# External Migration of Labour Force and Access to Justice: Malaysian Law in the context of ILO Standards[1]

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**Abstract**

*The number of migration of labour force into Malaysia is increasing every year. Malaysia fairly strong economic standing compared to neighbouring countries has forced external migration into Malaysia. Workers from countries such as Indonesia, Nepal, Philippines, Bangladesh, India and Vietnam are now being employed in various economic sectors in Malaysia. This situation has given rise to legal and social issues. In this paper, the authors will discuss the legal issues pertaining to the employment of foreign workers in Malaysia. One significant issue that will be raised here is the right of foreign workers to have access to justice or particularly the dispute resolution mechanism in Malaysia. The relevant labour legislation will be discussed against the international standards as contained in the ILO conventions. The writing of this paper takes in the form of legal narrative.*

Key words: Migration, Malaysia, Employment Law, ILO Standards, Dispute Resolution

## Introduction

The existence of migrant workers has long been recognized as giving problems to the receiving countries. Such countries will have to grapple with issues such as the rights of the migrant workers, the resentment of the local population, the image of the country, legal enforcement or the lack of it, the issue of illegal immigrant workers, problems relating to data collection and the right to access to legal redress. Malaysia in particular has been experiencing such a problem and has also put her in the bad light internationally especially when stories of abuse on migrant workers were reported in the media. A fairly strong economy compared to her neighbours, with the exception of Singapore, Malaysia has been the focal point of a good number of migrant workers from Indonesia, Nepal, Bangladesh, Philippines, Vietnam, India and Pakistan. The 1990s and beyond has seen the influx of migrant workers onto Malaysian shores. Being a member of the ILO, Malaysia is expected to observe the ILO international labour standards on migrant workers. Although Malaysia does not ratify all ILO conventions pertaining to migrant labours, however, being an ILO member, it is argued that some obligations are placed on her to ensure that the international norms are observed.

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**Labour Market Scenario**

Malaysia suffered from financial crisis in the late 1990s. Before that, the economy of the country was very vibrant and jobs opportunity was plenty. But Malaysia economy recovered although not as vibrant as before 1998, and following such recovery and sustained economic expansion after the crisis, the economy continues to be in an improved situation. The pattern of the labour market seems to spread into many sectors of economy especially to the services sectors and spread across the Klang Valley and major towns like, Penang, Johor Bharu and Ipoh. This attracted the influx of both legal as well as illegal foreign workers. Total foreign workers rose from 4% of total employment in 1990 to about 10.7% in 1997 and 9% in 2001. As at July 2004, there are about 1.3 million registered foreign workers, constituting 12% of total employment in the country[4].

The Survey conducted by the Department of Statistics revealed that the number of foreign workers has increased to 1.1 million in 2000 compared to about 136,000 persons in the early 1980s. Immigration statistics show that the number of legal foreign workers in Malaysia rose to 1,359,632 as at July 2004. The majority of foreign workers are from Indonesia, averaging 66.5% of total foreign workers, followed by Nepal (9.2%), Bangladesh (8.0%), India (4.5%) and Myanmar (4.2%)[5]. In 2001, male foreign workers accounted for 66% of total foreign workers and they dominated all major sectors, except services. . The majority of expatriates are employed in the manufacturing, petroleum, construction and services sectors, such as health, education and ICT related industries. They are largely professionals and highly skilled workers, account for about 3% of the foreign workers in the country. Foreigners with work permits increased to 1.7 million in 2005, with the manufacturing sector as the largest employer accounting for 31%[6]. Given our estimated national workforce was about 10.9 million in that year, this means that officially sanctioned foreign workers accounted for 15% of the total workforce, according to the official statistics[7]. They come from over 15 countries with the largest number from Indonesia (1.2 million as of 2006). But can the official statistics be believed? According to Lim Teck Ghee:

"In fact the foreign component of the Malaysian workforce is a lot larger – in fact, very, very much larger. According to government's own estimates, there is an equivalent number of unregistered or undocumented migrant labour in the country. Another estimate was provided by Syed Shahir, president of the MTUC when he spoke at an international meeting on migrant workers[8]. His estimate is supported by the fact that official entry-exit immigration records in 2004 showed that there were 5,852,997 persons who overstayed after entering the country. This figure – if true today – means that four in every 10 visitors to the country is overstaying, with a very large proportion probably entering the informal labour market. Hence a realistic estimate of the number of foreign workers in the country would be anywhere between 3.5 and over 7 million. If the higher number is taken into account, it

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[4] Statistic: Department of Immigration, Malaysia

[5] Statistic: Department of Immigration, Malaysia

[6] The 9th Malaysia Plan, p 240.

[7] Statistic, Department of Immigration, Malaysia.

[8] Speech at MTUC/ILO Follow Up Workshop on Migrant Workers in Malaysia, December, 4-6 2006.

means that a staggering two in every three workers in the country could be a foreign worker"[9].

**Foreign Labour Policy**

Malaysia has never practiced a prohibition of the import of foreign workers into Malaysia; in fact Malaysia does need their services. As indicated above, the good standing of Malaysian economy as compared to her neighbours have resulted in the influx of foreign workers. Various policy measures pertaining to foreign workers have been instituted by the Government to regulate and administer their employment and to control the influx of illegal foreign workers. Workers who wish to work in this country have to apply for work permit. This is to legalize their presence here. But as the number of legal workers is increasing, so do the illegal workers and they are hard to control and monitor. The situation is made worse when legal workers extend their stay and become illegal. There are times where the Government has to deal with this difficult situation and one example is when the Government implements the Foreign Worker Rationalization Programme to legalize illegal workers, amendments to the Immigration Act, 1977 and imposition of an annual levy. In addition, several Memorandums of Understanding (MOUs) were signed with labour exporting countries to authorize legal recruitment of foreign workers. Currently, Malaysia allows recruitment of foreign workers from several countries including Indonesia, Nepal, Bangladesh, India, Philippines, Vietnam and Myanmar.

Almost all sectors are allowed to bring in foreign workers. Not only export-oriented manufacturers (with more than 50% of their output meant for export market) are eligible to hire foreign workers, those with domestic-oriented businesses are also permitted to hire foreign workers with certain conditions[10]. In addition, companies with a minimum paid up capital of RM100, 000 and with a total sale of RM2 million are permitted to hire foreign workers on the ratio of 1 foreign worker for 1 domestic worker. In the services sector, foreign workers are allowed to work in various industries, including hotels, charity houses, golf clubs and resorts. Although there have been ministerial pronouncement made lately to reduce the number of foreign workers in Malaysia, employers by and large still require foreign workers to work in their companies.

**ILO Conventions and Ratification by Malaysia**

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[9] Lim Teck Ghee, A Malaysian Fantasy: Less dependence on foreign workers, CPI Writings, August 4, 2009, On line (9 March 2010)

[10] **See "HR Ministry to meet MNCs on foreign labour issue", (The Star, 02 October 2009)**

The two main ILO Conventions concerning migrant workers are the *Migration for Employment (Revised) Convention of 1949 (Convention 97)* and the *Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of 1975 (Convention 143)*[11].

These two Conventions have been poorly ratified, Malaysian being the only country to in the Asia Pacific region to have ratified Convention 97[12]. However, this does not mean that migrant workers in this region are unprotected by the ILO as the majority of the ILO Convention applies to migrant workers and nationals equally. States that ratified Conventions concerning fundamental rights are under an obligation to protect the rights of migrants' workers. In a complaint lodged against the Dominican Republic and Haiti in 1981 for the mistreatment of Haitian migrant workers employed in the sugar plantations of the Dominican Republic, it was found that although both the countries had not ratified either Convention 97 nor Convention 143, both countries had ratified a number of ILO fundamental human rights conventions which were relevant to the protection of migrant workers. As such, both countries were found to be in violation of Convention 97 and Convention 143[13].

In the recent ILO Declaration on the Fundamental Principles and Rights at Work which was adopted by the ILO at it eighty sixth session in Geneva in June 1998, it was agreed that all countries are to respect the principles contained in the conventions relating to migrant workers, irrespective of whether the state has ratified the conventions in question. The Declaration on the Fundamental Principles and Rights at Work states that "All members, even if they have not ratified the Convention in question, have an obligation arising from the very fact of membership in the organization, to respect, to promote and to realize, in good faith and in accordance with the constitution, the principles concerning the fundamental rights which are the subject of those Conventions"[14]. The Declaration also makes provisions enabling the Governing Body to request on an annual basis, reports from those ILO member states which have not ratified these Conventions to supply information on the efforts undertaken to give effect to the fundamental rights and freedoms. The ILO Conventions concerning the rights of migrant workers, strictly speaking do not come within the category of fundamental rights and freedom, however, the preamble to the Declaration underlines the need to devote particular attention to this vulnerable group, where it states that 'whereas the ILO should give special attention to the problems of persons with special social needs, particular the unemployed and migrant worker and mobilize and encourage international, regional and national efforts aimed at resolving their problems and promote effective policies aimed at job creation'.[15] Therefore, it is in this broad sense that the comparison between the international conventions governing workers rights, in particular that of a migrant worker and Malaysian labour legislation will be made to determine the extent of compliance of Malaysia labour laws with international labour standards.

[11] See Lammy Betten, *International Labour Law*: Selected Issues, 1993, Deventer: Kluwer.

[12] International Labour Organisation, 2004. (Url)

[13] Ibid

[14] Declaration on fundamental Principles and Right at Work, Geneva, June 1998. Paragraph 2.

[15] Ibid

Malaysia has been a member of the ILO since 1957 and to date, it has ratified thirty four ILO Conventions, [16] which are as follows:-

International Labour Conventions Ratified by Malaysia

| Convention No | Convention | Ratified By |
|---|---|---|
| C 7 | Minimum Age (Sea) Convention, 1920 | Malaysia (Sarawak) *Denounced in 1997* |
| C 11 | Right of Association (Agriculture) Convention, 1921 | Malaysia (Peninsular) |
| C 11 | Right of Association (Agriculture) Convention, 1921 | Malaysia (Sarawak) |
| C 12 | Workmen's Compensation (Agriculture), Convention 1921 | Malaysia (Peninsular) |
| C 12 | Workmen's Compensation (Agriculture), Convention 1921 | Malaysia (Sarawak) |
| C 14 | Weekly Rest (Industry) Convention, 1921 | Malaysia (Sarawak) |
| C 15 | Minimum Age (Trimmers and Strokers) Convention, 1921 | Malaysia (Sabah) *Denounced in 1997* |
| C 16 | Medical Examination of Young Persons (Sea) | Malaysia (Sabah) |
| C 16 | Medical Examination of Young Persons (Sea) | Malaysia (Sarawak) |
| C 17 | Workmen's Compensation (Accidents), Convention,1925 | Malaysia (Peninsular) |
| C 19 | Equality of Treatment (Accident | Malaysia (Peninsular) |

[16] International Labour Organisation, 2004. (Url)

Http://webfusion.ilo.org/public/db/standards/normes/appl/Appl-

byCtry.cfm?hdoff=1&CTYCHOICE=0820&Lang=EN.(15 November 2002)

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|---|---|---|
|  | Compensation) Convention, 1925 |  |
| C 19 | Equality of Treatment (Accident Compensation) Convention, 1925 | Malaysia (Sarawak) |
| C 29 | Forced Labour Convention,1930 | Malaysia |
| C 45 | Underground Work (Women) Convention, 1935 | Malaysia (Peninsular) |
| C 50 | Recruitment of Indigenous Workers Convention,1936 | Malaysia |
| C 64 | Contract Of Employment (Indigenous Workers) Convention,1939 | Malaysia |
| C 65 | Penal Sanctions (Indigenous Workers) Conventions, 1939 | Malaysia |
| C 86 | Contract of Employment ( Indigenous Workers) Convention, 1947 | Malaysia (Sabah) |
| C 86 | Contract of Employment ( Indigenous Workers) Convention, 1947 | Malaysia (Sarawak) |
| C 88 | Employment Service Convention, 1948 | Malaysia |
| C 94 | Labour Clauses (Public Contracts) Conventions, 1949 | Malaysia (Sabah) |
| C 94 | Labour Clauses (Public Contracts) | Malaysia (Sarawak) |
| C 95 | Protection of Wages Convention, 1949 | Malaysia |
| C 98 | Right to Organise and Collactive Bargaining, Convention, 1949 | Malaysia |
| C 88 | Employment Service Convention, 1948 | Malaysia |
| C 94 | Labour Clauses (Public Contracts) | Malaysia (Sabah) |

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|---|---|---|
| C 94 | Labour Clauses (Public Contracts) | Malaysia (Sarawak) |
| C 95 | Protection of Wages Convention, 1949 | Malaysia |
| C 97 | Migration for Employment Convention (Revised) 1949 | Malaysia (Sabah) |
| C 98 | Right to Organise and Collective Bargaining | Malaysia |
| C 100 | Abolition of Forced Labour Convention, 1957 | Malaysia<br>*Denounce in 1990* |
| C119 | Guarding of Machinery Convention, 1963 | Malaysia |
| C 138 | Minimum Age Convention, 1973 | Malaysia |
| C 144 | Tripartite Consultation (International Labour Standards) Conventions, 1976 | Malaysia |
| C 182 | Worst Forms of Child Labour Convention, 1999 | Malaysia |

A cursory review of the above table indicates that Malaysia has only ratified one of the conventions relating to the rights of migrant workers, which is the Migration for Employment Convention (Revised) of 1949 (Convention 97) and of the eight conventions designated as 'core labour standards', it has ratified one Convention, which is Convention 98, the right to Organise and Collective Bargaining Convention of 1949.

**Is Malaysian Law Compatible with International Standards?**

In examining the extent to which Malaysian labour laws comply with international labour standards, a comparison must firstly be made between the relevant international labour standards with the Malaysian labour laws, to determine the extent to which the rights of migrant workers are protected in Malaysian.

As explained above, the Migration for Employment Convention (Revised) of 1949 (Convention 97) is aimed at ensuring non-discrimination or equality and treatment between migrant workers and national workers. Article 6 of the Convention stipulate that each

member States undertakes to apply without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment not less favourable than that which is applies to its own national in respect of such matters as remuneration, hours of work, overtime arrangement, holiday with pay…etc., so far as such matters are regulated by law or regulations or are the subject of control of administrative authorities. Member States, are also as far as possible, to refrain from removing a migrant worker from its territory on account of the migrant worker's lack of means or the state of the employment market. Further, the Convention states that migrants for employment are not to be returned to their country of origin if they are unable to pursue their occupation by reason of illness or injury arising after admission, subject to the qualifications that the power to deport will be exercise within a reasonable period of time i.e. not exceeding five years from the date of arrival.

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 labour legislations having provisions to that effect. It is submitted that the Malaysian Employment Act of 1995[17] 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.

Convention 97 also state that migrant workers should also have equality with workers in terms of trade union rights and the benefits of collective bargaining. The Industrial Relations

[17] Kamal Halili Hassan, Nik Ahmad Kamal, Mumtaj Hassan, *Undang-undang Pekerjaan* (Employment Law), vol 7, 2009, Kuala Lumpur: Dewan Bahasa dan Pustaka.

Act of 1967 regulates the relation between employers and workman and their trade union[18]. 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 barred from joining or participating in trade unions.

A look at the Trade Unions Act of 1959, which regulates the running of a trade union, does not deny migrant workers to join and participate in union activities[19]. The only restriction appears to be section 28 of the Trade Union Act which stipulates that a member of the executive of a 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 are barred from doing so. In the Malaysian context, it is submitted the allowing a permitting migrant workers **to** join or form trade unions give rise to 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 i.e. long hours, no overtime pay…etc. this, give rise to ill-feelings between national workers (who are more expensive) and migrant workers which can lead to various types of social repercussions. 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. This is turn, 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. It is also worth bearing in mind at this point that one of the reasons behind the creation of the ILO was the belief that improvement in working conditions would lead to social rest and peace.

The cost of labour plays a part in determining the cost of goods and services. It is arguable that permitting migrant workers to join trade unions, would invariably lead to an increase in wages, which would lead to an increase in the cost of goods and services, which in turn would cause Malaysia to lose the cost advantage it has over many countries. Nevertheless, it is submitted that ensuring good and fair working conditions play the role in increasing the productivity and quality of workers. The advantages of allowing migrant to form or join trade unions far outweigh the disadvantage.

[18] See Wu Min Aun, *The Industrial Relations Law of Malaysia*, 1995, 2nd Ed, Kuala Lumpur Longman.

[19] Ibid; See also V. Anantaraman, *Malaysian Industrial Relations, Law and Practice*, 1997, Serdang: UPM Press.

In Malaysia, the provisions regarding social security are contained in the Employees Social Security Act of 1969 and the Workmen's Compensation Act of 1952[20] which the later is applicable to foreign workers whilst national workers are covered by the Employees Social Security Act. 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 an on job injury, disablement weather partial or total, hospitalization and medical expenses.

Article 6(1)(b) of Convention 97 states that 'each member of which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex to immigrants lawfully within its territory, treatment no less favourable that then which is applies to its own nationals in respect of social security (that is to say, legal provisions in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme). Here, the CEACR[21] has observed that Malaysia has contravened Article (1) (b) of the Convention that in the event of an occupational accident, the foreign workers receives compensation in the form of a lump sum payment, whereas national workers have the right to periodic payments of these benefits. As the Convention requires the migrant worker to receive treatment 'no less favourable' than that received by a national worker, the Committee invited the Government of Malaysia to submit a report concerning the allegation of discrimination in the payment of employment injury and invalidity for foreign workers. The Government of Malaysia has stated that the value of periodic benefits and that of a lump sum benefit were equivalent; however, it has failed to explain how this conclusion was derived. It was also pointed out that States sending migrant workers to Malaysia endorse the removal of foreign workers from the Employee Social Security Scheme. To this, the Committee stated that the principles of equality of treatment between nationals and non national in respect of workers compensation pursuant to Article 6 (1) (b) of Convention 97 cannot be bargained away, even with the consent of the worker.

Further, it is also noted under the Social Security Scheme for national workers, both the employer and employee make contributions towards the scheme whereas under the Workmen's Compensation Act, only employers are liable to make payment. As stated earlier, payment under the Workman's Compensation Act is made vide an insurance scheme where the amount paid is standard rate, irrespective of wages. This compares badly with the social security scheme wherein payments towards that scheme are based on a percentage of wages.

A look at the Employees Provident Fund Act of 1951, which provide 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

[20] See Kamal Halili Hassan, *Undang-undang Keselamatan Industri di Malaysia* (Law of Industrial Safety in Malaysia), 2003, Kuala Lumpur: Dewan Bahasa dan Pustaka.

[21] CEACR: Individual Observation concerning Convention No. 97, Migration for Employment (Revised), 1949 Malaysia (Sabah) (ratification:1964) Published:1997

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.

Thus, the brief review of the relevant Malaysian labour laws concerning employment, termination and social security demonstrates that Malaysian labour laws are not in total alignment with the labour standards under Convention 97. Malaysia, a signatory to Convention 97 has violated Article 6 of the convention, in that migrant workers are treated less favourably than national workers in the following areas:

i. Part XIIB of the Employment Act which prohibits the retrenchment or termination of services of national workers prior to that of a migrant worker;

ii. Section 28 of the Trade unions Act which disallow a migrant worker from being a number of the executive;

iii. Lump sum payment to migrant workers as compensation for injury as opposed to periodic payments which national workers are entitled to; and

iv. Payment of a flat rate of ringgit Malaysia five in respect of employer contribution to the employee's provident fund, irrespective of wages.

A comparison of the international standards laid down in other Conventions relating to migrant workers is also necessary to determine the extent to which Malaysian labour laws comply with international labour standards. This is examined in the broad sense and in accordance with the ILO Declaration on the Fundamental Principles and Rights at work which was adopted by the ILO at it eighty sixth session in Geneva in June 1998 where it was agreed that all countries are to respect the principles contained in the conventions relating to migrant workers, irrespective of whether the stated has ratified the convention in question.

The Migrant Workers (Supplementary Provision) of 1975 (Convention 143) which also seeks to promote equality of opportunity and treatment of migrant workers is to a greater part, devoted to the suppression of clandestine migration where appropriate measure should be taken by number States to combat clandestine migration by detecting illegal employment of migrant workers and the imposition of civil and penal sanctions. Measures should also be taken against those assist in clandestine movements of migrant workers. The Convention also provides hat loss of employment should not change he status of a legal migrant worker to that of an illegal worker. Article 10 the Convention ensures equality of opportunity and treatment I respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedom of migrant workers. Finally, under this Convention, non discrimination or equality of opportunity and treatment between migrant workers is extended to 'access of employment'. It is also interesting to note that this Convention

encourages member States to preserve that national and ethnic identity and cultural ties of migrant workers and the country of their origin and this includes the possibility of the children of migrant workers be given some knowledge of their mother tongue. A brief comparison should also be made with the provisions or standards of treatment contained in the United Nations Conventions on the Protection of the Rights of All Migrant Workers and Members of Their Families which in essence seeks to provide protection to the worker in all aspects of the migration process, from the time of preparation for migration to the return to the state of origin. The provisions of this Convention are also designed to protect migrant workers who are irregular (illegal). Further, the Convention also enables a migrant worker to seek judicial remedy for any violation of rights. However, under Malaysian laws, a distinction is made between legal and illegal migrant workers in that the former is accorded protection whilst the latter is not. Thus, an illegal migrant worker is considered as an illegal person under the immigration law and is not able to have any legal recourse, with the exception of criminal law. It is submitted that the contract of employment entered into by the employer and an illegal migrant workers is void, although this issue is yet to be tested in the court of law.

A review of the designated 'core labour standards' at this point is also relevant to determine or examine the rights available to a worker in the Malaysian labour climate. The International Confederation of Free Trade Union (ICFTU)[22] in its report for the WTO General Council Review of the Trade Policies of Malaysia states that although Malaysia has ratified Convention 98 i.e. The Right to Organise and Collective Bargaining Convention 1949, it has been subject to criticism by the ILO for its non respect of Convention 98. Convention 98 essentially addresses the relationship between labour and management in satisfying workers rights[23]. In safeguards the rights of workers to organize themselves into trade unions, the international labour standard seeks to protect the workers against unfair labour practices and victimization for trade union activity. Convention 98 also seeks to ensure the independence of trade unions from employer influence, control and dominance.

Under the Malaysian labour laws, both the Employment Act and 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 labour 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 labour 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[24]. 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[25].

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[22] Internationally recognized core labour standards in Malaysia, report for the WTO General Council Review of the Trade Policies of Malaysia, Geneva 4-5 December 1997

[23] Dr. V. Anantaraman, Malaysian Industrial Relations System: Its Congruence with the International Labour Code; (url) http://www.mtuc.org.my/anantharaman %20paper.htm (15 November 2002)

[24] Section 5(2) of the Industrial Relation Act 1967

[25] Section 59 of the Industrial Relation Act 1967

As far as the employment of a migrant worker is concerned, the Employment (Restriction) Act 1968[26] provides that a non-citizen cannot be employed or accepted for employment without a valid employment permit. The permit is valid only in respect of the particular employment and employer specified and is non transferable and has to be kept by the person upon whom the permit is issued.

The use of migrant workers is prevalent in certain sectors of the economy, such as construction, plantation, textiles and the footwear sectors. Some migrant workers have reported having to work as much as fifty four hours in a row, to fulfill an order while only receiving normal pay rates for their overtime work[27]. Many employers are unable to recruit local workers due to the low wages, have turned to foreigners who are willing to accept meager wages. Unskilled foreign workers are more likely to be exploited and oppressed because they are willing to take up low paying jobs which are rejected by the locals.[28]

In response to the poor situation of migrant workers, the Malaysian government has initiated to regularize the status of the migrant worker and has expended investigation of abuses of migrant worker rights. The ICFTU in its report states that in 1996, at least two hundred thousand illegal immigrants were regularized and that the Malaysian Government has issued new guidelines for action against labour contractors who violate the law, although in practice, punishment remain rare. There was also recommendation in the guidelines on foreign workers that the foreign labour should not be paid less than Ringgit Malaysia Three Hundred and Fifty per month. The wages should not be less then what has been paid to the local workers and if the employers are having difficulty engaging local workers as result of the low wages offered, then why do not deserve to hire foreign workers.[29]

**Access to Justice**

The right to access to legal redress by foreign workers is like an unchartered territory. There has been no literature that extensively writes on the right of foreign workers to access to justice or particularly to institute their legal action in the courts or tribunals in Malaysia. No legislation prohibits them to take legal action against the employers. However, it can be said that the number of legal suits instituted against the employers is almost negligible. There are several reasons to that: (i) most foreign workers do not have knowledge in law, therefore most of them are ignorant of the law and consequently they do not know their rights to institute legal actions against their former employers, (ii) they are non-union members and this deprive them of legal advice and the right to representation: (iii) legal process in dispute resolution is very slow, court process take years to be resolved, thus foreign workers would very likely not to proceed their case in court. Foreign workers can lodge complaints at the Labour Office. Article 60 (l) of the Employment Act of 1955 provides that a migrant worker can file a complaint with the Director-General of Labour 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.

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[26] Section 5 of the Employment (Restriction) Act 1968

[27] Ibid 14

[28] Ibid 14

[29] Ibid 14

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, migrants can complaints file their case under section 20 of the Industrial Relations Act 1967. 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, etc[30]. 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 ending of the work permit, which is the basis in law for the migrant right to stay in Malaysia. Thus, filing a complaint prompts action by the employer that makes the migrant complainant subject to immediate deportation[31]. This is the risk that foreign workers will normally have to face and that deter them from lodging a formal complaint against their employers.

Legally, migrant workers may institute their legal suits in the Industrial Court, Labour Court or even the civil courts. As long as they are legal 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 Labour Court whilst action based on a breach of contract can be filed at the civil courts. As indicated above, 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. However as indicated above, this point of law has never been argued in the courts and therefore there is no legal pronouncement on it yet.

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 & Ano[32]r*, the plaintiff, an Indonesian national, entered into the employment with one Mr Vijaya (second defendant) as a domestic helper. The first defendant (Mdm Shalini) was the wife of the second defendant. It was the plaintiff's allegation 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 she ran away, she had lodged a police report and was brought to the Sarawak General Hospital for medical examination. She claimed that Mr Vijaya as her legal employer owed a duty of care towards her and she

[30] Philip S. Robertson Jr. "Migrant Workers in Malaysia – Issues, Concerns and Points for Action" *Commissioned by the Fair Labor Association*, Oct 2008 (on-line, Mar 9, 2010).

[31] Ibid

[32] [2006] 5 CLJ 330.

alleged that he had failed to discharge that duty by not exercising due and reasonable care for her well being. The defendant's joint defence denied the abuses as alleged and averred that she was treated like their own daughter. Mr Vijaya further denied any knowledge of the abuses she allegedly suffered at the hands of Mdm Shalini and contended that the plaintiff had never complained to him about any assault or beatings by Mdm Shalini. (It was not disputed that Mdm Shalini had been charged with two counts of offences under ss. 326 and 323 of the Penal Code for the injuries sustained by the plaintiff. She had been convicted after a full trial and sentenced). 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. **(2)**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 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".

## Conclusion

From the foregoing analysis, Malaysia laws generally do not discriminate foreign workers. Migrant workers are protected under almost all important legislation such the Employment Act and Industrial Relations Act. In theory, it appears that as far as the employment rights of a migrant worker is concerned, they are entitled to the same employment rights and benefits enjoyed by other local workers. The Employment Act provides for the payment of wages, termination of contract of services, hours of work, holidays and other conditions of service. In practice however but in certain situation, the working conditions of some migrant workers is treated quite badly compared to those of national workers[33]. In addition, illegal workers generally do not have recourse to the legal protections available to Malaysian workers.

[33] Ibid 14