

MIGRANT WORKER'S RIGHTS IN MALAYSIA: THE CHALLENGES AND LIMITATIONS

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ABSTRACT

The legal framework in Malaysia mandates that migrant workers have the same fundamental rights as citizens. Still, migrant workers in Malaysia face challenges in accessing their legal rights, such as low wages, poor working conditions, limited access to healthcare, and restricted freedom of movement. The COVID-19 pandemic worsened their situation. Policy changes are needed to address these challenges and underlying structural factors leading to the exploitation of migrant workers. NGOs, employers, and the Government play a crucial role in enforcing existing labour standards and protection for migrant workers and improving them. However, there are gaps in implementation and legal aid schemes which tend to exclude migrant workers. Educating the public about their rights is necessary. Migrant workers, especially women domestic workers, face additional challenges like gender-based violence and exploitation. Malaysia must implement vigorous measures to ensure equal protection and support for all migrant workers and address systemic issues. Protecting migrant workers' rights is essential for promoting social justice and economic development in Malaysia.

Keywords: Migrant workers, Fundamental rights, policy changes, labour standards, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2022, Exploitation, NGOs, Government, Gender-based violence, Social justice.

PREFACE

This article is inspired by the Advoc8 Legal Affairs Fellowship, which the authors had the privilege of completing as fellows in 2023. The Fellowship was organised by Project Liber8, a non-profit organisation, as an initiative to shift attitudes towards women migrant workers and a behavioural shift among future law practitioners in Malaysia through building capacity workshops, field trips and mentorship sessions. Thanks to the Fellowship, the authors, in collaboration with Global Shepherds, visited a shelter for migrant workers. Witnessing the challenges faced by migrant workers first-hand and hearing their stories made the authors realise the pressing need for collaborative efforts involving NGOs, civil society organisations and relevant stakeholders to address migrant workers' issues and improve the overall well-being of migrant workers in Malaysia.

INTRODUCTION

A migrant worker is an individual who moves from their country of origin to another country in search of work or better economic opportunities. These individuals are usually driven by their home country's lack of opportunities, and economic conditions, among other factors.

In Malaysia, there are approximately 2 million registered migrant workers from various countries, mainly Indonesia, Nepal, Bangladesh and Myanmar. They make up a significant portion of the country's workforce, particularly in low-wage and low-skilled jobs that locals may not want to do, especially domestic work, construction, manufacturing and services.

However, many migrant workers in Malaysia face significant challenges and exploitation, including low wages, long working hours, poor working conditions, limited access to healthcare, and restrictions on their freedom of movement. Some also face physical and psychological abuse from employers or recruitment agencies. Some even face legal and administrative barriers, such as restrictions on mobility, access to justice and limited social protection.

The International Labour Organization^[1] defines a migrant worker as any person who migrates from their country of origin to another country or region intending to work there. This definition includes individuals who move voluntarily and those who are compelled to migrate due to economic or social pressures.

There are many misconceptions about migrant workers which leads to many treating migrant workers as if they are not welcomed. For example, one of the biggest misconceptions is that migrant workers are uneducated and thus incompetent for high-skilled occupations. However, Juan Somavía, the Director-General of the International Labour Organization (ILO),^[2] in a statement, emphasised that: ‘Migrants are an asset to every country where they bring their labour. Let us give them the dignity they deserve as human beings and the respect they deserve as workers.’ This statement highlights the significance of migrant workers and fortifies that educating the youth about the rights of and the challenges faced by migrant workers is essential to creating awareness, inculcating social responsibility among future leaders and addressing the misconceptions or mislabelling of migrant workers as a problem for the countries they migrate to.

This article intends to raise awareness about the fundamental rights to which every individual is entitled, regardless of their status as migrant workers. It also aims at drawing the attention of law practitioners and students alike towards the pressing issue of the multitude of daily challenges faced by migrant workers. By highlighting these issues, we hope to promote a better understanding of the rights and needs of migrant workers and encourage action towards protecting them from exploitation and abuse.

Towards this purpose, this article will provide comprehensive coverage of the ILO’s international labour standards and protection^[3] concerning migrant workers in Malaysia. In addition, it will give an overview of the legal framework in Malaysia that governs the rights of migrant workers, including an analysis of the various barriers they face in accessing justice.

The article will also explore the intersectional issues that impact the rights of migrant workers, with a particular focus on the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (‘ATIPSOM Act’).^[4] It is hoped that with a thorough examination of the challenges faced by migrant workers in Malaysia, readers will reflect on these issues, empathise with migrant workers and inspire positive action to protect migrant workers’ rights and needs.

LABOUR STANDARDS AND PROTECTION

Migrant workers are an integral part of Malaysia’s economy, with approximately 2.1 million registered migrant workers in June 2022, up from 1.9 million in 2021,^[5] from various countries, mainly Indonesia, Nepal, Bangladesh, and Myanmar.

Due to the increasing numbers of migrant workers, Malaysia and the international community have established labour standards and protection for migrant workers. In Malaysia, the primary legislation governing migrant workers’ rights is the Employment Act 1955 (‘the Act’), which sets out the minimum standards for employment contracts, wages, working hours, and rest days. The Act applies to all employees,^[6] including migrant workers, regardless of nationality or immigration status. In addition to the Act, Malaysia has also ratified several international instruments that protect the rights of migrant workers, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which covers the fundamental rights of migrant workers to decent work, fair wages and adequate living conditions.

Despite the legal framework in place, many migrant workers in Malaysia continue to face significant challenges in accessing their rights. Despite the challenges stated above, some migrant workers also face legal and administrative barriers, such as restrictions on mobility access to justice and limited social protection.

The COVID-19 pandemic further exacerbated these issues, with many migrant workers disproportionately affected by job loss, wage cuts and lack of access to healthcare. Additionally, migrant workers often lack access to legal representation and face significant hurdles in seeking justice when their rights are violated.

To ensure that the labour standards and protection in place are met in practice, various stakeholders such as the Government of Malaysia, employers, NGOs and many other stakeholders play a crucial role in enforcing these standards and protections.

As the primary regulator of labour conditions, the Malaysian Government has a duty to ensure that all employers comply with labour laws and regulations. One of the significant initiatives taken by the Government was the establishment of the National Act Plan on Forced Labour (2021–2025).^[7] This plan aims to safeguard the welfare and rights of migrant workers. However, there are still gaps in its implementation, and some employers and recruitment agencies continue to exploit migrant workers. In worst-case scenarios, many who migrated to work in a different country suddenly find themselves victims of human trafficking. In 2021, Malaysia was downgraded to Tier 3 (the worst ranking) in the United States Department’s annual trafficking in-person report and Malaysia has remained at Tier 3 since with the United States authorities.^[8] The TIP Report provides insight into countries’ governmental efforts against human trafficking. The United States Department ranks countries in Tier 3 for failure to comply with the minimum standards for eliminating trafficking or making significant efforts to comply with the standards.^[9] Given Malaysia’s downgrade and its remaining in the lowest tier, it is clear that more needs to be done.

Apart from the Government, NGOs and civil society organisations also play an essential role in advocating the migrant workers’ rights and providing support services such as giving migrant workers access to legal aid, healthcare and education. These organisations can help migrant

workers in so many ways: (1) help migrant workers understand their legal rights and provide legal representation; (2) advocate for policy changes that improve the lives of migrant workers by visiting shelters to assess the conditions and address immediate needs; and (3) conduct surveys and research to gather data and identify specific challenges faced by migrant workers.

This discussion brings us to our visit to a shelter for women migrant workers in collaboration with Project Liber8 and Global Shepherds. Witnessing the challenges faced by migrant workers first-hand and hearing their stories has highlighted the pressing need for collaborative efforts involving NGOs, civil society organisations and relevant stakeholders to address migrant workers' issues and improve the overall well-being of migrant workers in Malaysia.

Not forgetting, the role of employers is also critical from the earliest stage of employment: before they hire a worker. Employers should ensure that their hiring practices do not lead to the exploitation of migrant workers.

Employers are also responsible for upholding labour standards and protection for all workers, especially migrant workers. They must comply with minimum wage requirements, provide safe and healthy working conditions and ensure that workers are not subject to physical or psychological abuse. Employers should also establish mechanisms to address worker grievances, such as helplines and complaint boxes, and actively investigate and rectify any issues raised. Furthermore, ensuring access to legal representation is also vital, which includes assisting in the event of language barriers, court procedures and any other unfamiliar matters within the legal process.

Although there may be standards and protections in place with various stakeholders responsible for upholding these standards and protections, there is a need for monitoring and enforcement of existing laws and regulations, as well as the need for new policies to address the unique challenges faced by migrant workers. It is also crucial to address the

underlying structural factors that lead to migrant workers' exploitation, such as poverty, inequality, and lack of job opportunities in their home countries.

An article titled 'Rights of Migrant Worker in Asia: Any Light at the End of the Tunnel?' by Piyasiri Wickramasekara^[10] notes that while there are international human rights standards and conventions in place to protect the rights of migrant workers, many countries in Asia, including Malaysia, have not ratified these agreements and therefore do not offer full legal protection to migrant workers. The article discusses the ILO's Fundamental Principles and Rights at Work, which include the right to freedom of association, the right to collective bargaining and the elimination of forced labour and child labour, as key standards that should apply to migrant workers in Malaysia and throughout the world. The article further notes that while Malaysia has specific laws and policies in place to protect the rights of migrant workers, such as the Employment Act 1955, the Immigration Act 1959/63 and the Malaysia Plan of Action on the Elimination of Human Trafficking (2016–2020), these laws and policies are often not enforced effectively and migrant workers continue to face significant challenges in accessing legal protections and remedies for rights violations. Therefore, while there have been some positive developments in recent years, such as the ratification of the ILO's Domestic Workers Convention^[11] and the introduction of the ATIPSOM Act, there is still much work to be done to ensure that migrant workers in Malaysia and throughout Asia are able to enjoy their full rights and protections under the law.

In summary, protecting migrant workers' rights is crucial for promoting social justice and economic development in Malaysia. While there are laws and regulations in place to safeguard the rights of migrant workers, there are still significant gaps in monitoring, implementation and enforcement; consequently, many migrant workers continue to face exploitation and abuse. To address these challenges, various stakeholders such as the Government, non-governmental organisations and employers must work

together to spread awareness, enforce the standards and strengthen the protection of migrant workers, including the need for investment in education, healthcare and social protection for all workers, including migrant workers, to ensure their dignity and well-being.

LEGAL FRAMEWORK AND LAW ENFORCEMENT

Understanding the legal framework is crucial in navigating legal complexities, minimising risks and achieving a desirable outcome. The process of hiring migrant workers is a complicated system that requires the involvement of many stakeholders. Thus, the legal framework is useful in determining the rights, responsibilities and obligations of employers, individuals and agencies involved. Additionally, it is necessary to gain insight into the legal components that protect migrant workers and the relevant agencies that should exercise their authority on such issues. Although the law and procedures may look sound on paper, some migrant workers continue to face hardship caused by external factors like health issues and may suffer within the legal process due to unexpected issues like the translator being discharged an hour before the court hearing. Therefore, the legal framework should be complied with to alleviate any possible risk to the migrant workers and assist them in getting recourse for the harm they have suffered. In short, enforcement agencies should work within the legal framework to ensure migrant workers' rights are protected and the public should know what laws exist to protect migrant workers' rights.

Law enforcement agencies like the Royal Malaysian Police Force, immigration, and the Ministry of Home Affairs ('MOHA') rely on the legislation enacted by the Parliament to monitor Malaysia's security and ensure policies are followed accordingly. Thus, these bodies work hand-in-hand significantly. For instance, MOHA is the main authority overseeing the implementation of policies related to migrant workers in Malaysia. MOHA is responsible for developing and enforcing policies that promote public order, security, harmony, and internal security. As a result,

migrant workers are viewed primarily from a security perspective rather than a labour perspective; thus, our discussion will focus on legislation that aims to protect national security and is applicable to national security.

Upholding the legal framework ensures that migrant workers can work safely and effectively, ultimately benefiting the country as a whole.

IMMIGRATION DEPARTMENT

More often than not, migrant workers in Malaysia hold a Visit Pass (Temporary Employment) (VP(TE)) rather than an Employment Pass, which is catered for expatriates. However, the VP(TE) is subject to fewer regulations than the Employment Pass, limiting the conditions for migrant workers. Migrant workers holding a VP(TE) may only stay for a maximum of 12 months.^[12] Bringing dependents leaving or re-entering the country is not allowed. Additionally, a change of employment is only permitted if the employers are unable to continue due to certain reasons, such as bankruptcy, natural disasters, economic downturn, restructuring, change in business status, or the passing of the original employer.^[13] Overall, the complex and restrictive regulations surrounding the VP(TE) present significant challenges for migrant workers in Malaysia. The Immigration Department of Malaysia exercises its duties specified in the Immigration Act 1959/63 and the Passports Act 1966. In accordance with the Immigration Act 1959/63, the Immigration Department has jurisdiction over all aspects of immigration in Malaysia. Not only that, the power granted under the Immigration Act 1959/63 is also extended to the Royal Malaysian Police ('PDRM'); for instance, PDRM has the power to arrest individuals suspected of being undocumented migrants without a warrant. Collaboration between these two agencies is necessary to ensure the smooth migration of migrant workers in Malaysia in accordance with the laws of Malaysia.

The Immigration Act 1959/63

The Immigration Act 1959/63 is the primary law that regulates immigration in Malaysia, and it is supplemented by the Immigration Regulations 1963. The Immigration Act primarily regulates the country's borders and authorises the Immigration Department of Malaysia to enforce its regulations. The Immigration Act mandates that individuals enter and exit Malaysia through specific checkpoints and requires non-citizens to possess an entry permit or pass.^[14] The Immigration Act also provides penalties for those who violate its provisions and outlines procedures for detention and deportation.^[15] Under the Immigration Act, the Minister has the power to designate authorised entry points, such as landing places, airports, or entry points for individuals entering Malaysia and all individuals must only enter Malaysia through these authorised entry points.^[16]

The Passports Act 1966

The Passports Act 1966 mandates any individual entering Malaysia from outside the country must present a valid passport to an immigration officer.^[17] Failure to comply is considered an offence resulting in a fine or imprisonment.^[18] Hence all migrant workers are expected to have their passports with them at all times. The rationale of the Passports Act 1966 is to ensure the safety and security of Malaysian citizens by regulating the issuance of passports and travel documents. Not only that, the Regulations can deter employers or agents from withholding migrant workers' passports, resulting in migrant workers travelling without passports, in violation of the Passports Act and being arrested if stopped for questioning by an enforcement officer for failing to have the passport with them. Under the Passports Act 1966, an immigration officer may arrest a person based on a reasonable belief that the person is liable for removal from Malaysia.^[19] As a result, the person can be held up to 30 days in prison, a police station or an immigration depot while awaiting the decision on the removal order.^[20]

MINISTRY OF HUMAN RESOURCES (‘MOHR’)

MOHR is proactive in developing and protecting the Malaysian workforce and promoting the country’s socio-economic growth via the introduction of policies to stakeholders in the Government and the corporate sector. MOHR also formulates policies to enhance the skills and capabilities of workers, including migrant workers, in the hope of increasing employment and employability in the country. Not only that, the MOHR oversees the one-channel system for hiring international workers because the Ministry has the capability to complete all necessary approvals on its own rather than involving multiple agencies, which may further lead to excessive time-consuming bureaucracy and added expenses.^[21]

The Employment Act 1955

The Employment Act 1955 is Malaysia’s underpinning piece of legislation that overlooks employment’s basic terms and conditions. The Employment Act 1955 establishes the legal framework that covers a broad range of issues related to employment, namely, wages, working hours, leave entitlements, termination of employment and more. The key objective of the Employment Act 1955 is to protect and promote the rights of employees (as defined under the Act), ensuring they are treated fairly and equitably by their employers.

A domestic worker, which a majority of migrant workers are, is defined under the Act as “a person employed exclusively in work or in connection with work of a private dwelling house and not of any trade, business or profession carried on by the employer in such dwelling house ...”.^[22]

The Employment (Restriction) Act 1968

The Employment (Restriction) Act 1968 regulates further terms and conditions of employment for non-Malaysian citizens. The Act include employment permits, registering with relevant government agencies and restrictions on job types or industries for non-Malaysian citizens.

MAJLIS ANTI-PEMERDAGANGAN ORANG DAN ANTI-PENYELUDUPAN MIGRAN ('MAPO')

MAPO is a special body established by the Home Ministry in 2007 to oversee measures on combating human trafficking and smuggling of migrants in Malaysia. MAPO is also responsible for developing policies and programs to prevent and combat these crimes. In 2021, MAPO also launched the National Action Plan on Anti-Trafficking in Persons (NAPTIP), a document which outlines the strategies, planned measures and actions to combat human trafficking issues in Malaysia for the next 5 years. NAPTIP focuses on four key pillars: prevention, prosecution and enforcement, protection and partnership.^[23] A partnership is one of the most important pillars, as tackling a global issue alone is almost impossible. Under the pillar of prosecution and prevention, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 acts as the main legislation in trafficking issues. It functions inclusively as its membership includes various Ministries, enforcement agencies, and NGOs. The Royal Malaysian Police, the Immigration Department of Malaysia, the Malaysian Maritime Enforcement Agency (MMEA), the Royal Malaysian Customs Department, and the Department of Labour (including the Department of Labour Peninsular Malaysia, Department of Labour Sabah and Department of Labour Sarawak) are the five authorised enforcement agencies empowered to implement the ATIPSOM Act. The inclusion of governmental organisations in MAPO promotes collaboration and better policy formulation.

The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007

The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act ('ATIPSOM Act') was first enacted in 2007 to address human trafficking and migrant smuggling, and it was amended in 2010 and 2015. Recently, on 22 February 2022, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2022 introduced several new amendments

to the ATIPSOM Act, improving 19 provisions. One of the significant and applaudable amendments is the term “coercion” being removed from the definition of the offence and is no longer included in the ATIPSOM Act. The term “coercion” was removed because it set a higher threshold to satisfy in order to convict an accused of the offence. Before it was removed, coercion required the prosecution to prove the use of threat of harm or physical restraint against an individual, any systematic, planned or patterned behaviour that could lead a person to believe that non-compliance would result in harm or physical restraint, or the abuse or threatened abuse of legal procedures. Not only that, the restrictive definition only referred to physical harm or restraint, disregarding harm in the form of mental and psychological controls. This made it difficult to obtain convictions, as physical harm or restraint needed to be proven beyond reasonable doubt, which was not always possible. With the removal of the word coercion from the definition, the courts now have the flexibility to interpret it more broadly to include non-physical forms of coercion like psychological oppression, abuse of power, exploitation of a victim’s vulnerability, fraud or deception, without requiring evidence of physical compulsion.

The amendments to the ATIPSOM Act 2007 demonstrate the Malaysian Government’s continued initiatives to improve the regulatory framework to better address human trafficking and migrant smuggling, intending to increase the effectiveness in combating these issues. One such step was criminalising both traffickings in persons and smuggling of migrants. The revised ATIPSOM Act now defines “trafficking in persons” as any actions involving recruiting, transferring, providing, acquiring, harbouring, maintaining, or receiving a person for exploitation purposes, using any of the following methods: (a) threat or use of force or coercion, (b) abduction, (c) fraud, (d) deception, (e) abuse of power, (f) taking advantage of a person’s vulnerability; or (g) offering or receiving payments or benefits to gain control over the trafficked person’s consent.^[24]

The recent amendments to the ATIPSOM Act have also introduced stricter penalties, including longer jail sentences and the possibility of whipping, to act as a deterrent and to reflect the severity of the crimes more accurately. For instance, the Act now prescribes imprisonment for life or a minimum term of 5 years and whipping for anyone found guilty of aggravated trafficking in persons.^[25] Similarly, the ATIPSOM Act stipulates that those found guilty of trafficking children or vulnerable individuals due to a physical or mental disability may face life imprisonment or a minimum of 5 years and whipping.^[26] Other notable amendments are as such:

- Section 15A now provides an increased maximum sentence of 15 years imprisonment for profiting from exploiting a trafficked person, up from 7 years under the previous legislation.
- Section 19, the maximum sentence now is 15 years imprisonment for recruiting individuals to participate in trafficking, as opposed to the previous maximum of 10 years.
- Section 26A, the maximum sentence of 20 years imprisonment for smuggling of migrants.
- Section 26B, imprisonment for life or a minimum of 5 years, along with whipping for aggravated cases of smuggling.
- Section 26C increases the maximum sentence for the offence of smuggling migrants in transit from 7 years to 15 years imprisonment.

The amendments to the ATIPSOM Act recognise the vulnerability of persons with disabilities to exploitation, where the ATIPSOM Act provides protection for physically or mentally disabled individuals. Anyone who traffics a child or a person who is unable to take care of or protect themselves because of a physical or mental disability or condition will be

guilty of an offence and may face life imprisonment or a minimum of 5 years in prison and whipping.^[27] The prosecution of such an offence will not require proof of the means used against the trafficked person.

The expanded definition of human trafficking and deletion of the word coercion in the definition allows for the prosecution of employers and recruitment agents who exploit migrant workers through debt-based coercion. The increased jail sentences and introduction of whipping for trafficking-in-person offences aim to deter further and punish perpetrators, in line with international efforts against human trafficking.

MIGRANT WORKERS' ACCESS TO JUSTICE IN MALAYSIA

Although a regulatory framework exists to protect migrant workers, unfortunately, migrant workers are often vulnerable to exploitation and mistreatment due to societal misconceptions. One such misconception is the belief that migrant workers are uneducated or will remain silent if they are abused in order to stay in Malaysia. Hence this illustrates that even though laws exist to protect migrant workers, many migrant workers are afraid to seek help from authorities due to fear of retaliation or a belief of “one law for the rich and another for the poor”. There are many more examples which we will attempt to highlight below.

ANALYSIS OF THE BARRIERS THAT MIGRANT WORKERS FACE IN ACCESSING JUSTICE IN MALAYSIA

According to the Federal Constitution of Malaysia, it is crucial for everyone to be treated equally in law.^[28] This is a fundamental human right that every person is entitled to. However, in reality, migrant workers encounter difficulties in accessing justice in Malaysia. To begin, the lack of recognition of their legal rights and documents is one of the biggest obstacles migrant workers encounter in Malaysia.^[29] There is a widespread misconception that the vast majority of migrant workers enter Malaysia illegally or through smuggling. As a result, there is a lack of recognition of their rights since their legal status in Malaysia is questioned due to the

belief that they have entered illegally or through smuggling. Thus, they find it difficult to access justice. On top of that, a migrant worker, who is not legally permitted to work in Malaysia, may be unwilling to take legal action against their employer. Due to their lack of documentation, they fear being deported or denied access to justice.

Furthermore, due to a lack of information and language barriers, migrant workers are often unaware of their rights, making it challenging to realise when their rights are being violated.^[30] For example, some migrant workers believe that because they are undocumented migrants, the Malaysian legal system does not safeguard their rights, based on the saying that anyone who comes to court must come with clean hands, so knowing they may violate certain laws, they do not expect the law to help them. In actual fact, migrant workers' rights are protected under Malaysian law, their basic rights are guaranteed and they have a right to access justice whether they have entered Malaysia legally or illegally.

Language barriers also make it difficult for migrant workers to access justice. Migrant workers in Malaysia come from different countries, including Indonesia, Bangladesh, Nepal, Vietnam, India, Cambodia, and Laos, among others. According to the United Nations classification, Bangladesh, Nepal, and Cambodia are the least developed countries^[31] and the other countries are also more under-developed than developing countries. Hence they may not be able to speak and understand English and it is highly unlikely that they speak and understand Malay either. They will be placed in a passive position by the employer since they do not grasp the language spoken in Malaysia. Without being able to communicate, migrant workers are unable to voice out, speak up or seek assistance or convey their needs, which may lead to misunderstandings and further issues. While it is possible to locate a translator to help with communication, finding one may be difficult. Even then, translation takes time, issues cannot be solved instantly and issues may escalate by the time help arrives. For instance, a migrant worker who does not speak Malay or English and is subjected to harsh treatment by his or her employer attempts to contact the police for

assistance, but because the migrant worker is unable to communicate and the police may not understand, the police are unable to assist the migrant worker. This example was shared by a migrant worker which we met at the shelter and her recollection of trying to escape from an abusive employer was heartbreaking.

In addition, there are also barriers based on the fear of termination and the associated loss of status, which can result in arrest and removal for those documented or legal migrant workers, as they will immediately lose their legal standing in Malaysia if their employer cancels their work permit. An employer has the authority to remove or cancel the migrant worker's visa or work permit, which creates a barrier for domestic workers in particular. Migrant workers may decide to keep quiet, refuse to exercise their rights and refrain from suing their employers out of fear of being fired, losing their income and being sent back to their home country with no money and back to the conditions they tried to escape in the first place.

Barriers are also created through duress by the employers and/or agents that threaten to harm the family members of the migrant workers still living in their home country. In some cases, the employer may use duress and intimidation to force the migrant worker to work obediently or to stop them from going against the employer, claiming that they know gangsters or influential people who may cause harm to their family in the home country. From the perspective of migrant workers, they travelled to Malaysia to find better opportunities, to live, make money and support their families back home and the thought of a threat to any of their families is unbearable. Hence, threatened migrant workers, understandably, are easily frightened and panicked thanks to these abusive employers, so much so that migrant workers do not dare to seek help even if they are suffering in the workplace. The duress and terror prevent them from seeking justice.

Next, passport retention is another common impediment for migrant workers. In Malaysia, employers and agencies commonly practise this.^[32] As a result, claims cannot be made and migrant workers are at risk of being

imprisoned and arrested for failing to have their passports on them at all times as required by law. It is necessary for migrant workers to provide their passports and work permits to submit a claim or police report; however, due to Malaysian employers' common practice of passport retention, migrant workers without their passports are prevented from seeking assistance from the police. As a result, it is clear that when employers or agencies retain a migrant worker's passport, they prevent them from filing a police report to defend themselves or even move about freely for fear that they could be stopped by the police and asked to produce their identification documents at any time while they are out.

DISCUSSION OF LEGAL AID AND OTHER FORMS OF SUPPORT AVAILABLE TO MIGRANT WORKERS AND THE EXAMINATION OF THE EFFECTIVENESS OF THESE SUPPORT SYSTEMS IN PROTECTING MIGRANT WORKERS' RIGHTS

There are a few resources accessible to migrant workers in accessing justice. Yet, these contributions are primarily made by non-profit organisations (NGOs) and more efforts are necessary. The assistance rendered by these organisations may vary, but the majority of it includes legal advice, representation, healthcare counselling and other forms of support for migrant workers facing a range of legal and social issues.

On top of that, there are efforts being made by the Government to support migrant workers. Since its establishment in 2007, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Office (MAPO) under the Ministry of Home Affairs has worked to defend the rights of migrant workers, particularly concerning the human trafficking and smuggling issue. To keep migrants safe and safeguard them from smuggling and human trafficking, MAPO works in collaboration with NGOs and other government departments.

The existing Malaysian legal aid scheme does not, however, particularly provide legal aid to migrant workers. Legal aid is the assistance given to those who cannot afford to obtain legal representation. It is a crucial

component of the right to justice and facilitates access to justice for those in need from a low income. The majority of migrant workers in Malaysia experience unfair treatment and discrimination, which is exacerbated by the lack of adequate measures to protect their right to justice. Migrant workers are one of the most vulnerable groups of people in Malaysia. There are legal aid schemes in Malaysia, though they tend to be limited to Malaysian citizens and there are no such schemes for migrant workers. Although they may not be citizens of Malaysia, migrant workers should have access to the Yayasan Bantuan Guaman Kebangsaan (YGBK) and the Legal Aid Bureau (Biro Bantuan Guaman) schemes.^[33] The Government of Malaysia and the legal aid department should take into account migrant workers' eligibility to receive legal aid as any Malaysian citizen would, especially since migrant workers are also underprivileged, which is why the legal aid schemes were created for.

INTERSECTIONAL ISSUES

Analysis of the Unique Challenges that Certain Groups of Migrant Workers May Face

All migrant workers

Due to the prevalence of employer discrimination and other factors, migrant workers may encounter certain general difficulties in Malaysia. To start with, one of the most common exercises used by employers to control migrant workers is to retain their passports, which have been mentioned above. This practice is still carried out because people lack legal knowledge and are unaware that both parties would violate the law, whilst some choose to blatantly ignore the law despite knowing it is an offence. Section 12(1)(f) of the Passports Act 1966 clearly states that passport retention is illegal, given that no one has the power to keep another person's passport or internal travel document unless they have legal authorisation to do so.^[34] There is no doubt about the legality of this practice; such a regular practice is clearly illegal, and migrant workers

have the right to keep their passports. But, most of the time, they are silent about their rights because they want to pursue employment in Malaysia.

Women Migrant Workers

Not disregarding the struggles male migrant workers may face, statistically, women migrant workers face more difficulties in particular due to their gender. Because of their gender, women occasionally have less privilege than men, in the sense that women face discrimination and inequality such as violence, abuse and unequal treatment because women may be more vulnerable, for example, due to pregnancy, which may affect work. Compared to male migrant workers, women may experience more prejudice, hardships and dangers. For example, if a woman and a man worker compete for a job at the same employer, the company may prefer the male worker because the woman worker may conceive and take maternity leave, causing problems for a company that may be already understaffed. However, the primary issue that women migrant workers in Malaysia experience is sexual exploitation or sex trafficking. Between 2021 and 2022, 1,679 women were victims of human trafficking, accounting for 92% of the total victims, according to a report by MAPO. According to the Royal Malaysian Police, the majority of victims in human trafficking cases are women migrant workers, whilst the majority of male migrant workers were victims of forced labour for men.

Domestic Worker

Malaysia's minimal domestic worker protection laws make it difficult for women migrant workers to exercise their rights as domestic workers. Foreigners who work as domestic workers in Malaysia have not been protected because of Malaysia's limited and ineffective domestic worker laws. Since domestic work is performed at home, there is no specific working hour and in some cases, a domestic worker may work the entire day without a break. There is no clear law to control this situation, which is why the number of cases is alarmingly high.

In Malaysia, migrant workers who work as domestic workers are frequently subjected to exploitation at the hands of their employers and/or recruiting agencies. Examples include physical and mental abuse, restrictions on their freedom of movement, not being paid for extra work, and more. A recent ILO report, ‘Skilled to Care, Forced to Work? Recognizing the Skills Profiles of Migrant Domestic Workers in ASEAN Amid Forced Labour and Exploitation’ surveyed 400 domestic workers in Malaysia between July and September 2022^[35] and discovered that 29% of these migrants experience forced labour and face punishment or threats if they try to stop working.^[36]

Male Migrant Workers

Male migrant workers in Malaysia are typically at risk of forced labour. MAPO’s report on human trafficking in persons reveals that migrant workers who are men are most likely to become victims of forced labour and exploitation. Forced labour is defined formally by International Labor Organization Convention 1930 (No. 29), which is confirmed by the Forced Labour Protocol. In accordance with its definition, forced labour includes “any work or service that is required of any person under the menace of any penalty and for which the said individual has not volunteered himself voluntarily.”^[37] Any work, employment or occupation that is imposed onto a person without their consent is considered forced labour, regardless of the nature or legitimacy of the employment connection.^[38] Notably, forced labour victims can be either adults or children.

EXAMINATION OF STRATEGY FOR ADDRESSING THESE INTERSECTIONAL ISSUES

Based on the above, there are many issues that the Government needs to address. Fortunately, there are already certain procedures involved to address the issues. In the following paragraphs, the existing procedures practised by the Malaysian Government will be discussed and a series of standard procedures regulated by the ATIPSOM Act:

- (1) When a case of exploitation of a migrant worker is discovered, the police may collaborate with NGOs and Diplomatic Missions to rescue the migrant worker. When a migrant worker is rescued, the police or any other enforcement officer will bring the migrant worker into temporary custody and to court within 24 hours^[39] to obtain an Interim Protection Order (IPO). A Magistrate will make an IPO for the rescued migrant worker to be placed at a place of refuge for a period of 21 days. The police are given 21 days to complete their investigation into the circumstances of the rescued person's case to determine whether the person is a trafficked person under the ATIPSOM Act, whilst a Protection Officer will enquire into the background of that rescued person.^[40]
- (2) If necessary, a victim will undergo a medical examination as part of the investigation.^[41]
- (3) If the police conclude that the victim is, in fact, a victim of exploitation in need of care and protection, the Magistrate will then make a Protection Order (PO) for the victim to be placed in a "place of refuge", i.e. shelter homes for three months, which may be extended.
- (4) Those who exploit the migrant workers, ordinarily the employers of the migrant workers, will be subject to criminal prosecution for offences under the ATIPSOM Act.
- (5) When a migrant worker is rescued, he or she is allowed to be repatriated or continue to work in Malaysia for a different employer. If the victim wishes to continue working in Malaysia, the MAPO office will assist the victim in locating a new position and securing a work permit.^[42] If a migrant worker wishes to go home or they do not have valid permits to work in Malaysia, or if there is insufficient proof during an investigation to confirm the person officers have rescued is a

victim of human trafficking, the migrant worker will instead be released to the Malaysia Immigration Department and sent to their home country.^[43]

However, despite having these procedures, issues continue to exist, hence the need for better mechanisms to address these issues. Nevertheless, it is worth highlighting the Malaysian Government's performance in the past few years, particularly concerning the problem of human trafficking. The ATIPSOM legislation was created to address the issue of smuggling and human trafficking. The second amendment to the ATIPSOM Act, which took place in 2016, modified the law to be seen more from human rights standpoint, allowing the victim to move around freely, which was before prohibited.^[44] Moreover, the ATIPSOM Act, following the amendment, states that the victim is granted an allowance. All of these actions taken by the Malaysian Government demonstrate the effort made by that Government to address some problems.

CONCLUSION

Owing to the essential role played by migrant workers in Malaysia's economy, we should alleviate the challenges they face and ensure their well-being. Given that they contribute to various sectors and support the country's development, we must ensure their rights are protected and they are treated fairly and equitably in the workplace.

The above discussions show that labour laws on minimum wage, working hour limits, access to healthcare, and protections for migrant workers exist in Malaysia. However, the implementation of these standards and protections for migrant workers in Malaysia has been criticised by human rights groups for being inadequate and poorly enforced, leading to widespread exploitation and abuse.

Despite this, we can see that Malaysia has taken some steps to address the issue. However, more must be done to ensure effective enforcement, including strengthening monitoring and inspection mechanisms, increasing

penalties for violations and addressing the root causes of labour exploitation and human trafficking.

It is clear that migrant workers here face difficulties accessing justice due to a lack of legal status, language barriers, fear of termination, passport retention, and systemic issues. All stakeholders, from the Government to NGOs and agencies like MAPO, collaborate to identify all issues and move towards finding solutions to reduce the challenges faced by migrant workers.

Challenges faced by migrant workers are not unique to Malaysia and it is commendable that Malaysia's Government and civil society have taken steps to address some of these issues. Nevertheless, it is essential that these efforts continue and that additional measures are implemented to ensure that migrant workers are treated fairly and with dignity so that they may continue to contribute to Malaysia's healthy development as a country.

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[6] “Employee” and “foreign employee” is defined under section 2 of the Act and include the category of employees in the First Schedule of the Act, specifically:

- “1. Any person who has entered into a contract of service;
 - 1A. “Notwithstanding paragraph 1, the person whose wages exceeds four thousand ringgit a month.”
2. “Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which—
 - (1) he is engaged in manual labour including such labour as an artisan or apprentice ...;
 - (2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;

- (3) he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work;
- (4) he is engaged in any capacity in any vessel registered in Malaysia ...;
- (5) he is engaged as a domestic employee.”

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[14] Immigration Act 1959/63 [Act 155], s 5(1).

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[18] Passports Act 1966, s 12.

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[28] Federal Constitution, Article 8.

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