

THE LEGAL PROTECTION OF INDONESIAN
DOMESTIC WORKERS IN MALAYSIA

BY

NUR CHAERANI

A thesis submitted in fulfillment of the requirement for
the degree of Master of Comparative Law

Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

MAY 2008

ABSTRACT

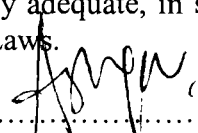
The abuse of domestic workers is a global disgrace, taking place in many countries including Malaysia as top destination in South East Asia for migrant domestic workers especially from Indonesia. Types of abuse that domestic workers (many of whom are Muslims and from Indonesia) experience in Muslim countries like Malaysia are physical, psychological and sexual violence. Without legal protection from receiving country, domestic workers are particularly vulnerable to exploitation and abuses from the recruitment agencies to the employer. Domestic workers who work in Malaysia are excluded from key protections in Malaysia's main labour laws under part XII of the Employment Act 1995. Gaps in labour laws and punitive immigration policies have left many migrants at risk of abuses and labour exploitation by employers and recruitment agencies. Indonesia and Malaysia signed a Memorandum of Understanding (MOU) in May 2006 to regulate migration of domestic workers. Positive measures included the introduction of a standard contract and protections against cutting workers' salaries to repay fees borne by the employer. However, it allows employers to keep workers' passports, prohibits workers from marrying, and fails to introduce clear standards on a minimum wage, a weekly day off, or monitoring mechanisms for labour agencies. This thesis therefore discuss and analyze the need of legal protection for Indonesian domestic workers in Malaysia from Chapter 2 to 4, of which will include the International legal framework toward migrant domestic workers and its definition to evade the existing ambiguity. It will further highlight the procedure and process of handling Indonesian domestic workers in Indonesia and Malaysia and the dispute that arise among the employer, employee and the Agency. Chapter 5 discusses on the Islamic principles regulating and giving legal protection toward these workers. Finally, Chapter 6 concludes the research by giving some relevant recommendations.

ملخص البحث

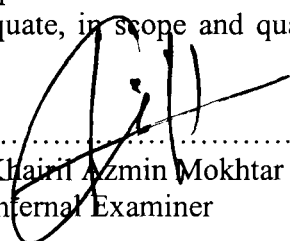
إساءة استخدام العاملين في المنازل هي شركة عالمية عارا ، وتحدث في كثير من البلدان بما فيها ماليزيا بوصفها المقصد الأعلى في جنوب شرق آسيا من اجل العمال المترلين المهاجرين ، وخاصة من اندونيسيا. أنواع الاساءه التي خدم المنازل (وكثير منهم من المسلمين ، واندونيسيا)تجربة المسلمين في بلدان مثل ماليزيا هي البدني والنفسي والعنف الجنسي. بدون حمايه قانونيه من البلد المتلقي ، وخاصة العاملين في المنازل هم عرضة للاستغلال والاساءه من وكالات التوظيف الى رب العمل. خدم المنازل الذين يعملون في ماليزيا تستبعد من الحماية الرئيسية في ماليزيا الرئيسية للعمل. بموجب القوانين الجزء الثاني عشر من قانون العمل لعام 1995. ثغرات في قوانين العمل وسياسات الهجره عقايه قد غادر العديد من المهاجرين المعرضين للخطر من التجاوزات والاستغلال في العمل من جانب اصحاب العمل ووكالات التوظيف. اندونيسيا وماليزيا وقعت مذكرة تفاهم) في ايار / مايو 2006 لتنظيم الهجره من خدم المنازل. وشملت هذه التدابير الايجابية مقدمة من عقد موحد والحمايه ضد القطع مرتبات العمال الى سداد الرسوم التي يتحملها صاحب العمل. ومع ذلك، فإنه يسمح لأرباب العمل ابقاء العمال جوازات السفر، ويمنع العمال من الزواج، ويفشل في ادخال معايير واضحة على حد ادنى للاجور، ويوم راحة اسبوعية، أو آليات الرصد لعمل الوكالات. هذه الفرضيه ولذلك مناقشة وتحليل الحاجة الى الحماية القانونية للعمال الخدمة المترلية الاندونيسيه من الفصل 2 الى 4 ، والتي تشمل الاطار القانوني الدولي تجاه العمال المترلين المهاجرين، وتعريفه القائم على التهرب من الغموض. انها ستزيد من ابراز الاجراءات وعملية مناولة الاندونيسيه الخدم في اندونيسيا وماليزيا والمنازعات التي تنشأ بين صاحب العمل والموظف والوكالة. الفصل 5 يناقش على المبادئ الاسلامية في تنظيم واعطاء الحماية القانونية تجاه هؤلاء العمال. واخيرا، يحتتم الفصل 6 البحوث باعطاء بعض التوصيات ذات الصلة.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.


.....
Asghar Ali Ali Mohamed
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.


.....
Khairil Azmin Mokhtar
Internal Examiner

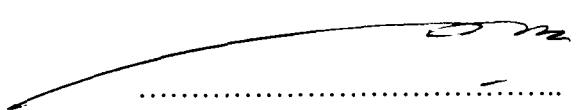
I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

.....
Siti Zaharah binti Jamaludin
External Examiner

This thesis was submitted to the Department of Public Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.


.....
Khairil Azmin Mokhtar
Head, Department of Public Law

This thesis was submitted to Ahmad Ibrahim Kulliyah of Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.


.....
Zaleha Kamarudin
Dean, Ahmad Ibrahim Kulliyah
of Laws

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degrees at IIUM or other institutions.

Nur Chaerani

Signature 

Date

**INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA**

**DECLARATION OF COPYRIGHT AND
AFFIRMATION OF FAIR USE OF UNPUBLISHED
RESEARCH**

Copyright © 2008 by Nur Chaerani. All rights reserved.

**THE LEGAL PROTECTION OF INDONESIAN DOMESTIC WORKERS
IN MALAYSIA**

No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder except as provided below.

1. Any material contained in or derived from this unpublished research may only be used by others in their writing with due acknowledgement.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes.
3. The IIUM library will have the right to make, store in a retrieval system and supply copies of this unpublished research if requested by other universities and research libraries.

Affirmed by Nur Chaerani.


.....
Signature

.....
Date

**I dedicate this thesis to my ever so loving parents,
(My deepest appreciation and gratitude to all in my life in honing me to what I
have achieved today)**

**Mr. Soetiarto Tjitrosoemarto
Dr.drg. Farida Nahdi Tjitrosoemarto,**

My bright and shining stars,

**Ananda Tjitrosoemarto
Nur Wulan Tjitrosoemarto**

ACKNOWLEDGEMENTS

First and foremost, I thank Allah (S.W.T.) who has seen me through this period of time and who has given me the inner strength towards the completion of this thesis. May the peace and blessing of Allah be upon Prophet Muhammad (S.A.W.) and upon his family and his companions and upon those who follow them in piety. I wish to express my most sincere gratitude and thanks to my supervisor, Associate Prof. Dr. Asghar Ali bin Ali Mohamed for his patience and dedication in supervising the preparation of this thesis from the beginning right to the very end. Working under him was pleasant and rewarding experience.

I would like to thanks the International Islamic University Malaysia and Ahmad Ibrahim Kullhiyah of Laws for giving me opportunity to study here. Also the Embassy of Republic Indonesia in Kuala Lumpur who have extended their generous help. I am also grateful to all those who have been interviewed for their valuable experience, opinion and suggestion for the improvement of the Labour Law in Malaysia.

Most of all, my heartfelt gratitude and thanks goes to my entire family, my loving mother and father, Dr.drg. Farida Soetiaro and Mr. Soetiaro Tjitrosoemarto, for their wholehearted support and generous understanding that they have displayed over the years it took to complete this thesis. Furthermore, the strength and courage has given to me by my beloved brother Ananda Tjitrosoemarto and my beautiful sister Nur Wulan Tjitrosoemarto. My gratitude thanks also goes to Mr. Irwin Ismail for his constant support was a motivational source in the completion of this thesis. Lastly, I would like to record my appreciation to all those who have contributed in extending their generous and kind help and support in the preparation of this thesis.

TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration Page	v
Copyright Page.....	vi
Dedication	vii
Acknowledgements.....	viii
Table of Content	ix
List of Tables	xii
List of Cases and Statutes	xiii
CHAPTER ONE: INTRODUCTION AND AN OVERVIEW	1
1.1. Introduction.....	1
1.2. Background of the study.....	2
1.3. Summary of the research	10
1.4. Objective of the research	10
1.5. Statement of the problem.....	13
1.6. Hypothesis	13
1.7. Literature review.....	14
1.8. Scope and Limitation of the study	19
1.9. Research methodology.....	19
1.10. Outline of Chapter	21
CHAPTER TWO: INTERNATIONAL LEGAL FRAMEWORK.....	22
2.1. Introduction.....	22
2.2. The History of ILO	23
2.3. The ILO Goals	25
2.4. The ILO Organs.....	26
2.5. The International Labour Code.....	29
2.6. The ILO Convention.....	29
2.7. ILO Convention towards Protection of Migrants Workers	33
2.8. The International Convention of All Migrant Workers.....	37
2.9. Cores of ILO Convention	40
2.10. International Legal Norm Related to Domestic Workers.....	47
2.11. Other Convention Related to Protection of Migrant Workers.....	51
2.12. Regional Instrument on Migrant Workers.....	54
2.13. Conclusion	55

CHAPTER THREE: THE PROCEDURE AND PROCESS	57
3.1. Introduction.....	57
3.2. The Types and Definition of workers.....	58
3.2.1. Types of Workers.....	58
3.2.2. Definition of Workers.....	60
3.3. The Mechanism of Hiring the Workers.....	63
3.3.1. The Republic of Indonesia in Review.....	64
3.3.2. Migration Cycle.....	68
3.3.2.1. Marketing the Domestic Workers.....	73
3.3.2.2. The Method of becoming labour agency.....	75
3.3.3. A Walk to Work in Malaysia.....	76
3.3.4. The Treatment of Agencies to Domestic Workers.....	77
3.3.5. The Agencies Behaviour.....	78
3.3.6. The Complex of the Situation.....	81
3.4. Victim of he Situation.....	82
3.5. The Importance of Contract for Domestic Workers.....	83
3.6. The Modification of Travel Documents.....	87
3.7. Discrimination in Hiring practices.....	88
3.8. Abuses in Training Centre and Work Place.....	88
3.8.1. Abuses in Training Centre.....	88
3.8.2. Hours of Work, Rest Day and Workload.....	90
3.8.3. Forced Confinement and Restricted Communication.....	95
3.8.4. Unpaid Wages.....	97
3.9. Treatment of Migrant Workers upon Return to Indonesia.....	101
3.10. Conclusion.....	104

CHAPTER FOUR: DOMESTIC MIGRANT WORKERS IN MALAYSIA	105
4.1. Introduction.....	105
4.2. Legal Framework in Malaysia for Foreign Domestic Workers.....	106
4.3. The Eligibly to Hire Foreign Workers.....	111
4.4. Indonesian Domestic Workers in Malaysia.....	113
4.5. The Mistreatment faced by Indonesian Maids in Malaysia.....	114
4.6. Factors Contributing to Foreign Domestic Workers Abuse.....	116
4.7. Freedom of Association and Collective Bargaining.....	118
4.8. Slavery and Forced or Compulsory Labour.....	136
4.9. Non-Discrimination on the Basis of Gender.....	142
4.10. Minimum Wage.....	144
4.11. Hours of Work.....	146
4.12. Social Safety.....	147
4.12.1. Employees Provident Fund Act 1991.....	149
4.12.2. Social Security Act 1969.....	150
4.12.3. Worker's Compensation for Migrant Workers.....	153
4.13. Rights of Migrant Workers in Malaysia Practice.....	154
4.14. Legal Framework in Singapore for Foreign Domestic Workers.....	160
4.15. Legal Framework in Saudi Arabia for Foreign Domestic Workers.....	167
4.16. Conclusion.....	172

CHAPTER FIVE: PROTECTION OF DOMESTIC M. WORKERS	173
5.1 Introduction.....	173
5.2 Sources of Islamic Law, Immutable Nature Flexible	174
5.2.1 Sources of Islamic Law	174
5.2.2 Immutable Nature and Flexible Character of <i>Syari'ah</i>	175
5.3 Work in Islam and the Employer/Employee Relationship	176
5.3.1 The Theory of Work in Islam.....	176
5.3.2 The Employer / Employee Relationship	183
5.4 Categories of Workers in Islam	191
5.5 Workers' Rights in Islam.....	194
5.5.1 The Right to Compensation	194
5.5.2. The Right to Have Leaves.....	195
5.5.3. Promotion.....	196
5.6. Duty to Provide and maintain Safety at Workplace	196
5.7. Conclusion	206
CHAPTER SIX: CONCLUSION AND SUGGESTION.....	208
A. Summary.....	208
B. Solution	210
BIBLIOGRAPHY	214
APPENDIX: Survey Conducted by Researcher	219

LIST OF TABLES

<u>Table No.</u>		<u>Page No.</u>
3.1	Number of Indonesian Overseas Workers Processed by The Ministry of Manpower, 2001 to 2006	65
3.2	Number of Indonesian Overseas Workers Processed by The Ministry of Manpower, 2006 to 2007	
3.2	Number of Indonesian Overseas Workers Processed by The Ministry of Manpower, 2006 to 2007	
3.3	Composition of Foreign Workers by Country of Origin	
3.4	Sectoral Distribution of Foreign Workers	
3.5	Surveys Conducted by Researcher Toward Indonesian Domestic Workers in Malaysia	
4.1	Monthly Report of Indonesian Domestic Workers Testimony in Asia Pacific and America. Directory Defense and Advocacy Year 2006	
4.2	Monthly Report of Indonesian Domestic Workers Testimony in Asia Pacific and America, Directory Defense and Advocacy January to August year 2007	
4.3	Monthly Report of Indonesian Domestic Workers Testimony in Asia Pacific and America, Directory Defense and Advocacy. September Year 2007	
4.4	Types of Abuses	
4.5	Housemaid Insurance by the Malaysian Association of Foreign Housemaids Agencies	
4.6	Types of Offence and Penalty in Singapore	
<u>Graphic No:</u>		<u>Page No.</u>
3.1	Remittance sending by foreign workers 1983-2005	71
<u>Chart No.</u>		<u>Page No.</u>
3.1	Outflow of Current Transfers Account	72
3.2	Recapitulation the arrival of Indonesian domestic workers from Asia Pacific period 1 October 2007 to 31 October 2007	97

LIST OF CASES AND STATUTES

A. List of Cases

Nirmala Bonat vs Yim Pek Ha
Ceriati Dapin
Kusiah
Parsiti
Nurjanah Maytak

B. List of Statutes

Convention Concerning Forced or Compulsory Labour / Convention No.29

Contract Act, 1950 (Malaysia)

Constitution of the International Labour Organization and Standing Order of the International Labour Conference

Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia)

Employment (Amendment) Act, 1998 (Malaysia)

Employment Social Security Act, 1969 (Malaysia)

Employment of Foreign Workers Act (Singapore)

Federal constitution of Malaysia

Human Rights Act 1998

Industrial Relation Act, 1967 (Malaysia)

Industrial Relation Reform Act, 1993

International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families

International Covenant on Economic, Social and Cultural Right, 1966

Labour and Workmen Regulation, 1969 (Saudi Arabia)

Labour Code 1912 (Federated Malay States)

Malaysian Employment Act of 1955

Memorandum of Understanding of the Government of Republic Indonesia and Government of Malaysia

Penal Code (Singapore)

Right to Organize and Collective Bargaining Convention, 1949

United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)

Workmen's Compensation Act, 1952 (Singapore)

Women's Charter (Singapore)

CHAPTER ONE

INTRODUCTION AND AN OVERVIEW OF THE RESEARCH

1.1 INTRODUCTION

In the economic sphere, globalization is not only characterized by liberalization of trade, services, investment, and capital, but also by transnational movements of people in search of better lives and employment opportunities elsewhere.

Given the absence of a willing domestic workforce, rich countries are increasingly looking outside their borders for low-skilled workers in agriculture, food-processing, construction, manufacturing, and low-wage services such as domestic work, home health care, and the sex sector, among others. Domestic workers and irregular migrants from poorer countries have stepped in to fill the demand.

In addition, receiving countries concerned with deregulating the labour market and making it more flexible have made it easier for cost-conscious and competition-minded employers to exploit domestic worker and migrant workers — at the expense of formal employment and human rights protections. This is especially true as the informal sector or "underground economy" has expanded in wealthy countries, providing increased risks and rewards for them.

In this economic climate, therefore, protecting all workers and particularly domestic workers, both those lawfully resident and those in an irregular situation, is becoming paramount. Yet, numerous shortcomings and gaps in the existing, international legal framework mean that many of domestic workers lack the protection they need. Major human rights organizations, including Amnesty International and Human Rights Watch, have begun to voice their concerns about the treatment of

domestic workers, and they have helped put a spotlight on migrant worker issues which define as a person who works in a country other than the one of which he or she is a citizen.¹ The term migrant worker as discussed in the below is used in a particular UN resolution as a synonym for "foreign worker."

1.2 BACKGROUND OF THE STUDY

Since the early 1980s, poverty, high unemployment and lack of educational opportunities have been driving Indonesian migrants abroad in search of work, and by the late 1990s, they were among the fastest-growing migrant population in Asia. By mid-2001, over 70 per cent of Indonesian migrants were women, and 43 per cent worked in the informal employment sector as domestic workers, factory workers or construction workers.² Most of these workers, considered low-status or "unskilled," must endure highly-exploitative or abusive treatment, and many work in conditions which meet the International Labour Organization's (hereafter referred as ILO) definition of forced labour as set out in Forced Labour Convention 1930.

Most Indonesians wishing to work abroad as low-status workers are officially required to go through over 400 government-sanctioned recruitment agencies, which seek to profit from the migrant trade.³ The Indonesian Government's requirement for migrants to use the agency system, and its failure to provide adequate rights and legal protection makes them particularly vulnerable to exploitation, abuse and forced labour.

¹ "Foreign Worker", at <http://en.wikipedia.org/wiki/Foreign_worker>, (accessed 5 January, 2006).

² "Pahlawan Devisa Negara Terbesar, Tenaga kerja Indonesia di Malaysia," <<http://www.kompas.com>>, (accessed on 5 January, 2006).

³ Ministry of Manpower and Transmigration of the Republic of Indonesia, unpublished data.

The agencies require prospective migrant workers to live in training camps for so many months, where they are often forced to work for the agency staff as well as carry out other tasks such as cleaning, shopping and cooking. Though the Indonesian labour department has set minimal standards to regulate certain practices within these camps, these are rarely enforced. Restrictions are placed on migrants' freedom of movement, and conditions in the camps are poor, often leading to health problems for which there is little medical care.

According to research conducted by the Centre for Indonesian Migrant Workers (CIMW) on conditions inside 100 such training camps, 68 per cent of girls/women interviewed were not provided with mattresses to sleep on; 62 per cent stated they received insufficient food; and nine per cent received no food at all. Though many training camps provided one toilet per 50 women, one training camp had 200 persons sharing a single toilet. Physical and sexual abuses were reported among 17 per cent of interviewees.⁴

The research also found that almost all workers interviewed had signed a contract in a foreign language (without translation) and were prevented from reading the contract. Forty one per cent had been forced by agents to use false ages and addresses and three per cent had provided false names. Seventy eight per cent of women interviewed had paid illegal fees to brokers of 100,000 Rupiah (US\$12) to seven million Rupiah (US\$855). Despite enduring such risks and violations, there is no guarantee that all foreign domestic workers would actually end up with a legitimate job abroad.⁵

⁴ *Training Camps for Potential Indonesian Migrant Women Workers: Study on the Conditions Inside Training Camps for Indonesian Migrant Workers in Jakarta*, Centre for Indonesian Migrant Workers, September 1999, Jakarta, Indonesia.

⁵ *Training Camps for Potential Indonesian Migrant Women Workers: Study on the Conditions Inside Training Camps for Indonesian Migrant Workers in Jakarta*.

Agencies generate huge profits as migrant workers exploitation continues after departing to host countries, where they are in a situation of debt bondage and forced labour for the first to fourteen months. Domestic workers must pay off agency fees, which are usually extortionate, even though a legal maximum for such fees is set by the Indonesian Government. Domestic workers going to the Gulf must pay official fees of Rp400,000 (US\$49) with a two to three months salary deduction; those going to Taiwan must pay Rp24,000,000 (US\$2,930) with a 13 month salary deduction; and those going to Hong Kong must pay Rp17,845,000 (US\$2,179). However, more than 50 per cent of migrants in Hong Kong pay excessive placement fees of up to HK\$21,000 (US\$2,699) with a four to seven month salary deduction.⁶

Foreign domestic workers must also pay excessive agency fees in order to renew their employment contract. According to a survey conducted in Hong Kong, 89 per cent of respondents were charged fees higher than the legal maximum of HK\$367 (US\$47) set by the Hong Kong Government. The average fee paid by respondents was HK\$5,655 (US\$727), and five per cent of respondents had even paid HK\$10,000 (US\$1,285).⁷

Hence, even if Indonesian migrants are mistreated and forced to work long hours under harsh conditions, they cannot leave because of the contract they have signed and the money "owed" to agencies. According to baseline research, 48 per cent of Indonesian migrant workers are paid below the legal minimum wage, 90 per cent do not receive their weekly rest days, and 24 per cent have undergone physical abuse.⁸

⁶ Surat Edaran Pemerintah Republik Indonesia Kepada Perusahaan Jawatan Tenaga Kerja Indonesia Tahun 2000.

⁷ *Campaign for Fair Treatment of Indonesian Domestic Helpers in Hong Kong by Agencies Approved by the Hong Kong Labour Department*, Asian Migrant Centre, Amal Indonesia Direct & Coalition for Indonesian Migrant Workers Associations (KOTKIHO), 30 March 2001, Hong Kong SAR.

⁸ *Campaign for Fair Treatment of Indonesian Domestic Helpers in Hong Kong*.

Domestic workers continue to be exploited and discriminated against even as they return home. All returning workers must return through the specially-designated Terminal three of Soekarno Hatta International Airport, where there have been reports of migrants experiencing rape and physical abuse and having to pay bribes in order to obtain basic information and services. All workers are also required to be met upon arrival by their family members. If not, they must return home by transportation offered by agencies, which again involves paying fees 10 times higher than public transportation.

As has been outlined above, the activities of these agencies, involving the recruitment, training, transportation and return of workers, often leads to them being subjected to forced labour or highly exploitative and abusive employment practices, in contravention of ILO Convention 29 on forced labour and the *UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. Many agencies who use coercion and deception for the purposes of exploitation to transport domestic workers abroad are traffickers, and hence they must be prosecuted according to principles as defined in the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)*. There is currently no comprehensive law against trafficking in Indonesia and no specific national legislation for the protection of migrant workers.

Article 66 of the Indonesian Government's Ministerial Decree No.104A/2002 has only served to worsen the situation by requiring low-status domestic workers to return to Indonesia to renew their contracts. This means they have to leave their jobs for two weeks and pay for their airfare and agency fees again rather than having their contract validated by the Indonesian Consulate in the host country.

Having stated that, it is hereby noted that the phenomenon of migrant workers started since Malaysia instituted its “New Economic Policy” in 1971 which aggressively pursued export-oriented industrialization and public sector expansion. There is an increasing in demand for labour in manufacturing, construction, agricultural and informal sector which could not be met by the local workforce.

Malaysia relies upon migrant workers from Indonesia, Bangladesh, Sri Lanka, Philippines, India, and Vietnam to meet labour demands.⁹ Indonesians are the largest group of foreign workers (83 percent) and have a long history of working in Malaysia. They migrated to Malaysia find jobs in informal work (17.54 percent), manufacturing (22.48 percent), agriculture (2.95 percent), and construction (15.51 percent).¹⁰

Approximately 480,393 Indonesians migrated in 2002 for overseas work, 76 percent of 480,393 overseas workers from Indonesia were women, and 94 percent of these women were employed as informal workers in Middle Eastern, East Asian, and Southeast Asian countries. There are currently 240,000 women migrant domestic workers in Malaysia and over 90 percent of them are Indonesian.¹¹ This situation – feminization of labour – was in part a response to Malaysian women moving into more secure, higher-paying factory, and other privileged job. Unfortunately, Indonesian domestic worker is poorly remunerated, and workers are particularly at risk of abuse because of their isolation in private homes.

They encounter abuses not only in the workplace, but also at many stages of the work cycle, from susceptibility to trafficking at the recruitment stage and abuses at training centres in Indonesia, to poor conditions of detention and lack of access to health care if arrested without documents and detained in order to provide the legal

⁹ “Semi-skilled & Unskilled Foreign Workers”, Immigration Department of Malaysia, at <http://www.imi.gov.my/eng/perkhidmatan/im_Separa.asp> (accessed 5 January, 2006).

¹⁰ <<http://www.fes.org.ph/pdf/Marketplace%202%20BWI.pdf>> (accessed 5 January, 2006).

and social protection, a number of measures taken by Malaysia and Indonesia over the past few decades. The Medan Agreement of 1984, which introduced regulations for recruiting Indonesian domestic workers and plantation workers, a November 1991-June 1992 amnesty for undocumented workers, and a 2002 amendment to the Immigration Act 2002 that established harsh punishments for immigration violations, and in May 2004, the Malaysian government signed an Memorandum of understanding (hereafter referred as 'MOU') with Indonesia regarding Indonesian domestic workers. The objective of this MOU is to develop the existing cooperation between the Parties for the purpose of strengthening the mechanism on the conveyance and recruitment of Indonesian domestic workers that shall be conducted in accordance with the MOU.¹² This agreement has made the government of Malaysia recognizes that the domestic workers shall be employed in the terms and conditions of employment as provided under the relevant laws, rules, regulations, policies and directives relating to employment in Malaysia.¹³ Meanwhile, the Government of the Republic of Indonesia agrees to ensure that the domestic workers who are offered for selection by the employer to work in Malaysia shall satisfy the conditions such as; minimum age is 21 and not more than 45, possess sufficient knowledge of Malaysian laws, culture and social practise, possess the ability to communicate either in Malay and/or English language, satisfy Malaysian immigration procedures in Malaysia; must be certified fit and healthy in accordance with the requirements of the relevant authorities in Malaysia and Indonesia, do not possess any previous criminal records.¹⁴

¹¹ Booklet from Department Tenaga Kerja dan Transmigrasi Republik Indonesia.

¹² Article 2 and 3 of MOU between the Government of the Republic of Indonesia and the Government of Malaysia on the recruitment and placement of Indonesian domestic workers.

¹³ Article 4 of MOU between the Government of the Republic of Indonesia and the Government of Malaysia on the recruitment and placement of Indonesian domestic workers.

¹⁴ Article 6 of MOU between the Government of the Republic of Indonesia and the Government of Malaysia on the recruitment and placement of Indonesian domestic workers.

This MOU has substitute and supersede the notes of Agreement on the Guidelines on the Hiring of Indonesian Maids between Malaysia and Indonesia of 30 January 1996.¹⁵ But the weakness of this MOU can be seen when each party reserves the right for reasons of national security, national interest, public order or public health to suspend temporarily either in whole or in part the implementation of this MOU which shall take effect immediately after notification has been given to the other Party through diplomatic channels.¹⁶ This article has made domestic workers again and again in weak position in both countries perspectives.

However, when it comes to section XII B of Malaysians Employment Act of 1955 the regulations that apply to other foreign workers often exclude domestic workers, which including hours of work, days off, and termination of contracts. They are also excluded from the Workmen's Compensation Act 1952 and a required post-arrival orientation program that Malaysia introduce for all other migrant workers consisting of thirty hours of Malaysian law, thirty hours of Malaysian culture, and thirty hours of Malay language.

Other obstacles prevent many migrant domestic workers from reporting abuses or seeking redress through the Malaysian justice system. These include employers' practices of forbidding domestic workers to leave the home, the government's inadequate monitoring of workplace conditions, and gaps in Malaysia's employment. Indonesian domestic workers in Malaysia typically work with long working hours, lack of rest days, and unpaid wages; violations of freedom of movement and freedom of association; and physical and sexual abuse.

¹⁵ Article 14 of MOU, between the Government of the Republic of Indonesia and the Government of Malaysia on the recruitment and placement of Indonesian domestic workers.

¹⁶ Article 13 of MOU between the Government of the Republic of Indonesia and the Government of Malaysia on the recruitment and placement of Indonesian domestic workers.

Many employers hold their domestic worker's salary until the end of the standard two-year contract. In Malaysia, most informal workers are forbidden to leave their workplace and many suffer psychological, physical, and sexual assault by labour agents and employers. Long processing time by criminal justice system in cases of breach of contract undermines migrant workers' right to employment as they cannot work while in the process of seeking legal redress.

Domestic workers who wish to file complaints against their employers or pursue criminal cases must get special passes because their temporary work permits and entry visas are tied to their employers. If they leave their employer, even for reasons of abuse, they lose their legal status and may be imprisoned, fined, and deported under Malaysia's immigration laws. The police often fail to distinguish workers who are escaping situations of abuse or trafficking victims from other types of undocumented migrants. These individuals are doubly victimized by being detained in sometimes appalling conditions and deported without any access to support services or redress.

All foreign domestic workers and members of their families' is the crucial aspect of the convention and in every article of the convention says 'the rights of all migrant workers and members of their families' which means the convention is not individualistic but collective, this approach is fundamental from the perspective of the rights of migrant workers.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (which came into force on 1 July 2003) outlines the human rights protections which all migrant workers, whether documented or undocumented, should receive. Under the terms of this Convention, migrant workers are entitled to protection of their basic freedoms including the right to life; the

right to freedom from torture; the right to due process including freedom from arbitrary arrest and detention; the right not to be subject to measures of 'collective expulsion;' the right to medical care that is urgently required and the right of equal treatment - in comparison to nationals in the country - in respect to remuneration and other conditions of work, membership of trade unions and access to social services.

1.3 SUMMARY OF THE RESEARCH

This research will encompass an overall view of the various problems that cause dispute among the parties (agency-employee-employers) and contribute to the problems face by the Indonesian domestic migrant workers in Malaysia since they are recruited by the agency until the tragedy that happened to them because of the lack of legal protection for workers which should be applied and ratified by both countries.

1.4 OBJECTIVES OF THE RESEARCH

Major concern of the study is to analyze the legal protection for Indonesian domestic workers and other issues such as working conditions and social problems were also presented to give an overall picture of the situation of Indonesian domestic workers in Malaysia today. It is also to concentrate on the following objectives:

1. To analyse the possible ways of establishing a proper set of laws that will underline, among others, a proper procedure of handling Indonesian domestic workers and sufficient legal protection. The objective is therefore towards a reformation of the existing laws.
2. To conduct a strategic review on the role of agencies in the recruitment process and their impact on migrant worker's rights; prosecute abusive agencies and traffickers; and make the necessary regulatory and policy