maternity allowance, overtime and so on. The Act is of compelling nature and states that failure to provide any of those benefits is an offence. Employer can be prosecuted in court should they fail to adhere to the Act. On the other hand, the Industrial Relations Act 1967 is more of persuasive nature. Industrial Relations problems are resolved through negotiation and conciliation.

Employers may find these legislations as legal guidelines in employment. Part XIIB of the Employment Act 1955 contains provisions regarding employment of foreign employees. However, the Act is silent on the right and protection accorded to the employers of the migrant workers. Sections 60K, 60L,60M, and 60N provide duties of employers towards the Director General and foreign employees. The employers' groups lack legal protection and the principle of "Equality before the Law" is not achieved. Labor laws, as the term itself suggests concerns and protects the employees groups which are often perceived as the underprivileged ones.

Article 60 (l) of the Employment Act of 1955 provides an avenue for migrant workers to file a complaint with the Director-General of Labor in cases where a "foreign employee is being discriminated against in relation to a local employee by his employer in respect of the terms and conditions of employment." However, most complaints are filed under Article 69 of the Employment Act, which provides authority for the Director-General to investigate and issue orders based on terms and conditions of contracts, wages, and provisions of the Employment Act. For issues of unfair dismissal, complaints are filed by migrants under the Industrial Relations Act.

In Malaysia, the principle holds that if the legislation does not clearly prohibit its application to foreign workers then it is applicable to them. There are several labor legislations having provisions to that effect. It is submitted that the Malaysian Employment Act of 1995 is applicable to migrant workers as it states that all employees (in the absence of provisions to the country, would include migrant workers) are governed by the Employment Act in relation to the payment of wages, termination of services, hours of work, holidays and other conditions of service. However for domestic servants (almost all are foreign workers), some of the provisions are inapplicable to them. The First Schedule of the 1955 Act excludes some important sections from them such as section 12, section 14, section 16, section 22, sections 61 and 64 and Parts IX, XII and XIIA. This clearly shows that the 1955 Act to a large extent does not protect the foreign workers who are employed as domestic servants. There have been stories reported in the media on the Indonesia maid abused by their employers to the extent that it has strained the relationship between Malaysia and Indonesia.

Section 2 of the 1955 Acts defines 'foreign employee' as an employee who is not a citizen. The only provision in the Employment Act dealing specifically with migrant workers is contained in Part XIIB of the Employment Act. Here, the Director General is empowered to inquire into any complaint made by a foreign employee that he is being discriminated against in relation to a local employee in respect of terms and conditions of his employment. The local employee is also given a similar benefit in that he is also able to lodge a complaint pursuant to Part XIIB of the Employment Act, with the Director General in the event he is discriminated against in relation a foreign employee. Except for this positive provision to promote equality of treatment between a migrant worker and that of a national, the Employment Act falls short of the equality of treatment envisages for migrant workers in Convention 97 and, for part XIID of the Employment Act goes on further to state that the services of a local employee cannot be terminated in favour of that of a foreign employee and in a situation of redundancy, the services of a foreign employee has to be terminated prior to that of a local employee. In such situation, equality cannot be extended to foreign or migrant workers.

c. Industrial Relation Act 1967

The Industrial Relations Act of 1967 regulates the relation between employers and workman and their trade union. The Industrial Relations Act stipulates that 'no person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of a trade union and participate in its lawful activities'. The Industrial Relation Act also prohibits the imposition of conditions in a contract of employment that seeks to restrain membership of a trade

union, discriminate against a person on the grounds of non trade union membership, dismisses or threatens to dismiss a workman for participating in the activities of a trade union or for persuading others to become members of a trade union. A brief review of the Industrial Relations Act seems to indicate that migrant workers are not prevented from joining or participating in the trade union.

The Industrial Relations Act expressly prohibits the restriction of the rights of workman to organize and join trade unions and to participate in its lawful activities. Unfair labor practices are listed in sections 5 and 7 of the Industrial Relations Act, which includes dismissal, threat of dismissal for joining a trade union…etc. 'Victimisation' as an unfair labor practice is viewed seriously in Malaysia. If an employer refuses to employ, to promote or suspends, transfers, lay-off or dismiss a person for lawful trade union activity, the section would be construed as victimizing the worker.[9] A proven act of victimization is a punishable offence and the Industrial Court is empowered not only to order reinstatement with back wages but also to enforce its order by treating non-compliance with its order as s further offence which is punishable with a fine or a term of imprisonment or both.[10]

d. Trade Union Act 1959

The Trade Unions Act of 1959 regulates the governance and operations of a trade union. The Act does not deny migrant workers to participate in union activities. The only existing restriction is section 28 of the Trade Union Act which provides that a member of the executive of a

9) Section 5(2) of the Industrial Relation Act 1967.
10) Section 59 of the Industrial Relation Act 1967.

trade union must be a citizen of the federation. In essence therefore, although migrant workers are not prohibited from joining and participating in trade union activities, in practice they would be prevented from doing so due to such provision.

Within the Malaysian context, it is submitted the allowing a permitting migrant workers to join or form trade unions would confer various benefits. Firstly in terms of administration dealing with an organized representation of migrant workers is far easier than dealing with individual. Secondly, in terms of wage it is undeniably that migrant workers are often willing to accept wage that are lower than that of a national worker and are also willing to work in a situation where employment conditions are unfair namely long hours, no overtime and others. Consequently this will led to ill-feelings between national workers (who are more expensive) and migrant workers which can lead to various types of social implications.

Thus, permitting migrant workers to join trade unions would in effect ensure that migrant workers are not exploited and at the same it would also protect the interest of national workers by ensuring that national workers are not 'passed over' in favour of cheaper migrant workers. Thirdly, it is noted that one of the objectives of trade unionism is to cater for the needs of all workers; therefore, permitting migrant workers to join trade unions would be in line with this objectives. Aa a result this would enhance Malaysia's image from an international point of view. Finally, the benefits of being a member of a trade union would among others ensure at the very least, good working conditions. At this juncture, one of the reasons behind the creation of the ILO was the belief that improvement in working conditions would lead to social order, peace and harmony.

e. Workman Compensation Act 1952

The Workmen's Compensation Act essentially provides for the payment of compensation for injury of a workman arising out of and in the course of employment. Migrant workers or foreign workers are covered in respect of injury sustained employment as well as non-employment injuries vide the Workmen's Compensations (Foreign Workers Scheme) (Insurance) Order of 1993. The scope of coverage under the Workmen's Compensation Act is accorded for accidents such as accidental death due to job injury, disablement either partial or total, hospitalization and payment for medical expenses.

f. Employers Provident Fund Act 1951

The Employees Provident Fund Act provides security for old age retirement and which allows members to utilize part of the savings for house ownership and other withdrawal scheme, also indicate a violation of the principle of 'applying without discrimination to migrant workers, treatment no less favourable that which applies to nationals', as contained in Article 6 of Convention 97. Under the Act, a migrant worker is given an option to contribute towards the fund, however it is noted that whilst the employee contribution to the fund in respect of a migrant worker is eleven percent, similar to that of a national worker, the employer contribution is a flat rate ringgit Malaysia five, irrespective of wages, for migrant workers, whilst the national worker received twelve percent of his wages.

g. The Private Employment Agency Act 1981

The regulatory procedures for recruitment of migrant workers are provided by the Private Employment Agency Act 1981. Recruitment agencies are

required to obtain a license to operate from the Ministry of Human Resources (MOHR) and an additional endorsement is required for placement of workers overseas. As the Act was originally formulated with the intention of regulating recruitment agencies providing services for domestic employment and sending Malaysian workers abroad, it has become outdated for the current context where inbound recruitment of migrant workers is much more prevalent. The Act is expected to be subsumed by the Private Employment Agencies Bill, a draft of which was shared publically 2014 but appears to have stalled out in the legislative process. MOHR has stated that the new legislation will extend to recruitment of foreign workers and improve enforcement particularly for recruitment of domestic workers but will not address the issue of outsourcing agencies.

h. The Anti-Trafficking in Persons Act 2007

The Anti-Trafficking in Persons Act criminalized trafficking for purposes of labor exploitation, in-line with the international standards established under the United Nations (UN) Palermo Protocols. It was amended to become the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act in 2010 (ATIPSOM), which broadened the definition of trafficking to include all actions involved in acquiring or maintaining the labor or services of a person through coercion. The law is comprehensive in criminalizing all dimensions of trafficking and establishes stringent penalties of up to twenty years imprisonment and fines for those convicted.

Laws in Malaysia do not specifically require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities. However, the laws instil avoidance and regulate the actions of individuals, companies and businesses through the creation of offences.

Anti-human trafficking/ sexual exploitation The Anti-Trafficking in Persons Act 2007 (ATPA 2007) addresses the problem of anti-human trafficking. It lists out a number of offences, namely, it makes it an offence for any person to:

a) Traffic any person not being a child, for the purpose of exploitation; the penalty is imprisonment for a term not exceeding 15 years, and a fine
b) Traffic a child for the purpose of exploitation; penalty is imprisonment for a term not less than years but not exceeding 20 years, and a fine
c) Obtain, give, sell or possess fraudulent travel or identity document for the purpose of facilitating an act of trafficking in persons; the penalty is imprisonment for a term not exceeding 10 years, and a fine of not less than RM50,000 but not exceeding RM500,000
d) Recruit a person to participate in trafficking of persons;
e) Provide facilities or services in support of trafficking in persons

The profit acquired from the exploitation of trafficked person will result in the penalty of imprisonment for a term not exceeding 15 years, and a fine of not less than RM50,000 but not exceeding RM500,000. Specifically for body corporates, 72 section 64 of ATPA 2007 states that,

> *"where any offence against any provision of this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, or was in any manner*

responsible for the management of any of the affairs of such body corporate, or was assisting in such management, shall also be guilty of that offence unless he proves that the offence was committed without his knowledge, consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."

The ATPA 2007 has extra territorial implications namely sections 3 and 4 of the ATPA 2007 Act states that, the offences apply regardless of whether the offence took place inside or outside Malaysia, in the following circumstances:

Section 15 "(a) if Malaysia is the receiving country or the exploitation occurs in Malaysia; or (b) if the receiving country is a foreign country but the trafficking in persons starts in Malaysia or transits in Malaysia. The ATPA 2007 does not contain a definition of "body corporate". The term "body corporate" is defined as an artificial legal person regardless of its nature and is an entity independent of or distinct from its members and directors.[11)]

Anti-terrorism provisions create offences, intended to protect the security of the individual and against the threat of terrorist acts.

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11) *Tan Lai v. Mohamed Bin Mahmud [1982] 1 MLJ 338;Development & Commercial Bank Bhd v Lam Chuan Company & Anor* [1989] 1MLJ 318; *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ714, SC.In December 2008, the Court convicted its first trafficking offender under the ATPA 2007; an Indian national convicted of forcing a female domestic worker into prostitution was sentenced to eight years in prison."

i. Penal Code

Chapter VIA of the Penal Code, though subject to criticism for its vague definitions, prohibits any person or company from directly or indirectly committing a terrorist act; such offences include providing devices to terrorist groups, recruiting person to be members of terrorist groups or participating in terrorist offences, providing training and instruction to terrorist groups, knowingly incite, promote or solicit property for the commission of terrorist acts, providing facilities in support of terrorist acts, soliciting and giving support to terrorist groups for the commission of terrorist acts, providing services for terrorist purposes, dealing with terrorist property. Section 130T of the Penal Code states that if the offences in sections 130N, 130O, 130P or 130Q are committed by a body corporate, the person responsible of the management and control of the body corporate shall be guilty of the offence unless he proves that the offence was committed without his consent or connivance and he exercised all such due diligence to prevent the commission of the offence.

Chapter VIA of the Penal Code applies even if these offences are committed outside Malaysia, provided that it is committed by any citizen or any permanent resident on the high seas on board any ship or on any aircraft whether or not such ship or aircraft is registered in Malaysia; or by any citizen or any permanent resident in any place without and Section 11 of the Penal Code includes any company or association or body of persons, incorporated or not, within the definition of ‘person’ in the Penal Code. No case law has been brought regarding the interpretation of the extraterritorial principle to companies. It is submitted that if an

offence is committed outside Malaysia by a company registered in Malaysia, Chapter VIA of the Penal Code would apply.

An assessment of Labor rights based on the labor legislations

Provisions in the Employment Act 1955, Industrial Relations Act 1967 (IRA 1967) and the OSHA 1994 ensures that employers refrain from certain actions that may violate the rights of employees. However, it should be noted that the Employment Act 1955 applies only to employees earning not more than RM1,500 per month. The right to join or form a trade union is guaranteed by law; section 8 of the Employment Act 1955 does not allow any contract of service to restrict the right of any employee from joining a registered trade union or to participate in activities of a registered trade union or to associate with any person to organize a trade union. Similarly, the Industrial Relations Act 1967 (IRA 1967) protects the rights of workmen and employers and their trade unions; section 4 of the IRA 1967 provides that no person (which includes business enterprises) shall interfere with, restrain or coerce a workman or an employer from exercising his or her right to form and assist in the formation of and join a trade union and to participate in its lawful activities.

Section 5 of the IRA 1967 prohibits discrimination on the ground that he or she is or is not a member or officer of a trade union in the area of employing, promoting or imposing any condition of employment or working conditions. Employers are also legally required to provide a minimum of 60 days paid maternity leave.[12] Also, it is an offence to terminate a female employee solely on the basis that she was absent

12) Employment Act 1955, Section 37.

from work as a result of illness (certified by a registered medical practitioner) arising out of her pregnancy or confinement and, which render[13] her unfit for her work, provided that her absence does not exceed 90 days.

Reading the Employment Act 1955 and the Companies Act 1965 together, these obligations apply to domestic and foreign employers alike.[14] Enforcement is by way of the Court process. In 2010, the Companies Commission of Malaysia CCM highlighted one Court case against a foreign company in Malaysia where the CCM commenced winding up action pursuant to a complaint received from the Ministry of High Education of Malaysia that the said foreign company was illegally carrying on business as a provider of private higher education institution. Section 59 of the Employment Act 1955 requires employers to provide one whole day of rest for each week of work; employees are not allowed to work more than eight hours a day and not more than 48 hours a week and employees are entitled to paid holiday.[15]

Section 15 of the OSHA 1994 provides that employers have the obligation to ensure the safety, health and welfare at work of its employees. Section 2 of the Employment Act 1955 defines employer as “employer” means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word “employ”, with its grammatical variations and cognate expressions, shall be construed accordingly.”

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13) *See* Penal Code, Section 4.76 Employment Act 1955, Section 37

14) Section 2 of the Employment Act 1955 defines employer as “employer” means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word “employ”, with its grammatical variations and cognate expressions, shall be construed accordingly.” Section 4 of the Companies act 1965 provides the definition of a foreign company.

15) Ibid, Section 60D

Section 4 of the Companies act 1965 defines foreign company as "Foreign company is defined under the Companies Act 1965 (CA 65) as: (a) a company, corporation, society, association or other body incorporated outside Malaysia; or (b) an unincorporated society association, or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Malaysia." A foreign company may carry on business in Malaysia by either incorporating a local company with the Companies Commission of Malaysia (CCM); or registering the foreign company in Malaysia with CCM.[16)]

Section 60D ensuring plants and systems are safe and the work place does not pose a risk to health; there is also a positive obligation to formulate a policy on safety and health. Section 6(1) of the Workers Minimum Standards of Housing and Amenities Act 1990 requires employers who provide their employees with housing at the place of employment, to ensure that such housing includes provision of free and adequate water, adequate electricity supply and that the buildings are kept in a good state of repair. In 2010, Department of Labor inspected 1,463 estates and found, amongst others, that the provision of clean water was less than 24 hours, the cleanliness of the water was inadequate.

To stimulate the agriculture industry, on 1 September 2010, the Malayan Agricultural Producers Association (MAPA) issued a directive encouraging its members to subsidize at least 90 percent of transportation cost to

16) Suruhanjaya Syarikat Malaysia v. Isles International Universite (European Union) Limited (formerly known as Irish International University), Kuala Lumpur High Court Companies (Winding-Up) No. D-28NCC-90-2010 in CCM Annual Report 2010. 80 Employment Act 1955, Section 60A. 81 Ibid.,

school of employees' children. As regards migrant workers, there is no specific law protecting migrant workers. The Employment Act 1955 applies to all employees, including foreign workers (see above). The only additional requirement is for employers to inform the Labor Department within 14 days of employment of a foreign worker. To curb labor trafficking, the Anti Trafficking Person Act 2001 (ATIP 2001) was amended in 2010 to include all actions involved in acquiring or maintaining labor services of a person through coercion, into the definition of trafficking.

However, the government of Malaysia remains slow in investigating and prosecuting labor trafficking cases, particularly those who exploit victims of labor trafficking. In 2011, reportedly, the Court convicted three individuals involved in labor trafficking, two of which were drivers who were involved in the transporting of Burmese refugees from a government immigration detention centre.[17] To tackle the number of illegal workers in Malaysia, an estimate of two million illegal immigrants,[18] the government launched the 6P program,[19] an amnesty and legalization process; under the amnesty program, illegal immigrants who register and wishes to return to their country of origin or those who surrender voluntarily would be given amnesty and returned home with costs fully borne by the immigrants themselves. Under the legalization process, illegal immigrants who fulfil a certain criteria would be registered for work purposes.

As of June 2012, according to the Deputy Minister of Home Affairs, over one million illegal immigrants have been registered and of those,

17) See OSHA 1994, Section 16.

18) Shannon Teoh, "Government amnesty for illegal immigrants," The Malaysian Insider, June 6, 2011, http://www.themalaysianinsider.com

19) Pendaftaran (registration), pemutihan (legalization), pengampunan (amnesty), pemantauan (observation), penguatkuasaan (enforcement) and pengusiran (deportation).

1,015,852 were registered for work purposes and 287,364 were registered to be sent to their country of origin.[20] As regards domestic workers, the problem in Malaysia, centers on (some) unscrupulous recruitment agencies. The law that governs recruitment agencies is the Immigration Act 1959, where it is an offence to give or sell any Entry Permit, Pass, Internal Travel Document or Certificate issued to another person or falsifies any statement or alters any Entry Permit, Pass, Internal Travel Document or Certificate. The punishment for contravening these provisions is a fine not exceeding RM10,000 or imprisonment not exceeding five years.

A private employment agency is required to obtain a licence from the Director General of Labor before carrying out their business.[21] Conditions to be fulfilled for a grant of the licence includes that the person[22] in-charge is a person of good character; is not an undischarged bankrupt; and has not been convicted of an offence and sentence to more than one year imprisonment or a fine of more than RM2,000; there are suitable premises for carrying on such business; such individual who, or the partnership or company which, is to carry on such business undertakes that such business will be carried on in a morally and irreproachable manner. The problem above is compounded by the lack of protection of foreign domestic servants who are brought into Malaysia for work and often exploited by recruitment agencies.[23]

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20) Wong Pek Mei, "More than 1.3 million illegals registered under amnesty program," The Star Online, June 18, 2012, http://www.thestar.com.my

21) Private Employment Agencies Act 1981, Section 7.

22) US Department of State, Trafficking in Persons Report 2011, http://www.state.gov/j/tip/tiprpt/2011/85 See also Shannon Teoh, "Government amnesty for illegal immigrants," *The Malaysian Insider,* June 6, 2011, http://www. themalaysianinsider.com

23) The European Commission's Directorate-General for Enterprise and Industry is developing a year-long project to develop guidance on the corporate responsibility to respect human rights for employment and recruitment agencies. Consultation and invitation to submit

Most conditions of employment of foreign domestic workers are governed by Memorandum of Understandings (MOU) between two governments. Domestic servants do not enjoy protection of all the provisions in the Employment Act 1955; provisions protecting conditions of termination of contract, maternity protection, conditions relating to rest days, hours of work, holidays and lay off and retirement benefits do not apply to domestic servants (foreign and local alike). As such, concerns have been expressed that the terms of conditions of MOUs do not necessarily ensure protection for domestic workers - for example, the new MOU between Malaysia and Indonesia governments covering the employment of Indonesian domestic workers in Malaysia, which was signed in December 2011, did not address the issues of rights of domestic workers.

In the area of sexual harassment, there are no laws compelling employers to take steps to prevent sexual harassment in the workplace. The only available legal provision is section 509 of the Penal Code, which makes it an offence for any person, who has the intention to insult the modesty of any woman, to utter any word, make any sound or gesture or exhibit any object intending that such word or sound to be heard or such gesture or object to be seen by such woman. This offence attracts a punishment of five years imprisonment of a fine or both. Whilst this section may be used to prosecute acts of sexual harassment, it deals with only the physical aspects of sexual harassment.

To encourage employers to address the issue of sexual harassment in the workplace, the Ministry of Human Resources is encouraging employers to adopt the Code of Practice Against Sexual Harassment and an internal

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Discussion Papers are ongoing, which would contribute to the development of the sector guidance

mechanism to prevent sexual harassment at the workplace. Introduced in 1999, the Code of Practice provides a definition of harassment, descriptions of behaviour that constitutes harassment, how employees should handle harassment, how the company handles complaints, what kind of disciplinary action and name and phone numbers to lodge a complaint. In 2010, the Department of Labor received 19 complaints of sexual harassment. To encourage employers to adopt the Code of Practice against Sexual Harassment, the said Department has set up booths, distributed brochures on the said subject matter, and provided seminars to employers.[24)]

2. Issues arising from foreign/migrants workers in Malaysia

Migrants are guaranteed rights and protections under Malaysia and international law, including, but not limited to, the right to equal treatment (non-discrimination), social security, a safe work environment, safe and hygienic living conditions, standardized working hours, minimum wage, organize, possession of identity documents and redress. However, these are often not implemented in a fair and transparent manner. Some of the legal issues relating to foreign migrant workers include forced labor and forced prostitution. This has led to a very critical national issue and a major concern for the country namely the exploitation of migrants workers.

24) US Department of State, Trafficking in Persons Report 2011, http://www.state.gov/j/tip /tiprpt/2011; see also, "Signing of new Malaysia-Indonesia MOU: An ASEAN PR Exercise?", Aliran, December 4, 2011, http://www.aliran.com93Ministry of Human Resources, Department of Labor Annual Report 2010 of the, http://jtksm.mohr.gov.my/

a. Exploitation of migrants workers

Migrant labors in Malaysia have to endure various forms of structural inequalities with regard to labor rights. The process will commence from the recruitment phase and the ways in which migrant labors are subject to exploitation are diverse. Over 400 complaints forward to the Malaysian Trade Union Congress (MTUC) in 2010 indicated some violation to migrant labor rights. The list of violation would encompass issues such as non-payment of wages, arbitrary and unexplained wage deductions, breach of working hours, including overtime pay, annual leave, paid public holidays and weekly days of rest.

They are employed on a temporary basis and harassed with contract fraud, debt bondage, and subsistence wages for above-average working hours, including structural unpaid overtime, and with obligatory wage deductions for food and accommodation provided by their employment agencies.

i. Debt bondage - In general the labor migrant will be charged with high recruitment fees up front, or demand pay backs. The amount varies according to the sending countries. These practices are in breach of Malaysian employment law and Article 9 of the Protection of Wages Convention, which Malaysia has ratified and which prohibits “any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a labor to an employer or his representative or to any intermediary (such as a labor contractor

or recruiter)". Families are also subjected to debt to pay for recruitment fees to at least get the labor migrant in the labor outsourcing system. (U.S. State Department. Trafficking in Persons Report, 2011

ii. Unawareness of Labor Rights- Migrant labor are often not aware of their (labor) rights. If they wanted to exercise the (limited) rights they have or seek redress in case of violations, they face tough obstacles. Employers can dismiss and revoke the work permit of migrant labors if they file a complaint, making them vulnerable to arrest, fines, imprisonment and deportation due to a lack of a working permit. The Labors were threaten and intimidated to silent them. They were also not able to invest, including financially, in a long judicial process, especially when the outcome thereof is uncertain. Malaysian law makes it illegal for a migrant labor to remain in the country once a contract has been terminated, so that access to justice is made effectively impossible.

iii. Low Wages- Manipulation and non-payment.-They are being forced to work long hours, while being paid much less than they were promised by their recruiters (Bormann et al.,2009). When outsourced they were not protected by any collective agreements or bonus systems. They were expected to meet production quotas without extra payment and threaten with deportation and wage deduction becomes a means to penalize mistakes and inefficiency by the migrant labor.

This violates ILO Convention No. 95, which was ratified by Malaysia. Article 8.2, provides that;

"labors shall be informed, in the manner deemed most appropriate by the competent authority, of the conditions under which and the extent to which such deductions may be made." Delayed salaries and non-payment of wages also violates ILO Convention No. 95, Article 12, which states that "wages shall be paid regularly. Except where other appropriate arrangements exist which ensure the payment of wages at regular intervals, the intervals for the payment of wages shall be prescribed by national laws or regulations or fixed by collective agreement or arbitration award" (ILO,1949).

iv. Rights to basic needs

The *Memorandum of Understanding* between Malaysia and home countries states that employers are obliged to provide migrant labors with accommodation, free access to water and electricity as well as transportation to the factory. Outsourcing leads to further migrant labor dependency to agents, threats such as wage deductions for illness, become homeless and lose his or her work permit, and can even be a ground to terminate labors' contracts. Agencies are legally obliged to cover the medical treatment of employees but in reality their wages

b. Right to legal remedies and protection of migrant workers

The right to access to legal redress by foreign workers is a very complicated issue in Malaysia. Currently there is no legislation which prohibits them to take legal action against the employers. Nevertheless the number of legal proceedings instituted against the employers is almost

negligible due to ignorance of the law and that most of them are non-union members which will deprive them of legal advice and the right to representation. Further the legal process in dispute resolution is very slow, court process take years to be resolved, thus foreign workers would very likely would not institute their case in court. Foreign workers can submit their complaints at the Labor Office.

However, most complaints are filed under Article 69 of the Employment Act.[25] For issues of unfair dismissal, migrants can complaints file their case under section 20 of the Industrial Relations Act 1967.[26] The problem is that documented migrant workers often are fired by employers for filing complaints with government officials or external advocacy groups like NGOs or trade unions. Termination of employment results in the termination of the work permit. Thus, lodging a complaint will lead to action by the employer that makes the migrant complainant subject to immediate deportation. This is the risk that foreign workers will normally have to face and that will stop them from lodging a formal complaint against their employers. Illegal migrant workers arguably do not have recourse to legal suits as they do not have 'locus standi' being an illegal person by virtue of the immigration law.

Legally, migrant workers may institute their legal suits in the Industrial Court, Labor Court or even the civil courts. As long as they are legal

25) Section 69 (1) of the Employment Act 1955 provides authority for the Director-General to investigate and issue orders based on terms and conditions of contracts, wages, and provisions of the Employment Act.

26) For complaints pertaining to employment law, usually, the complaints are filed by migrant workers, with the assistance of NGOs and trade unions, with common areas of concern being non-payment of wages, late or partial payment, excessive working hours, cheating on wages (especially related to overtime premium pay and unauthorized deductions), refusal to provide paid leave (annual and sick leave), lack of medical benefits or assistance, failure to provide support and compensation in cases of occupational accidents.

workers and have a contract of employment, they have the right to do so as the law does not prohibit them from doing so. Actions on the ground of dismissal can be made to the Industrial Court (via the Industrial Relations Department) or the Labor Court whilst action based on a breach of contract can be filed at the civil courts.

Although the number of foreign workers taking legal action against their employers is very minimal, this is not to say that there has been no case at all. In fact, they have the right to do so and one case has demonstrated the success of an action under civil suit. The foreign worker took action under implied breach of a contract of service on the ground that the employer has breached her implied obligation to provide a safe place of work.

In the case of **Maryini Anyim v Shalini Shanmugam & Anor,**[27] the plaintiff, an Indonesian national, was employed by Mr Vijaya (second defendant) as a domestic helper. The first defendant (Mdm Shalini) was the wife of the second defendant. The plaintiff's allege that in the course of her employment with the defendants until 27 November 2000 when she ran away from their residence, she was subjected to moral degradation, verbal and physical abuse by Mdm Shalini. After her escape, she than lodged a police report and was brought to the Sarawak General Hospital for further medical examination. She claimed that Mr Vijaya as her legal employer owed a duty of care towards her and she alleged that he had failed to discharge that duty by not exercising due and reasonable care for her health and wellbeing. The defendant's joint defence denied the abuses as alleged and that she was treated like their own daughter. Mr Vijaya further denied any knowledge of the abuses she allegedly suffered

27) (2006)5 CLJ 330

at the hands of Mdm Shalini and contended that the plaintiff had never complained to him about any assault or beatings by Mdm Shalini.[28] At the time of this civil trial before the court, Mdm Shalini had already been released from prison having served her sentences. The Session Court in Kuching Sarawak held that:

"(1) The sheer improbability of the plaintiff inflicting the injuries herself was too overwhelming. The mark at her back, for instance, was clearly in the shape of an iron. How anyone could have possibly inflicted such injury herself or that such a clear shaped mark was caused by hot water as alleged by the defendant was simply an impossibility in itself. Why she would have wanted to hammer her own head and her finger or punched her own eyes was totally mind boggling. This court was satisfied on a balance of probability that the plaintiff had suffered the abuses that she alleged at the hands of Mdm Shalini. In addition, as plaintiff's counsel had submitted Mdm Shalini's criminal convictions for causing the more serious of the injuries were prima facie evidence of her wrongdoing and in both the defendants' testimonies, there was nothing said or proved by them to dislodge that legal proof. The usefulness of the record of appeal in the criminal trial was the material consistencies of the evidence of abuse suffered by the plaintiff. The probability of Mr Vijaya's knowledge as testified by the plaintiff was real as theirs was a small household and the injuries sustained by the plaintiff was not minor. Mr Vijaya was very much aware of his wife's temperament and even if

28) Mdm Shalini had been charged with two counts of offences under the Penal Code for the injuries sustained by the plaintiff. She had been convicted after a full trial and sentenced).

he were powerless to act against her, it did not exonerate him from his culpability because his omission to act was not proven to have been caused by any extenuating factors. There was no clear evidence that he was unable to act in the plaintiff's defence for fear of his own safety and life. Thus, the legal duty to provide her with a safe working environment, which in this case was to be translated as removing her with some urgency from being further abused still remained with him. Consequently, both the defendants were liable for the injuries sustained by the plaintiff in the course of her employment with them".

It was stated that the majority of trafficking victims are among the estimated two million documented and more than two million undocumented foreign workers in Malaysia. Majority of the foreign workers are from Indonesia, Bangladesh, the Philippines, Nepal and Burma. Many of them are employed by recruiting or outsourcing companies. It was stated that sometimes, the recruitment and contracting fees are deducted from the workers' wages, which has led to debt bondage. In addition, the Government regulations which requires the foreign workers to pay immigration and employment authorization fees has also burdened them.

Some foreign workers whose visa were to work in the agricultural and palm oil plantations were found to be working at construction sites; in the electronics industry; and as domestic workers. It was also stated in such instances these workers are subjected to forced labor and that their movements were restricted; fraud in wages; passport confiscated; and faced significant debts by recruitment agents or employers. Some employers withhold an average of six months' salary from foreign domestic workers to recoup recruitment agency fees and other debts. Some victims of forced

labor were also found on Malaysian waters, including those from Cambodia and Burma who worked on Thai fishing boats. Some of these victims were reportedly escaped into Malaysian territory. The Government of Cambodia continued to ban women's emigration to Malaysia for domestic work, however, some women enter Malaysia to work despite this ban.

Young foreign women were recruited as a legal workers (legally enter Malaysia) mainly in restaurants, salons and hotels but were later forced into the commercial sex trade. There were cases of Vietnamese women and girls who entered into brokered marriages in Malaysia and were subsequently forced into prostitution. A small number of Malaysian are subjected to sex trafficking in Australia, France, South Africa, and the United Kingdom.

Refugee issues (mainly Rohingya men, women, and children) as well as quotas on admission and employment also pose serious problems in protecting migrants' rights.

The refugees lacked the ability to obtain work permits under Malaysian law, making them vulnerable to trafficking. Many incurred large smuggling debts and traffickers use these debts to bond some refugees. An estimated 80,000 Filipino Muslims without legal status, including 10,000 children, resided in Sabah, with some vulnerable to trafficking.

The core laws relating to employment of migrant workers have been supplemented by an array of secondary instruments, most of which are intended to regulate the admission and employment of low-skilled workers but also encourage high-skilled migration. Similar to Singapore's twin-track policy on labor migration, Malaysia maintains a distinction between migrants who are "contract workers" (low-skilled workers) and those who are "expatriates" (high-skilled workers), with the latter receiving preferential

treatment in terms of admission, duration of stay and allowing accompanying dependents, though nonetheless regarded as temporary migrants. The classification is made largely based upon salary, as workers earning over MYR3,000 (US$685) per month are classified as expatriates.

With the intention of reducing the likelihood of dependence on any single population of migrant workers and protecting job opportunities for nationals, an elaborate system of quotas and restrictions has been established for low-skilled migrants. These include considerations related to sector, gender, nationality and availability of a domestic candidate:

(1) Malaysian employers must prove that they have posted the job vacancy and attempted to hire a national before employing a migrant worker;
(2) the permitted sectors of employment for migrants are manufacturing, construction, agriculture, plantation, services and domestic work. Further restrictions are placed on the ratio of migrants to nationals employed in specific types of enterprises (more liberal for sectors shunned by local workers such as palm oil plantations and more limiting in others with domestic candidates available, including hotel services);
(3) admission of migrant workers is restricted to 14 nationalities and each nationality is only permitted to work in specified sectors; and
(4) gender restrictions have been applied, particularly in regards to migration of women, which has been promoted as a means to facilitate the transfer of domestic work and caregiving tasks in private households from nationals to migrants.

To maintain the quota system, Malaysian law provides very limited flexibility for migrant workers to change jobs of their own volition. Their

legal status to remain in the country is directly tied to their current employer, restricting the ability of migrant workers to leave without losing permission to stay and work and increasing their vulnerability to abuse. However, the constitution of labor migration flows to Malaysia to date have been extensively shaped by practical considerations such as wage differentials, cultural and linguistic similarities and the ease of migrating informally rather than the stipulations of migration management policies.

3. Causes for Failure in Fair Treatment of Migrant Workers

a. Institutional Framework ?Fragmentation and lack of coordination has hampered efforts to control illegal immigration

Many actors are responsible for the management of immigrants in Malaysia. Malaysia has a complex ecosystem overseeing migration management, ranging from a cabinet committee and several joint committees to more than ten different ministries and overlapping tools and departments within these ministries. Additionally, there are separate migration systems within Malaysia, with Sabah and Sarawak each having their own system governing migration into their respective regions. Such a complex structure may create confusion among employers and immigrants as to where responsibility lies for various parts of the migration process. This problem is exacerbated by limited coordination between these numerous actors, resulting in frequent duplication of functions and contradictions in policy implementation.

The Ministry of Human Resources (MOHR) and the Ministry of Home Affairs (MOHA) are the leading agencies overseeing many actors in the admission of foreign workers. The three main actors in the Malaysian

immigration system are The Cabinet Committee on Foreign Workers and Illegal Immigrants (JKKPA/PATI), the Ministry of Human Resources (MOHR), and the Ministry of Home Affairs (MOHA). JKKPA/PATI is comprised of 19 cabinet ministers and is responsible for determining policy on immigrant workers. The Deputy Prime Minister chairs the committee with the Chief Secretary of the Ministry of Home Affairs as the secretariat. MOHR is responsible for the implementation of labor laws.

Through its Department of Labor, the Ministry handles issues related to worker welfare and the terms and conditions of employment. It also assesses employers' applications for recruiting immigrants (both foreign workers and expatriates). Finally, MOHR is responsible for reviewing and approving labor contracts and licensing and monitoring private employment agencies (PEAs). MOHA houses the Department of Immigration, which manages the number of immigrants to Malaysia and the duration of their stay; the Foreign Worker Management Division, which is responsible for immigrant applications (quota); and the police department, which handles border patrol and criminal cases involving foreign workers. The Ministry of Health is responsible for conducting health screenings of immigrants (FOMEMA) and the Foreign Workers Health Insurance Protection Scheme (SPIKPA, which was made mandatory in 2010 to reduce the strain on the public healthcare system of unpaid hospitalization bills of uninsured.

The oversight body for migration policy in Malaysia is termed the Cabinet Committee on Foreign Workers and Illegal Immigrants (CCFWII). The MOHA functions as the secretariat for the CCFWII, which is chaired by the Deputy Prime Minister and includes representatives from 13 ministries. The Committee was initially mandated with setting policy related to labor migration but its mission was expanded in 2005 to include the

issue of illegal immigration. As there are currently no legislative or administrative provisions in place governing the protection of refugees in Malaysia, “illegal immigrants” is an undifferentiated grouping that includes all irregular migrant workers and asylum-seekers in the country.

There are some indications that labor migration policy may be more closely aligned with national development goals and provide better protection for workers moving forward. In the Eleventh Malaysia Plan, it has been stated that “A comprehensive immigration and employment policy for foreign workers will be formulated, taking into account the requirements of industry and the welfare of foreign workers. The MOHR will assume the lead role in policy-making for foreign worker management” This appears to be a positive step towards achieving greater coherency on labor migration governance.

b. Regulating recruitment

The recruitment sector has proven a major regulatory challenge for the Malaysian Government. Mandatory licensing of recruitment agencies is required under the provisions of the Private Employment Agencies Act but the evidence suggests that compliance with rules and regulations has been far from complete.

In response to widespread complaints about deceptive and abusive practices, attempts have been made to reduce their role in facilitating labor migration over the years. A ban on recruitment agency placement of migrant workers was enforced in all economic sectors in 1995 (except for domestic work). However, the prohibition was later lifted when the authorities determined that the use of recruitment services had become an “unstoppable trend” An important change in policy occurred in 2005 when

a guideline was issued by the Cabinet Committee on Foreign Workers requiring that companies intending to hire fewer than 50 migrant workers must use the services of "labor outsourcing companies." For companies hiring over 50 migrant workers, either direct recruitment in countries of origin or use of an outsourcing company were allowed.

The legal framework governing the operations of these companies was not determined until 2010 when the Committee decided that the Private Employment Agency Act would be applied. However, it remains unclear how the provisions of the law have been used to regulate outsourcing companies as MOHA has been administratively responsible for the issuing of licenses rather than MOHR.

The rationale for introducing this recruitment system was primarily that it was a more efficient and flexible means for recruiting and managing migrant workers. In particular, it simplified the process for employers, reducing administrative delays and allowing for changes in employment and short-term assignments. Supply chain research has suggested that lobbying pressure from the powerful manufacturing industry was highly influential factor in the policy decision.

The policy quickly spawned a massive new recruitment industry within Malaysia, growing to over 400 outsourcing companies at its peak. Even for "direct recruitment" of migrant workers, outsourcing firms were often heavily involved, acting as the employer's representative to source workers in countries of origin and handling the administrative requirements. The scope of regulatory responsibilities created by this new system proved beyond the capacity of the Government to manage effectively, leading to major problems with misconduct by outsourcing companies. Pervasive abuses related to the fee amounts charged convinced the Government to

suspend the quota of job orders and distribution of new work permits in 2010. Further regulatory action followed in 2011, halting the issuance of licenses and work permits to outsourcing companies.

A critical problem with the policy has been that it clouds the legal relationship between migrant workers and their employers, making their statutory responsibilities unclear. Rather than a direct contractual arrangement, the outsourcing policy artificially divides accountability for meeting the terms of employment to the outsourcing agency while the employer is directly responsible for managing the worker. This disconnect has contributed to greater casualization of employment and scope for abuse of migrant workers, compounding the fundamental vulnerability of being employed outside of their countries of origin.

In many cases, workers placed by outsourcing companies were not provided with acceptable housing facilities, stable employment, freedom of movement or the legal minimum wage. Contract substitution was also a common rights violation, with complaints often leading to job transfers rather than remedies for the abuse.

The results of the outsourcing policy on increasing labor market efficiency have been mixed. While employers benefitted from having a ready pool of workers to draw upon, migrant workers often experienced prolonged periods without jobs or income. A Bangladeshi worker recruited by an outsourcing company described his experience: “After arrival at the Kuala Lumpur International Airport, we were taken by the agent to a house where we were kept for about a month. There were 50 of us there at the house. We were fed very little.”[29] Introduction of another intermediary into the recruitment process also increased the cost substantially. For the

29) (Amnesty International, 2010).

first batch of workers recruited under the MOU with Bangladesh in 2006, the cost borne by migrant workers was said to frequently be more than double the rate set forth in the agreement.

A Parliamentary decision was made in December 2013 to phase out the outsourcing system for recruitment of migrant workers. As several major multinational corporations rely extensively upon migrant workers at their electronics manufacturing plants in Malaysia, it is believed that increasing pressure from buyers and the international community was an important factor in the decision. The Eleventh Malaysia Plan further confirms the change in policy, stating that MOHR will assume full responsibility for regulating the recruitment of migrant workers and that the role of outsourcing companies and other intermediaries will be eliminated. It has not been made clear when this policy will be fully implemented as the existing outsourcing firms have been granted licenses that are valid through 2021.

Other recent government efforts to ensure a fair and efficient recruitment process have focussed on the signing of bilateral agreements with countries of origin. These agreements have generally set fixed amounts for the fees that can be charged by private recruitment agencies or have bypassed them entirely through government-to-government recruitment arrangements.

c. Frequent policy changes related to BLAs and MOUs and bans on immigration from specific countries limit the effectiveness of these tools to manage immigration flows from distinct countries.

Malaysia has instituted multiple bans on specific sending countries. New recruitment from Bangladesh was banned in May 2001 and again in October 2007 following problems with recruiting agents in the Bangladesh-

Malaysia flow.[30] Problems were mostly related to recruiters violating various immigration conditions, such as having an employer in Malaysia seeking to hire the worker. Each of these bans was followed by a subsequent reversal within one or two years, generally due to employers' demand. Such frequent policy changes have the potential to both strain relationships with sending country governments and create an uncertain investment climate for employers.

E. Implementation and Enforcement of Laws on Migrant Workers

A number of factors continue to constrain systematic enforcement of labor legislation for migrant workers in Malaysia. The MOHR has limited resources to fulfil and comply its labor inspection mandate, particularly in terms of staffing. A total of just 350 labor inspectors are responsible for monitoring conditions at over 400,000 workplaces around the country. As a result, the Ministry responds to specific complaints from migrants but lacks the resources to comprehensively inspect their workplaces. It should be noted that this situation is not unique to Malaysia as insufficient human resources to conduct labor inspections is a common challenge faced in many countries.

Compounding the shortfall in law enforcement personnel, migrants often work in sectors that are harder for labor inspectors to reach, such as on remote palm oil plantations. Other major sectors of migrant worker employment, including domestic work in private homes, fall outside the scope of inspections entirely. Uneven law enforcement has contributed to

30) (UC Davis 2001; World Bank 2013).

segmentation of the labor force, establishing migrants as a class of workers to which a largely different set of rules apply.

The official mechanism for resolving migrant worker grievances about labor rights violations has been similarly unsuccessful at ensuring employer accountability. In the event of a breach of their terms and conditions of employment, workers can lodge a complaint with the Labor Department, and for cases of unlawful dismissal, objections can be registered with the Industrial Relations Department. Despite being provided with equal access to these complaint mechanism under law, the number of cases pursued by migrant workers negligible in comparison to the number of violations committed against them.[31] It should be noted that those with irregular legal status or informal work arrangements are not guaranteed similar rights to redress, which prohibits a very substantial portion of migrant workers from registering grievances.

When complaints are filed, even completing the initial step of identifying the employer who bears legal responsibility often proves a daunting task due to the common practices of outsourcing and sub-contracting.[32] Moreover, the long duration of the process favours employers as it is common for cases to require six months or more to be resolved - by which time migrants have often returned home.[33] Because the legal process often does not function effectively for migrant workers, service providers report that most migrant complainants rely on direct negotiation with employers to attempt to resolve their grievances.

These gaps in regulating employment practices have had detrimental

31) (Santhiago, 2011).

32) (ILO, 2015a).

33) (MOHR has recently issued a directive that all migrant cases should be resolved within three months).

impacts on the labor rights of both migrant and national workers, particularly in undercutting efforts by trade unions to organize and bargain collectively for better terms and conditions. Understanding the importance of protecting the rights of all workers in order to avoid a race to the bottom on working conditions, the Malaysian Trades Union Congress (MTUC) has been active in reaching out to migrant workers to join trade unions and providing them with legal assistance for cases of abuse.

However, the operating environment remains extremely challenging in this regard as migrants often cannot remain in Malaysia long enough to benefit from collective bargaining agreements and/or are reluctant to actively engage with trade unions due to fear of retaliatory dismissal and deportation. These fears may be well-founded as there have been reports by MTUC and other civil society organizations of migrants being sent home immediately upon attempting to organize. Although the practice has become less common in recent years, some employers of migrant workers continue to include an invalid clause within employment contracts stating that joining a trade union is prohibited.

To make further progress in strengthening its policies, a more coherent and equitable approach is required that acknowledges the critical role played by migrant workers in Malaysia's economy rather than repeating the antithetical sequence of amnesty and deportation that has characterized past efforts.

Ⅲ. Laws on Migrant Workers in South Korea

A. Introduction and Background

Along with the world's economy going into recession and the physical distance between countries are considered as no barrier in pursuing one's life across borders, thanks to the globalization, foreign worker population in South Korea is increasing every year. In the beginning the majority of foreign workers residing in South Korea were composed of Korean-Chinese; now the demographic of the migrant worker pool is changing as to include more foreigners from South-East Asia. As most of the foreign workers from South-East Asian region took up the workforce in the aging society[34] of South Korea, it is important than ever to review and examine whether adequate protection of the rights of those foreign workers, as working resources and as human beings, are provided.

Internationally, UN Human Rights Commission makes continuous and various efforts to improve legal standards that are related to the treatment of migrant workers, and also to have the standards that they develop to be adopted and implemented by all countries. The efforts made by the UN is shown by the International Labor Organization Migrant for Employment Convention (1949, No.97) with 49 ratifications and the International Labor Organization Migrant Workers Convention (1975, No. 143) with 23 ratifications.[35] The International Convention on the Protection of All Migrant

34) By United Nations definition, a society with more than 7 percent of its population at age 65 or older is considered as "Aging Society", 14 percent as "Aged Society" and 20 percent as "Hyper-Aged Society." Korea entered into the Aging Society in 2000 and expected to enter into the Aged Society in 2018.

35) Ratifications of International Instruments on Migrantion/Migrants Rights, available at

Workers and Their Families was also adopted in December of 1990 by the Committee of the Migrant Workers in the United Nations. This Convention became effective as of July 1, 2003, having 46 states parties and 16 signatories pending ratification. Almost one hundred countries around the world have signed up for at least one out of the above mentioned three International Conventions for Migrant Workers; however, it is notable that almost all OECD countries, including South Korea,[36] where the scale of the State's economy tends to be larger, have not joined, while countries with smaller economy where people migrate out of are mostly ratified those international conventions. Migration destination countries are not pledging to protect the foreign workers coming into their soil to earn living, possibly because they would not reduce their price-competitive of the migrant workers in their region. Korea's no exception, and what is worse, with the downturn of the domestic economy, migrant workers become targets of homophobia, assumed as a potential group of criminals. Realizing that migrant workers are no less than domestic workers is the first step forward, and setting up suitable legal measure to protect rights of the migrant workers should be the following procedure to make sure that the general consensus of the human rights are officially backed up by enforceable system - law. This brings about the need for the relevant domestic laws.

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http://picum.org/picum.org/uploads/attachement/Ratification%20doc.pdf(lastvisitedJune22,2016)

36) Kwangsung Kim (2011), "Suggestions on the Laws for the Protection of the Rights of Migrant Workers" Labor Law Journal, Vo. 23, Korea Comparative Labor Law Association, p.214

B. Review on Legislative History and Literature of Relevant Laws

With the inter-office regulation circulated within the ministry of justice, “The operations rules on issuance of visas for foreign industry technological trainees (Rule No. 255)” in 1991, foreign workers are introduced into the Korean job market with the title of “trainee” attached. The manual labor that those foreign workers performed in South Korea resolved labor-deficient market issues, especially in the SMEs, and contributed to the growth of the economy with low wage and unfair working conditions. Yet because they were admitted into South Korea as trainees, not as workers, their “training”, which was no different than working, could not have been subject to the Labor Standard Act that provided protective measures for workers. Low wage and unfair working conditions drove those workers to the point of leaving their workplaces, when their visa status was tied with the workplace that leaving the business without obtaining prior permission or porting to another business legally would put their status in jeopardy.[37)]

The ordinance was replaced with the Act on the Employment, Etc. of Foreign Workers in 2004, the law that builds the basis of the labor and employment area of foreign workers. Besides the Act on the Employment, Etc. of Foreign Workers, the Immigration Control Act and the Framework Act on Treatment of Foreigners Residing in the Republic of Korea are the two laws that are most relevant to foreign workers besides other

37) Kyungsoo Yeo(2016), “Legislative Suggestions for Migrant Worker Issues on the Constitution,” Korea Legislative Research Institute Workshop(2016. 5. 3.) Booklet p. 97

labor-related laws that apply not only to foreign workers but also to Korean workers in general.

In executing the law by the administration, the government has their regulations and ordinances[38] published by the presidential decree or ministerial decrees. Those do not carry the same legal weight as the laws as they only binds administration; yet they explain exactly how the law is interpreted and performed by the government. Reviewing those ordinances for reference would help in understanding and anticipating the enforcement of the law.

C. Analysis of Laws and Regulations on Migrant Workers in South Korea

1. Legal Framework

a. Immigration Control Act

The Immigration Control Act provides definitions and restrictions for status and period of stay allowed for foreigners, thereby prohibiting hiring of foreigners without legal status that has work permit.[39] The law provides legal basis for foreigner's employability whereas no definition of "illegally staying foreigner" or "illegally staying and working foreigner," that scholars in the field generally assume any foreigner who is employed in violation to the provisions of the Immigration Control Act as Illegal (undocumented) Foreign Workers.[40] Other scholars have taken more

38) Operational Ordinance on Online Visa Issuance and Recommender for Visa, Reporting Regulations for Violator of Immigration Control Act, Rules for Foreigner in Custody, Rules for Food Supply for Foreigners in Custody, Legal Procedure and Human Rights Protection for Checking Violators for Immigration Control Act, are some of those regulations.

39) Section 18 (2) of Immigration Control Act

40) Guicheon Park, Yubong Lee, Study on Immigration Control Act and Nationality Act

categorial approach in defining undocumented foreign workers as someone meeting any one of following: (1) Someone who entered into South Korea as per visa issued under the Immigration Control Act but overstayed and is employed, (2) Staying in accordance with the visa issued without employment authorization, but get employed anyway, (3) Following illegal entry into the country started working without authorization.[41)]

Although these definitions were conferred based on analysis of current law that does not provide definition of undocumented migrant worker, thus although such definition provided by scholars in the field may have reasonable basis on the close reading of the law as well as the review of the practical application, careful attention should still have to be paid to the term "illegally staying migrant worker" as the term may infer the illegality attributed to the labor law perspective in addition to the immigration law sector. When a foreign worker is still in his/her authorized stay period but is employed without work authorization, his/her employment may make him/her a "illegal worker" but the immigration status may still be argued as valid.[42)] This argument, that the use of "Illegal Worker" liberally may wrongfully impute the violation of law both to the status and to the employment, may have its basis; however, it may also be argued that by being employed without authorization where the status that the foreigner were admitted as did not allow employment, being unlawfully

for improvement – focused on foreign workers, Female and child migrants, Korea Legislation Research Institute, 2012, at 54

41) Sangyoon Lee, Status of Migrant Workers in Labor Law Perspective, Justice Vol. 70, Korean Law Institute, 2012, at 51; Hongyup Choi, Study on Status of Migrant Workers in Labor Law Perspective, Labor Law Review, Vol. 13, Seoul National University Labor Law Research Association, 2003, at 73

42) Guicheon Park, Issues for Legislation and Policy on Foreign Female Workers, Gender Law Studies, Vol. 5 Issue 1&2 Combined, Korea Gender Law Studies Association, 2014, at 204.

employed may be construed as violating the terms of the status, thus imputing illegality to both the status and the work should not be considered too far-fetched.

Starting from the definition of status and period of stay for foreigners, the Immigration Control Act is the basic, overarching law that governs foreigners in South Korea. Among the 106 provisions that the law outlays, what closely relate to migrant workers that are of importance would be the deportation provisions at section 46 and the custody provisions at section 51.

Section 46(1) provides a list of foreigners subject to deportation. Although the same law provides appeals procedure in section 60, the appeals do not constitute protective measures to prevent any mishap the administrative system may commit in the deportation proceedings. For example, even with an appeal with the administration or with filing an appeals in the court for the deportation decision made by the Ministry of Justice, there is no staying power vested on the administrative or judicial appeals that the outstanding deportation order will be executed. Because no stay will be granted based on the pending appeal, the appeal will not have any realistic merit to pursue.

Section 51 allows the Ministry of Justice to have custody of the subject foreigner when the subject is likely to flee. This power to take custody of the migrant worker is easily abused, as clearly stated on the dissent made by Justice Duhwan Song and Jungmi Lee of the Constitutional Court in 2012[43], when the Ministry of Justice needed[44] to deport the foreigner in subject, even when the foreigner's whereabouts were already

43) Heonjae 2012.8.23; 2008Heonma430

44) In this case, the deported foreigners were the leaders of the labor union of migrant workers, that it is suspected that the government targeted those foreigners to dissolve the union's activities and protests.

known thus no urgent custody taking was justified, the Ministry used this custody card anyway, deprived them of their labor right, constitutional right to be free unreasonable seizures, and their right to consult an attorney.

b. Act on the Employment, Etc. of Foreign Workers

Issues arose out of the increasing number of undocumented migrant workers who left the employment due to the low wage and unfair labor condition under the "Rules on Visa issuance fore Foreign Industry Technology Trainees." Domestic labor market was affected, SMEs struggled with keeping workers, human rights violations against migrant workers, and the national reputation issues all appeared.[45] In furtherance of the effort in reducing those socio-economic problems, the Korean government enacted the Act on the Employment, Etc. of Foreign Workers so that businesses may directly hire foreign workers under government authorization and the government may have their fingers on the foreigners during their stay.[46]

The Act on the Employment, Etc. of Foreign Workers consists of 32 sections. The Act aims to provide supply of human resources (migrant workers) to promote balanced economic development through systematic management of migrant workers. It has general provisions including the purpose section and then the law sets out the hiring procedure for migrant workers, management of migrant workers, protection of the rights of the migrant workers, and penalties for violation. What stands out among the provisions are the section requiring the migrant workers to

45) Kyungsoo Yeo, Migrant Worker Workshop Booklet, Korea Legislation Research Institute, 2016.5.3., at 97

46) *Id.*

leave the country at least for 6 months before returning back,[47] and the section spelling out the prohibition on discrimination.[48]

c. Nationality Act

Many migrant workers, after spending several years working in Korea, decide to take up a residence and become Korean to call this country home for many reasons - some for economic reasons, other for providing better life and options for their family members, just to name a few. Each State may have their own credentials and rules to apply for foreigners who wish to naturalize, but the common value that each government should pursue in those foreigners would be the contribution that the individual have made and/or will be abel to make to the country. In terms of the contribution to the country, migrant workers can be no less than famous artists - they fill in the much-needed labor-intensive sector of the society and keep the economy growing. Without those migrant workers' role, many businesses, especially SMEs, would struggle to find workers to operate. Their hard work and sweat should be appreciated and it must be reflected on the Naturalization path.

Under the Nationality Act, among the three ways[49] to obtain Korean nationality, what is available for migrant workers is through the general naturalization path in Section 5 of the Act. Naturalization under section 5 of the Act requires 5 continuos residency in South Korea, among other requirements. This residency requirement then places a huge roadblock on the path of the naturalization for migrant workers who play by the rules.

47) Section 18 of the Act on Employment, Etc. of Foreign Workers
48) *Id*., Section 22
49) By birth, by recognition, and by naturalization.

Under the Act on the Employment, Etc. of Foreign Workers,[50] foreign workers may be granted for 3 years of stay initially, which may be extended for 2 more years, but such foreign worker may stay only up to 4 years and 10 months.[51] The rule does not allow foreign workers to fulfill the required 5 year residency, preventing them from naturalizing.

d. Labor Standard Act, Trade Union and Labor Relations Adjustment Act, and Industrial Accident Compensation Insurance Act

Migrant workers are 'workers' in their nature, and thus laws related to workers would apply to them. Among many laws on workers in Korea, what is relevant and most closely related to foreign workers would be the "Labor Standard Act," the "Trade Union and Labor Relations Adjustment Act," and the "Employment Insurance Act."

In terms of providing equal protection for Korean workers and foreign workers, Section 6 of the Labor Standard Act specifically prohibits any discrimination based on nationality.[52] This equal treatment provision is subject to the fine for the violation section, that violation of the provision will incur maximum 500 million won under Section 114 of the same law. This law brought about a case[53] to the constitutional court later on, on the constitutionality of the trainee system under the "Rules on Visa issuance fore Foreign Industry Technology Trainees." The Constitutional

50) Article 18, 18-2 of the Act on the Employment, etc. of Foreign Workers

51) Ministry of Justice, Korea Immigration Service, Manual for Foreigners' Stay, 2016, at 146

52) Labor Standard Act, Section 6, Equal Treatment: An employer shall neither discriminate against workers on the basis of gender, nor take discriminatory treatment in relation to terms and conditions of employment on the ground of nationality, religion, or social status.

53) Constitutional Court, decision on August 30, 2007, 2007heonma670

Court recognized that the trainees under the previous system in their nature were no different than workers, thus such trainee system that intentionally deprived conditions on work environments that were provided to workers from trainees was unconstitutional as the system violated equal protection provision.

The Constitutional Court is not the only adjudicating body that understands the nature of work that the migrant workers perform. The Supreme Court of Korea also acknowledges that migrant workers who are not authorized to work should be entitled to their rights to form a labor union and to join such union, as the right to form and join labor union is inherent to workers whether they are authorized to work or not. In their decision made on June 25, 2015, the Supreme Court of Korea stated that the purpose of the employment restrictions on the Immigration Control Act is to prevent foreigners from getting employed without authorization, not to prevent any rights of foreign workers who has already provided labor or any rights guaranteed under the labor laws that are attached to the position as employees in the already-built employer-employee relationship. The Court concluded that anyone who provides labor in his/her relationship with another and receives payment in return qualifies as employees under the Trade Union and Labor Relations Adjustment Act, and as long as such person is classified as employee, the nationality or the work authorization of the worker should not make him/her otherwise.

Perhaps what comes next to the equal treatment of workers in general would be the protection and compensation from workplace accidents and injuries, especially for migrant workers wheir their line of duty inherently implies larger possibilities of accidents and danger. The Industrial Accident Compensation Insurance Act is the law that was devised to cover workers

for such incidents and to protect and compensate them when such unfortunate accident happens, and the Supreme Court had already decided that the coverage of the law is wide enough to include undocumented migrant workers.[54)]

2. Issues Arising from Migrant Workers in South Korea

Among the handful laws related to migrant workers either directly or not, perhaps the Act on Employment, Etc. of Foreign Workers play the largest role almost as if the law is a Framework Act on migrant workers' employment, status, and welfare. The fact that the Act on Employment, Etc. of Foreign Workers is the key law that places the premise that workers are related to this country through employment is placing significant weight in assessing the workers' rights and liberty, as the law defines employment as a relationship controlled by the employer, not leaving any room even for leverage to employees. This is evidenced by the fact that the employment of migrant workers are under employment permit system that forms too tilted playground as discussed more in detail below.

Another important aspect of migrant worker in South Korea is that although those workers are laborers under the labor law, protections and privileges under the same law are not effectively provided nor explained to those workers. This unequal treatment as workers creates conflicts and brings about illegitimization of migrant workers further. Also important to note while reviewing those laws is that for those low-skilled migrant workers, the law hinders family unity, which prevents stable working condition for those workers that leads to the opposite of harmonization in the workplace.

54) Supreme Court decision on September 15, 1995, 94nu12067

a. Employment Permit System

Migrant workers, mostly low-skilled laborers, are allowed to enter into South Korea based on their employer's petitioning the government. As soon as those migrant workers laid their foot on Korean soil, their relationship to their employer has complete control over their legal status in the country. Although there may be many employees who are satisfied with their work environment and pay, it is always reasonable to believe that some of the workers may need to be relocated to another place. It would be no problem with another job opening, if such worker was authorized to work regardless of the employer; however, it is not the case under the Korean law.

The Act on Employment, Etc. of Foreign Workers laid the premise that migrant workers are only allowed to work for the petitioning employer for only three years, with a possibility of a renewal that guarantees less than two years more of stay. When a migrant worker wishes to change worksite and need to be employed by another employer, the migrant worker may not port to a different employer on his/her free will. It is always the employer who could file for a change of employer/worksite for the employee.

Under Article 25 of the Act on Employment, Etc. of Foreign Workers, the law specifies circumstances when an employer may lay off or refuse renewal of contract for workers.

> Article 25 Permission for Change of Business or Place of Business
> (1) Where any of the following events occur, a foreign worker (excluding a foreign worker under Article 12 (1)) may file an application for change of business or place of business with the head of an employment security

office, as prescribed by Ordinance of the Ministry of Employment and Labor: <Amended by Act No. 10339, Jun. 4, 2010; Act No. 11276, Feb. 1, 2012>

1. If his/her employer intends to terminate his/her employment contract during the contract period, or intends to refuse renewal of his/her employment contract after its expiration, on a justifiable ground;
2. Where the Minister of Employment and Labor gives public notice, as he/she deems, under a social norm, that the foreign worker is unable to continue to work in the business or place of business on a ground not attributable to him/her, such as temporary shutdown, closure of business, cancellation of the employment permit under Article 19 (1), limitation on the employment under Article 20 (1), or his/her employer's violation of terms and conditions of employment or unfair treatment;
3. Where any other cause or event prescribed by Presidential Decree occurs.

(2) Where an employer hires a foreign worker seeking re-employment after applying for change of business or place of business under paragraph (1), Articles 6, 8, and 9 shall apply *mutatis mutandis* to the procedure and method for such employment.

(3) Any foreign worker who fails to obtain permission for change of workplace under Article 21 of the Immigration Control Act within three months from the date of the application for change of business or place of business under paragraph (1) or who fails to file an application for change of business or place of business within one month after the expiration of the employment contract with the employer shall leave the Republic of Korea: *Provided*, That for a foreign worker who is unable to obtain permission for change of workplace or file an application for change of workplace due to causes such as an accident on duty, illnesses, pregnancy and childbirth, such period shall be calculated from the date on which such cause ceases to exist.

(4) Foreign worker's change of business or place of business under paragraph (1) shall not, in principle, exceed three times during the period under Article 18 or two times during the extended period under Article 18-2 (1): *Provided*, That the foregoing shall not include cases of change of business or place of business on any ground prescribed in paragraph (1) 2. <Amended by Act No. 12371, Jan. 28, 2014>

Although the frame of the change of employer is set as if the employee may file for an approval and port to another employer, when taken a closer look, it is obvious that the employer is in control.

b. Unfair Treatment as Workers under Labor Law

Migrant workers are accorded the same privileges and protections as Koreans under the Korean Labor Standards Act, and the freedom to join and to form the labor union was clearly recognized by the supreme court's decision.[55] However, in terms of the specific conditions and rights that ordinary workers enjoy under various aspects of labor laws, the equal treatment of workers is still hard to grasp. For example, the priority built in under the Labor Standards Act and the Wage Claim Guarantee Act cannot be applied for migrant worker in their back-wage payment, thus employers are required to pay in insurance for wage payments as well as insurance for workers compensation claims.[56]

c. Hinderance to Family Unity

Most non-professional low-level skilled workers are not allowed to bring their family members as their dependants. Because only the migrant worker him/herself is allowed to travel to and reside in South Korea, their family members, especially young children, are grown without their parents in their home country. Furthermore, because the Korean law recognizes jus sanguinis, the law of the blood, in vesting nationality, when a migrant worker working and residing in Korea gives birth to a

55) Supreme Court 2015.6.25. Decision 2007Du4995.

56) Youngmi Kim, Protection of Migrant Workers under Korean Labor Law, KLRI Workshop Booklet at p.25, workshop held on August 5, 2016.

child, such child by birth would be undocumented foreigner without any legal right to stay with his/her mother. By not accompanying their family members, migrant workers are discouraged to feel at home in South Korea and thus less assimilation efforts are made, which lead to the lower productivity of labor.

3. Causes for Failure in Fair Treatment of Migrant Workers

Systematically, laws on migrant workers were designed in the way that the Korean employers control foreign workers in the view of utilizing foreign labor in the best effective method. Efficiency focused legal system in its nature inherently lacks basic and essential components in attracting and maintaining migrant workers such as empathy and equality.

The staple of the failure of fair treatment for migrant workers may be the employment permit system. This, too, is a measure that has its root in the employer's control purview, that it is best to restrain migrant workers' employment circumstances by leaving almost no room to maneuver for workers in terms of shopping for better work environment. Although it might have been effective at first partly because of the strict system, as time goes by and the migrant worker population sour, securing and providing environment that are the best for the well-being of the migrant workers would ultimately be the best practice to attract and keep best workers in Korean market without triggering any increase in the crime rates.

By switching employment permit system to work permit system where migrant workers have option to quit current job and leave to another one for any reason, the Korean government not only attracts better workers more but also to retain them better, as such freedom of portability would

prevent any employer from conducting behavior that may be in violation of human rights and also may constitute infringement of protections under the labor law.

D. Enforcement and Improvements of Laws on Migrant Workers

The Framework Act on the Treatment of Foreigners Residing in the Republic of Korea limits the definition of foreigners as those who reside legally in Korea. This definition brings discussion as to whether such limitation is appropriate and also as to what effect this law should have on affairs with foreign workers. The purpose of this law, as provided in Section 1, is to provide basic information on treatment of foreigners residing in Korea and also to build environment for the unified society. Realizing that a large proportion[57] of the foreigners currently residing in Korea are people without legal status, it makes more sense to include all foreign nationals regardless of their legal status so that to pursue protection of all constituents of the community for the unified society.

Other relevant laws, especially those related to the workers in light of the labor law sector, do guarantee equal protection between foreign workers and domestic workers. The Labor Standard Act and the Trade Union and Labor Relations Adjustment Act both specifically states no different treatment for foreign workers and set out penalties for violation of such provisions. It is the enforcement of the law and the reality on the field

57) Depending on the year and the sector, foreigners without legal status are generally 15% ~ 35% of all foreigners residing in South Korea. Study on Irregularization Pattern of Immigrants In Korea, Sang-Lim Lee, Youngtak Jeong, IMO MRTC Research Paper Series 2011-05

that may not delivering the legislative intent, as field reports are still showing abuse of migrant workers' rights at workplaces and also manipulation of legal system in exploiting foregin workers. When union activities are not prohibited, the union workers were not banned from participating union work but held in custody as an effective way to prevent the workers from organizing union activities - under the legal excuses that the law allows holding foreign workers under certain circumstances, only in this case the circumstances did not sufficiently guarantee the legitimacy of such custody holding.[58)]

For the improvement of the law, as previously stated, shfting gears from employment permit system to work permit system would certainly benefit employers with migrant workers, thus help with economy in general. Devising laws and rules providing ways for vast majority of migrant workers, the low-level skilled workers, to be able to bring their family members together, along with paving ways for them to reside to meet the required minimum period of time to naturalize would form a solid foundation to induce migrant workers and young population into South Korea. In the aging society with ever-low birth record, this opportunity to review our laws on migrant workers and to think of ways to improve the same may be a great chance to reform the law to adapt our system to welcome young foreign population.

58) Constitutional Court Decision on August 23, 2012, 2008heonma430. Dissent by Duhwan Song and Jeongmi Lee, stating that such custody holding does not meet the urgency requirement under the law.

Ⅳ. Comparison and Conclusion

Issues regarding migrant workers are always the subject between the sending countries and a receiving country like Malaysia and Korea. In Malaysia employers are normally blamed and, indirectly, the political ties between both receiving and sender countries are affected. It would be better that groups, employers and employees, understood their rights, duties and responsibilities in employment in view of their interdependent relationships. If both groups know that their rights are protected and well taken care of, they will know how to channel respective grievances should the need arise. In Korea the vast majority of the sending countries is China and the law provides a special section for workers from them, the Korean-Chinese people while having a general part on all other migrant workers. Thus for Korean case, it is not much of the relationship issues between the sending country and receiving country. Rather, it is the perception of the Korean legislatures that were fixed from long time ago that may need to be rearranged to reflect current status and trend.

Generally, if the employers of the migrant workers are given enough rights and protections as their fellow employees, both groups will respect each others' rights and will not take advantage or abuse their positions. One should remember that migration will increase in the future not decrease, given the global demographic trends, widening disparities in income, human securities and rights across countries, increasing migrant networks and environmental and climate changes. In this context, there are currently three major migration issues that demand attention: governance of migration, protection of migrant workers and maximizing development benefits of migration.

Thus, the governance challenge is not on how to stop or prevent migration for both countries for Malaysia and Korea but the emphasis is to focus on how to govern it for the benefit of all concerned that encompass the source countries, destination countries and migrant workers through international cooperation. Malaysia and Korea to a certain extent requires the empowerment of more and improved labor policies, not more policing, and intensified border controls.

Globalization has also led to the emergence of global production chains initiated by multinational corporations involving various levels of subcontracting and outsourcing to different suppliers. In the process, ‘labor’ brokers have emerged supplying the needs of different enterprises. This has undermined the traditional employer-employee relationship, under which employers are accountable for conditions of work offered to workers. Employers have a vital role to play in all the three areas identified above: governance of labor migration, protection of migrant workers, and promoting development benefits of migration. The employer group has played a valuable role in all of these processes.18 However, employers are still facing challenges in relation to migration.

Malaysia is a signatory to the UN Convention on Elimination of Discrimination Against Women (CEDAW), the UN Convention on the Rights of the Child (CRC) and has ratified five of the eight core ILO Conventions. Malaysia is also a member of the UN Human Rights Council. It is also a signatory to the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted by ASEAN in January 2007.

Major issues of terms and conditions of work are regulated by the Employment Act and the Workman Compensation’s Act, overseen by the Labor Department. Issues regarding relations between employers and workers

are covered by the Industrial Relations Act, while labor unions are regulated by the Trade Union Act. However, there is no Foreign Workers Act or other similar law that unifies regulation of migrant worker issues in one law. A comprehensive law is being drafted by the Malaysian Government but the draft has not been shared outside of government circles nor has a timetable been set for the law to be considered by the Cabinet, and ultimately, the Parliament. While there are disagreements on what the content of such a law should be, the concept of writing a comprehensive law has broad support among NGOs, trade unions, and employers groups. A previous attempt to develop such a law was not successful. The result is migrant workers affairs are regulated through a series of immigration laws and regulations, supplemented by policies from the Ministry of Home Affairs (MHA) which issues work permits, and labor laws overseen by the Ministry of Human Resources (MHR).

The Malaysian Government does not have a comprehensive legal and policy framework to regulate the recruitment, admission, placement, treatment, and repatriation of migrant workers. Oversight of migrant workers is divided among ministries, and even within ministries, between various departments. The MHA is in charge of approving applications to bring in migrant workers and overseeing manpower companies, while the MHR (Labor Dept. and Industrial Relations Dept.) are tasked with receiving and acting on complaints by migrant workers. The Police and Immigration Department are tasked with enforcement, but have delegated significant powers to the RELA, which is an armed (yet poorly trained and part-time) volunteer corps that has been repeatedly accused of serious human rights abuses against migrant workers and resident foreigners.

When reviewed the current legal system and the issues arising out of the law, the most striking trait of Korean laws on migrant worker is that the law was centered on the notion of handling migrant workers as helping hands from foreign countries. It needs to change. shfting gears from employment permit system to work permit system would certainly benefit employers with migrant workers, thus help with economy in general. Devising laws and rules providing ways for vast majority of migrant workers, the low-level skilled workers, to be able to bring their family members together, along with paving ways for them to reside to meet the required minimum period of time to naturalize would form a solid foundation to induce migrant workers and young population into South Korea. In the aging society with ever-low birth record, this opportunity to review our laws on migrant workers and to think of ways to improve the same may be a great chance to reform the law to adapt our system to welcome young foreign population.

Amidst the above challenges, the immediate focus of any policy action clearly should be on the various stakeholders of migration instead of on the migrants per se. With adequate and effective enforcement together with regular inspection the policymakers can ensure that the migrant workers are accorded basic and equal treatment especially in terms of wages and working conditions. More importantly policymakers should also realize that a holistic and appropriate migration policy and program and effective management of the migrant workers are an economic asset instead of a liability. In summary underlying all this is the role of the migrant workers in the various sectors of the Malaysian and Korean economy that needs to be critically defined and their contribution to the economic welfare of the country to be broadly understood.

Comparison of the laws, policies, and systems of the two countries is summarized on the table below.

	Malaysia	South Korea
Regulating Government Authorities	Ministry of Human Resources, Ministry of Home Affairs Immigration Department	Immigration Office Under the Department of Justice
Relevant Domestic Laws	Immigration Act 1959, Employment Act 1955, Industrial Relation Act 1967,Trade Union Act 1959,Workmens Compensation Act 1952, Employers Provident Fund Act 1951,Private Employment Agency Act 1981, Anti Trafficking in Person Act 2007, Penal Code	Act on the Employment, Etc. of Foreign Workers, Immigration Control Act, Nationality Act, and other labor laws apply to migrant workers equally in principle
Ratification to International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No	No
Discrimination under Immigration Law	Provisions for foreign workers are observed in the legislation but rights and protection to migrant workers are still ambiguous as seen in the labour legislations.	Discrimination against foreign workers is prohibited under the Act on the Employment, Etc. of Foreign Workers

	Malaysia	South Korea
Scope of Applicability of Labor Law for Migrant Workers	Equal protection under labor law for migrant workers, excluding domestic workers	Equal protection under labor law (exclusing domestic workers), even right to form labor union by undocumented foreign workers
Currently Pressing Issues	Fragmentation and lack of coordination overseeing migration management and issues relating to recruitment agency.	Employment Permit System provides unlevel playingfield for migrant workers that may contribute to increase in the undocumented migrant worker population in South Korea than regulating the same.

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