UNIVERSITAS INDONESIA

PENGARUH GLOBALISASI HUKUM TERHADAP PEKERJA/BURUH MIGRAN: STUDI KASUS PEMBAYARAN GAJI BAGI PEKERJA/BURUH MIGRAN INDONESIA DI MALAYSIA DAN HONG KONG

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SKRIPSI
Diajukan sebagai syarat untuk memperoleh gelar sarjana

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PROGRAM KEKHUSUSAN HUKUM, MASYARAKAT DAN PEMBANGUNAN
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JUNI 2012

HALAMAN PERNYATAAN ORISINALITAS

Skripsi ini adalah hasil karya saya sendiri,

dan semua sumber baik yang dikutip maupun dirujuk

telah saya nyatakan dengan benar.

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NPM	**: 0806341936**
Tanda Tangan	**: .....**
Tanggal	**: 25 Juni 2012**

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Program Studi : Ilmu Hukum

Judul Skripsi :

"Pengaruh Globalisasi Hukum terhadap Pekerja/Buruh Migran: Studi Kasus Pembayaran Gaji bagi Pekerja/Buruh Migran Indonesia di Malaysia dan Hong Kong"

-

Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk memperoleh gelar Sarjana Hukum pada Program Studi Ilmu Hukum, Fakultas Hukum, Universitas Indonesia

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Tanggal : 25 Juni 2012

KATA PENGANTAR

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Depok, Juni 2012

Elsa Marliana

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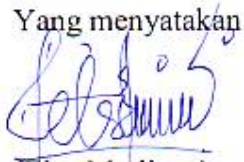

(Elsa Marliana)

ABSTRAK

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Program Studi : Ilmu Hukum
Judul : **"Pengaruh Globalisasi Hukum terhadap Pekerja/Buruh Migran: Studi Kasus Pembayaran Gaji bagi Pekerja/Buruh Migran Indonesia di Malaysia dan Hong Kong"**

Penelitian ini bertujuan untuk menjelaskan dan menganalisis bagaimana pengaruh globalisasi hukum terhadap pekerja/buruh migran Indonesia yang bekerja di Malaysia dan Hong Kong. Penulis menggunakan metode penelitian sosio legal dengan studi kepustakaan dan wawancara di lapangan. Hasil penelitian menunjukkan bahwa pekerja/buruh migran tidak diberikan kesempatan untuk membuat perjanjian kerja, melainkan negara yang membuat klausula perjanjian kerja untuk melindungi warga negaranya. Hal ini dikarenakan perjanjian kerja antara pekerja/buruh migran dengan majikan, adalah perjanjian kerja yang melintasi yurisdiksi negara pengirim dan penerima. Klausula besaran gaji dibuat kosong untuk memberikan kebebasan menenetukan besarannya antara pekerja/buruh migran dengan majikannya. Tetapi besarnya gaji di lapagan ditentukan oleh agen pengirim.

Kata kunci:
Globalisasi Hukum, Pekerja/Buruh Migran Indonesia, Perjanjian Kerja, Sistem Penggajian.

ABSTRACT

Name : Elsa Marliana
Study Program: Law
Title : **"The Impact of Globalization of Law to Migrant Workers: Case Study on Remuneration System Applied to Indonesian Migrant Workers in Hong Kong and Malaysia"**

This research aimed to describe and analyze the impact of globalization of law to Indonesian migrant workers who work in Malaysia and Hong Kong. The Researcher use socio-legal research method with literature studies and field research. The research shows that migrant workers have no opportunity to directly negotiate the employment contract. However, the States drafted clauses of the contract to protect its migrant workers. It is because the employment contracts between the migrant workers and the employers were contracts which across the jurisdiction of the sending and receiving States. The clause of remuneration was deliberately unfilled to allow the parties to determine its amount. In fact, the amount of remuneration was determined by the sending agents.

Key words:
Globalization of Law, Indonesian Migrant Workers/Labors, Employment Contract, Remuneration System.

DAFTAR ISI

HALAMAN JUDUL **i**
HALAMAN PERNYATAAN ORISINALITAS **ii**
HALAMAN PENGESAHAN **iii**
KATA PENGANTAR **iv**
LEMBAR PERSETUJUAN PUBLIKASI KARYA ILMIAH **vii**
ABSTRAK **viii**
DAFTAR ISI **x**
DAFTAR LAMPIRAN **xii**
DAFTAR ISTILAH **xiii**

BAB I PENDAHULUAN **1**
I.1. Latar Belakang Permasalahan 1
I.2. Pokok Permasalahan 9
I.3. Tujuan penelitian 9
I.4. Kerangka Konsepsional 10
I.5. Metode Penelitian 12
I.6. Kegunaan Teoritis dan Praktis 14
I.7. Sistematika Penulisan 14

BAB II GLOBALISASI HUKUM DAN PEKERJA MIGRAN **16**
II.1. Globalisasi Hukum 16
II.2. Migrasi Manusia 23
II.3. Pengaruh Globalisasi Hukum terhadap Pekerja Migran 30

BAB III KETENTUAN HUKUM TERKAIT SISTEM PEMBAYARAN GAJI PEKERJA/BURUH MIGRAN INDONESIA DI MALAYSIA DAN HONG KONG **34**
III.1. Peraturan Indonesia 35
1. UUD 1945 Pasal 28 D ayat (2) 35
2. UU No. 39 Tahun 1999 tentang Hak Asasi Manusia 36
3. UU No. 13 Tahun 2003 tentang Ketenagakerjaan 37
4. UU No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar negeri 40
III.2. Peraturan Negara Malaysia Terkait dengan Pembayaran Gaji Pekerja/Buruh Migran Indonesia 41
III.3. Peraturan Distrik Administrasi Khusus Hong Kong Terkait dengan Pembayaran Gaji Pekerja/Buruh Migran Indonesia 43
III.4. Perjanjian Bilateral, Deklarasi, dan konvensi Terkait 45
1. *International Covenant on Economic, Social, and Cultural Rights* 45
2. *Equal Remuneration Convention 1951* 45
3. *Domestic Workers Convention 2011* 46
4. *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers* 47
5. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990* 47

6. Perjanjian Bilateral Indonesia dengan Malaysia 49
7. Perjanjian Bilateral Indonesia dengan Hong Kong 52

BAB IV PELAKSANAAN SISTEM PENGGAJIAN DI MALAYSIA DAN HONG KONG 54
IV.1. Penggajian di Dalam Perjanjian Kerja (PK) 54
IV.1.1. Keterlibatan Pekerja dalam Pembuatan Perjanjian Kerja (PK) 55
IV.1.2. Apakah Perjanjian Kerja (PK) Berdasarkan Undang-undang Sah Secara Hukum Perdata? 56
IV.1.3. Posisi Tawar Pekerja dalam Pembuatan Perjanjian Kerja (PK) 57
IV.1.4. Perjanjian Kerja (PK) Pekerja/Buruh Indonesia di Malaysia 58
IV.1.5. Perjanjian Kerja (PK) Pekerja/Buruh Indonesia di Hong Kong 62
IV.2. Penandatanganan Perjanjian Kerja (PK) 64
IV.2.1. Penandatanganan Perjanjian Kerja (PK) Malaysia 66
IV.2.2. Penandatanganan Perjanjian Kerja (PK) Hong Kong 67
IV.3. Permasalahan terkait Penggajian di Malaysia dan Hong Kong 68
IV.3.1. Permasalahan Penggajian di Malaysia 68
IV.3.2. Permasalahan Penggajian di Hong Kong 72
IV.4. Metode Penyelesaian Permasalahan Penggajian 74
IV.4.1. Berdasarkan Undang-undang Indonesia 74
IV.4.2. Proses Penyelesaian Masalah di Malaysia 78
IV.4.3. Proses Penyelesaian Masalah di Hong Kong 82

BAB V GLOBALISASI HUKUM DALAM SISTEM PENGGAJIAN PEKERJA/BURUH MIGRAN INDONESIA DI MALAYSIA DAN HONG KONG 84
V.1. Dampak Globalisasi Hukum terhadap Pekerja/Buruh Migran 84
V.2. Ketentuan Hukum yang Berlaku terkait Sistem Pembayaran Gaji Pekerja/Buruh Migran 91
V.3. Dampak dari Sistem Pembayaran Gaji Pekerja/Buruh Migran Indonesia di Malaysia dan Hong Kong 92
V.3.1. Keberlakuan Perjanjian Kerja 92
V.3.2. Sistem Pembayaran Gaji di Malaysia 94
V.3.3. Sistem Pembayaran Gaji di Hong Kong 96

BAB VI PENUTUP 102
VI.1. Kesimpulan 102
VI.2. Rekomendasi 104

DAFTAR PUSTAKA 106
LAMPIRAN

DAFTAR LAMPIRAN

1. *Malaysian Employment Act 1955*
2. *Hong Kong Employment Ordinance Chapter 57 1997*
3. *International Covenant on Economic, Social and Cultural Rights*
4. *Equal Remuneration Convention 1951*
5. *Domestic Workers Convention 2011*
6. ASEAN *Declaration on the Protection and Promotion of the Rights of Migrant Workers*
7. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990*
8. *Memorandum of Understanding (MoU) on The Recruitment and Placement of Indonesian Domestic Workers* yang ditandatangani di Bali tahun 2006 (berikut dengan *Amending Protocol*-nya)
9. Perjanjian Kerja Pekerja/Buruh Migran Indonesia di Malaysia
10. Perjanjian Kerja Pekerja/Buruh Migran di Hong Kong
11. Hasil wawancara
12. Foto-foto

DAFTAR ISTILAH

1. TKI = Tenaga Kerja Indonesia
2. PRT = Pekerja Rumah Tangga
3. LSM = Lembaga Swadaya Masyarakat
4. UNIMIG = *Union Migrant*
5. TKW = Tenaga Kerja Wanita
6. ASEAN = *Association of South-East Asia Nation*
7. PPTKIS = Perusahaan Penyalur Tenaga Kerja Indonesia Swasta
8. KBRI = Kedutaan Besar Republik Indonesia
9. KJRI = Konsulat Jenderal Republik Indonesia
10. PK = Perjanjian Kerja
11. BNP2TKI = Badan Nasional Penempatan dan Perlindungan Tenaga Kerja Indonesia
12. SIP = Surat Izin Penempatan
13. KTKLN = Kartu Tenaga Kerja Luar Negeri

BAB I
PENDAHULUAN

Aku ini binatang jalang dari kumpulannya yang terbuang

-Chairil Anwar

I.1. Latar Belakang Permasalahan

> *"Dikatakan Tia, dirinya sudah tiga tahun bekerja sebagai pembantu rumah tangga di Malaysia, akan tetapi tidak pernah digaji. Padahal sebelum berangkat, dia telah dijanjikan sebulannya digaji sebesar 450 ringgit. "Saya di Malaysia sudah sejak 2008, tapi tak pernah digaji. Setahun pertama majikan saya sempat baik, selepas itu enggak lagi," kata Tia kepada* batamtoday *di shelter penampungan Dinsos Batam, Sabtu (11/2/2012."*[1]

Permasalahan pekerja/buruh migran belum terselesaikan. Hal ini dapat dilihat dengan adanya berbagai macam permasalahan yang sering kali muncul melingkupi mereka. Salah satu contohnya adalah permasalahan gaji yang belum dibayarkan setelah pekerja/buruh migran melaksanakan kewajibannya untuk bekerja. Selain gaji yang tidak dibayarkan, permasalahan pekerja/buruh migran dilingkupi dengan ketakuatan atas tindakan kekerasan yang dilakukan oleh majikan.

Pertanyaan-pertanyaan mengecam ditujukan kepada pemerintah atas segala persoalan yang terjadi. Ketiadaan perlindungan menjadi pertanyaan yang sangat sering muncul. Bagaimanakah perlindungan yang seharusnya didapatkan? Sejauh mana pemerintah Indonesia dapat memberikan perlindungan terhadap pekerja Indonesia di luar negeri?

Pekerja/buruh Indonesia bermigrasi ke luar negeri demi mendapatkan pekerjaan. Pekerja/buruh tersebut disebar ke beberapa negara. Inilah 20

[1] Tiga Tahun Jadi TKI Gaji Tak Dibayar, http://www.batamtoday.com/berita11905-Tiga-Tahun-Jadi-TKI-Gaji-Tak-Dibayar.html. Diunduh pada tanggal 9 Maret 2012 pukul 12.17 WIB

negara dengan jumlah pekerja/buruh migran Indonesia terbesar hingga tahun 2011:[2]

1	Arab Saudi	1.500.000
2	Malaysia	917.932
3	Pelaut	170.000
4	Taiwan	146.189
5	Hong Kong	140.555
6	Singapura	106.000
7	Uni Emirat Arab	87.568
8	Suriah	80.000
9	Amerika Serikat	60.000
10	Brunei Darussalam	47.368
11	Korea	30.000
12	Oman	30.000
13	Lebanon	30.000
14	Jordania	26.000
15	Jepang	25.000
16	Papua Nugini	25.000
17	Kuwait	23.041
18	Qatar	20.000
19	Australia	20.000
20	Belanda	15.000
21	Lain-Lain	76.437
TOTAL		3.578.093

Besarnya angka pekerja/buruh migran yang berada di luar negeri tersebut ternyata tidak disertai dengan jaminan dan perlindungan yang mumpuni. Pada tahun 2011 saja di Malaysia sebanyak 15.539 orang TKI bermasalah

[2] Data-Data Penempatan dan Perlindungan TKI. Pusat Penelitian dan Pengembangan Informasi (PUSLITFO) BNP2TKI, 6 Januari 2011.

yang dipulangkan, mereka terdiri dari 10.809 orang laki-laki dan 4.730 orang perempuan.[3]

Fakta di atas menjadi ironi ketika dihadapkan dengan klaim bahwa sumbangan devisa yang berasal dari Tenaga Kerja Indonesia (TKI) masih menduduki peringkat kedua terbesar setelah sektor minyak dan gas (migas). Pada tahun 2009 saja devisa yang dihasilkan TKI melalui pengiriman remitansi ke tanah air mencapai US$ 6,617 miliar.[4] Keberadaan data tersebut membuat apa yang dialami oleh pekerja/buruh migran Indonesia sangat tidak adil. Masalah-masalah tersebut tidak perlu terjadi apabila perlindungan pekerja/buruh migran berjalan dengan baik, karena pada dasarnya hak untuk mencari penghidupan yang layak dijamin dan dilindungi oleh negara.

Permasalahan yang terjadi pada pekerja/buruh migran disebabkan kerena negara tidak menjalankan fungsinya untuk memberikan jaminan dan perlindungan dalam mencari penghidupan yang layak. Mengenai penghidupan yang layak, negara telah mengatur hal tersebut di dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 hasil perubahan ke-IV. Pasal 28D ayat (2) menyatakan bahwa setiap orang berhak untuk bekerja serta mendapat imbalan dan perlakuan yang adil dan layak dalam hubungan kerja.[5] Hal tersebut dijelaskan lebih detil di dalam UU No. 39 Tahun 2004 tentang Perlindungan Tenaga Kerja Indonesia di Luar Negeri dan UU No. 13 Tahun 2003 tentang Ketenagakerjaan. Dengan adanya peraturan perundang-undangan tersebut, telah menjadi jelas bahwa negara berperan penting di dalam memberikan perlindungan bagi pekerja/buruh migran.

Pekerjaan erat kaitannya dengan hak asasi yang harusnya diterima oleh setiap orang. Setiap manusia diciptakan oleh Tuhan Yang Maha Esa dengan berbagai kebutuhan yang harus dipenuhi oleh manusia tersebut. Kebutuhan

---

[3] Malaysia Deportasi 83 TKI Bermasalah Awal 2012, http://www.antaranews.com/berita/291852/malaysia-deportasi-83-tki-bermasalah-awal-2012 Diunduh pada 9 Maret 2012 pukul 20.26 WIB.

[4] TKI Sumbang Devisa Negara Terbesar Kedua setelah Migas, http://www.fahmina.or.id/artikel-a-berita/berita/845-tki-sumbang-devisa-negara-terbesar-kedua-setelah-migas-.html. Diunduh pada tanggal 2 Januari 2012 pukul 11.23 WIB.

[5] Jimly Asshidiqie [b], *Gagasan Kedaulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia,* (Jakarta: PT. Ikhtiar Baru Van Hoeve, 1994), hal.49.

paling dasar adalah kebutuhan manusia akan sandang, pangan dan papan. Dalam perkembangannya kebutuhan tersebut bertambah. Pendidikan dan kesehatan kini pun telah berkembang sebagai salah satu kebutuhan dasar. Permasalahan timbul ketika kebutuhan tersebut tidak dapat diakses dengan cuma-cuma. Orang-orang membuka akses untuk mendapatkannya dengan berbagai macam pekerjaan yang dimilikinya. Setiap individu harus mencari pekerjaan secara informal karena minimnya lapangan pekerjaan formal yang ada.[6]

Indonesia masih memiliki catatan yang buruk dalam hal penyerapan angkatan kerja. Sampai Februari 2011, jumlah pengangguran di Indonesia mencapai 8,1 juta orang atau 6,80 persen dari total angkatan kerja yang mencapai 119,4 juta orang.[7] Hal tersebut dikarenakan lapangan pekerjaan yang ada tidak mampu untuk menampung seluruh pencari kerja. Penyerapan pekerja yang tidak maksimal disebabkan oleh banyak faktor, salah satunya adalah kualifikasi pendidikan. Bagaimanapun pencari kerja yang tidak mendapatkan pekerjaan, harus tetap memenuhi kebutuhannya. Kondisi ini memaksa mereka memilih opsi mencari pekerjaan ke luar negeri. Meskipun demikian, baik pekerja di dalam negeri maupun luar negeri tetap membutuhkan perlindungan.

Pada kenyataannya posisi pekerja tidaklah setara dengan posisi pemberi kerja. Secara yuridis hal ini dapat dilihat di dalam Pasal 1601 a, Bab 7A, Buku III Kitab Undang-Undang Hukum Perdata yang menyatakan bahwa "*... si buruh mengikatkan dirinya di untuk di bawah perintahnya pihak yang lain, si majikan, untuk sesuatu waktu tertentu, melakukan pekerjaan dengan menerima upah...*"[8]. Kata 'di bawah perintahnya' memiliki makna bahwa pekerja dikontrol oleh si pemberi kerja. Dengan adanya pengontrolan ini, maka jelaslah bahwa posisi pekerja dan pemberi kerja tidaklah sama.

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[6] Forum Warga Kota Jakarta, *Bunga Trotoar, Sebuah Tinjauan terhadap Keberadaan Pedagang Kaki Lima dalam Roda Pembangunan Ibukota,* (Jakarta : FAKTA, 2004) hal. 60.

[7] Badan Pusat Statistik, *Keadaan Ketenagakerjaan Februari 2011*, Berita Resmi Statistik, No. 33/05/Th. XIV (5 Mei 2011), hal 1.

[8] K*itab Undang-Undang Hukum Per-data [Burgerlijk Wetboek]*, diterjemahkan oleh R. Subekti dan R.Tjitrosudibio, cet.8, (Jakarta: Pradnya Paramita, 1976), Ps. 1601 a.

Ketimpangan posisi antara buruh dengan pemberi kerja ini perlu dilindungi oleh pihak ketiga, dalam hal ini adalah negara. Perlindungan tersebut diberikan dengan memberikan perlindungan lewat hukum negara yang berlaku (hukum positif). Dengan demikian, instrumen hukum yang ada dapat memberikan posisi yang sejajar antara buruh dan pemberi kerja.

Pertanyaan kemudian timbul tentang bagaimana dengan pekerja/buruh yang bekerja di luar negeri? Apakah negara juga memberikan perlindungan yang sama? Inilah yang menjadi masalah ketika persoalan jarak yang berimbas pada masalah pengawasan. Belum lagi persoalan terkait dengan hukum yang berlaku di negara tempat tujuan si pekerja/buruh migran.

Ada banyak sebab mengapa orang melakukan migrasi, yang terbesar adalah karena pekerjaan dalam rangka mencari penghidupan yang layak. Migrasi karena pekerjaan merupakan situasi yang paling umum, karena dapat dijumpai di berbagai belahan dunia. Masyarakat dari kelompok paling miskin di negara berkembang bermigrasi ke negara-negara yang lebih kaya. Berbagai temuan penelitian menunjukkan wajah yang hampir sama. Pada umumnya mereka mengisi lowongan pekerjaan rendah, dengan upah rendah, dan kondisi kerja yang buruk, karena ketiadaan perlindungan hukum.[9]

Migrasi adalah strategi bertahan hidup mengingat kebanyakan migrasi dilakukan dengan alasan ekonomi. Migrasi adalah hasil keputusan yang dibuat individu dan keluarga yang mencari solusi terbaik, dengan mempertimbangkan kesempatan dan hambatan yang mereka hadapi.[10]

Masalah pekerja migran Indonesia erat kaitannya dengan migrasi global. Sejumlah lembaga internasional menetapkan tiga faktor penentu utama yang mendorong migrasi tenaga kerja internasional, yaitu:[11]

1. daya "tarik", berupa demografi yang berubah dan kebutuhan pasar tenaga kerja di negara-negara dengan pendapatan tinggi,
2. daya "dorong", berupa perbedaan gaji dan tekanan krisis di negara berkembang dan miskin,

[9] Sulistyowati Irianto, *Akses Keadilan dan Migrasi Global*, (Jakarta: Obor, 2011), hal 2.
[10] *Ibid.*, hal 7.
[11] *Ibid.*

3. jaringan antar negara berdasarkan keluarga, budaya, dan sejarah.

Gaji yang lebih tinggi yang ditawarkan oleh pemberi kerja di luar negeri tentu saja membuat tenaga kerja Indonesia tertarik untuk bekerja di luar negeri. Bayangan kesejahteraan dari gaji tinggi inilah yang kemudian memicu semangat tenaga kerja Indonesia untuk bekerja di luar negeri.

Kemiskinan yang dialami sebagian besar masyarakat merupakan lingkaran tak berujung dari rendahnya tingkat pendidikan dan akses yang rendah terhadap informasi atas peluang yang memungkinkan mereka untuk melakukan perbaikan hidup. Di tengah situasi kemiskinan tersebut, peluang yang ada dan masih dapat diharapkan untuk memperbaiki tingkat kesejahteraan adalah dengan menjadi buruh migran.[12] Inilah yang kemudian menjadi salah satu alasan pendorong untuk melakukan migrasi.

Migrasi telah menyebabkan dunia kehilangan batas-batas konvensionalnya. Gelombang migrasi telah menepis batas-batas hukum bahkan budaya dari negara. Batas negara hanyalah batas administratif, dan hukum kehilangan batas yurisdiksi substantifnya.[13] Inilah yang kemudian yang biasa kita kenal sebagai dampak globalisasi.

Di dalam buku *A Fair Globalization: Creating Opportunities for All* disebutkan bahwa:

> *"Globalization has set in motion a process of far-reaching change that is affecting everyone. New technology, supported by more open policies, has created a world more interconnected than ever before. This spans not only growing interdependence in economic relations – trade, investment, finance and the organization of production globally – but also social and political interaction among organizations and individuals across the world."*[14]

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[12] Komnas Perempuan, *Migrasi Tanpa Dokumen*, (Jakarta: Publikasi Komnas Perempuan, 2005), hal 2.

[13] *Ibid.*, hal 1.

[14] Terjemahannya adalah sebagai berikut:
"Globalisasi memiliki sejumlah proses dalam mencapai perubahan yang mempengaruhi semua orang. Teknologi baru, didukung oleh kebijakan yang lebih terbuka, telah menciptakan sebuah dunia yang lebih saling berhubungan daripada sebelumnya. Hal ini mencakup tidak hanya sifat saling ketergantungan dalam hubungan ekonomi - perdagangan, investasi, keuangan dan organisasi produksi global - tetapi juga interaksi sosial dan politik di kalangan organisasi dan individu di seluruh dunia."
World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All,* (Jenewa: International Labour Office, 2004), hal x.

Kebijakan yang lebih terbuka ini kemudian membuat nilai-nilai yang masuk ke dalam suatu regulasi diserap oleh negara lain dan menyebabkan terjadinya *cross-culture*[15]. Inilah yang menyebabkan dunia memiliki sama rasa dan sama suka, sehingga batas-batas negara yang sangat konvensional yang dianut oleh hukum internasional menjadi tidak jelas lagi.

Globalisasi menyebabkan hukum kehilangan yurisdiksi substantif[16]-nya sebagai akibat terjadinya perbenturan antar hukum. Perbenturan antar hukum menyebabkan tarik menarik hukum yang menyebabkan dinamika di dalam hukum tersebut. Negara yang memiliki kedaulatan atas wilayah dan menegakkan hukum di atas wilayahnya menjadi kehilangan kekuatan dikarenakan hukum yang digunakan merupakan hukum yang sudah bercampur dan memiliki dinamika tersendiri, hukum negara pun akan mentah begitu saja. Contohnya saja perjanjian/aturan yang dibuat oleh korporasi multi nasional yang mana perjanjian/aturan tersebut adalah hukum bagi korporasi tersebut, hukum negara menjadi mentah dan tidak dapat mencampuri perjanjian/aturan yang telah dibuat karena sifatnya yang multi nasional dan personal subjek hukum.

Dalam kasus pekerja/buruh migran ini, terjadi perbenturan antara hukum negara pengirim dengan hukum yang berlaku di negara penerima. Hal ini dapat menimbulkan ketidakjelasan hukum yang berujung pada ketidakjelasan perlindungan. Ketidakjelasan ini timbul karena pekerja/buruh migran melewati batas-batas konvensional untuk bekerja. Perlindungan hukum seperti apa yang akan diterima oleh si pekerja/buruh migran? Bagaimanakah mekanisme perlindungan bagi mereka? Menggunakan sistem hukum negara pengirim atau negara penerima? Tidak adanya batasan tersebut semakin membuat posisi pekerja/buruh, khususnya migran, menjadi tidak

[15] *Cross-culture* atau dikenal dengan lintas budaya merupakan budaya-budaya yang saling bertukar dan berkaitan dengan luar batas-batas bangsa atau kelompok budaya.

Joseph F. Trimmer dan Tilly Warnock, *Undertanding Others: Cultural and Cross-Cultural Studies and The Teaching of Literature*, (National Council of Teachers of English, 1992), hal. 38.

[16] Yurisdiksi substantif dalam hal ini adalah yurisdiksi dimana negara memiliki kekuatan untuk menegakkan hukum di dalam wilayahnya.

jelas. Berdasarkan persoalan tersebut penulis mengangkat masalah ini untuk dibahas dalam penelitian ini, dengan mengambil sempel perlindungan pekerja/buruh migran Indonesia yang bekerja di Malaysia dan Hong Kong yang difokuskan kepada sistem pembayaran gaji mereka.

Mengapa sistem pembayaran gaji?

Sistem pembayaran gaji tertuang di dalam perjanjian kerja antara majikan dengan pekerja/buruh migran yang mana di dalam perjanjian tersebut terjadi pilihan hukum yang di dahului oleh beragamnya hukum yang dapat dipilih oleh kedua belah pihak. Pilihan-pilihan hukum ini terjadi karena pekerja/buruh migran yang berasal dari suatu negara dapat menggunakan ketentuan hukum negara asalnya atau ketentuan hukum negara dimana tempat ia bekerja atau bahkan ketentuan lain yang mereka sepakati. Pilihan-pilihan hukum inilah yang kemudian memiliki imbas kepada para pembuat perjanjian. Dalam kasus pekerja/buruh migran, imbas dari pilihan hukum ini dimulai dari: besaran gaji yang diterima oleh pekerja/buruh migran, proses pemberian gaji, dan proses penyelesaian sengketa yang akan dilakukan apabila terjadi permasalahan hukum.

Pada dasarnya pekerja/buruh migran Indonesia kita kenal dengan nama Tenaga Kerja Indonesia (TKI). Mereka adalah warga negara Indonesia yang telah memenuhi syarat untuk bekerja di luar negeri dalam hubungan kerja untuk jangka waktu tertentu dengan menerima upah. Dengan demikian, baik WNI yang bekerja sebagai pekerja kantoran maupun sebagai pembantu rumah tangga di luar negeri, dapat kita sebut sebagai TKI. Tetapi dalam penelitian ini penulis memfokuskan pada PRT (Pekerja Rumah Tangga), sehingga yang penulis maksudkan dengan pekerja/buruh migran dalam penelitian ini adalah pekerja rumah tangga. Pekerja rumah tangga kerap dijadikan robot yang bekerja dan terkadang dengan gaji yang sangat rendah dan tidak sesuai dengan beratnya pekerjaan yang dijalani, yang kemudian dapat disimpulkan hak-hak mereka belum terpenuhi secara keseluruhan.

Mengapa Malaysia dan Hong Kong? Penulis menilai bahwa perjanjian kerja di Hong Kong memiliki standar yang baik dan sudah mengakomodir hak-hak pekerja/buruh migran. Berbeda dengan Malaysia, yang mana

Malaysia tidak memiliki standar perjanjian kerja yang kemudian pelaksanaan hak-hak pekerja/buruh migran sukar terakomodir. Padahal apabila dinilai, perjanjian kerja merupakan hukum bagi pekerja dengan majikan untuk melaksanakan hak dan kewajiban masing-masing yang kemudian mengikat kedua belah pihak.

I.2. Pokok Permasalahan

Pokok permasalahan dari penelitian ini adalah bagaimana pengaruh globalisasi hukum terhadap sistem pembayaran gaji pekerja/buruh migran. Terhadap hal tersebut, penulis memformulasikannya ke dalam pertanyaan penelitian, yakni:

1. Bagaimana globalisasi hukum berpengaruh terhadap pekerja/buruh migran?
2. Bagaimana ketentuan hukum yang berlaku terkait sistem pembayaran gaji pekerja/buruh migran di Malaysia dan Hong Kong?
3. Bagaimana pelaksanaan dan dampak dari sistem pembayaran gaji pekerja/buruh migran Indonesia di Malaysia dan Hong Kong?

I.3. Tujuan Penelitian

Tujuan umum dari penelitian ini adalah untuk mengetahui pengaruh globalisasi hukum terhadap sistem pembayaran gaji pekerja/buruh migran. Tujuan khusus dari penelitian ini adalah:

1. Mengetahui pengaruh globalisasi hukum terhadap pekerja/buruh migran.
2. Mengetahui ketentuan hukum yang berlaku terkait sistem pembayaran gaji pekerja/buruh migran Indonesia yang berlaku di Malaysia dan Hong Kong.
3. Mengetahui kondisi lapangan terkait sistem pembayaran gaji pekerja/buruh migran Indonesia di Malaysia dan Hong Kong beserta dampaknya.

I.4. Kerangka Konsepsional

Berikut penulis jabarkan mengenai konsep-konsep yang digunakan dalam penelitian ini, antara lain:

1. Pekerja/buruh adalah setiap orang yang bekerja dengan menerima upah atau imbalan dalam bentuk lain.[17] Dalam penelitian ini penulis memfokuskan kepada PRT (Pekerja Rumah Tangga), sehingga pekerja/buruh migran yang penulis maksud adalah PRT.
2. Pemberi kerja adalah orang perseorangan, pengusaha, badan hukum, atau badan-badan lainnya yang mempekerjakan tenaga kerja dengan membayar upah atau imbalan dalam bentuk lain.[18]
3. Tenaga Kerja Indonesia yang selanjutnya disebut dengan TKI adalah setiap warga negara Indonesia yang memenuhi syarat untuk bekerja di luar negeri dalam hubungan kerja untuk jangka waktu tertentu dengan menerima upah.[19]
4. Perjanjian kerja adalah perjanjian tertulis antara TKI dengan Pengguna yang memuat syarat-syarat kerja, hak dan kewajiban masing-masing pihak.[20]
5. Migrasi adalah perpindahan seseorang atau sekelompok orang baik melintasi perbatasan internasional atau dalam suatu Negara. Hal ini adalah perpindahan penduduk yang mencakup setiap jenis gerakan orang berapapun jauh, komposisi dan penyebabnya, termasuk juga migrasi pengungsi, migrasi ekonomi, dan orang-orang bergerak untuk tujuan lain termasuk reunifikasi keluarga.[21]
6. Globalisasi merupakan hasil dari kekuatan modernisasi dan ekspansi kapitalis yang menyebabkan terjadinya integrasi dari semua kegiatan

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[17] Di dalam penulisan ini, penulis menggambarkan pekerja/buruh sebagai pekerja/buruh yang bermigrasi ke luar negeri atau biasa disebut dengan pekerja/buruh migran.

Indonesia, *Undang-Undang Ketenagakerjaan*, UU No. 13 Tahun 2003, LN Nomor 39 Tahun 2003, TLN Nomor 4279, Ps. 1 angka 3.

[18] *Ibid.*, Ps. 1 angka 4.

[19] Indonesia, *Undang-Undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*, UU No. 39 Tahun 2004, LN Nomor 133 Tahun 2004, TLN Nomor 4445, Ps. 1 angka 1.

[20] *Ibid*, Ps. 1 angka 10.

[21] International Organization for Migration, *Glossary on Migration*, (International Migration Law Series No. 25, 2011).

ekonomi (lokal, nasional, maupun regional) menjadi suatu pasar global, yakni pasar yang melampaui batas geo-politik dan tidak tunduk pada peraturan perundang-undangan suatu negara.[22]

7. Pluralisme hukum adalah suatu cara pandang terhadap kondisi keberagaman sistem hukum yang ada dalam masyarakat. Merupakan juga 'reaksi' terhadap cara pandang yang positivistik, yang memandang satu-satunya sistem hukum adalah hukum negara (legal sentralisme).[23]
8. Hukum adalah keseluruhan asas-asas dan kaidah-kaidah yang mengatur kehidupan manusia dalam masyarakat, dan juga mencakupi lembaga-lembaga *(institutions)* dan proses-proses *(processes)* yang mewujudkan berlakunya kaidah-kaidah itu dalam kenyataan.[24]
9. Upah adalah hak pekerja/buruh yang diterima dan dinyatakan dalam bentuk uang sebagai imbalan dari pengusaha atau pemberi kerja kepada pekerja/buruh yang ditetapkan dan dibayarkan menurut suatu perjanjian kerja, kesepakatan, atau peraturan perundang undangan, termasuk tunjangan bagi pekerja/buruh dan keluarganya atas suatu pekerjaan dan/atau jasa yang telah atau akan dilakukan.[25]
10. Perlindungan TKI adalah segala upaya untuk melindungi kepentingan calon TKI/TKI dalam mewujudkan terjaminnya pemenuhan hak-haknya sesuai dengan peraturan perundang-undangan, baik sebelum, selama, maupun sesudah bekerja.[26]

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[22] Shalmali Guttal, *Globalisation*, Development in Practice, Vol. 17, No. 4/5 (Aug., 2007), hal. 524.

[23] Lidwina IngeNurtjahyo, *Pluralisme Hukum*, Slides Perkuliahan Antropologi Hukum, Fakultas Hukum Universitas Indonesia, 7 Maret 2011.

[24] Pengertian dan Definisi Hukum Menurut Para Ahli, http://carapedia.com/pengertian_definisi_hukum_menurut_para_ahli_info489.html. Diunduh pada tanggal 2 Januari 2012 pukul 17.29 WIB.

[25] Di dalam penelitian ini, penulis menggunakan istilah gaji daripada upah. Pada dasarnya artinya sama saja. Hanya saja menurut penulis, kata gaji lebih pantas digunakan di dalam penelitian ini, mengigat kosa katanya lebih sopan. Tetapi dalam setiap penulisan (tidak termasuk kutipan), penulis akan menyebutnya dengan gaji/upah.

Indonesia, *Undang-Undang Ketenagakerjaan*, UU No. 13 Tahun 2003, LN Nomor 39 Tahun 2003, TLN Nomor 4279, Ps. 1 angka 30.

[26] Indonesia, *Undang-Undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*, UU No. 39 Tahun 2004, LN Nomor 133 Tahun 2004, TLN Nomor 4445, Ps. 1 angka 4.

I.5. Metode Penelitian

Bentuk penelitian ini merupakan penelitian kepustakaan yang dipadukan dengan penelitian lapangan. Penelitian kepustakaan diarahkan pada perolehan data mengenai teori dan informasi terkait dengan pokok permasalahan, yakni pengaruh globalisasi hukum terhadap pekerja/buruh migran. Selain itu, dilakukan pula *review* untuk menilai apakah ketentuan hukum yang berlaku sudah memberikan perlindungan yang cukup kepada pekerja/buruh migran terkait dengan pembayaran gaji mereka dengan cara membandingan kebijakan pemberian gaji di Malaysia dan Hong Kong. Penelitian lapangan dilakukan untuk mengetahui dalam prekteknya bagaimana pembayaran gaji pekerja/buruh migran dilakukan dan apa saja permasalahannya.

Tipologi penelitian ini adalah yuridis sosiologis. Penulis mencoba menggambarkan peraturan yang berlaku yang melindungi pekerja/buruh migran untuk mendapatkan hak mereka, yakni gaji. Hal tersebut kemudian akan dibenturkan dengan kenyataan bagaimana praktek pembayaran gaji pekerja/buruh migran Indonesia di Malaysia dan Hong Kong.

Data yang digunakan dalam penelitian ini adalah data primer dan data sekunder. Data primer yang dimaksud adalah wawancara dengan mengambil narasumber pekerja/buruh migran, lembaga swadaya masyarakat yang bergerak di bidang perlindungan buruh migran, dan pejabat pemerintah yang berwenang di bidang tersebut. Data sekunder yang digunakan dalam penelitian ini berupa data yang tidak diperoleh secara langsung dari lapangan, melainkan melalui bahan-bahan kepustakaan yang terdiri dari bahan hukum primer dan bahan hukum sekunder. Bahan hukum primer berupa peraturan perundang-undangan dan putusan pengadilan. Bahan hukum sekunder berupa buku, disertasi, jurnal, artikel, surat kabar, dan internet.

Studi pustaka yang penulis lakukan adalah menggunakan peraturan perundang-undangan yang berlaku, baik di Indonesia, Malaysia, maupun Hong Kong. Selain itu penulis juga menggunakan buku-buku dan jurnal-jurnal, baik jurnal dalam negeri maupun jurnal internasional, yang berkaitan dengan tema yang yang menjadi fokus penelitian. Selain studi kepustakaan

penulis menggunakan cara lain untuk mengumpulkan data, yakni wawancara. Wawancara yang penulis lakukan menggunakan *random sampling* untuk pekerja/buruh migran. Hal ini dikarenakan untuk menjaga netralitas dari hasil penelitian. Penulis mewawancarai BNP2TKI dan Kementrian Tenaga Kerja dan Transmigrasi yang mana merupakan pembuat dan pelaksana kebijakan yang ada di Indonesia yang berkaitan dengan permasalahan yang penulis angkat. Selian itu penulis juga melakukan wawancara dengan atase ketenagakerjaan KBRI di Malaysia untuk mendapatkan gambaran lapangan terkait peran pemerintah di luar negeri untuk melindungi pekerja/buruh migran. Penulis juga sempat bercakap-cakap dengan mantan staf ahli salah satu Menteri Malaysia terkait dengan hal ini. Ini akan menjadi data tambahan yang penulis harapkan dapat mendeskripsikan pandangan pemerintah Malaysia terhadap pekerja/buruh migran Indonesia. Karena keterbatasan biaya dan waktu, penulis tidak dapat melakukan penelitian di Hong Kong, meskipun demikian penulis berusaha mewawancarai pekerja/buruh migran Indonesia yang pernah bekerja di Hong Kong dan juga mewawancarai majikan yang berasal dari Hong Kong melalui *e-mail*.

Selain dari pemerintah, penulis juga mewawancarai beberapa LSM (Lembaga Swadaya Masyarakat) yang berada di dalam negeri maupun yang berada di Malaysia dan Hong Kong. LSM dalam negeri yang penulis wawancarai antara lain: Migrant Care dan Solidaritas Perempuan. Penulis menilai kedua LSM ini memiliki peran yang aktif dalam mengandvokasi permasalahan pekerja/buruh migran. LSM Hong Kong yang penulis wawancarai adalah Dompet Dhuafa. Sementara LSM Malaysia yang penulis wawancarai adalah UNIMIG. UNIMIG sebenarnya adalah LSM Indonesia yang membuka cabang di Malaysia dengan bergabung dengan LSM Malaysia.

Di samping unsur pemerintah dan LSM, penulis juga mewawancarai beberapa pekerja/buruh migran di Malaysia dan Hong Kong untuk mendapatkan data terkait dengan kondisi yang daihadapi sesungguhnya. Selain itu, penulis juga mewawancarai majikan di Malaysia dan Hong Kong yang memiliki pekerja/buruh migran yang berekerja di rumahnya. Penulis

juga sempat mewawancarai *agency* Malaysia yang sempat mengirim pekerja/buruh migran dalam sektor pekerja rumah tangga. Diharapkan data yang didapatkan dari *agency* ini dapat mendukung penulis untuk mencari permasalahan utama dalam sistem penggajian pekerja/buruh migran Indonesia.

Hasil penelitian ini akan berbentuk laporan yang bersifat deskriptif dan preskriptif. Penulis akan memaparkan fakta-fakta yang diperoleh untuk kemudian memberikan saran mengenai perlindungan hukum gaji/upah bagi pekerja/buruh yang bermigrasi ke luar negeri.

I.6. Kegunaan Teoritis dan Praktis

Kegunaan teoritis dilakukannya penelitian ini adalah memberikan pengetahuan mengenai globalisasi hukum dan dampaknya bagi perlindungan tenaga kerja yang bekerja di luar negeri –biasa disebut dengan pekerja/buruh migran-, yang difokuskan pada pembayaran gaji. Adapun kegunaan praktis dilakukannya penelitian ini adalah memberikan masukan kepada pejabat yang berwenang terkait dengan permasalahan pembayaran gaji pekerja/buruh migran Indonesia.

I.7. Sistematika Penulisan

Adapun sistematika penulisan penelitian ini adalah sebagai berikut:

- Bab I membahas pendahuluan yang terdiri dari latar belakang permasalahan, pokok permasalahan, tujuan penelitian, kerangka konsepsional, metode penelitian, kegunaan teoritis dan praktis, dan sistematika penulisan.
- Bab II membahas mengenai globalisasi hukum dan pekerja migran yang mana akan dipecah ke dalam beberapa sub-bab, yakni: globalisasi hukum, migrasi manusia, dan pengaruh globalisasi hukum terhadap pekerja/buruh migran.
- Bab III membahas mengenai ketentuan hukum yang berlaku mengenai sistem pembayaran gaji pekerja/buruh migran Indonesia di Malaysia dan Hong Kong yang mana akan dipecah ke dalam beberapa sub-bab, yakni:

berdasarkan peraturan perundang-undangan Indonesia, berdasarkan peraturan negara penerima pekerja/buruh migran (Malaysia dan Hong Kong), serta instrumen hukum internasional.

- Bab IV membahas mengenai pelaksanaan pembayaran gaji pekerja/buruh migran Indonesia di Malaysia dan Hong Kong, berikut dampak yang ditimbulkan. Di dalam bab ini juga akan dijelaskan secara terperinci mengenai temuan lapangan yang dibenturkan dengan ketentuan hukum yang berlaku.
- Bab V berisi penutup yang terdiri dari kesimpulan dan saran.

BAB II

GLOBALISASI HUKUM DAN PEKERJA MIGRAN

Commencons par l'impossible

-Jacques Derrida

II.1. Globalisasi Hukum

"*Think locally, act globally. Think globally, act locally.*"

Dua jargon tersebut seringkali kita dengar di dalam berbagai pembicaraan yang berkaitan dengan pola berpikir dan pelaksanaannya. Pada dasarnya kedua jargon tersebut adalah pertentangan satu dengan yang lainnya. Membicarakan hal yang sama tetapi dengan metode yang berbeda. "*Think locally, act globally"* pada dasarnya adalah cara mudah untuk menerangkan istilah glokalisasi. Sementara *"think globally, act locally"* untuk menerangkan istilah globalisasi.

Istilah glokalisasi pertama kali digunakan orang Jepang pada tahun 1980-an terkait pasar Jepang.[27] Boyd mengungkapkan glokalisasi sebagai berikut:

> *"The ugliness that ensues when the global and local are shoved uncomfortably into the same concept. It doesn't sit well on your palette, it doesn't have a nice euphoric ring. It implies all sorts of linguistic and cognitive discomfort."*[28]

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[27] Manu N. Kulkarni, *Glocalisation,* Economic and Political Weekly, Vol 38, No. 31 (Aug, 2003),hal. 3328.

[28] Terjemahannya adalah sebagai berikut:
Keburukan yang terjadi ketika global dan lokal saling mendorong di dalam konsep yang sama. Dorong-mendorong tersebut tidak akan berdiam di suatu tempat, dan tidak memiliki sesuatu yang konstan. Hal tersebut berimplikasi kepada berbagai jenis ketidaknyamanan linguistik dan kognitif.
D. Boyd, *Glocalization: When Global Information and Local Interaction Collide,* (San Diego: O'Reilly Emerging Technology Confrence: 2006), hal. 1.

Sementara itu, globalisasi adalah sebuah konsep penyatuan global yang melintasi batas-batas yurisdiksi negara di dunia. Konsep ini memungkinkan adanya keterbukaan, kesamaan, dan kebebasan berkomunikasi di antara negara maju dengan negara berkembang dan terbelakang. Annabelle Sreberny – Mohammadi memberikan definisi globalisasi dengan:

> *"The intensification of worldwide social relations which link distant localities in such a way that happenings are shaped by events accuring many miles away and vice versa."*[29]

Sementara itu, Shalmali Guttal mengatakan:

> *"Globalisation is both a result and a force of modernisation and capitalist expansion, entailing the integration of all economic activity (local, national, and regional) into a 'global' market place: that is, a market place that transcends geo-political borders and is not subject to regulation by nation states.*[30]

Pengertian globalisasi dari sudut pandang Annabelle Sreberny – Mohammadi lebih berifat umum dan fokus kepada informasi yang didapatkan dengan cepat, meskipun kejadian yang diinformasikan berada sangat jauh. Sementara Shalmali Guttal lebih kepada pasar global yang merupakan hasil dari ekspansi kapitalis yang menyebabkan integrasi pada kegiatan ekonomi tanpa mengindahkan peraturan yang berlaku.

Beda halnya dengan pemahaman yang diberikan oleh Thomas L. Friedman yang mengatakan bila di era perang dingin dunia terbelah ke

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[29] Terjemahannya adalah sebagai berikut:
Intensifikasi hubungan sosial yang menjangkau seluruh dunia yang menghubungkan daerah yang jauh dengan berbagai cara yang mana dibentuk oleh suatu kejadian yang bermil-mil jauhnya dan juga sebaliknya.
Annabelle Sreberny – Mohammadi, *The Global and The Local in International Communication*, (Oxford: Blackwell Publishing, 2002), hal 338.

[30] Terjemahannya adalah sebagai berikut:
Globalisasi merupakan hasil dari kekuatan modernisasi dan ekspansi kapitalis yang menyebabkan terjadinya integrasi dari semua kegiatan ekonomi (lokal, nasional, maupun regional) menjadi suatu pasar global, yakni pasar yang melampaui batas geo-politik dan tidak tunduk pada peraturan perundang-undangan suatu negara.
Shalmali Guttal, *Globalisation*, Development in Practice, Vol. 17, No. 4/5 (Aug., 2007), hal. 524.

dalam *'division'*, di era globalisasi yang tampak ialah *'integration'*. Friedman hendak menjelaskan bahwa, bagaimanapun dunia sudah semakin menyatu, malampaui batas-batas politik masing-masing negara, mengusung eksistensi dan peran warga negara (individu) secara demikian optimal menerobos sekat-sekat formal negara.[31]

Penafsiran globalisasi memang ditengarai sebagai sebuah proses dan tatanan yang kompleks. Kompleksitas ini terjadi karena ia digerakkan oleh berbagai kekuatan, baik budaya, teknologi, politik, maupun ekonomi. Tidak mengherankan bila kemudian ia dapat mempengaruhi kehidupan manusia. Ia tidak hanya merubah kehidupan sehari-hari tetapi juga menciptakan kekuatan-kekuatan internasional baru. Bahkan disadari atau tidak, globalisasi telah mentranformasikan ruang dan waktu serta institusi-institusi, baik sosial maupun ekonomi.[32]

Dengan demikian, beberapa ciri-ciri dari globalisasi berdasarkan pengertian-pengertian yang disampaikan sebelumnya adalah:

1. Intensifikasi hubungan sosial yang menjangkau seluruh dunia.
2. Integrasi dari kegiatan ekonomi yang menyebabkan terjadinya pasar global.
3. Melampaui batas politik dan tidak tunduk pada peraturan perundang-undangan suatu negara.
4. Eksistensi individu/peran warga negara menjadi semakin optimal.

Selain pengertian globalisasi yang begitu banyak, terdapat pro dan kontra terhadap globalisasi ini. Shalmali Guttal mengatakan:

> *"Many argue that globalisation is a 'natural' outcome of technological, scientific, and economic progress and is irreversible. Others claim that globalisation is driven by greed and the desire for accumulation and control of material wealth, for which capitalism provides a rational ideology and operational framework. Among those on the left, globalisation is viewed as an undeniably capitalist process that has its roots at least as far back as the industrial revolution in Europe and the rise of the British Empire,*

[31] Thomas L. Friedman, *Understanding Globalization: Lexus and Olive Tree*, (Paperback: Anchor Books, 2000).

[32] Anthony Giddens, Runway World: *How Globalization Is Reshaping Our Lives*, (New York: Routledge, 2000), hal 38.

> *and has rapidly gained ground since the collapse of the Soviet Union and of socialism as a viable form of economic organisation. The proponents of globalisation claim that it will create convergences of income, access to knowledge and technology, consumption power, living standards, and political ideals. By integrating local and national economies into a global economy that is unfettered by protectionism, economic growth will increase, wealth will be created, and more people in the world will be able to enjoy the advantages and fruits of modernisation, technological progress, and civilis ation. Its critics, on the other hand, argue that globalisation is hegemonic, antagonistic to the poor and vulnerable, and is debilitating local and national economies, communities, and the environment."*[33]

Perdebatan yang ditawarkan oleh Shalmali Guttal berangkat dari pemahaman mengenai sejarah, khususnya mengenai terjadinya globalisasi.

Gejala globalisasi telah muncul pada abad XIX sebagai rekaan demokrasi sosial gaya lama.[34] Gejala itu muncul sejak petualang dan pedagang Eropa menjelajahi dunia. Era merkantilis pertengahan abad XIX

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[33] Terjemahannya adalah sebagai berikut:

> Banyak yang berpendapat bahwa globalisasi adalah hasil yang 'alami' dari kemajuan teknologi, hal ilmiah, kemajuan ekonomi yang mana tidak dapat diubah. Pihak lain mengklaim bahwa globalisasi didorong oleh keserakahan dan keinginan untuk mengakumulasikan dan mengontrol kekayaan materi untuk menyediakan sebuah ideologi kapitalisme rasional dan kerangka operasional. Di dalam golongan kiri, globalisasi dipandang sebagai suatu proses yang tidak dapat disangkal yang akarnya tidak jauh dari revolusi industri di Eropa dan kebagkitan Kerajaan Inggris, dan telah berkembang pesat sejah runtuhnya Uni Soviet dan sosialisme sebagai bentuk organisasi ekonomi yang layak. Para pendukung globalisasi menyatakan bahwa globalisasi akan menciptakan konvergensi pendapatan, akses terhadap pengetahuan dan teknologi, konsumsi daya, standar hidup, dan cita-cita politik. Dengan melakukan integrasi antara ekonomi local dan nasional menjadi ekonomi global yang tidak terkekang oleh proteksionisme, maka pertumbuhan ekonomi akan meningkat, terciptanya kekayaan, dan akan lebih banyak lagi orang-orang di dunia yang dapat menikmati keuntungan dan buah dari modernisasi, kemajuan teknologi dan peradaban. Para pengkritik, di sisi lain, berpendapat bahwa globalisasi adalah hegemonic, bertentangan dengan kaum miskin dan rentan kemiskinan, dan melemahkan ekonomi lokal dan nasional, masyarakat dan lingkungan.

Shalmali Guttal, *Globalisation*, Development in Practice, Vol. 17, No. 4/5 (Aug., 2007), hal. 524

[34] Demokrasi sosial gaya lama memandang pasar bebas sebagai sesuatu yang menghasilkan banyak dampak negatif. Faham ini percaya bahwa semua ini dapat diatasi lewat intervensi negara terhadap pasar. Negara memiliki kewajiban untuk menyediakan segala yang tidak bisa diberikan oleh pasar. Intervensi pemerintah dalam perekonomian dan sektor-sektor kemasyarakatan adalah mutlak diperlukan. Kekuatan publik dalam masyarakat demokratis adalah representasi dari kehendak kolektif.

Masyarakat Madani: Aktualisasi Profesionalisme Community dalam Mewujudkan Masyarakat yang Berkeadilan, http://www.policy.hu/suharto/modul_a/makindo_16.htm. Diunduh pada tanggal 26 April 2012, pukul 20.43 WIB.

dengan dukungan transportasi laut boleh dikatakan sebagai awal globalisasi abad 19. Saat itu perdagangan dan perekonomian dunia sudah terbuka dan dikuasi pedagang Eropa (negara maju). Jalur perdagangan dan pasar dunia dikuasai dan dimonopoli pedagang Eropa. Monopoli tidak hanya melalui diplomasi tetapi diusahakan melalui kekerasan (peperangan) dalam upaya menundukkan dan hasrat menguasai kerajaan-kerajaan di Asia, Afrika, Amerika Latin untuk dijadikan daerah jajahan demi kepentingan perdagangan (sumber bahan mentah dan pasar). Ketika itu muncul koloni-koloni yang sudah dikuasai sehingga dengan mudah untuk dikontrol aktivitas perdagangannya. Dengan demikian keuntungan para pedagang dapat dilipat gandakan dan negara bisa mengambil keuntungan untuk membiayai pembangunan di negara asal.[35]

Globalisasi pada abad XX terlihat dengan adanya merk-merk luar negeri yang bertebaran di dalam negeri yang kemudian menunjukkan bahwa modal asing telah masuk. Media komunikasi semakin berkembang dan mudah diakses.

Globalisasi pada abad XXI akan terus diiringi biaya telekomunikasi yang menurun akibat perkembangan *microchips*, prosesor yang semakin cepat, *fiber optics*, satelit, dan internet. Teknologi informasi tidak hanya menguntungkan negara-bangsa dan perusahaan-perusahaan yang memungkinkan mereka memperluas jaringannya keseluruh dunia. Untuk mempertahankan pertumbuhan ekonomi agar legitimasi kekuasaan rezim berkuasa tidak goyah maka penanaman modal asing dipermudah dengan bantuan berbagai kebijakan. Persyaratan untuk menanamkan modal dibuat lebih ringan dan lunak. Modal asing mengalir terus. Kegiatan industri meningkat tajam. Kerjasama (*joint venture*) pengusaha pribumi dengan pengusaha asing semakin banyak dilakukan.kerjasama perusahaan modal asing dengan perusahaan pribumi tidak hanya dalam perdagangan tetapi juga dalam otomotif.[36]

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[35] Christopher G. A. Bryant dan David Jary, *The Contemporary Giddens: Social Theory in a Globalizing Age,* MIS Quarterly, Vol. 32, Issue 1 (March., 2008), hal. 32-33.

[36] Christoph Antons, *Law and Development in East and Southeast Asia*, (1998), hal. 327-345.

Karakteristik yang terlihat di atas adalah karakteristik globalisasi yang berhubungan dengan ekonomi. Lalu dari segi manakah kita dapat melihat globalisasi hukum?

Bagaimanapun karakteristik dan hambatannya, globalisasi ekonomi menimbulkan akibat yang besar sekali pada bidang hukum. Globalisasi ekonomi juga menyebabkan terjadinya globalisasi hukum. Globalisasi hukum tersebut tidak hanya didasarkan kesepakatan internasional antar bangsa, tetapi juga pemahaman tradisi hukum dan budaya antara Barat dan Timur.[37]

Globalisasi hukum terjadi melalui usaha-usaha standarisasi hukum. antara lain melalui perjanjian-perjanjian internasional.[38] *General Agreement on Tariff and Trade* (GATT) misalnya, mencantumkan bebarapa ketentuan yang harus dipenuhi oleh negara-negara anggota berkaitan dengan penanaman modal, hak milik intelektual, dan jasa prinsip-prinsip "Non-*Discrimination*," "*Most Favoured Nation*," "*National Treatment*," "*Transparency*" kemudian menjadi substansi peraturan-peraturan nasional negara-negara anggota.[39]

Persamaan ketentuan-ketentuan hukum berbagai negara bisa juga terjadi karena suatu negara mengikuti model negara maju berkaitan dengan institusi-institusi hukum untuk mendapatkan modal. Undang-Undang Perseroan Terbatas berbagai negara, dari "*Civil Law*" maupun "*Common Law*" berisikan substainsi yang serupa.[40]

Globalisasi hukum akan menyebabkan peraturan-peraturan negara-negara berkembang mengenai investasi, perdagangan, jasa-jasa dan bidang-

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[37] Essay Prof. Erman Rajagukguk, *Peranan Hukum dalam Pembangunan pada Era Globalisasi: Implikasinya bagi Pendidikan Hukum Indonesia*, hal. 6.

[38] Lihat antara lain, Stephen Zamora, *The Americanization of Mexican Law : Non-Trade Issues in The North American Free Trade Agreement*, Law & Policy in International Business. Vol. (1993),hal. 406-433

[39] GATT saat ini sudah berubah nama menjadi WTO (*World Trade Organisastion*).

Micheal A Geist, *Toward A General Agreement on the Regulation of Foreign Direct Investment*, Law & Policy in International Business, vol. 26 (1995) hal. 714-716. Bandingkan Denine Manning-Cabral, *The Eminent Death of the Calvo Clause and the Rebirth of the Calvo Principle : Equality of Foreign and National Investors*, Law & Policy in International Business vol. 26 (1995) hal. 1171-1199.

[40] David Goddard, *Gonvergence in Corporations Law-Towards A Facilititave Model*, VUWLR vol. 26 (1996), hal. 197-204.

bidang ekonomi lainnya mendekati negara-negara maju (*convergence*). Namun tidak ada jaminan peraturan-peraturan tersebut memberikan hasil yang sama di semua tempat. Hal mana dikarenakan perbedaan sistem politik, ekonomi, dan budaya. Apa yang disebut hukum itu tergantung kepada persepsi masyarakatnya. Friedman, mengatakan bahwa tegaknya peraturan-peraturan hukum tergantung kepada budaya hukum masyarakat, budaya hukum masyarakat tergantung kepada budaya hukum anggota-anggotanya yang dipengaruhi oleh latar belakang pendidikan, lingkungan, budaya, posisi atau kedudukan, bahkan kepentingan-kepentingan.[41]

Globalisasi hukum semakin mendorong kompleksitas hukum yang plural yang diimplementasikan oleh berbagai aktor. Globalisasi juga meningkatkan interaksi dinamis antar hukum. Namun, fakta tentang keberadaan pluralisme hukum bukan merupakan fenomena baru. Globalisasi meningkatkan dan menambah dinamika konstelasi pluralisme hukum yang telah ada (Benda-Beckmann, 2002).[42]

Globalisasi hukum erat kaitannya dengan kedaulatan negara sebagai satu-satunya subjek hukum internasional yang memiliki kedaulatan wilayah, yang kemudian akan timbul pertanyaan dimanakah suatu kedaulatan dari negara apabila terjadi suatu 'integrasi' dalam bidang hukum?

Dalam berbagai referensi mengenai globalisasi, analisis dampak dari globalisasi hukum pada umumnya terletak pada bentuk hubungan antara kepentingan nasional, internasional dan transnasional. Ide mengenai Negara sebagai satu-satunya pemilik kedaulatan hukum semakin melemah dengan munculnya berbagai pola interaksi hukum yang melintasi batas-batas antara hukum internasional dan nasional, praktek di tingkat lokal dan internasional, serta kewenangan yuridis internal dan eksternal (McGrew, 1998 , p.336). Saat ini kedaulatan harus diterima sebagai suatu kewenangan yang tidak lagi dimonopoli oleh Negara, namun kedaulatan dalam pembentukan hukum telah terbagi di antara berbagai entitas/agen -nasional, regional dan

[41] Lawrence M. Friedman. *American Law*, (New York - London : W.W. Norton & Company. 1984), hal. 218-230.

[42] Dian Rositawati, *Kedaulatan Negara dalam Pembentukan Hukum di Era Globalisasi* dalam buku *Hukum yang Bergerak*, (Jakarta: Obor, 2009), hal. 46.

internasional. McGrew (1998, hal 340) menyatakan bahwa: "Keberadaan jaringan aktivitas global dan regional, rezim internasional, tata pemerintahan global dan regional, gerakan sosial di tataran transnasional, interaksi hukum global dan transnasional, dan berbagai jenis asosiasi transnasional, dapat diinterpretasikan sebagai munculnya 'ruang politik (dan hukum)' jenis baru yang melepaskan diri dari ikatan wilayah negara."[43]

Dengan demikian globalisasi ekonomi yang disebarkan oleh para penjajah, tanpa disadari berimbas pada bidang hukum. Hal ini dikarenakan hubungan ekonomi diikatkan pada suatu hukum yang berlaku. Globalisasi menyababkan berintegrasinya hukum. Hukum berinteraksi melewati batas-batas negara yang menyebabkan yurisdiksi wilayah negara menjadi melemah.

II.2. Migrasi Manusia

Globalisasi menyebabkan sekat-sekat antar negara menjadi hilang yang kemudian menyebabkan pergerakan manusia dari satu negara ke negara lainnya menjadi lebih mudah. Migrasi merupakan dari pergerakan manusia dari suatu tempat ke tempat lainnya dengan berbagai macam tujuan dan berbagai jangka waktu.

Setiap tahunnya beribu-ribu orang bermigrasi dari suatu daerah ke daerah lain. Migrasi ini dikarenakan mobilitas penduduk yang disebabkan oleh berbagai macam faktor. Mobilitas berarti perpindahan tempat tinggal dari suatu tempat ke tempat lain.

Menurut Priyono (2000), mobilitas penduduk merupakan bagian integral dari proses pembangunan secara keseluruhan. Mobilitas telah menjadi penyebab dan penerima dari dampak perubahan dalam struktur ekonomi dan sosial suatu daerah. Tidak akan terjadi proses pembangunan tanpa adanya mobilitas penduduk. Tetapi juga tidak akan terjadi pengarahan

[43] *Ibid,* hal. 47-48.

penyebaran penduduk yang berarti tanpa adanya kegiatan pembangunan itu sendiri.[44]

Migrasi itu sendiri adalah perpindahan seseorang atau sekelompok orang baik melintasi perbatasan internasional atau dalam suatu negara. Hal ini adalah perpindahan penduduk yang mencakup setiap jenis gerakan orang berapapun jauh, komposisi dan penyebabnya, termasuk juga migrasi pengungsi, migrasi ekonomi, dan orang-orang bergerak untuk tujuan lain termasuk reunifikasi keluarga.[45]

Sementara itu, Munir mendefinisikan migrasi dengan perpindahan penduduk dengan tujuan untuk menetap dari suatu tempat ke tempat lain melampaui batas politik/negara ataupun batas administrasi/batas bagian dalam suatu negara.[46] William B. Wood dalam artikelnya yang berjudul *Forced Migration: Local Conflicts and International Dilemmas* mengatakan:

> *"Migration is defined as a permanent or semi-permanent change of residence, usually across some type of administrative boundary. Unlike the singular demographic events of birth and death, a person can migrate many times, for varied durations, and across numerous territorial divisions. The inherent complexity of most migrations-especially those within and between poor countries-hinders our understanding of the ways migration affects and is affected by economic development and international relations."*[47]

Di dalam hal yang sama, National Gheograpic mengatakan:

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[44] Direktorat Analisis Dampak Kependudukan Badan Kependudukan dan Keluarga Bencana Nasional, *Fenomena Kemiskinan dan Tenaga Kerja Indonesia ke Luar Negeri*, (Jakarta: BKKBN, 2011), hal 1.

[45] International Organization for Migration, *Glossary on Migration*, (International Migration Law Series No. 25, 2011).

[46] Munir, *Migrasi*, (Jakarta: Lembaga Penerbit UI, 2000), hal 116.

[47] Terjemahannya adalah sebagai berikut:
Migrasi didefinisikan sebagai perubahan tempat tinggal yang permanen atau semi-permanen, yang biasanya melewati batas-batas administrative. Berbeda dengan peristiwa demografi tunggal, yakni kelahiran dan kematian, seseorang dapat melakukan migrasi berkali-kali, untuk jangka waktu yang bervariasi, dan dilakukan di berbagai wilayah. Kompleksitas yang melekat pada migrasi –terutama mereka yang berada dan di dalam negara miskin- yang menghalangi pemahaman kita tentang dampak-dampak migrasi dan dipengaruhi oleh perkembangan ekonomi serta hubungan internasional.
William B. Wood, Forced Migration: *Local Conflict adnd International Dilemmas*, Annals of the Association of American Geographers, Vol. 84, No. 4 (Dec., 1994), hal. 607-634.

> *"Migration (human) is the movement of people from one place in the world to another for the purpose of taking up permanent or semipermanent residence, usually across a political boundary. An example of "semipermanent residence" would be the seasonal movements of migrant farm laborers. People can either choose to move ("voluntary migration") or be forced to move ("involuntary migration"). Migrations have occurred throughout human history, beginning with the movements of the first human groups from their origins in East Africa to their current location in the world. Migration occurs at a variety of scales: intercontinental (between continents), intracontinental (between countries on a given continent), and interregional (within countries). One of the most significant migration patterns has been rural to urban migration—the movement of people from the countryside to cities in search of opportunities."*[48]

Pengertian-pengertian yang disajikan berisikan hal yang sama terkait migrasi, yakni:

1. Migrasi adalah perpidahan manusia dari suatu tempat ke tempat lain.
2. Migrasi dapat dilakukan di dalam negeri maupun melewati batas negara yang mana dengan kata lain melewati batas adminstratif ataupun batas politik suatu negara.
3. Migrasi dilakukaan dengan berbagai macam tujuan, seperti: memenuhi kebutuhan sehari-hari dengan bekerja di tempat lain, reunifikasi keluarga, dan lain sebagainya.

Migrasi ini dilakukan dengan berbagai macam cara yang kemudian membagi migrasi menjadi berbagai macam jenis.

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[48] Terjemahannya adalah sebagai berikut:
Migrasi (manusia) adalah pergerakan manusia dari suatu tempat ke tempat lain di duniadengan tujuan bertempat tinggal secara permanen ataupin semi permanen, biasanya melalui batas politik. Contoh dari "tempat tinggal semi permanen" adalah pergerakan pekerjaburuh tani imigran. Orang-orang juga dapat memilih untuk pindah ("migrasi secara sukarela') atau dipaksa untuk pindah ("migrasi paksa"). Migrasi terjadi selama sepanjang sejarah manusia, dimulai dari perpindahan sekelompok manusia dari daerah asal mereka Afrika Timur ke lokai mereka saat ini. Migrasi terjadi dalam berbagai skala: antar benua (antar negaradi berbagai benua), dan antar daerah (terjadi di dalam suatu negara). Salah satu pola migrasi yang paling signifikan yang terjadi adalah perpindahan dari pedesaan ke kota – pergerakan manusia dari pedesaan ke kota untuk mencari peluang hidup.
National Gheographic, *What is Human Migration?*, (Expeditions Human Migration Guide No, 6-8, 2005), hal 1.

Migrasi penduduk terbagi menjadi 2 jenis:

1. Migrasi internasional: perpindahan penduduk yang melewati batas suatu negara.
2. Migrasi intern: migrasi yang terjadi dalam batas wilayah suatu negara.

Perilaku mobilitas penduduk oleh Revenstain disebut dengan hukum-hukum migrasi sebagai berikut: para migran cenderung memilih tempat terdekat sebagai daerah tujuan. Faktor paling dominan yang mempengaruhi seseorang untuk bermigrasi adalah situasinya memperoleh pekerjaan di daerah asal dan kemungkinan untuk memperoleh pekerjaan dan pendapatan yang lebih baik di daerah tujuan. Daerah tujuan mempunyai nilai faedah wilayah (*place utility*) lebih tinggi dibanding dengan daerah asal.[49] Tentunya pemilihan tempat untuk bermigrasi didasari oleh alasan-alasan seseorang melakukan migrasi dan tentunya pula yang akan menentukan jenis dari suatu migrasi.

Seseorang melakukan migrasi disertai dengan berbagai macam alasan, mereka akan mempertimbangkan keuntungan dan kerugian yang akan mereka terima apabila mereka melakukan perpindahan. *National Geographic* mengatakan bahwa alasan seseorang melakukan migrasi adalah:

> "*Push Factors: Reasons for emigrating (leaving a place) because of a difficulty (such as a food shortage, war, flood, etc.). Pull Factors: Reasons for immigrating (moving into a place) because of something desirable (such as a nicer climate, better food supply, freedom, etc.). Several types of push and pull factors may influence people in their movements (sometimes at the same time), including:*
> 1. *Environmental (e.g., climate, natural disasters)*
> 2. *Political (e.g., war)*
> 3. *Economic (e.g., work)*
> 4. *Cultural (e.g., religious freedom, education).*"[50]

[49] Direktorat Analisis Dampak Kependudukan Badan Kependudukan dan Keluarga Bencana Nasional, *Fenomena Kemiskinan dan Tenaga Kerja Indonesia ke Luar Negeri*, (Jakarta: BKKBN, 2011), hal 20-21.

[50] Terjemahannya adalah sebagai berikut:
Faktor pendorong: alasan untuk beremigrasi (meninggalkan suatu tempat) dikarenakan oleh kesulitan (seperti kekurangan makanan, peperangan, banjir, dan lain-lain). Faktor penarik: alasan untuk bermigrasi (melakukan perpindahan tempat) dikarenakan kebutuhan (seperti iklim yang lebih baik, kebebasan, dan lain-lain). Beberapa jenis faktor pendorong dan penarik dapat mempengaruhi orang-orang di dalam perpindahan mereka (terkadang pada saat yang bersamaan), termasuk:

Dengan adanya faktor pendorong dan penarik ini memungkan seseorang melakukan perpindahan, baik secara permanen maupun semi permanen. Semua itu bergantung pada kebutuhan apa yang ingin dilengkapi. Faktor penarik dari suatu migrasi sangat dipengaruhi oleh kelebihan tempat yang akan dituju yang kemudian akan menambah kegunaan bagi yang melakukan migrasi. Hal ini disebut dengan *place utility*.

Sementara itu menurut Everett S. Lee ada 4 faktor yang menyebabkan orang mengambil keputusan untuk melakukan migrasi, yaitu:[51]

1. Faktor-faktor yang terdapat di daerah asal.
2. Faktor-faktor yang terdapat di tempat tujuan.
3. Rintangan-rintangan yang menghambat.
4. Faktor-faktor pribadi.

Di setiap tempat asal ataupun tujuan, ada sejumlah faktor yang menahan orang untuk tetap tinggal di situ, dan menarik orang luar untuk pindah ke tempat tersebut; ada sejumlah faktor negatif yang mendorong orang untuk pindah dari tempat tersebut; dan sejumlah faktor netral yang tidak menjadi masalah dalarn keputusan untuk migrasi. Selalu terdapat sejumlah rintangan yang dalam keadaan-keadaan tertentu tidak seberapa beratnya, tetapi dalam keadaan lain dapat diatasi. Rintangan-rintangan itu antar lain adalah mengenai jarak, walaupun rintangan "jarak" ini meskipun selalu ada, tidak selalu menjadi faktor penghalang. Rintangan-rintangan tersebut mempunyai pengaruh yang berbeda-beda pada orang-orang yang mau pindah. Ada orang yang memandang rintangan-rintangan tersebut sebagai hal sepele, tetapi ada juga yang memandang sebagai hal yang berat yang menghalangi orang untuk pindah.[52]

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1. Lingkungan (misalnya: iklim, bencana alam)
2. Politik (misalnya: perang)
3. Ekonomi (misalnya: pekerjaan)
4. Budaya (misalnya: kebebasan beragama, pendidikan).

National Gheographic, *What is Human Migration?*, (Expeditions Human Migration Guide No, 6-8, 2005), hal 2.

[51] Munir, *Migrasi*, (Jakarta: Lembaga Penerbit UI, 2000), hal 120.

[52] *Ibid.*

Sedangkan faktor dalam pribadi mempunyai peranan penting karena faktor-faktor nyata yang terdapat di tempat asal atau tempat tujuan belum merupakan faktor utama, karena pada akhirnya kembali pada tanggapan seseorang tentang faktor tersebut, kepekaan pribadi dan kecerdasannnya.[53]

Adanya faktor-faktor sebagai penarik ataupun pendorong di atas merupakan perkembangan dari ketujuh teori migrasi (*The Law of Migration*) yang dikembangkan oleh E.G Ravenstein pada tahun 1885. Ketujuh teori migrasi yang merupakan pen"generalisasi"an dari migrasi ini ialah:[54]

1. Migrasi dan Jarak
   - Banyak migran pada jarak yang dekat
   - Migran jarak jauh lebih tertuju ke pusat-pusat perdagangan dan industri yang penting
2. Migrasi Bertahap
   - Adanya arus migrasi yang terarah
   - Adanya migrasi dari desa - kota kecil - kota besar
3. Arus dan Arus balik
   - Setiap arus migrasi utama menimbulkan arus balik penggantiannya
4. Perbedaan antara desa clan kota mengenai kecenderungan melakukan migrasi
   - Di desa lebih besar dari pada kota
5. Wanita melakukan migrasi pada jarak yang dekat dibandingkan pria
6. Teknologi dan migrasi
   - Teknologi menyebabkan migrasi meningkat
7. Motif ekonomi merupakan dorongan utama melakukan migrasi

Itulah yang kemudian menurut E.G Ravenstein menjadi alasan-alasan seseorang melakukan migrasi. Apapun alasan seseorang melakukan migrasi, migrasi dilakukan untuk mencari penghidupan yang lebih baik, bukan hanya untuk dirinya sendiri tetapi juga unntuk keluarganya. Inilah yang kemudian dapat kita lihat dalam pekerja/buruh migran.

[53] *Ibid.*
[54] *Ibid,* hal 122.

Fenomena munculnya pekerja/buruh migran juga tidak bisa dipisahkan dari alasan kelaparan dan kemiskinan yang kronis, bencana alam, kerusakan lingkungan, konflik dan perang saudara, serta politik diskriminasi.

Menurut IOM (2009), migrasi tenaga kerja biasanya didefinisikan sebagai perpindahan manusia yang yang melintasi perbatasan untuk tujuan mendapatkan pekerjaan di negara asing. Melalui cara yang resmi atau tidak resmi, difasilitasi atau tidak, tenaga kerja memberikan kontribusi ekonomi terhadap negara pengirim maupun tujuan. Tenaga kerja membantu memperbesar jumlah angkatan kerja di negara penerima dan dapat membantu pembangunan di negara mereka sendiri melalui pengiriman uang penghasilan mereka. Hal ini menunjukkan betapa eratnya migrasi penduduk dengan upaya keluar dari kemiskinan.[55]

Migrasi tenaga kerja di Asia sebagian besar bersifat temporer, dengan kebanyakan pekerja mempunyai kontrak selama satu atau dua tahun. Selain itu, migrasi tenaga kerja di Asia didominasi oleh pekerja berketerampilan rendah, umumnya dipekerjakan di proyek bangunan, rumah tangga, pertanian, industri pengolahan dan sektor jasa. Bagi beberapa pekerja, alasan untuk bekerja ke luar negeri adalah agar mereka bisa mendapatkan gaji yang lebih besar untuk membatu keluarga mereka dan diri mereka sendiri. Pada saat mereka bekerja di luar negeri, banyak dari mereka mengirimkan uangnya ke rumah untuk membantu membiayai kebutuhan sehari-hari keluarga, biaya pendidikan anak atau membayar utang mereka. Pada tahun 2008, negara-negara di wilayah Asia menerima kira-kira US$ 36 milyar dalam bentuk pemasukkan dari para tenaga kerja di dalam dan luar wilayah ASEAN (Bank Dunia, dikutip dari IOM, 2010).[56]

Pada tahun 2003 setiap tahunnya tercatat sekitar 500.000 pekerja migran Indonesia secara resmi pergi ke luar negeri mencari pekerjaan, dan data pekerja yang pergi bukan lewat jalur resmi tidak diketahui. Sekitar 70% dari mereka adalah pekerja perempuan (Misra & Rosenberg 2003). Pada

[55] Direktorat Analisis Dampak Kependudukan Badan Kependudukan dan Keluarga Bencana Nasional, *Fenomena Kemiskinan dan Tenaga Kerja Indonesia ke Luar Negeri*, (Jakarta: BKKBN, 2011), hal 21.

[56] *Ibid,* hal 22.

tahun 2005, 474.310 orang Indonesia pergi ke luar negeri untuk bekerja, dan pemerintah mengimumkan bahwa sekitar 2,7 juta pekerja migran Indonesia tercatat bekerja di luar negeri. Jumlah mereka yang tidak tercatat diperkirakan dua hingga empat kali lebih besar. Sekitar 75% pekerja adalah perempuan yang bekerja di sektor domestik (ILO Jakrta, 2008).[57]

Berdasarkan *Jakarta Report* 2006, sejak krisis yang membuat ekonomi Asia terpuruk di akhir 1990-an, jumlah pekerja Indonesia pada pekerjaan tidak terlatih dan semi terlatih di luar negeri meningkat tajam. APJATI memperkirakan 40.000 dari mereka melalui jalur tidak resmi. Menteri Tenaga Kerja dan Transmigrasi mengumumkan bahwa pada januari 2009 satu juta orang akan pergi setiap tahunnya. Tujuan kebijakan migrasi ialah untuk mengentaskan kemiskinan (ILO Report 2006: 7).[58]

Data terakhir menunjukkan jumlah pekerja migran Indonesia seluruhnya mencapai 6,5 juta orang, dan 4,5 juta diantaranya masuk kategori pekerja migran yang resmi. Sekitar 75% adalah perempuan yang bekerja di sektor domestik (Kompas, 26 November 2010).[59]

Dengan banyaknya jumlah pekerja/buruh migran Indonesia yang bekerja di luar negeri semakin memperjelas bahwa terdapat faktor pendorong yang berasal dari dalam negeri serta faktor penarik yang berasal dari luar negeri yang mana tentunya tidak tersedia di dalam negeri. Pekerja/buruh migran melewati batas negara (baik secara administratif maupun secara politik) untuk bekerja. Perjalanan melewati batas negara ini dilakukan secara semi permanen dengan jangka waktu tertentu. Mereka melakukan hal tersebut untuk menghidupi diri sendiri dan keluarga.

II.3. Pengaruh Globalisasi Hukum terhadap Pekerja Migran

Dengan adanya globalisasi hukum, maka khasanah hukum menjadi semakin banyak. Pilihan hukum dan penunjuk kepastian semakin beragam. Globalisasi hukum tidak hanya dilihat sebagai suatu penyatuan hukum saja

[57] Sulistyowati Irianto, *Akses Keadilan dan Migrasi Global*, (Jakarta: Obor, 2011), hal 7-8.

[58] *Ibid*, hal 8.

[59] *Ibid.*

tetapi juga menyemarakkan sistem hukum yang ada. Keadilan akan memiliki arti yang begitu banyak sehingga kesepakatan sebagai penanda keadilan dibutuhkan di banyak tempat.

Selain dampak yang memudahkan dan berarti positif, globalisasi juga memiliki dampak yang negatif. Arus pergerakan manusia yang sangat cepat membuat manusia dinilai sebagai komoditi *(goods)*, yang diperdagangkan dan kemudian apabila sudah tidak sesuai dengan harapan pemberi kerja, maka dapat dibuang atau sudah tidak dipakai lagi. Selain itu, hubungan emosional yang terdapat di dalam hubungan pekerjaan –antara pemberi kerja dengan pekerja- menjadi sangat kaku, kerena hanya sebatas dengan apa yang tertulis di dalam perjanjian kerja ataupun kontrak.

Globalisasi hukum tidak berjalan sendiri. Terdapat aktor yang menggunakan hukum dan istitusi untuk menengahi hal tersebut. Benda-Beckmann mengatakan ada empat jenis aktor dalam hal ini, yaitu:

1. Perusahaan komersial, firma hukum, dan konsultan hukum
2. Perwakilan negara
3. Organisasi internasional
4. NGOs (*Non-Government Organisations*) dan *social movement*.[60]

Pada dasarnya kesemua aktor tersebut adalah badan hukum/orang-perorang yang melintasi banyak negara dan berkutat dengan pilihan-pilihan hukum yang ada. Badan hukum/orang-perorang tersebut pada akhirnya harus memilih hukum mana yang akan digunakan untuk suatu peristiwa hukum yang dijalaninya.

Salah satu aktor yang menyebabkan globalisasi hukum adalah pekerja/buruh yang bermigrasi (salah satu aktor *social movement*), baik secara permanen mapun semi-permanen. Pekerja/buruh ini melintasi batas negara untuk mencari penghasilan. Pekerja/buruh yang berasal dari suatu negara kemudian bekerja di negara lain dihadapkan pada pilihan-pilihan atas hukum: hukum negara asal, hukum negara penerima, hukum internasional yang ada, ataukah hukum yang didasarkan atas kesepakatan para pihak.

[60] Keebet von Benda-Beckmann, *Globalisation and Legal Pluralism*, (Netherlands: Kluwer International, 2002), hal 20.

Pilihan-pilihan atas hukum ini mengharuskan mereka untuk memilih salah satu hukum sebagai pilihan hukum yang digunakan untuk suatu peristiwa hukum yang mereka jalani. Hal ini sangat terlihat dalam hal perjanjian kerja yang mereka buat, kalusula-klausula yang tertera di dalam perjanjian kerja mereka dengan majikan/pemberi kerja menunjukkan pilihan-pilihan hukum yang mereka buat, terlebih terkait dengan permasalahan gaji.

Gaji, yang merupakan hak bagi para pekerja, memiliki nilai yang lebih. Terlebih saat kita melihatnya sebagai gaji yang diberikan oleh majikan, yang berbeda kewarganegaraan dan terikat oleh hukum negara mereka, kepada warga negara lain sebagai pekerjanya. Kemudian, akan timbul pertanyaan-pertanyaan: pilihan hukum seperti apa yang akan dijalani apabila terjadi persoalan hukum? Dan bagaimana dinamika *conflict of law* yang terjadi?

Pilihan-pilihan hukum yang kemudian akan ditemui oleh pekerja/buruh migran di dalam membuat perjanjian kerja terkait dengan gaji, antara lain:

1. Penentuan gaji berdasarkan ketentuan hukum yang sudah ditetapkan oleh pemerintah negara penerima
2. Penentuan gaji berdasarkan ketentuan hukum yang ditetapkan oleh pemerintah negara asal pekerja/buruh migran
3. Penentuan gaji berdasarkan kesepakatan bersama

Pilihan-pilihan ini kemudian akan menentukana besaran gaji yang akan ditetapkan. Selain penentuan besaran gaji, pilihan hukum juga berpengaruh terhadap penyelesaian konflik apabila terjadi *dispute* antara pekerja/buruh migran dengan majikan/pemberi kerja. Hal inilah yang kemudian akan mengantarkan kita kepada betapa pentingnya pilihan hukum pekerja/buruh migran dalam proses penyelesaian sengketa. Apabila menggunakan ketentuan hukum pekerja/buruh migran berasal, maka keseluruhan proses harus mengikuti ketentuan yang berlaku di negara pekerja/buruh migran berasal, dan begitu pula sebaliknya.

Malaysia dan Hong Kong memiliki ketentuan hukum terkait dengan standar minimum gaji pekerja/buruh migran Indonesia yang bekerja di negara tersebut. Tetapi tentu saja ketentuan tersebut tidak luput dari

permasalahan. Hal ini juga disebabkan oleh pilihan hukum yang digunakan oleh pekerja/buruh migran pada saat membuat perjanjian dengan majikannya. Oleh karena itu, kesepakatan pada saat membuat perjanjian merupakan hal yang sangat penting dalam proses yang terjadi berikutnya, seperti: besaran gaji, sistem pembayaran, dan proses penyelesaian sengketa.

BAB III
KETENTUAN HUKUM TERKAIT SISTEM PEMBAYARAN GAJI PEKERJA/BURUH MIGRAN INDONESIA DI MALAYSIA DAN HONG KONG

Panggung hukum pun sudah bergeser dari dunia nyata ke dunia maya yang terdiri dari kalimat dan kata-kata
- Satjipto Rahardjo

Perlindungan hukum merupakan dasar dari semua usaha untuk menjamin pekerjaan rumah tangga menjadi salah satu bentuk pekerjaan yang layak. Di banyak negara, pekerjaan rumah tangga luput dari perundangan nasional karena dianggap sebagai pekerjaan informal yang dilakukan di wilayah pribadi rumah tangga dan keluarga. Kondisi ini membuat mereka tidak mungkin menuntut hak mereka, dikarenakan hak-hak pekerja dan HAM mereka tidak diakui maupun dinyatakan dalam perundang-undangan.[61]

Sebagai langkah awal, pekerjaan rumah tangga harus didefinisikan secara hukum, diawali dengan cakupan pekerjaan dan menyebutkan secara khusus rumah sebagai tempat kerja yang dapat diatur oleh undang-undang ketenagakerjaan. PRT harus diperlakukan sebagai pekerja dengan hak yang sama dengan pekerja sektor formal lainnya, meskipun kondisi kerja mereka mungkin membutuhkan tindakan-tindakan khusus. Seperti dinyatakan oleh Blackett, "Peraturan khusus […] yang mengungkap jenis pekerjaan, tempat kerja dan pekerja.[62] Peraturan tersebut membuat mereka membayar pekerjaan tersebut, yang mengatur pekerjaan tersebut, dan yang melakukan pekerjaan, menggambarkan pekerjaan tersebut dengan cara yang sama sekali berbeda. Melalui proses yang dinamis dan adanya

[61] Organisasi Perburuhan Internasional, *Pekerja Rumah Tangga di Asia Tenggara Prioritas Pekerjaan yang Layak*, (Jakarta: Kantor Perburuhan Internasional, 2006), hal 7.

[62] Blackett dalam Organisasi Perburuhan Internasional, *Pekerja Rumah Tangga di Asia Tenggara Prioritas Pekerjaan yang Layak*, (Jakarta: Kantor Perburuhan Internasional, 2006), hal 7.

peraturan yang lebih khusus dan lebih akurat memungkinkan pemberian penghargaan dan pengakuan bagi pekerjaan rumah tangga."[63]

Perundangan mengenai pekerjaan rumah tangga harus menetapkan standar minimum lingkup pekerjaan, usia, upah, jam kerja, hari libur, hari raya, cuti tahunan dan cuti hamil, biaya akomodasi, tunjangan makan dan transportasi, asuransi, serta pengobatan fisik dan mental bagi pekerja rumah tangga. Perundangan tersebut juga harus menjamin kebebasan berserikat dan dapat memberikan jawaban sehubungan dengan jaminan sosial, pelatihan, pemutusan kontrak, serta jasa konsulat dan pemulangan (bagi pekerja rumah tangga di luar negeri).[64] Perundangan tersebut juga harus menyebutkan hukuman yang realistis dan membuat jera jika terjadi pelanggaran terhadap kewajiban baik oleh PRT maupun majikan, dan juga mekanisme yang dapat dijangkau dan efektif untuk mengurangi pelanggaran terhadap hak-hak pekerja dan memungkinkan para PRT mendapatkan ganti rugi jika terjadi kasus duka cita. Blackett berpendapat bahwa "peraturan khusus mungkin juga diperlukan untuk memastikan mekanisme penegakan hukum tidak meluputkan PRT, namun disesuaikan sehingga dapat memenuhi kebutuhan para PRT."[65]

III.1. Peraturan-peraturan Indonesia

Gaji merupakan hak bagi setiap pekerja yang telah melakukan pekerjaannya, sebagai imbalan atas penunaian kewajiban. Gaji yang sudah dibayarkan majikan pada umumnya digunakan untuk memenuhi kebutuhan hidup. Bekerja dan mendapatkan gaji merupakan hak asasi setiap orang. Beberapa peraturan Indonesia yang mengatur tentang pekerjaan dan penggajian yang layak, antara lain:

1. UUD 1945 Pasal 28 D ayat (2)

   Pasal 28 D ayat (2) mengatakan: "Setiap orang berhak untuk bekerja serta mendapat imbalan dan perlakuan yang adil dan layak dalam

[63] Organisasi Perburuhan Internasional, *Pekerja Rumah Tangga di Asia Tenggara Prioritas Pekerjaan yang Layak*, (Jakarta: Kantor Perburuhan Internasional, 2006), hal 7.

[64] *Ibid.*

[65] *Ibid.*

hubungan kerja."[66] Undang-undang Dasar 1945 berisikan seputar dasar-dasar negara[67] dan Hak Asasi Manusia yang dijunjung oleh Indonesia. Hak Asasi Manusia yang diatur di dalam Undang-undang Dasar ini antara lain: hak untuk hidup, hak untuk berserikat, hak untuk berkeluarga, hak untuk mengembangkan diri, hak untuk mendapatkan jaminan kepastian hukum, hak memeluk agama, dan hak atas penghidupan yang layak.

Hak atas penghidupan yang layak diatur di dalam Pasal 28 D ayat (2). Dengan adanya hak atas penghidupan yang layak di dalam peraturan dasar negara Indonesia, berarti Indonesia mengakui keberadaan hak ini dan menjunjung tinggi hak tersebut. Hak warga negara dalam memperoleh penghidupan yang layak ini akan diturunkan kepada undang-undang yang mengatur atau berkaitan dengan hal penghidupan untuk diatur lebih jelas dan detil. Hal ini dikarenakan, Undang-undang Dasar berisikan hal yang umum dan merupakan dasar bagi setiap peraturan perundang-undangan di Indonesia.

2. UU No. 39 Tahun 1999 tentang Hak Asasi Manusia

Pasal 38 undang-undang ini menyatakan:

> "(1) Setiap warga negara, sesuai dengan bakat, kecakapan, dan kemampuan, berhak atas pekerjaan yang layak.
> (2) Setiap orang berhak dengan bebas memilih pekerjaan yang disukainya dan berhak pula atas syarat-syarat ketenagakerjaan yang adil.
> (3) Setiap orang, baik pria maupun wanita yang melakukan pekerjaan yang sama, sebanding, setara atau serupa, berhak atas upah serta syarat-syarat perjanjian kerja yang sama.
> (4) Setiap orang, baik pria maupun wanita, dalam melakukan pekerjaan yang sepadan dengan martabat kemanusiaannya berhak atas upah yang adil sesuai dengan prestasinya dan dapat menjamin kelangsungan kehidupan keluarganya."[68]

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[66] Indonesia, *Undang-undang Dasar Negara Republik Indonesia Tahun 1945*, LN No. 75 Tahun 1959, Psl. 28 D ayat (2).

[67] Dasar-dasar negara yang terdapat di dalam konstitusi meliputi tujuan negara dan nilai-nilai luhur yang dianut dan diejawantahkan dalam peraturan.

[68] Indonesia, *Undang-undang Hak Asasi Manusia*, UU No. 39 Tahun 1999, LN No. 165 Tahun 1999, TLN No. 3886, Psl. 38.

Di dalam Undang-undang tentang Hak Asasi Manusia No. 39 Tahun 1999 ini dijelaskan lebih detil. Tidak hanya terkait permasalahan bahwa setiap warga negara berhak mendapatkan pekerjaan dan upah yang layak, tetapi juga menjelaskan bahwa pekerjaan yang layak tersebut didapatkan atas dasar bakat dan kemampuan setiap warga negara. Pekerjaan tersebut dipilih secara bebas oleh warga negara berdasarkan syarat-syarat ketenagakerjaan yang adil. Di dalam ayat (2) dijelaskan adanya *freedom of choice* di dalam memilih pekerjaan. Lebih detil di dalam ayat (3) menjelaskan terkait dengan persamaan perlakuan atas perolehan pekerjaan yang layak antara laki-laki dan perempuan sejauh memiliki kemampuan yang memang pantas untuk pekerjaan tersebut. Di dalam ayat (3) ini pula menekankan atas persamaan syarat-syarat perjanjian kerja dan upah yang sama bagi laki-laki dan perempuan. Di dalam ayat (4) menjelaskan bahwa, baik laki-laki maupun perempuan berhak mendapatkan upah yang adil atas prestasinya yang mana upah tersebut menjamin kelangsungan hidupnya.

Ketentuan terkait dengan hak untuk mendapatkan pekerjaan dan upah yang layak di dalam undang-undang ini di dasarkan atas nilai-nilai Hak Asasi Manusia yang diusung oleh Undang-undang Dasar 1945. Isu Hak Asasi Manusia difokuskan pada *freedom of choice* atas pekerjaan yang layak dan hak mendapatkan upah atas pekerjaan tersebut. Selain itu, isu gender atas persamaan hak untuk mendapatkan pekerjaan dan upah yang layak juga sangat ditekankan di dalam Pasal ini.

3. UU No. 13 Tahun 2003 tentang Ketenagakerjaan

Pasal 88 undang-undang ini menyatakan:

> "(1) Setiap pekerja/buruh berhak memperoleh penghasilan yang memenuhi penghidupan yang layak bagi kemanusiaan.
> (2) Untuk mewujudkan penghasilan yang memenuhi penghidupan yang layak bagi kemanusiaan sebagaimana dimaksud dalam ayat (1), pemerintah menetapkan kebijakan pengupahan yang melindungi pekerja/buruh.
> (3) Kebijakan pengupahan yang melindungi pekerja/buruh sebagaimana dimaksud dalam ayat (2) meliputi :
> a. upah minimum;

b. upah kerja lembur;
c. upah tidak masuk kerja karena berhalangan;
d. upah tidak masuk kerja karena melakukan kegiatan lain di luar pekerjaannya;
e. upah karena menjalankan hak waktu istirahat kerjanya;
f. bentuk dan cara pembayaran upah;
g. denda dan potongan upah;
h. hal -hal yang dapat diperhitungkan dengan upah;
i. struktur dan skala pengupahan yang proporsional;
j. upah untuk pembayaran pesangon; dan
h. upah untuk perhitungan pajak penghasilan.

(4) Pemerintah menetapkan upah minimum sebagaimana dimaksud dalam ayat (3) huruf a berdasarkan kebutuhan hidup layak dan dengan memperhatikan produktivitas dan pertumbuhan ekonomi."[69]

Di dalam Undang-undang Ketenagakerjaan lebih detil dijelaskan terkait dengan teknis pengupahan, di dalam Pasal 88 ayat (1) berisikan hal umum yang nilai dasarnya diambil dari Undang-undang Dasar 1945 Pasal 28 D ayat (2). Di dalam Pasal 88 ayat (2) dijelaskan bahwa pemerintah menetapkan kebijakan pengupahan yang melindungi pekerja/buruh. Di dalam ayat (3) disebutkan jenis-jenis kebijakan pengupahan yang dikeluarkan oleh pemerintah. Salah satu kebijakan terkait upah yang dikeluarkan oleh pemerintah adalah upah minimum. Upah minimum adalah upah minimal yang cukup untuk memenuhi kebutuhan hidup. Berdasarkan Penjelasan Pasal 88 ayat (1), kebutuhan hidup secara wajar meliputi makanan dan minuman, sandang, perumahan, pendidikan, kesehatan, rekreasi, dan jaminan hari tua. Di dalam ayat (4) dijelaskan bahwa upah minimum didasarkan pada kebutuhan hidup yang layak dengan memperhatikan prodiktivitas dan pertumbuhan ekonomi.

Pasal 88 menjelaskan terkait dengan teknis pengupahan dan lagi-lagi menekankan bahwa upah adalah hak bagi pekerja/buruh. Teknis pengupahan yang terkait dengan upah minimum ditekankan lebih lanjut di dalam Pasal 91 undang-undang ini. Dikatakan di dalam pasal tersebut

[69] Indonesia, *Undang-undang Ketenagakerjaan*, UU No.13 Tahun 2003, LN No.39 Tahun 2003, TLN No. 4279, Psl. 88.

bahwa kesepakatan antara pengusaha (pemberi kerja/majikan) dengan pekerja/buruh atau serikat pekerja/serikat buruh tidak boleh lebih rendah dari apa yang telah ditentukan oleh perundang-undangan yang baru. Apabila lebih rendah, maka kesepakatan tersebut batal demi hukum dan pengusaha (pemberi kerja/majikan) wajib membayar sesuai dengan standar yang telah ditentukan oleh undang-undang.

Membicarakan kesepakatan, maka kita akan membicarakan perjanjian kerja. Di dalam undang-undang ini jelaskan pula terkait dengan perjanjian kerja (Bab IX, Hubungan Kerja). Perjanjian kerja dilakukan secara tertulis yang dibuat oleh pengusaha (pemberi kerja/majikan) dengan pekerja/buruh. Perjanjian kerja dibuat atas dasar (Pasal 52 ayat (1)):

a. kesepakatan kedua belah pihak;
b. kemampuan atau kecakapan melakukan perbuatan hukum;
c. adanya pekerjaan yang diperjanjikan; dan
d. pekerjaan yang diperjanjikan tidak bertentangan dengan ketertiban umum, kesusilaan, dan peraturan perundang undangan yang berlaku.

Perjanjian kerja yang dibuat secara tertulis sekurang-kurangnya memuat (Pasal 54 ayat (1)):

a. nama, alamat perusahaan, dan jenis usaha;
b. nama, jenis kelamin, umur, dan alamat pekerja/buruh;
c. jabatan atau jenis pekerjaan;
d. tempat pekerjaan;
e. besarnya upah dan cara pembayarannya;
f. syarat syarat kerja yang memuat hak dan kewajiban pengusaha dan pekerja/buruh;
g. mulai dan jangka waktu berlakunya perjanjian kerja;
h. tempat dan tanggal perjanjian kerja dibuat; dani. tanda tangan para pihak dalam perjanjian kerja.

Isi dari perjanjian kerja tidak boleh bertentangan dengan ketentuan yang tercantum di dalam peraturan perundang-undangan. Perjanjian kerja

tidak dapat ditarik kembali ataupun diubah tanpa adanya kesepakatan para pihak (Pasal 55).

Pada dasarnya undang-undang ini adalah undang-undang yang mengatur terkait ketenagakerjaan, sehingga undang-undang ini mengatur teknis dan apa-apa saja yang harus ada di dalam hubungan kerja. Oleh karena itu, undang-undang cukup detil dalam memberikan arahan dan ketentuan, tidak hanya berkaitan dengan pekerjaan dan upah yang layak tetapi juga yang berkaitan dengan hubungan kerja.

4. UU No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri

   Pasal 8 huruf e undang-undang ini menjelaskan: "Setiap calon TKI mempunyai hak dan kesempatan yang sama untuk: e. memperoleh upah sesuai dengan standar upah yang berlaku di negara tujuan."[70]

   Di dalam undang-undang ini, pembahasan terkait permasalahan gaji hanya sebatas pada Pasal 8 huruf e ini saja. Standar upah minimum yang terdapat pada Pasal 88 ayat (3) UU No. 13 tahun 2003 tetap diterapkan di dalam undang-undang ini. Hanya saja standar upah yang digunakan bukanlah standar upah Indonesia, melainkan standar upah negara penerima TKI. Besarnya upah juga disepakati di dalam perjanjian kerja antara TKI dengan majikannya. Di dalam Pasal 55 ayat (5) dijelaskan bahwa perjanjian kerja TKI dengan majikan harus berisikan:

   a. nama dan alamat pengguna;
   b. nama dan alamat TKI;
   c. jabatan dan jenis pekerjaan TKI;
   d. hak dan kewajiban para pihak;
   e. kondisi dan syarat kerja yang meliputi jam kerja, upah, dan tata cara pembayaran, baik cuti dan waktu istirahat, fasilitas dan jaminan sosial; dan
   f. jangka waktu perpanjangan kerja.

[70] Indonesia, *Undang-undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*, UU No. 39 Tahun 2004, LN No. 133 Tahun 2004, TLN No. 4445, Psl. 8 huruf e.

Perlindungan di dalam undang-undang ini sangat minim. Hal ini dibuktikan dengan ketiadaannya kalusula apa yang harus dilakukan apabila perjanjian kerja telah dicederai oleh salah satu pihak. Undang-undang ini tidak mengaturnya dan juga tidak ada ketentuan pidana terkait dengan hal tersebut. Undang-undang ini lebih berfokus kepada penempatan, bukan perlindungan. Dengan demikian, peraturan perundang-undangan Indonesia tidak mengatur prosedur perlindungan apabila perjanjian kerja yang telah dibuat oleh TKI dan majikan telah dicederai oleh salah satu pihak.

III.2. Peraturan Negara Malaysia Terkait dengan Pembayaran Gaji Pekerja/Buruh Migran Indonesia

Malaysia adalah salah satu negara tujuan utama pekerja/buruh migran Indonesia. Pada tahun 2011 sebanyak 1.089.285 orang warga negara Indonesia yang bekerja sebagai pekerja/buruh migran disana.[71] Keberadaan pekerja/buruh migran Indonesia yang sangat banyak di Malaysia dikarenakan Malaysia adalah negara dengan jarak terdekat dengan Indonesia dan memiliki satu rumpun bahasa yang sama sehingga tidak terlalu sulit untuk berkomunikasi.

Pekerja/buruh migran di Malaysia tidak memiliki payung hukum yang kuat untuk mendapatkan perlindungan. Pasalnya Malaysia belum memiliki peraturan perundang-undangannya sendiri terkait pekerja/buruh migran. Malaysia hanya memiliki peraturan pekerja/buruh secara umum, yakni *Employment Act 1955*, dimana undang-undang tersebut diberlakukan kepada semua pekerja di Malaysia, baik pekerja domestik maupun pekerja migran.

Inilah beberapa peraturan Malaysia terkait dengan pekerja/buruh migran:[72]

1. Akta Ketenagakerjaan tahun 1955: peraturan yang diberlakukan kepada pekerja Malaysia dan tenaga kerja asing dalam sektor formal. Adapun ketentuan dari akta ini antara lain mengenai:

[71] Data-Data Penempatan dan Perlindungan TKI. Pusat Penelitian dan Pengembangan Informasi (PUSLITFO) BNP2TKI, 6 Januari 2011.

[72] Slide KBRI oleh Atase Ketenagakerjaan, Agus Triyanto.

a. Mengatur jam kerja, upah, cuti, jaminan sosial dan hal lain yang harus dipenuhi oleh majikan serta pekerja dalam melaksanakan hubungan industrial.
b. Tidak mengatur mengenai standar upah dan gaji minimum.
c. Berfokus pada pekerja formal.

2. Akta Pampasan tahun 1952: berlaku untuk tenaga kerja asing uang mengalami kecelakaan kerja dan kematian akibat kerja.
3. Akta tahun 1966: mengenai anak-anak dan pemuda.
4. Akta tahun 1959: mengenai serikat pekerja.
5. Akta Imigresen tahun 1959/63: mengatur tata cara keberadaan pekerja asing di Malaysia (baik dalam sektor formal, maupun informal).
6. Akta tahun 1994: mengenai keselamatan dan kesehatan pekerja.
7. Akta 670/2007: mengenai *trafficking*.
8. Sabah labour ordinance: mengamandemen peraturan terkait izin bagi majikan yang memepekerjakan pekerja asing, berlaku di negara bagian Sabah.
9. Serawak labour ordinance: peraturan yang mengatur mengenai ketenagakerjaan secara komprehensif, berlaku untuk negara bagian Serawak.

Dengan demikian, di dalam peraturan yang berlaku di Malaysia tidak ada yang mengatur mengenai standar besaran gaji yang harus didapatkan oleh pekerja/buruh migran. Mengenai besaran gaji ini diserahkan kepada mekanisme pasar yang berlaku.

Tidak ada standar gaji/upah yang diberikan oleh Malaysia kepada buruh migran yang bekerja di Malaysia. Hal inilah yang membuat kebanyakan pekerja/buruh migran Indonesia memiliki ketidakpastian besaran gaji yang diterima. Selama ini, gaji pekerja/buruh migran Indonesia yang bekerja di sektor informal di Malaysia digaji sangat murah yaitu RM 350-500, atau setara dengan Rp 1 juta-1,4 juta (kurs RM 1 = Rp 2900). Bahkan dengan gaji itu, mereka mengerjakan semua bidang pekerjaan rumah seperti, mencuci, menyetrika, memasak, mengasuh anak, menjaga rumah. Bahkan ada juga yang mengurus hewan peliharaan dan dipinjamkan pada

sanak saudara lainnya.[73] Pemerintah Indonesia sudah menerapkan standar perjanjian kerja dengan gaji perbulan yang akan diterima pekerja/buruh migran Indonesia sebesar RM 600-700. Tetapi apakah perjanjian kerja tersebut dilaksanakan dengan baik ataupun diterima oleh majikan di Malaysia menjadi lain soal, pasalnya pemerintah Malaysia tidak memiliki standar perjanjian kerja.

III.3. Peraturan Distrik Administrasi Khusus Hong Kong Terkait dengan Pembayaran Gaji Pekerja/Buruh Migran Indonesia

Pada tahun 2011 sebanyak 50.252 pekerja/buruh migran Indonesia bekerja di Hong Kong. Jumlah ini mengalami peningkatan dari tahun 2010 yang hanya sebesar 30.262.[74] Peningkatan ini dikarenakan berbagai faktor, diantaranya: perlindungan untuk pekerja/buruh migran sangat ketat, atmosfir kebebasan, dan tingginya gaji minimum yang ditawarkan.

Pekerja/buruh di Hong Kong memiliki hak, kewajiban, dan standar kontrak yang telah diatur sedemikian rupa oleh pemerintah Hong Kong. Ketentuan tersebut tertuang dalam *Employment Ordinance Chapter 57* Tahun 1997 untuk penatalaksanaan rumah tangga asing atau *foreign domestic helper*. Pelbagai hal yang diatur antara lain, hak-hak para TKW, seperti gaji minimum, uraian kerja, kodisi tempat tinggal, asuransi kecelakaan kerja, libur satu hari dalam seminggu, cuti tahunan 7 hari, makan dan transportasi, hingga pemeriksaan kesehatan bila TKW sakit. Persoalan kontrak kerja bagi buruh migran telah diatur oleh Departemen Imigrasi Pemerintah Hong Kong. Departemen tersebut hanya menyediakan satu bentuk standar kontrak kerja bagi profesi pekerja rumah tangga asing (Pemerintah Hong Kong menyebutnya *Foreign Domestic Helpers/FDH*).[75]

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[73] Protes Gaji TKI, Bukti Publik Malaysia Tak Siap Terima PRT Indonesia, http://news.detik.com/read/2012/03/20/183611/1872586/10/protes-gaji-tki-bukti-publik-malaysia-tak-siap-terima-prt-indonesia?9922022. Diunduh pada tanggal 24 Maret 2012, pukul 22.58 WIB.

[74] Data-Data Penempatan dan Perlindungan TKI. Pusat Penelitian dan Pengembangan Informasi (PUSLITFO) BNP2TKI, 6 Januari 2011.

[75] Informasi Negara Tujuan TKI: Hong Kong, http://buruhmigran.or.id/2011/05/15/informasi-negara-tujuan-tki-hongkong/. Diunduh pada tanggal 20 Maret 2012, pukul 08.00 WIB.

Foreign Domestic Helpers/FDH merupakan kontrak yang dijadikan standar untuk membuat perjanjian antara pekerja/buruh dengan majikan. Kontrak tersebut berisikan gaji minimum yang harus dibayarkan, akomodasi, makanan, pengobatan gratis, gratis biaya perjalanan dari dan ke negara asal, dan kewajiban majikan untuk menanggung biaya cuti.

Gaji minimum yang dibayarkan oleh majikan tidak boleh kurang dari 3.740 HKD per bulan dan maksimal dibayarkan 7 hari setelah waktu pemberian gaji/upah di dalam kontrak berakhir. Jika gaji/upah yang diterima kurang dari yang seharusnya, maka pekerja/buruh diharuskan untuk: meminta kejelasan gaji/upah yang diterima; menolak untuk menerima kwitansi gaji/upah yang belum dibayar; dan apabila gaji/upah yang diterima masih kurang, pekerja/buruh melapor kepada Departemen Tenaga kerja sesegera mungkin. Majikan wajib memberikan tanda terima/kwitansi apabila sudah membayar gaji/upah kepada pekerja/buruh. Gaji/upah yang diterima belum termasuk dengan tunjangan pekerja/buruh, sebesar HK$ 100. Pekerja/buruh migran Indonesia di Hong Kong hanya melakukan satu pekerjaan untuk setiap perjanjian kerja, sehingga mereka tidak akan tereksploitasi.

Apabila terjadi sengketa terkait dengan isi perjanjian kerja, maka pekerja/buruh migran di Hong Kong diharuskan untuk melapor kepada *Labour Department* yang kemudian akan berusaha mendamaikan pekerja/buruh migran dengan majikan mereka. Apabila di dalam pertemuan tersebut belum ada kata damai, maka sengketa tersebut akan dibawa ke dalam persidangan.

Pengaturan terkait dengan pekerja/buruh migran di Hong Kong sangatlah ketat. Pemerintah Hong Kong mengatur hingga ke hal-hal teknis terkait dengan pemberian gaji/upah dan bagaimana bila tidak dibayarkan. Penyatuan standar kontrak *Foreign Domestic Helpers/FDH* membuat rasa kepastian kepada pekerja/buruh yang kemudian menimbulkan rasa perlindungan yang cukup.

Dari segi peraturan, Hong Kong adalah satu-satunya negara tujuan buruh migran yang mengakui pekerjaan rumah tangga sebagai ‘pekerjaan’

dan memiliki peraturan yang menyeluruh untuk melindungi buruh migran di sektor rumah tangga, dan dengan demikian mengupayakan keadilan dalam hubungan kerja.[76] Hong Kong sudah mendeklarasikan bahwa *domestic helper* adalah pekerjaan formal. Hal ini terbukti dengan adanya pengaturan yang khusus terkait dengan pekerjaan ini.

III.4. Perjanjian Bilateral, Deklarasi, dan Konvensi Terkait

1. *International Covenant on Economic, Social and Cultural Rights*[77]

   Di dalam kovenan ini diatur mengenai bahwa negara yang menyetujui kovenan ini memberikan jaminan terkait dengan kondisi yang layak untuk bekerja (*article* 7). Di dalam *article* 7 ini diatur pula mengenai lingkup gaji minimum yang harus didapatkan oleh pekerja/buruh. Lingkup ini meliputi: persamaan kedudukan antara laki-laki dan perempuan dalam mendapatkan pekerjaan dan gaji/upah yang layak, mendapatkan sarana kesehatan dan keamanan saat bekerja, mendapatkan kesempatan yang sama untuk memperoleh jabatan yang lebih tinggi, dan hari libur serta waktu istirahat dari batas jam kerja.

   Kekuatan hukum dari kovenan ini tidak bisa dipaksakan kepada setiap negara. Kovenan ini baru bisa diterapkan pada negara yang meratifikasi kovenan ini.

2. *Equal Remuneration Convention 1951*[78]

   Indonesia telah meratifikasi konvensi persamaan upah pada tahun 1958. Konvensi ini keseluruhan terdiri dari 14 artikel. Pada artikel 2 dikatakan bahwa prinsip-prinsip penggajian dapat didasarkan pada hukum nasional masing-masing negara yang meratifikasi konvensi ini, diakui secara hukum atau diakui sebagai standar gaji/upah, kesepakatan bersama antara majikan dengan pekerja/buruh, atau dengan kombinasi

[76] Laporan Asian Migrant Care (AMC), Indonesian Migrant Worker Union (IMWU), dan The Hong Kong of Indonesia Migrant Workers Organization (KOTKIHO), *Underpayment 2*, 2006.

[77] Disepakati pada 19 Desember 1966di New York. Indonesia meratifikasi kovenan ini pada 23 Feb 2006, sementara Malaysia tidak meratifikasi kovenan ini.

[78] Disepakati pada 29 Juni 1951 pada sesi ke-34 dari ILO di Jenewa. Indonesia meratifikasi pada 11 Agustus 1958. Malaysia meratifikasi pada 9 September 1997.

diantaranya. Kemudian pada artikel 3 disebutkan bahwa penggajian tidak membedakan gender.

Konvensi ini sungguh pendek dan masih belum jelas bagaimana teknis terkait dengan sistem pengganjian: minimal gaji/upah, sistem pembayaran, dan lain-lain. Terlebih konvensi ini mendasarkan salah satu penerapan sistem penggajian kepada peraturan negara tujuan pekerja/buruh migran. Bagaimana bila negara tersebut tidak memiliki standar gaji/upah minimum? Inilah yang terjadi di Malaysia. Pemerintah Malaysia tidak mengeluarkan aturan terkait dengan upah minimum yang harus didapatkan oleh pekerja/buruh migran. Sehingga percuma saja apabila pemerintah Indonesia mendorong pemerintah Malaysia untuk mengikuti konvensi ini karena Malaysia sendiri masih belum mempunyai undang-undang terkait pekerja/buruh migran.

Konvensi ini juga diratifikasi oleh Malaysia, tetapi tidak oleh Hong Kong. Kekuatan konvensi ini hanya dapat diberlakukan kepada negara-negara yang turut meratifikasi konvensi ini. Konvensi ini adalah satu-satunya konvensi *International Labour Organisation (ILO)* terkait dengan pengupahan yang diratifikasi oleh Indonesia.

3. *Domestic Workers Convention 2011*[79]

Konvensi ini adalah konvensi terbaru yang dikeluarkan oleh ILO. Konvensi ini terdiri dari 27 artikel secara keseluruhan. Secara umum konvensi ini mengatur perlindungan hak asasi manusia untuk pekerja/buruh migran. Konvensi ini sudah cukup detil mengatur permasalahan-permasalahan yang sering terjadi, seperti penggajian.

Di dalam artikel 9 dikatakan bahwa pekerja/buruh migran bebas untuk membuat perjanjian kerja kepada majikan dan calon majikan. Di dalam artikel 11 dikatakan bahwa pekerja/buruh migran wajib mendaptkan gaji/upah minimum yang mana juga disertai dengan peng-*cover*-an asuransi oleh majikan. Pemberian gaji/upah tersebut tidak boleh dibedakan antara laki-laki dan perempuan. Di dalam artikel 12

[79] Disepakati pada 16 Juni 2011dalam sesi ke-100 dari ILO di Jenewa. Baik Indonesia, maupun Malaysia belum meratifikasi konvensi Indonesia.

dikatakan bahwa gaji/upah harus dibayarkan secraa langsung setiap bulannya dengan adanya tanda bukti pembayaran: kwitansi, lewat bank, ataupun pembayaran moneter lainnya.

Meskipun konvensi ini sangat detil, belum ada satu negarapun yang meratifikasi konvensi ini. Direncanakan Indonesia baru akan meratifikasi konvensi ini pada 2013.

4. ASEAN *Declaration on the Protection and Promotion of the Rights of Migrant Workers*[80]

   Deklarasi dalam Perlindungan dan Peningkatan Hak-Hak Pekerja Migran ini dikumandangkan pada 13 Januari 2007 di Filipina. Di dalam deklarasi ini disebutkan bahwa seluruh anggota ASEAN mendukung adanya toleransi dalam bekerja antara pekerja/buruh migran dengan negara penerima. Selain itu negara penerima memberikan informasi yang cukup terkait dengan ketentuan hukum melalui informasi dan pelatihan-pelatihan. Negara ASEAN pun bersepakat untuk memberikan perlindungan pekerja/buruh migran dengan adil dan tepat, perlindungan terhadap gaji/upah, dan kondisi pekerjaan serta kehidupan yang layak bagi pekeja/buruh migran.

   Dengan adanya deklarasi ini membuktikan bahwa setiap negara anggota ASEAN memiliki komitmen terhadap perlindungan pekerja/buruh migran. Salah satu negara penerima pekerja/buruh migran Indonesia adalah Malaysia, yang juga merupakan anggota ASEAN. Dengan demikian, Malaysia seharusnya mendukung perlindungan pekerja/buruh migran Indonesia.

   Deklarasi ini tidak memiliki kekuatan hukum, hanya berupa persetujuan atas sesuatu hal. Dalam hukum internasional deklarasi termasuk *soft law* dimana tidak memiliki daya paksa untuk diterapkan di masing-masing negara yang menandatangani deklarasi ini.

5. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990*[81]

[80] Disepakati pada 13 Januari 2007 dalam ASEAN SUMMIT ke-12 di Filipina. Ditandatangani oleh seluruh Kepala Negara ASEAN.

Dalam rapat kerja antara Komisi IX DPR, Menteri Hukum dan HAM, Menteri Luar Negeri, dan Menteri Tenaga Kerja dan Transmigrasi pada tanggal 9 april 2012 menyepakati akan meratifikasi Konvensi Perlindungan Hak-hak Buruh Migran dan Keluarganya tahun 1990. Ratifikasi ini dinilai akan memperkuat *bargain* Indonesia di dalam melindungi TKI ysng bekerja di luar negeri.

Konvensi ini terdiri dari 93 pasal yang mana pasal-pasal tersebut didasari atas perlindungan hak-hak buruh migran dan keluarganya. Terdapat beberapa pasal di dalam konvensi tersebut yang menyangkut dengan gaji dan perjanjian kerja pekerja/buruh migran. Di dalam Pasal 1 konvensi ini disebutkan bahwa konvensi berlaku kepada seluruh pekerja/buruh migran dan seluruh anggota keluarganya tanpa ada pembedaan apapun. Konvensi ini juga berlaku selama proses pra-penempatan, penempatan, dan pasca-penempatan, termasuk di dalamnya pemberian gaji/upah. Di dalam Pasal 2 konvensi ini juga menjelaskan terkait dengan pengertian-pengertian pekerja/buruh yang mana terikat perjanjian kerja dan dibayar serta diakui sebagai pekerja mandiri sesuai dengan peraturan berlaku di negara di tempat ia bekerja.

Di dalam Pasal 5 konvensi ini mengatur pula terkait dengan pekerja/buruh migran yang *documented* dan *undocumented* yang mana selama ini menjadi masalah karena perlindungan yang tersedia hanya bagi pekerja/buruh migran yang *documented*. Di dalam Pasal 25 konvensi ini, ditegaskan bahwa pekerja/buruh migran memiliki hak yang sama dengan warga negara tempat ia bekerja, termasuk di dalamnya antara lain mengenai jam kerja, keselamatan, kesehatan, dan usia minimum bekerja. Negara yang meratifikasi konvensi ini, wajib memastikan hak-hak pekerja/buruh migran terpenuhi, tidak terpengaruh oleh ketidakteraturan pada saat penempatan dan pada saat bekerja. Selain itu, majikan juga tidak dibebaskan dari kewajiban pemenuhan atas

[81] Disepakati pada 18 Desember 1990 melalui Resolusi Majelis Umum 45/158. Indonesia menandatangani pada tanggal 22 September 2004, dan baru akan diratifikasi. Malaysia tidak menandatangani dan meratifikasi.

perjanjian kerja karena ketidakteraturan pada saat penempatan dan pada saat bekerja.

Di dalam Pasal 52 dikatakan bahwa pekerja/buruh migran memiliki hak untuk memilih pekerjaan sesuai dengan kualifikasi yang telah ditentukan sesuai dengan izin yang dikeluarkan. Selain itu, Pasal 54 mengatakan bahwa pekerja/buruh migran memiliki hak yang sama dengan warga negara dalam hal: perlindungan terhadap pemecatan, jaminan pengangguran, akses terkait dengan pemberantasan pengangguran, dan akses kepada pekerjaan alternatif karena pemecatan. Di dalam pasal ini disebutkan pula bahwa pekerja/buruh migran berhak melaporkasn permasalahannya kepada pejabat yang berwenang di negara penerima apabila perjanjian kerjanya telah dilanggar. Ditegaskan kembali di dalam Pasal 55 bahwa pekerja/buruh migran memiliki hak dan perlakuan yang sama dengan warga negara tempat ia bekerja sesuai dengan kondisi yang melekat pada izin kerjanya.

Dengan Indonesia meratifikasi konvensi ini, dinilai oleh teman-teman Lembaga Swadaya Masyarakat (LSM), menjadi langkah awal bagi perlindungan pekerja/buruh migran Indonesia yang bekerja di luar negeri terkait dengan pembenahan permasalahan perlindungan pekerja/buruh migran Indonesia dan alasan kuat untuk menyegerakan pembuatan amandemen UU No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri.

6. Perjanjian Bilateral Indonesia dengan Malaysia

Malaysia dan Indonesia terikat *Memorandum of Understanding (MoU) on The Recruitment and Placement of Indonesian Domestic Workers* yang ditandatangani di Bali tahun 2006 (berikut dengan *Amending Protocol*-nya). Di dalam MoU tersebut pada Pasal 5.3 disebutkan:

> "Pengguna Jasa wajib member upah bulanan kepada PRT yang disepakati dalam persyaratan dan ketentuan Perjanjian Kerja dalam jumlah yang ditentukan oleh mekanisme pasar dengan memperharikan kisaran upah yang disepakati Para Pihak."

Sedangkan di dalam Pasal 6.4 disebutkan bahwa upah yang diberikan menggunakan satuan mata uang Malaysia, yakni Ringgit, dan diberikan dengan cara mentransfer ke bank. Tetapi syangnya MoU tidak memiliki kekuatan mengikat yang kuat untuk di-*enforce* kepada pihak majikan di Malaysia. MoU tidak memiliki sanksi apabila salah satu pihak tidak menerapkannya, yang mungkin diterapkan hanyalah sanksi diplomatik dan penghentian pengiriman pekerja/buruh migran Indonesia (moratorium).[82]

Indonesia baru saja mencabut moratorium pada tanggal 1 Desember 2011. Indonesia memberlakukan moratorium pekerja/buruh migran untuk dikirim ke Malaysia dikarenakan begitu banyaknya pelanggaran hak asasi yang dilakukan oleh majikan Malaysia dan sedikitnya itikad baik dari pemerintah Malaysia untuk memperbaiki hal tersebut. Tetapi hingga saat ini Indonesia masih belum mengirimkan pekerja/buruh migrannya dikarenakan Indonesia masih dalam tahap perbaikan sistem dan koordinasi pelaksanaan pengiriman dengan pemerintah Malaysia.

Terdapat beberapa kesepakatan antara pemerintah Indonesia dengan pemerintah Malaysia untuk menyelesaikan permasalahan yang kerap terjadi antara pekerja/buruh migran Indonesia dengan majikan Malaysia. Kesepakatan tersebut antara lain:[83]

NO	PERMASALAHAN	STATUS/PENJELASAN
1	Kontrak Kerja	Sebuah kontrak kerja standar yang telah disepakati oleh kedua belah pihak
2	Upah/gaji	Telah disepakati bahwa upah akan ditentukan melalui kontrak kerja antara majikan dan pekerja rumah tangga masing-masing

[82] Moratorium berarti penghentian, dalam hal ini penghentian pengiriman. Moratorium Indonesia kepada Malaysia baru saja dicabut pada 1 Desember 2011 dengan permintaan dari Malaysia.

[83] Data Badan Penempatan dan perlindungan Tenaga Kerja Indonesia (BNP2TKI).

3	Metode Pembayaran Upah	Pembayaran harus dilakukan melalui rekening bank atas nama pekerja domestik Indonesia (TKI)
4	Penguasaan Paspor	Paspor akan disimpan oleh PRT
5	Libur	PRT Indonesia berhak untuk satu hari libur setiap minggu dan mereka akan dibayar sesuai dengan ketentuan dalam Undang-Undang Ketenagakerjaan 1955
6	Rekrutmen Agensi	Pemerintah Malaysia dan Indonesia hanya mengakui Agency (Malaysia) dan PPTKIS (Indonesia) yang telah sepakat untuk memenuhi kewajiban yang sebagaimana diatur dalam Protokol dan Nota Kesepahaman (MoU 2006)
7	Struktur Biaya	Kedua Pihak akan menjamin pelaksanaan struktur biaya RM 4.511 yang terdiri dari: a. RM 2.711 akan ditanggung oleh majikan di Malaysia, dan b. RM 1.800 akan ditanggung oleh PRT
8	Pelatihan Kompetensi Dasar	Durasi pelatihan yang disepakati adalah 200 jam. PRT perlu menjalani pelatihan kompetensi sebelum mulai bekerja di Malaysia
9	Penyelesaian Sengketa/masalah	Kedua Pihak sepakat untuk mengatur sebuah mekanisme penyelesaian sengketa/masalah melalui komite yang dibentuk di Indonesia dan Malaysia
10	*Journey Performed* (JP) Visa	Akan dibubarkan/dihentikan segera setelah moratorium dibuka pada tanggal 1 Desember 2011
11	Perekrutan Langsung	Sesuai dengan hukum nasional dan

		peraturan Pemerintah Republik Indonesia dan sebagaimana disepakati dalam Protokol Amendement MoU 2006

Dengan adanya kesepakatan tersebut diharapkan di masa depan permasalahan terkait dengan pekerja/buruh migran Indonesia di Malaysia berkurang. Baru-baru ini pemerintah Malaysia mengeluarkan aturan baru yang memberikan 'keistimewaan' gaji bagi pekerja/buruh migran Indonesia, pekerja/buruh migran Indonesia hanya akan mengerjakan satu pekerjaan untuk satu perjanjian kerja. Aturan baru ini mendapat kecaman dari masyarakat Malaysia, dan ini membuktikan bahwa warga Malaysia tidak siap menerima pekerja/buruh migran Indonesia.[84] Selain itu itikad baik pemerintah Malaysia terkait dengan pembentukan pengaturan khusus untuk pekerja/buruh migran belum terlihat. Dengan demikian pemerintah Malaysia belum menganggap bahwa pekerjaan rumah tangga adalah sebagai suatu pekerjaan formal. Tidak adanya peraturan perundang-undangan khusus terkait pekerja/buruh migran di Malaysia inilah yang membuat banyak permasalahan hukum terjadi.

7. Perjanjian Bilateral Indonesia dengan Hong Kong

Indonesia tidak memiliki perjanjian bilateral dengan Hong Kong terkait dengan pekerja/buruh migran, yang mana pada umumnya perjanjian bilateral dapat menjaga konsistensi hubungan, dan pada khususnya menjamin perlindungan bagi pekerja/buruh migran Indonesia. Di lain pihak, Konsulat Jenderal Republik Indonesia (KJRI) di Hong Kong melarang pemberlakuan kontrak mandiri dengan majikan, dengan kata lain harus melalui agen. Setiap buruh migran Indonesia pendatang baru telah dikenakan biaya penempatan minimal 21.000 dolar Hong Kong dan ketika memproses kontrak baru harus membayar biaya lagi antara 1.500 – 15.000 dolar Hong Kong kepada agensi.[85] Hal ini

[84] *Ibid.*

[85] Hasil wawancara dengan Muhammad Iqbal, Direktur Lembaga Swadaya Masyarakat UNIMIG. Wawancara dilakukan pada 6 Maret 2012.

sungguh merugikan pekerja/buruh migran. Padahal dalam Pasal 59 dan 60 UU No. 39 tahun 2004, pembuatan kontrak secara mandiri diperbolehkan. Inilah yang kemudian menjadi masalah dan mendapat kecaman dari berbagai pihak.

BAB IV
PELAKSANAAN SISTEM PENGGAJIAN DI MALAYSIA DAN HONG KONG

Jika kita hanya bisa hidup satu kali, maka jadikanlah hidup itu sebuah petualangan berani yang memeras seluruh kekuatan kita
-Julian Assange

Membicarakan sistem penggajian untuk pekerja/buruh migran tidak bisa hanya fokus kepada hal sistem penggajian saja, tetapi juga harus mengikutsertakan alur yang menyertai hal tersebut. Mengapa demikian? Pasalnya sistem penggajian pekerja/buruh migran terdapat di dalam Perjanjian Kerja (PK) yang mana PK tersebut ditandatangani oleh pekerja/buruh migran pada saat mereka masih berada di Indonesia. Dengan ditandatanganinya PK tersebut maka akan timbul dampak pada pelaksanaan PK di negara tujuan *(receiving country)*, termasuk di dalamnya pelaksanaan sistem penggajian. Pelanggaran terhadap PK yang sering terjadi adalah pelanggaran terkait dengan gaji yang tidak dibayarkan. Oleh karena itu, pembahasan sistem penggajian harus berkesinambungan, mulai dari pra-penempatan, penempatan, dan pasca-penempatan.

IV.1. Penggajian di Dalam Perjanjian Kerja (PK)

Sistem penggajian pekerja/buruh migran yang merupakan hak dari pekerja/bekerja buruh migran diatur di dalam PK. Hal ini disesuaikan dengan Pasal 55 ayat (5) huruf e UU No. 39 Tahun 2004 yang mengharuskan salah satu isi dari PK adalah pengaturan mengenai upah/gaji. Hal ini merupakan pengejawantahan dari Pasal 54 ayat (1) huruf e UU No. 13 Tahun 2003 yang menginstruksikan bahwa sekurang-kurangnya salah satu isi dari PK adalah terkait dengan pengupahan dan sistem pembayarannya. Perjanjian Kerja (PK) dibuat secara tertulis ataupun lisan. Tetapi mengingat bahwa PK yang dibuat oleh pekerja/buruh migran

merupakan PK yang mengikat para pihak yang berbeda kewarganegaraan, maka diharuskan untuk dibuat secara tertulis. Hal ini pun untuk sebagai bukti adanya hubungan kerja antara pekerja/buruh migran dengan majikannya. Selain itu, PK inilah yang kemudian akan menjadi dasar perlindungan pemerintah Indonesia yang berada di negara tujuan untuk memproteksi pekerja/buruh Indonesia yang bekerja di negara tersebut. Perjanjian Kerja (PK) dibuat untuk jangka waktu 2 tahun, dan dapat diperpanjang dengan sepengatahuan pejabat yang berwenang. Perpanjangan PK dilakukan sekurang-kurangnya 3 bulan sebelum PK pertama berakhir.

IV.1.1. Keterlibatan Pekerja dalam Pembuatan Perjanjian Kerja (PK)

Berdasarkan Pasal 55 ayat (4) UU No. 39 tahun 2004 PK yang akan ditandatangani oleh pekerja/buruh migran disiapkan oleh PPTKIS/agen yang berada di Indonesia. Bagaimana bisa PPTKIS mewakilkan keberadaan pekerja/buruh migran untuk membuat PK? Apakah ada surat kuasa[86] untuk membuat PK tersebut? Bagaimana konten/isi dari PK?

Fakta di lapangan mengatakan bahwa tidak ada PK yang dibuat langsung oleh calon pekerja/buruh migran yang akan berangkat bekerja. Mereka juga tidak membuat surat kuasa untuk membuat PK kepada PPTKIS yang akan menempatkan mereka. Seperti dinyatakan oleh Yana:[87]"…. ya langsung disodorin gitu aja buat saya tandatanganin. Saya aja belom sempet baca itu PK, langsung buru-buru diambil sama agen saya." Kodisi inilah yang penulis temukan di lapangan terkait dengan PK. Perjanjian Kerja (PK) tidak dibuat oleh pekerja/buruh yang bekerja. Pekerja/buruh yang akan melaksanakan PK tersebut juga tidak memberikan surat kuasa kepada PPTKIS untuk membuat PK tersebut. Mereka hanya disuruh untuk menandatanganinya saja, bahkan kesempatan untuk membaca pun

[86] Kuasa adalah suatu perjanjian dengan mana seseorang memberikan kekuasaan kepada orang lain, yang menerimanya, untuk atas namanya menyelenggarakan suatu urusan. Pasal 1792 KUH Perdata.

[87] Hasil wawancara dengan Yana, seorang TKW Indonesia yang bekerja di Hong Kong. Wawancara dilakukan pada 1 Mei 2012.

tidak diberikan. Pasal 55 ayat (4) UU No. 39 tahun 2004 terkait dengan PK yang disiapkan oleh PPTKIS ini sangat multitafsir. Apakah PPTKIS yang menyiapkan seluruh berkas PK termasuk di dalamnya isi dari PK? Ataukah hanya menyiapkan berkas PK saja dengan isi yang ditentukan oleh pekerja/buruh migran? Tentunya apabila PPTKIS turut menentukan isi dari PK, tanpa adanya campur tangan dari calon pekerja/buruh migran, ini melanggar ketentuan perjanjian perdata.

IV.1.2. Apakah Perjanjian Kerja (PK) Berdasarkan Undang-undang Sah Secara Hukum Perdata?

Di dalam Pasal 1313 Kitab Undang-undang Hukum (KUH) Perdata disebutkan bahwa perjanjian adalah suatu perbuatan dengan mana satu orang atau lebih mengikatkan dirinya terhadap satu orang lain atau lebih. Dengan demikian, daya ikat ini akan berlaku kepada para pembuat perjanjian yang kemudian akan melaksanakan perjanjian tersebut. Lantas apakah PK yang tidak ada campur tangan calon pekerja/buruh migran dalam pembuatannya sementara mereka adalah salah satu pihak yang akan melaksanakan PK dapat disebut PK yang sah?

Berdasarkan Pasal 1320 KUH Perdata, syarat sah perjanjian ada empat, yakni:

a. Adanya kesepakatan
b. Pihak yang membuat perjanjian adalah orang yang cakap hukum
c. Apa yang diperjanjikan adalah suatu hal yang jelas
d. Mengenai suatu sebab yang halal/diperbolehkan oleh hukum

Apabila keempat klausula ini terpenuhi, maka perjanjian tersebut adalah suatu perjanjian yang sah. Sebelum pekerja/buruh migran ditempatkan atau menyetujui ditempatkan, PPTKIS memberikan perjanjian penempatan yang mana seharusnya ditandatangani oleh calon pekerja/buruh migran dan calon penyalur (Pasal 52 UU No. 39 Tahun 2004). Perjanjian penempatan tersebut berisikan hak dan

kewajiban calon pekerja/buruh migran dan penyalur serta kesepakatan hak dan kewajiban para pihak dalam rangka penempatan pekerja/buruh migran di luar negeri yang harus sesuai dengan kesepakatan dan syarat-syarat yang ditentukan oleh calon majikan, tercantum juga di dalamnya mengenai jenis pekerjaan yang diinginkan oleh majikan. Dengan adanya perjanjian penempatan antara calon penyalur dengan calon pekerja/buruh migran ini, pekerja/buruh migran telah memberikan kuasa atas penandatanganan PK kepada penyalur. Tetapi mengenai penggajian tetap harus dibicarakan dengan pekerja/buruh migran karena tidak termasuk ke dalam konten dari perjanjian penempatan.

IV.1.3. Posisi Tawar Pekerja dalam Pembuatan Perjanjian Kerja (PK)

Hal tersebut akan berbeda apabila kita melihat posisi calon pekerja/buruh migran yang memang tidak seimbang, baik dengan PPTKIS, maupun dengan majikannya. Calon pekerja/buruh migran menyatakan bersedia untuk disalurkan oleh PPTKIS dengan dasar mereka dikejar-kejar dengan kebutuhan hidup mereka dan mereka membutuhkan pekerjaan untuk menghasilkan uang. Kebutuhan akan pekerjaan inilah yang kemudian membuat mereka bertahan. Ketimpangan posisi yang lainnya dialami pekerja/buruh migran adalah posisi mereka dengan majikannya. Pekerja/buruh migran akan bekerja di dalam rumah majikan dan mengikuti aturan yang ada di dalam rumah majikan, selain itu juga mereka harus mengikuti aturan negara penerima yang sangat berbeda dengan aturan yang ada di negara mereka. Ketimpangan posisi antara pekerja/buruh migran dengan majikannya inilah yang akan menjadi masalah dalam pengimplementasian PK.

Dengan adanya ketimpangan posisi diperlukan adanya pihak ketiga yang dapat memfasilitasi kepentingan berbagai pihak tanpa mencederai hak dari salah satu pihak. Disinilah negara mengambil peran penting, terutama dalam pembuatan PK. Peran negara ini pula

semakin besar mengingat PK yang akan dibuat adalah PK lintas negara yang mana akan terjadi persinggungan sistem hukum antara sistem hukum Indonesia dengan negara penerima. Negara menjadi penyelaras antara kedua sistem hukum tersebut dengan membentuk suatu klausula umum yang baku yang berlaku dan dapat diterapkan oleh kedua belah negara. Lain halnya apabila negara penerima memiliki standar PK tersendiri untuk pekerja/buruh migran. Apabila hal ini yang terjadi, maka pekerja/buruh migran dan pemerintah Indonesia mengikuti PK yang diterapkan oleh negara tersebut, tentunya disesuaikan dengan nilai-nilai hak asasi manusia secara umum. Negara yang tidak memiliki standar PK adalah Malaysia, sehingga pemerintah Indonesia membentuk standar PK tersendiri bagi pekerja/buruh migran yang akan bekerja di Malaysia. Perjanjian Kerja ini juga berlaku untuk majikan yang berada di Malaysia, karena standar PK ini dibuat atas dasar persetujuan kedua belah negara. Sementara itu daerah yang memiliki standar PK adalah Hong Kong (daerah administratif khusus dari negara China), sehingga pemerintah Indonesia tidak membuat standar PK bagi pekerja/buruh migran Indonesia yang akan bekerja di Hong Kong.

IV.1.4. Perjanjian Kerja (PK) Pekerja/Buruh Migran Indonesia di Malaysia

Pemerintah Malaysia tidak memiliki standar PK yang diberlakukan di negaranya. Mengapa demikian? Karena mereka belum memiliki peraturan khusus terkait dengan pekerja/buruh migran. Oleh karena itu, pemerintah Indonesia dan pemerintah Malaysia membentuk suatu standar PK tertentu guna menjamin terpenuhinya hak pekerja/buruh dan hak majikan. Standar PK tersebut dibuat berdasarkan atas hukum Malaysia yang tidak bertentangan dengan Indonesia.

Secara garis besar standar PK adalah berisikan mengenai masa berlakunya PK, penjelasan terkait dengan tempat kerja, tugas dan

tanggung jawab pekerja, tugas dan tanggung jawab majikan, pembayaran gaji, tidak diperbolehkan adanya pemotongan gaji, waktu istirahat, pembatalan PK oleh majikan, pembatalan PK oleh pekerja, ketentuan umum (terkait dengan biaya perjalanan pekerja dan proses penyelesaian permasalahan menggunakan hukum Malaysia), perpanjangan PK dan ketentuan yang mengatakan bahwa PK dibuat berdasarkan hukum yang berlaku di Malaysia. Perjanjian Kerja ditandatangani oleh calon pekerja/buruh dan calon majikan dengan disaksikan oleh dua orang. Saksi-saksi ini adalah pejabat instansi di bidang ketenagakerjaan. Di dalam klausula yang menyangkut dengan penggajian, terdapat bagian yang kosong, yakni bagian nominal terkait dengan besaran gaji. Mengapa demikian? Karena pada dasarnya Malaysia tidak memiliki besaran upah/gaji standar untuk pekerja/buruh migran. Gaji/upah yang diberikan didasarkan atas perkembangan perekonomian yang terjadi (diserahkan pada mekanisme pasar). Selain itu, kosongnya bagian penggajian ini, memberika ruang gerak negosiasi antara calon pekerja/buruh migran dengan calon majikan.

Gaji/upah yang tidak ada batas minimumnya ini menyulitkan pekerja/buruh migran karena mungkin saja mereka akan dibayar dengan sangat murah. Untuk menyelesaikan permasalahan tersebut, pemerintah Indonesia melakukan kesepakatan dengan pemerintah Malaysia berupa MoU tahun 2006 tentang Perekrutan dan Penempatan Pekerja Domestik Indonesia yang diubah dengan protokol perubahan MoU tersebut yang ditandatangani pada 30 Mei 2011 di Bandung.

Apabila dilihat dari PK ini, maka gaji yang akan diterima oleh pekerja/buruh adalah gaji bersih, karena tempat tinggal, biaya makan, dan asuransi sudah ditanggung oleh majikan. Tetapi apakah kenyataannya seperti itu? Tentu apa tertulis di dalam kertas tidak mudah dilaksanankan dengan begitu saja. Banyak sekali pelanggaran

terkait dengan PK, terutama dalam hal penggajian (*underpayment dan unpaid*).

Indonesia baru saja selesai melakukan moratorium pengiriman pekerja/buruh ke Malaysia dikarenakan banyaknya persoalan yang terjadi kepada pekerja/buruh migran Indonesia. Malaysia memohon kepada pemerintah Indonesia agar moratorium dicabut. Setelah pencabutan moratorium, pemerintah Indonesia dengan pemerintah Malaysia membuat 11 kesepakatan unrtuk memperbaiki keadaan yang telah terjadi sebelumnya. Sebelas kesepakatan itu adalah:[88]

NO	PERMASALAHAN	STATUS/PENJELASAN
1	Kontrak Kerja	Sebuah kontrak kerja standar yang telah disepakati oleh kedua belah pihak
2	Upah/gaji	Telah disepakati bahwa upah akan ditentukan melalui kontrak kerja antara majikan dan pekerja rumah tangga masing-masing
3	Metode Pembayaran Upah	Pembayaran harus dilakukan melalui rekening bank atas nama pekerja domestik Indonesia (TKI)
4	Penguasaan Paspor	Paspor akan disimpan oleh PRT
5	Libur	PRT Indonesia berhak untuk satu hari libur setiap minggu dan mereka akan dibayar sesuai dengan ketentuan dalam Undang-Undang Ketenagakerjaan 1955
6	Rekrutmen Agensi	Pemerintah Malaysia dan Indonesia hanya mengakui *Agency* (Malaysia) dan PPTKIS (Indonesia) yang telah sepakat untuk memenuhi kewajiban yang sebagaimana diatur dalam Protokol dan

[88] Data Badan Penempatan dan perlindungan Tenaga Kerja Indonesia (BNP2TKI).

		Nota Kesepahaman (MoU 2006)
7	Struktur Biaya	Kedua Pihak akan menjamin pelaksanaan struktur biaya RM 4.511 yang terdiri dari: c. RM 2.711 akan ditanggung oleh majikan di Malaysia, dan d. RM 1.800 akan ditanggung oleh PRT
8	Pelatihan Kompetensi Dasar	Durasi pelatihan yang disepakati adalah 200 jam. Pekerja Rumah Tangga perlu menjalani pelatihan kompetensi sebelum mulai bekerja di Malaysia
9	Penyelesaian Sengketa/masalah	Kedua Pihak sepakat untuk mengatur sebuah mekanisme penyelesaian sengketa/masalah melalui komite yang dibentuk di Indonesia dan Malaysia
10	*Journey Performed* (JP) Visa	Akan dibubarkan/dihentikan segera setelah moratorium dibuka pada tanggal 1 Desember 2011
11	Perekrutan Langsung	Sesuai dengan hukum nasional dan peraturan Pemerintah Republik Indonesia dan sebagaimana disepakati dalam Protokol Amendement MoU 2006

Kenyataannya, hingga saat ini pekerja/buruh migran Indonesia belum ada yang dikirim ke Malaysia karena setelah ditandatanganinya protokol perubahan MoU 2006 pada 30 Mei 2011 di Bandung, pemerintah Indonesia mengirimkan surat kepada pemerintah Malaysia terkait dengan ruang lingkup pekerjaan pekerja/buruh migran hanyalah *housekeeping*. Adapun ruang lingkup *housekeeping* adalah: memasak, mencuci, menggosok, dan membersihkan rumah. Pemerintah Malaysia menyetujui hal tersebut, tetapi dengan sengaja mengubah kata '*housekeeping'* menjadi

'*housemaid'*. Pemerintah Indonesia merasa 'dikadali', lalu membuat surat pertanyaan sekaligus pernyataan kepada perwakilan Malaysia di Indonesia bahwa ketentuan yang disepakati di awal bukan *housemaid*, tetapi *housekeeping*. Apa perbedaan *housemaid* dengan *housekeeping*? Perbedaannya terletak pada ruang lingkup kerjanya. Ruang lingkup kerja *housekeeping* seperti yang telah disebutkan, sementara *housemaid* adalah mengerjakan seluruh pekerjaan rumah tangga.

Sampai saat ini, gaji yang diterima pekerja/buruh migran Indonesia berkisar antara 500-800 RM, bahkan hingga ada yang mencapai 900 RM. Penulis menemukan bahwa pekerja/buruh migran Indonesia yang bekerja di Malaysia dengan gaji di atas 800 RM adalah pekerja/buruh yang sudah lama bekerja pada majikan yang sama dan juga memiliki kedekatan khusus dengan majikan.

IV.1.5. Perjanjian Kerja (PK) Pekerja/Buruh Indonesia di Hong Kong

Hong Kong adalah wilayah administratif khusus yang terdapat di China. Peraturan yang berlaku di daerah Hong Kong berbeda dengan peraturan yang terdapat di China daratan. Hong Kong memiliki peraturan khusus terkait dengan pekerja/buruh migran yang bekerja di sana. Pemerintah Hong Kong menganggap bahwa pekerja rumah tangga adalah suatu pekerjaan formal dengan *job description* yang jelas. Hal tersebut diakui secara luas oleh warga Hong Kong. Hong Kong adalah salah satu daerah yang maju dengan rasa penghargaan terhadap hak asasi manusia yang cukup tinggi. Dengan dibuatnya peraturan khusus mengenai pekerja/buruh migran, Hong Kong mengakui pekerja rumah tangga sebagai suatu pekerjaan formal. Peraturan tersebut salah satunya berisikan mengenai PK.

Perjanjian Kerja yang dikeluarkan oleh pemerintah Hong Kong adalah PK standar yang berlaku secara luas dan mengikat pekerja/buruh migran dari negara manapun yang akan bekerja di Hong Kong. Adapun isi dari standar PK yang dikeluarkan oleh

pemerintah Hong Kong mayoritas mengenai hak-hak pekerja/buruh migran; tempat tidur, apa yang harus dilakukan apabila pekerja/buruh migran meninggal, pembayaran gaji, hari libur, apa-apa saja yang harus dibayarkan oleh majikan, makanan, jenis pekerjaan yang dilakukan oleh pekerja/buruh migran, dan fasilitas yang didapatkan oleh pekerja/buruh migran pada saat bekerja di majikan tersebut.

Perjanjian Kerja standar yang dikeluarkan oleh pemerintah Hong Kong jauh lebih baik dari PK standar yang dikeluarkan oleh pemerintah Indonesia untuk pekerja/buruh migran yang bekerja di Malaysia. Perjanjian Kerja Malaysia terlihat sangat umum dan tidak mengatur hingga sampai kepada hal teknis pelaksanaan. Sementara PK Hong Kong sangat detil dan cara pandang pembuatan PK tersebut didasarkan atas pemenuhan hak-hak dasar pekerja/buruh migran saat bekerja. Di dalam PK tersebut tidak ada klausula 'penekanan' terkait dengan apa-apa saja yang harus dilakukan oleh pekerja/buruh migran. Berbeda dengan PK standar pekerja/buruh migran yang akan bekerja di Malaysia yang mana klausulanya lebih memberatkan kepada pekerja/buruh migran.

Di Hong Kong terdapat gaji minimum yang harus diberikan kepada pekerja/buruh migran, yakni sebesar 3.740 HKD. Jadi apabila ada majikan yang memberikan gaji kurang dari gaji minimum yang sudah ditetapkan oleh pemerintah Hong Kong, maka majikan tersebut akan dihukum. Gaji yang diterima pekerja/buruh migran adalah gaji bersih, karena makan, tempat tinggal, dan asuransi sudah dibayarkan oleh majikan. Apabila majikan tidak memberikan makan pekerja/buruh migrannya, maka ia harus membayar 750 HKD per bulan kepada pekerja/buruh migrannya sebagai pengganti untuk biaya makan. Inilah mengapa Hong Kong menjadi salah satu negara tujuan favorit untuk pekerja/buruh migran Indonesia. Perlindungan yang diberikan pun tidak main-main. Pemerintah Hong Kong akan

menindak tegas, baik kepada majikan maupun pekerja/buruh migran yang melanggar PK yang sudah ditandatangani.

IV.2. Penandatanganan Perjanjian Kerja (PK)

Penandatanganan suatu perjanjian merupakan bukti bahwa para pihak telah sepakat dengan isi dari perjanjian yang sudah dibuat. Berdasarkan Pasal 55 ayat (2) UU No. 39 Tahun 2004 mengatakan bahwa pekerja/buruh migran menandatangani PK sebelum mereka berangkat ke negara tujuan. Dengan kata lain, bahwa PK harus sudah ada dan sudah disepakati oleh pekerja/buruh migran dan majikan sebelum pekerja/buruh migran berangkat ke negara tujuan. Pertanyaan menariknya adalah dapatkan suatu perjanjian disepakati tanpa bertatapan muka? Bagaimana dengan negosiasi yang dilakukan? Seperti yang dijelaskan sebelumnya bahwa pemberian kuasa atas penandatanganan PK dilakukan pada saat perjanjian penemapatan ditandatangani oleh pekerja/buruh migran dengan PPTKIS yang mana si pekerja/buruh migran belum bertemu secara langsung dengan majikannya. Mereka tidak dapat menilai karakteristik, bahkan mereka tidak mengetahui wajah dari calon majikannya. Penulis sangat menyayangkan hal ini karena pekerja/buruh migran tidak dapat memilih majikan. Mereka tidak dapat menolak majikan seperti apa yang akan mereka dapatkan, dan mereka baru mengetahui majikannya setelah mereka sampai di rumah majikan. Hal inilah yang menurut penulis menjadi salah satu faktor ketimpangan posisi antara majikan dengan pekerja/buruh migran.

Penandatanganan PK dilakukan dihadapan pejabat instansi yang bertanggungjawab di bidang ketenagakerjaan (Pasal 55 ayat (3) UU No. 39 Tahun 2004). Menurut Pasal 58 ayat (1) undang-undang yang sama, PK harus mendapatkan persetujuan dari perwakilan pemerintah RI di negara penerima dan pada ayat (2) dikatakan bahwa untuk mengurus itu semua menjadi tanggung jawab dari PPTKIS. Alur penandatanganan PK terdapat

pada alur penempatan pekerja/buruh migran di negara penerima. Inilah bagan alur penempatan yang penulis dapatkan dari BNP2TKI:[89]

Di dalam bagan tersebut PK sudah ada sejak berada pada No. 1. Pada saat PPTKIS mengajukan SIP, mereka sudah memiliki permintaan terhadap pekerja/buruh migran Indonesia dari *agency* yang ada di Malaysia. Dengan demikian, PK ada pada saat itu adalah *draft* PK yang masih bersifat umum. Setelah proses perekrutan, PK yang khusus akan ditandatangani pekerja/buruh migran pada saat menjalani tes psikologis hingga tes kesehatan. Lalu PK tersebut akan dikirim kepada perwakilan pemerintah Indonesia di luar negeri untuk pemberitahuan (No.12). Dengan demikian PK

[89] Slide yang berasal dari Badan Penempatan dan perlindungan Tenaga Kerja Indonesia (BNP2TKI).

antara pekerja/buruh migran Indonesia dengan majikan sudah disepakati. Selebihnya alur tersebut fokus kepada persiapan pekerja/buruh migran secara teknis untuk bekerja di luar negeri (penerbitan Kartu Tenaga Kerja Luar Negeri (KTKLN)).

Pada umumnya penandatanganan PK dilakukan di dalam negeri sebelum pekerja/buruh migran berangkat ke negara tujuannya. Tetapi terdapat beberapa perbedaan antara penandatanganan PK Malaysia dan penandatanganan PK Hong Kong.

IV.2.1. Penandatanganan Perjanjian Kerja (PK) Malaysia

Penandatanganan PK Malaysia dilakukan di dalam negeri sesuai dengan ketentuan yang terdapat di dalam bagan yang dikeluarkan olehn BNP2TKI. Tetapi hal yang menarik yang ingin penulis ungkapkan disini adalah banyak pekerja/buruh migran Indonesia yang bekerja di Malaysia tanpa memiliki PK, atau dengan kata lainnya melewati jalur yang tidak ditentukan oleh pemerintah Indonesia. Banyak yang menyebutnya sebagai *illegal*, tetapi lebih halus disebut sebagai *undocumented*. Jumlah pekerja/buruh migran yang melewati jalur resmi di Malaysia sampai saat ini berjumlah 1.089.230 orang, sementara yang *undocumented* berjumlah 1,3 juta orang.[90] Jumlah pekerja/buruh migran yang *undocumented* ini dikarenakan banyaknya 'jalur tikus' yang memungkinkan pekerja/buruh migran Indonesia bekerja di Malaysia tanpa melewati prosedur yang ketat. Hal ini juga disebabkan oleh pekerja/buruh migran yang datang ke Malaysia dengan paspor pelancong padahal disana ia mencari pekerjaan dan bekerja.

Keadaan *undocumented* ini membuat pekerja/buruh migran tidak terlindungi secara hukum sebagai seorang pekerja/buruh migran. Terlebih lagi mereka bekerja tanpa adanya suatu PK sehingga tidak ada perlindungan yang jelas bagi mereka. Tidak

[90] Hasil wawancara dengan Agus Triyanto, Atase Ketenagakerjaan di KBRI Malaysia. Wawancara dilakukan pada 12 April 2012.

adanya PK inilah yang terkadang dijadikan majikan untuk menakut-nakuti pekerja/buruh migran agar mereka mengikuti apa yang majikan inginkan, sampai terkadang terjadi eksploitasi. Pada dasarnya pekerja/buruh migran yang *undocumented* ini melakuakan kesepakatan PK dengan majikannya, tetapi kesepakatan tersebut hanyalah lisan, tidak tertulis sebagai mana semestinya.

IV.2.2. Penandatanganan Perjanjian Kerja (PK) Hong Kong

Di Hong Kong tidak ada pekerja/buruh migran yang tidak memiliki PK, semuanya memiliki PK. Apabila terdapat pekerja/buruh migran yang tidak memiliki PK, maka si pekerja/buruh tersebut beserta majikannya akan dihukum sesuai ketentuan yang berlaku di Hong Kong: "Kalo di Hong Kong sih masalah PK ga jadi masalah, karena pemerintah Hong kong ketat banget. Tapi paling masalahnya penggajian."[91] Dengan demikian, permasalahan terkait penandatanganan PK di Hong Kong tidak ada kendala. Permasalahan justru timbul saat pekerja/buruh migran Indonesia ingin memperpanjang PK. Mereka diharuskan membayar sejumlah uang yang cukup besar untuk memperpanjang PK. Pemerintah Hong kong tidak akan memberlakukan PK pekerja/buruh migran yang tidak mendapatkan cap dari perwakilan pemerintahan negaranya di Hong Kong. Cap legalisasi inilah yang kemudian dihargai oleh KJRI HongKong sebesar 21.000 HKD atau senilai dengan 21 juta rupiah.

Permasalahan lainnya yang timbul adalah tidak dibolehkannya membuat PK mandiri dengan majikan Hong Kong. Hong Kong sama sekali tidak melarang pekerja/buruh migran untuk membentuk PK sendiri. Yang melarang hal ini justru KJRI di Hong Kong. Ada beberapa alasan yang diungkapkan oleh KJRI diantaranya adalah ketakutan terhadap *human trafficking*. Tetapi apabila si pekerja/buruh migran Indonesia harus menggunakan PPTKIS

[91] Hasil wawancara dengan Adzimattinur Siregar, seorang aktifis Dompet Dhuafa yang kerap kali membantu permasalahan terkait dengan TKW Indonesia. Wawancara dilakukan pada 31 Maret 2012.

kembali, maka biaya yang harus dikeluarkan sangatlah besar, dan menurut penulis hal tersebut tidak sebanding dengan pengalaman kerja yang sudah didapatkan si pekerja/buruh. Oleh karena itu, menurut penulis PK mandiri dipersilakan tetapi ada kewajiban melapor kepada KJRI siapa saja yang membuat PK mandiri, tentunya pelaporan ini tidak disertai dengan pemungutan biaya. Dengan demikian ketakutan KJRI tidak terjadi, dan pekerja/buruh migran masih dalam proteksi Indonesia dengan memiliki PK yang sudah didaftarkan.

IV.3. Permasalahan terkait Penggajian di Malaysia dan Hong Kong

Sistem penggajian yang berlaku di Malaysia dan Hong Kong saat ini tidak selalu mengikuti apa yang telah ditentukan di dalam PK. Hal ini disebabkan karena banyak faktor yang mempengaruhi pelaksanaan PK tersebut, khususnya terkait dengan penggajian.

IV.3.1. Permasalahan Penggajian di Malaysia

Malaysia yang tidak memiliki standar PK memiliki banyak permasalahan terkait dengan penggajian. Permasalahan penggajian ini termasuk di dalam *labour cases* dalam klasifikasi permasalahan pekerja/buruh migran Indonesia di Malaysia. KBRI Malaysia membuat dua pembagian permasalahan pekerja/buruh migran yang bekerja di Malaysia. Dua pembagian tersebut adalah sebagai berikut:[92]

No	*LABOUR CASES*	
	Permasalahan	Jenis
1.	Gaji Tidak Dibayar	1. *Underpaid* 2. *Unpaid wages*
2.	Disharmoni	1. Majikan garang 2. Kondisi kerja yang tidak sesuai

[92] Slide KBRI oleh Atase Ketenagakerjaan, Agus Triyanto.

		3. Tidak betah kerja
3.	Eksploitasi	1. Kerja yang melebihi kompetensi pekerja 2. *Unlimited working hours* 3. Kerja lebih dari satu tempat
4.	*Early Termination*	1. PHK sepihak oleh majikan 2. PHK sepihak oleh TKI 3. TKI dibuang
5.	Tidak Sesuai PK	1. Fasilitas kerja dan *hospitality* 2. Pemotongan gaji 3. Gaji tidak sesuai 4. Ditipu oleh *agency*
6.	Kecelakaan/Kematian	1. Kecelakaan kerja 2. Kematian akibat kerja

No	*NON-LABOUR CASES*	
	Permasalahan	Jenis
1.	*Physically abuse*	1. Dianiaya 2. Disiksa majikan
2.	*Sexual abuse*	1. Diperkosa 2. Pelecehan seksual 3. Dijadiin PSK
3.	*Trafficking*	1. *Under age* 2. *Smuggling* 3. *Trafficking*
4.	Sakit	1.Sakit fisik 2. Kejiwaan terganggu
5.	Kriminal	1. Mencuri 2. Merampok 3. Membunuh 4. Narkoba 5. Senpi

6.	Lain-lain	1. KDRT 2. Hamil 3. *Stranded* 4. Kecelakaan bukan karena kerja 5. *Verbal abuse*

Pembagian permasalahan pekerja/buruh migran yang dilakukan oleh KBRI digunakan untuk mempermudah mengenali jenis dari permasalahan yang dialami oleh pekerja/buruh migran.

Mengenai gaji yang tidak dibayarkan, selama tahun 2011 di Malaysia terdapat 1882 kasus yang tercatat. Kasus tersebut berasal dari sektor formal dan sektor informal. Di Malaysia, KBRI membagi pekerjaan pekerja/buruh migran Indonesia menjadi 2, yakni formal dan informal. Sektor formal terdiri dari pekerjaan: konstruksi, kilang/pabrik, jasa/*service*, perladangan, dan pertanian. Sementara sektor informal adalah Pekerja Rumah Tangga (PRT). Menenai sektor informal ini memang masalah penggajian adalah masalah yang paling sering terjadi.

Permasalahan penggajian ini mayoritas dikarenakan pekerja/buruh migran dibohongi oleh majikan. Mereka dijanjikan gaji mereka akan dibayar pada akhir tahun atau akan ditansfer setelah mereka pulang ke Indonesia. Pada kenyataannya majikan yang menjanjikan gaji akan dibayarkan pada akhir tahun, tidak mampu untuk membayarnya dikarenakan jumlahnya yang besar. Sementara majikan yang menjanjikan gaji akan dibayar setelah pekerja/buruh migran pulang ke Indonesia pada dasarnya mereka tidak memiliki uang untuk membayar pekerjanya sehingga mayoritas berbohong dengan cara itu.[93] Bahkan majikan yang tidak mampu membayar gaji

[93] Hasil wawancara dengan Agus Triyanto, Atase Ketenagakerjaan di KBRI Malaysia. Wawancara dilakukan pada 12 April 2012.

pekerjanya terkadang menuduh pekerjanya melakukan pencurian dan lain-lain agar terbebas dari tuntutan membayar gaji pekerjanya.[94]

Selain itu permasalahan penggajian terkadang juga disebabkan karena pekerja/buruh migran tidak mengetahui bahwa selama beberapa bulan awal, gaji yang diterimanya dipotong oleh *agency* Malaysia. Pemotongan ini disebabkan oleh biaya penempatan yang diterapkan oleh *agency* Malaysia. Ketidaktahuan pekerja/buruh migran terkait dengan pemotongan ini dikarenakan pekerja/buruh migran tidak mengetuhui isi dari PK dan alur yang menyertainya. Sehingga yang kemuadian terjadi adalah pekerja/buruh migran merasa bahwa majikannya memotong gajinya tanpa alasan.

Penulis menemukan permasalahan terkait dengan penggajian ini memang permasalahan yang paling banyak terjadi pada pekerja/buruh migran Indonesia di Malaysia. Tetapi penulis menemukan permasalahan lain yang cukup menarik, di luar masalah terkait dengan penggajian, yakni permasalahan terkait dengan *overtime* dan jenis pekerjaan yang dilakukan oleh pekerja/buruh migran. Banyak pekerja/buruh migran tidak mengetahui bahwa mereka telah dieksploitasi oleh majikannya, sampai pada suatu titik mereka sudah tidak kuat dan akhirnya melapor. Eksploitasi terjadi karena pekerja/buruh migran tidak mengetahui secara jelas ruang lingkup pekerjannya dan waktu bekerja. Mereka tidak memahami bahwa apabila mereka bekerja di luar apa yang ditentukan oleh PK, maka telah terjadi pelanggaran PK dan mereka berhak mendapatkan penggantian atas hal tersebut.

Tetapi, kalaupun mereka mengetahui dan menyadari adanya pelanggaran PK, mereka tidak akan dapat berbuat banyak. Mengapa? Karena mereka tinggal di rumah majikan dengan paspor yang dipegang majikan. Barulah pada keadaan yang sangat terdesak sekali, mereka akan melapor. Pada saat Penulis mengunjungi *shelter*

[94] Hasil wawancara dengan Muhammad Iqbal, Direktur Lembaga Swadaya Masyarakat UNIMIG. Wawancara dilakukan pada 6 Maret 2012.

pekerja/buruh migran Indonesia di Malaysia, penulis bertemu dengan salah satu pekerja/buruh migran, Nurjanah. Beliau sudah berada di *shelter* 11 hari (per 12 april 2012). Beliau baru bekerja di Malaysia selama empat bulan, tetapi sudah tidak kuat dan pada akhirnya melarikan diri ke KBRI. Beliau melarikan diri dikarenakan dipaksa untuk bekerja dari jam 06.00-23.00 di 2-3 rumah selama sehari.

Ketidaktahuan atas isi PK sangat memberikan dampak pada pekerja/buruh migran. Mereka tidak mengetahui apa saja hak yang mereka dapatkan. Ditambah lagi dengan kondisi bahwa si pekerja/buruh migran berada di bawah kekuasaan majikan sehingga semakin tidak memungkinkan pekerja/buruh migran mendapatkan hak dan keadilannya.

Bagi pekerja/buruh migran yang *undocumented*, masalah penggajian adalah salah satu tekanan masalah yang didapatkan oleh mereka. Mereka benar-benar di bawah kendali majikan, baik mengenai pekerjaan maupun penggajian. Apabila si pekerja/buruh migran yang *undocumented* tidak melaksanakan apa yang majikan suruh, majikan akan menekan mereka dengan ancaman akan melaporkan mereka kepada pihak berwajib di Malaysia bahwa si pekerja/buruh migran ini bekerja tanpa adanya dokumen yang sah. Tekanan ini juga berlaku bagi masalah penggajian. Sehingga mayoritas pakerja/buruh migran yang *undocumented* mereka lebih cenderung menurut dan pasrah pada keadaan.

IV.3.2. Permasalahan Penggajian di Hong Kong

"Permasalahan pekerja/buruh migran Indonesia di Hong Kong 90% terkait dengan penggajian. Jarang ada masalah lainnya, karena disini tuh hukum ketat banget."[95] Permasalahan pekerja/buruh migran Indonesia di Hong Kong memang mayoritas adalah permasalah terkait dengan penggajian. Masalah eksploitasi juga ada,

[95] Hasil wawancara dengan Yana, seorang TKW Indonesia yang bekerja di Hong Kong. Wawancara dilakukan pada 1 Mei 2012.

tetapi tidak banyak. Hukum di Hong kong sangat ketat terkait dengan pelaksanaan PK. Hukuman yang diberikan apabila PK tidak dilaksanakan berlaku bagi majikan dan pekerja/buruh migrannya. Oleh karena itu, mereka saling menajaga agar PK tersebut dilaksanakan sesuai dengan ketentuan yang terdapat di dalamnya.

Pemerintah Hong Kong mengharuskan warga negaranya untuk membayar gaji pekerja/buruh migran yang diperjakannya olehnya melewati bank. Selain itu diwajibkan untuk adanya tanda bukti pembayaran gaji. Mengenai hal ini sudah diatur di dalam PK dan tentunya sudah menjadi kesepakatan pekerja/buruh migran dengan majikannya.

Modus *underpayment* dan *unpaid* yang sering terjadi di Hong Kong adalah pekerja/buruh migran disuruh tanda tangan kwitansi pembayaran gaji tetapi gaji tidak dibayarkan oleh majikan. Jadi apabila pekerja/buruh migran melaporkan bahwa ia belum mendapatkan gaji dari majikan, majikan memberikan bukti bahwa telah memberikan gaji kepada pekerjanya dengan menunjukkan kwitansi yang sudah ditandatangani oleh pekerjanya. Modus lainnya sering terjadi adalah majikan membayarkan gaji pekerjanya lewat bank. Lalu bank memberikan kuitansi pembayaran kepada majikan. Tetapi bank tidak mentransfer uang tersebut kepada pekerja/buruh migran, melainkan mengembalikan uang tersebut kepada majikan yang membayar. Oleh karena itu, si pekerja/buruh migran tidak mendapatkan gaji.

Gaji yang diberikan di Hong Kong minimal sebesar 3.740 HKD dengan potongan selama tujuh bulan sebesar 3.000 HKD. Potongan tersebut digunakan untuk mambayar *fee agency* Hong Kong, PPTKIS, dan KJRI Hong Kong. Sementara itu apabila mendapatkan gaji sebesar 2.000 HKD, potongan diberlakukan hanya lima bulan sebesar 1.000 HKD. Pilihan terkait dengan gaji ini harus disesuaikan dengan keinginan majikan agar tidak ada kesalahpahaman pada saat pemberian.

IV.4 Metode Penyelesaian Permasalahan Penggajian

Metode penyelesaian permasalahan penggajian beraneka ragam. Metode ini dapat dipilih berdasarkan ketentuan perundang-undangan, maupun berdasarkan kebiasaan yang berlaku. Metode penyelesaian sengketa di Malaysia dan Hong Kong pun berbeda-beda.

Dalam menyelesaikan sengketa, pekerja/buruh migran yang tidak atau kurang memahami hukum, pada umumnya meminta bantuan kepada KBRI/KJRI ataupun kepada Lembaga Swadaya Masyarakat (LSM) yang memberikan layanan pengaduan. Hal ini dikarenakan mereka ingin memperjuangkan hak mereka sesuai dengan ketentuan hukum yang berlaku.

IV.4.1. Berdasarkan Undang-undang Indonesia

Apabila terjadi permasalahan di negara tujuan, cara penyelesaian permasalahan tersebut ditentukan oleh aturan pemerintah negara setempat. Pemerintah Indonesia tidak dapat turut campur. Tetapi di dalam Pasal 87 UU No. 39 tahun 2004 yang berbunyi:[96]

> "Pasal 87
> Pembinaan oleh Pemerintah sebagaimana dimaksud dalam Pasal 86, dilakukan dalam bidang:
> a. Informasi;
> b. sumber daya manusia; dan
> c. perlindungan TKI"

Selanjutnya di dalam Pasal 90 disebutkan:[97]

> "Pasal 90
> Pembinaan oleh Pemerintah dalam bidang perlindungan TKI sebagaimana dimaksud dalam Pasal 87 huruf c, dilakukan dengan:
> a. memberikan bimbingan dan advokasi bagi TKI mulai dari pra penempatan, masa penempatan dan purna penempatan;

[96] Indonesia, *Undang-undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*, UU No. 39 Tahun 2004, LN No. 133 Tahun 2004, TLN No. 4445, Psl. 87.

[97] *Ibid*, Psl. 90.

b. memfasilitasi penyelesaian perselisihan atau sengketa calon TKI/TKI dengan Pengguna dan/atau pelaksana penempatan TKI;
c. menyusun dan mengumumkan daftar Mitra Usaha dan Pengguna bermasalah secara berkala sesuai dengan peraturan perundang-undangan;
d. melakukan kerjasama internasional dalam rangka perlindungan TKI sesuai dengan peraturan perundang-undangan."

Dengan demikian apabila terjadi permasalahan terhadap pekerja/buruh migran, pemerintah wajib memberikan pembinaan dengan cara memberikan bimbingan dan advokasi, termasuk di dalamnya apabila pekerja/buruh migran maju ke dalam pengadilan. KBRI/KJRI sebagai perwakilan pemerintah Indonesia di negara tujuan, wajib memberikan bantuan hukum dan mendesak pemenuhan hak yang seharusnya didapatkan oleh pekerja/buruh migran. Tetapi apakah pada kenyataannya seperti itu?

> "…… kalau sudah masuk kedalam KJRI pasti dipulangin, masalah hukum ga diselesain. Makanya itu KJRI selalu kosong. Bahkan penggantian hak yang seharusnya di dapatkan oleh TKW ga diselesain."[98]

Disamping itu pula, dinyatakan oleh Atase Ketenagakerjaan KBRI di Malaysia:

> "…….memang kami ini dinas sosial? Kami juga memiliki keterbatasan. Kami tidak bisa membantu semua pihak. Tetapi apabila ada laporan, kami akan bantu. Tetapi dana kami pun terbatas."[99]

Permasalahan hukum yang tidak terselesaikan tidak hanya merugikan pekerja/buruh migran secara materil, tetapi juga mengganggu kesehatan mental mereka. Hak mereka yang kemudian

[98] Hasil wawancara dengan Yana, seorang TKW Indonesia yang bekerja di Hong Kong. Wawancara dilakukan pada 1 Mei 2012.

[99] Hasil wawancara dengan Agus Triyanto, Atase Ketenagakerjaan di KBRI Malaysia. Wawancara dilakukan pada 12 April 2012.

tidak terpenuhi juga tidak akan memberikan efek jera kepada majikan yang telah melakukan pelanggaran PK ataupun tindakan lainnya yang merugikan pekerja/buruh migran. Tentunya hal ini juga ditentukan oleh *law enforcement* di negara tujuan. Tetapi di dalam Pasal 7 UU No. 39 Tahun 2004 dikatakan:[100]

> "Pasal 7
> (1) Setiap orang berhak untuk menggunakan semua upaya hukum nasional dan forum internasional atas semua pelanggaran hak asasi manusia yang dijamin oleh hukum Indonesia dan hukum internasional mengenai hak asasi manusia yang telah diterima negara Republik Indonesia.
> (2) Ketentuan hukum internasional yang telah diterima negara Republik Indonesia yang menyangkut hak asasi manusia menjadi hukum nasional."

Upaya hukum yang dijanjikan di dalam Pasal 7 tersebut di beberapa negara penerima diterapkan. Pemerintah mengejawantahkan Pasal tersebut pada Pasal 90 mengenai pembinaan yang difokuskan kepada pemberian bantuan hukum, advokasi, dan memfasilitasi permasalahan yang terjadi.

Pekerja/buruh migran yang telah mengalami permasalahan hukum harus dipulangkan terlebih dahulu setelah menyelesaikan permasalahannya. Pemerintah pun bertanggung jawab atas pemulangan ini. Menurut penulis hal ini tidak perlu dilakukan. Mengapa? Saat pekerja/buruh migran dipulangkan dan mereka ingin kembali ke negara sebelumnya untuk bekerja, mereka tetap harus melawati alur perekrutan yang sebetulnya pernah mereka ikuti. Selain itu, mereka akan kembali diperas oleh PPTKIS. Pasalnya gaji meraka akan dipotong selama beberapa bulan dan juga menyerahkan uang untuk biaya administrasi. Menurut penulis, yang seharusnya dipulangkan adalah pekerja/buruh migran yang terbukti melakukan pelanggaran terhadap PK maupun yang terbukti melakukan tindak

[100] Indonesia, *Undang-undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*, UU No. 39 Tahun 2004, LN No. 133 Tahun 2004, TLN No. 4445, Psl. 90.

pidana. Apabila tidak terbukti, maka yang bermasalah bukan pekerja/buruh migrannya, tetapi majikannya.

Badan Penempatan dan perlindungan Tenaga Kerja Indonesia (BNP2TKI) mengkalim bahwa segala permasalahan yang diadukan oleh pekerja/buruh migran ditangani semuanya. Tetapi ada yang aneh di dalam penanganan permasalahan ini. Hasil wawancara penulis dengan salah satu pegawai BNP2TKI bagian advokasi, Bapak Aritonang, mengatakan bahwa BNP2TKI dalam menyelesaikan permasalahan terkait dengan pekerja/buruh migran dengan memanggil PPTKIS yang menyalurkan pekerja/buruh tersebut, lalu menyuruhnya menyelesaikan permasalahan yang terjadi pada pekerja/buruh yang disalurkannya. Menurut penulis ini sangat tidak efektif. Mengapa? Pada dasarnya PPTKIS tidak memantau secara langsung apa yang terjadi kepada pekerja/buruh migran yang telah mereka salurkan. Mereka hanya mengetahui bahwa mereka telah menyalurkan. Mereka pada dasarnya sudah lepas tangan. Penyelesaian seperti ini terasa sangan kuno dan hanya bagian dari formalitas belaka bahwa pemerintah sudah bekerja. Tetapi apakah dapat menyelesaikan secara langsung?

Bapak Aritonang menambahkan bahwa PPTKIS yang tidak dapat menyelesaikan permasalahan pekerja/buruh migran yang telah mereka salurkan, akan mendapatkan hukuman. Hukuman seperti apakah? Dendakah? Atau pencabutan SIP?[101] Koordinasi yang sangat tidak singkron ini menyebabkan dalam penyelesaian permasalahan pekerja/buruh migran seperti bekerja sendiri. Mereka memperjuangkan nasib mereka sendiri. Apakah ini semua sebanding dengan devisa yang mereka hasilkan untuk negara?

[101] SIP adalah Surat Izin Penempatan. Apabila PPTKIS ingin melakukan penempatan pekerja/buruh migran di luar negeri, maka harus memiliki SIP ini. SIP ini dikeluarkan oleh BNP2TKI dan Kemenakertrans. Terkait dengan pengeluaran SIP ini, BNP2TKI dan Kemenakertrans memiliki 'sensitifitas' tertentu. BNP2TKI mengklaim bahwa wewenang untuk mengeluarkan SIP adalah wewenangnya dikarena BNP2TKI mengurusi permasalahan teknis dari penempatan pekerja/buruh migran. Sementara itu, Kemenakertrans mendasarkan kewenangannya pada UU No. 39 tahun 2008 bahwa yang dapat mengeluarkan SIP adalah pemerintah, dalam hal ini Kemenakertrans yang merupakan bagian dari pemerintahan.

Permasalahan yang terjadi tidak melulu berasal dari pekerja/buruh migran, bisa juga berasal dari majikan seperti yang pada umumnya terjadi di Hong Kong. Lantas apakah majikan akan dihukum? Bagaimana bentuk penghukuman kepada majikan? Proses penyelesaian permasalahan yang adil ini tentunya akan memberikan kepastian hukum kepada pekerja/buruh migran maupun majikan. Banyak kasus yang terjadi kepada pekerja/buruh migran tidak terselesaikan. Hak mereka untuk mendapatkan akses keadilan tidak didapatkan dan begitu pula dengan hak mereka yang dilanggar. Mengapa kedua hal tersebut tidak didapatkan? Karena mereka dipulangkan tanpa menyelesaikan permasalahan yang timbul. Saat mereka sampai di Indonesia sangat sulit sekali untuk mendapatkan keadilan di negara tempat mereka bekerja. Oleh karena itu, apabila terjadi permasalahan pekerja/buruh migran sebaiknya menyelesaikannya terlebih dahulu, barulah pulang ke Indonesia. Dan inilah yang sering dilakukan oleh KBRI/KJRI kita di luar negeri.

IV.4.2. Proses Penyelesaian Masalah di Malaysia

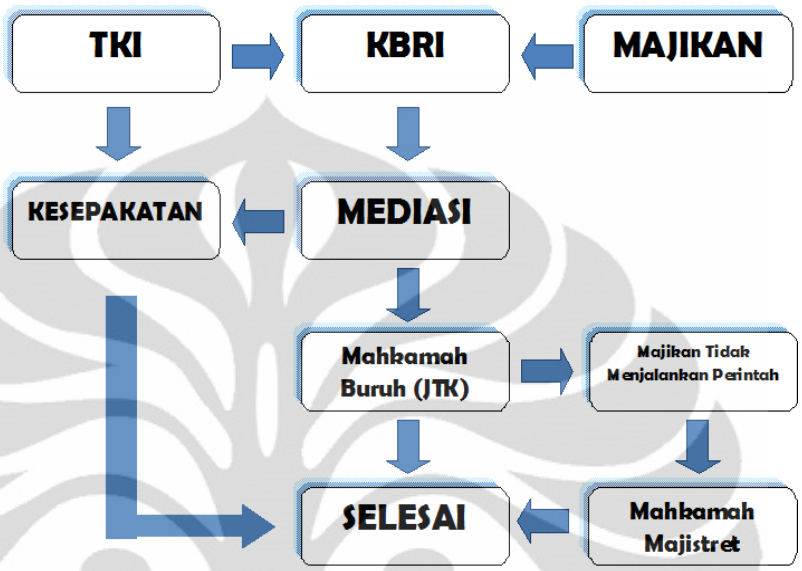
Proses penyelesaian permasalahan penggajian di Malaysia (salah satu masalah yang terdapat di bagian *labour cases*) didasarkan atas hukum Malaysia. Menurut KBRI Malaysia proses penyelesaian kasus pekerja/buruh migran Indonesia di Malaysia ada empat, yakni:[102]

a. Mediasi bipartit (dua pihak)
b. Mengajukan ke jabatan tenaga kerja → Mahkamah Buruh
c. Mengajukan permohonan di mahkamah (persidangan)
d. Penyediaan penasehat hukum

Setiap harinya terdapat 40 pengaduan yang datang ke KBRI Malaysia dan 60 pengaduan via telepon. KBRI Malaysia menetapkan

[102] Slide KBRI oleh Atase Ketenagakerjaan, Agus Triyanto.

penyelesaian permasalah pekerja/buruh migran Indonesia sebagai berikut:[103]

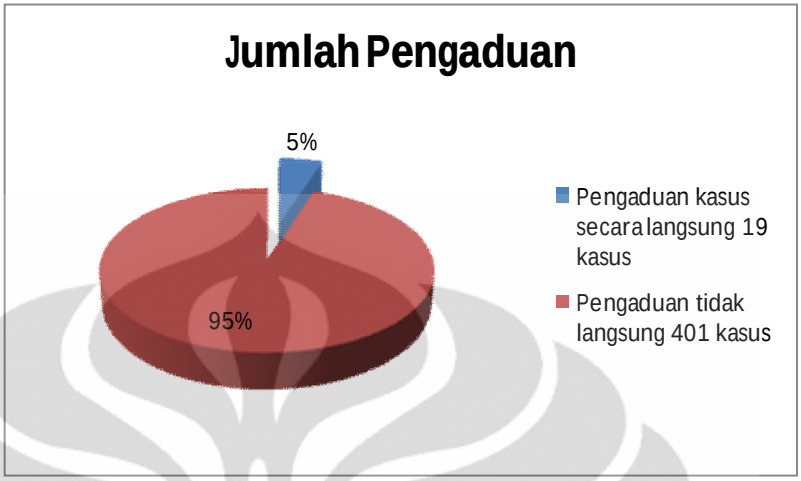


*Mahkamah Majistret adalah Pengadilan Tinggi

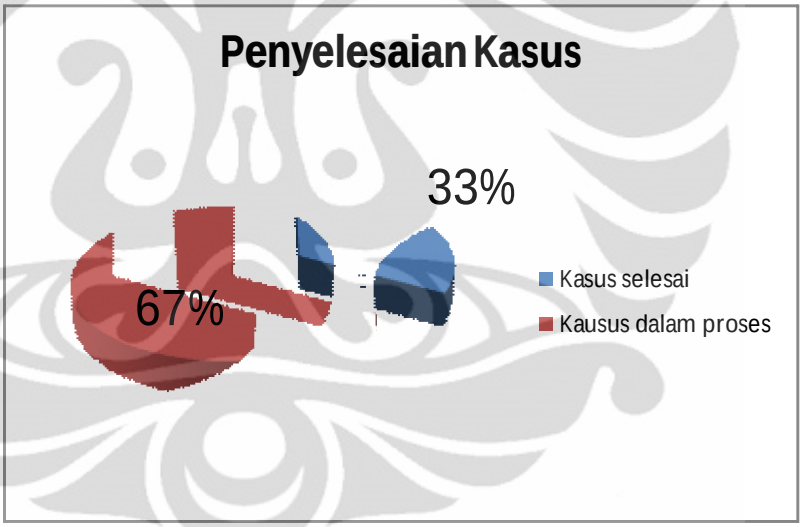
Dengan adanya proses penyelesaian seperti bagan di atas, maka sudah jelaslah langkah-langkah yang perlu diambil apabila pekerja/buruh migran mengalami permasalahan, baik permasalah gaji maupun permasalahan lainnya.

Menurut data KBRI Malaysia (sampai Maret 2012), jumlah pengaduan yang ada sebesar:[104]

[103] *Ibid.*
[104] *Ibid.*



Sementara itu kasus yang telah diselesaikan:



Besarnya kasus yang masih dalam proses ini tidak memiliki kejelasan bagaimana prosesnya berlangsung. Ketidakjelasan inilah yang kemudian membuat pekerja/buruh migran pasrah dengan keadaan yang ada.

Apabila terjadi pelaporan terkait dengan pekera/buruh migran Indonesia, KBRI akan langsung menindak dengan cara:

a. Menghubungi pihak berwajib Malaysia

b. Datang ke rumah majikan untuk menanyakan terkait permasalahan pekerja/buruh migran, apabila diperlukan dilaksanakan penjemputan
c. Melakukan proses penyelesaian sengketa seperti yang terdapat pada bagan penyelesaian sengketa

Pekerja/buruh migran yang dijemput oleh KBRI akan di tempatkan di dalam *shelter*. Apabila pekerja/buruh migran sudah masuk ke dalam shelter, maka mereka tidak diperbolehkan untuk keluar dari shelter hingga permasalahan hukum mereka selesai. Setelah permasalahan hukum mereka selesai, mereka akan dipulangkan oleh KBRI ke Indonesia. Mereka tidak boleh melanjutkan pekerjaan di Malaysia, karena mereka dianggap sebagai orang yang sudah memiliki permasalahan hukum dan permasalahan mental. *Labelling* inilah yang terkadang mengganggu. Tidak semua permasalahan hukum yang terjadi pada pekerja/buruh migran disebabkan oleh pekerjanya, tetapi juga disebabkan oleh majikan. Apakah majikan mendapatkan hukuman? Di Malaysia majikan yang sudah terkena kasus hukum tidak boleh lagi mengambil pekerja/buruh migran Indonesia kembali. Tetapi kenyataannya banyak sekali majikan yang 'main belakang' dengan *agency* sehingga di dalam catatan permohonan pekerja/buruh migran tidak ada permasalahan hukum di dalamnya.

Data lapangan yang penulis dapatkan, KBRI Malaysia seringkali tidak menyelesaikan kasus pekerja/buruh migran Indonesia, tetapi langsung memulangkan mereka. Hal ini menyebabkan si pekerja/buruh migran hak atas keadilan dan hak atas hak-hak yang dilanggar di dalam PK tidak terpenuhi. KBRI juga tidak ingin dianggap sebagai panti sosial, karena dana yang mereka miliki terbatas dan tidak bisa membantu seluruh pekerja/buruh migran Indonesia yang bermasalah.

IV.4.3. Proses Penyelesaian Masalah di Hong Kong

Proses penyelesaian permasalahan terkait dengan penggajian di Hong Kong sangat jelas, baik dari segi alur dan segi kepastian hukum. Pada proses penyelesaian permasalahan penggajian di Hong Kong, penulis tidak akan berfokus kepada kinerja KJRI. Mengapa demikian? Karena KJRI Hong Kong terkenal akan 'memulangkan'. Seperti yang sudah penulis jelaskan sebelumnya pada bagian Malaysia, KJRI Hong Kong terkenal suka memulangkan pekerja/buruh migran Indonesia tanpa menyelesaikan kasus yang terjadi di Hong Kong. *Shelter* di KJRI pun kosong, karena pekerja/buruh migran tidak ada yang ingin melapor kepada KJRI.[105] Lalu kepada siapa mereka melapor?

Pada umumnya pekerja/buruh migran Indonesia di Hong Kong melaporkan permasalahan mereka ke Lembaga Swadaya Masyarakat (LSM) yang ada di sana. Lembaga Swadaya Masyarakat (LSM) di sana berusaha untuk memediasi permasalahan yang terjadi antara majikan dan pekerja/buruh migran. Apabila proses tersebut tidak selesai, maka akan dibawa ke dalam pengadilan. Pengadilan untuk pekerja/buruh migran terdapat pada *Labour Court.* Pada umumnya LSM akan menghindari hal ini, mengapa? Karena pekerja/buruh migran terkadang tidak memahami hukum acara yang ada di sana dan juga bahasanya. Bahasa yang digunakan di dalam *labour court* adalah bahasa Kanton yang mana mayoritas pekerja/buruh migran Indonesia membutuhkan penerjemah untuk maju ke dalam persidangan. Tetapi mayoritas kasus yang dibawa ke dalam persidangan dimenangkan oleh pekerja/buruh migran, syaratnya hanya satu, yakni: cukup bukti. Apabila si pekerja/buruh migran memiliki cukup bukti maka kasus akan dimenangkan oleh mereka dan majikan akan dihukum dengan membayar apa yang seharusnya didapatkan oleh pekerja/buruh migran. Selain itu majikan juga

[105] Hasil wawancara dengan Yana, seorang TKW Indonesia yang bekerja di Hong Kong. Wawancara dilakukan pada 1 Mei 2012.

dikenakan hukuman oleh pemerintah Hong Kong. Hukuman ini dapat berupa denda dan tentunya tidak boleh mempekerjakan pekerja/buruh migran lagi.

Dalam penegakan hukum, pemerintah Hong Kong tidak pandang bulu. Meskipun yang mendapatkan masalah adalah bukan warga negara China, pemerintah Hong Kong akan tetap membantu dengan sepenuh hati.

Mengenai majikan yang tidak dapat membayar gaji pekerjanya, majikan dapat mengajukan permohonan kepailitan kepada pengadilan. Apabila pengadilan merasa bahwa majikan memang mengalami kepailitan, maka majikan akan dianggap pailit dan seluruh gaji pekerja/buruh migran yang bekerja pada majikan tersebut akan dibayarkan oleh pemerintah atas putusan pengadilan. Di kemudian hari, majikan tersebut tidak boleh mengajukan permohonan mempekerjakan pekerja/buruh migran. Dengan demikian, maka proses penyelesaian permasalahan pekerja/buruh migran di Hong Kong tidak hanya pemenuhan hak atas keadilan tetapi juga pemenuhan terhadap hak yang dilanggar di dalam PK yang telah disepakati.

BAB V
GLOBALISASI HUKUM DALAM SISTEM PENGGAJIAN PEKERJA/BURUH MIGRAN INDONESIA DI MALAYSIA DAN HONG KONG

I am thankful to all those who said NO to me. It's because of them I did it my self
-Albert Einstein

V.1. Dampak Globalisasi Hukum terhadap Pekerja/Buruh Migran

Di dalam bab sebelumnya, penulis menemukan bahwa globalisasi mempunyai ciri-ciri sebagai berikut:

1. Intensifikasi hubungan sosial yang menjangkau seluruh dunia.
2. Integrasi dari kegiatan ekonomi yang menyebabkan terjadinya pasar global.
3. Melampaui batas politik dan tidak tunduk pada peraturan perundang-undangan suatu negara.
4. Eksistensi individu/peran warga negara menjadi semakin optimal.

Ciri-ciri tersebut kemudian sejalan dengan apa yang terjadi kepada pekerja/buruh migran Indonesia.

Pekerja/buruh yang bermigrasi menciptakan jaringan luas dikarenakan pergaulan yang melewati batas negara. Mereka menjadi komoditi tenaga bagi kegiatan perekonomian yang menunjang ekonomi dunia. Pergerakan mereka tidak tunduk kepada peraturan perundang-undangan suatu negara. Hal ini disebabkan karena keadaan mereka yang sudah menyatu dengan sifat universalitas dunia, tidak tunduk pada sistem hukum manapun, tetapi justru menciptakan pilihan sistem hukum baru. Peran individu menjadi semakin dominan karena globalisasi yang dibawa masuk ke dalam negeri menciptakan ranah pemikiran baru yang mana memerlukan sumber daya untuk mengembangkannya. Untuk hal ini dapat terlihat di dalam

perusahaan-perusahaan multi nasional yang memiliki cabang di setiap negara.

Pekerja/buruh migran yang merupakan salah satu aktor dari globalisasi[106] tidak langsung begitu saja menjadi aktor. Mereka adalah korban dari suatu kondisi. Kondisi yang mana memberatkan mereka sehingga mereka tidak bisa memenuhi kebutuhan hidup mereka sendiri. Kondisi apakah ini? Kondisi ini terdiri dari beberapa bagian:[107]

1. Ketersediaan lapangan pekerjaan.

   Ketersediaan lapangan pekerjaan yang terbatas di dalam negeri dan kebutuhan hidup yang semakin banyak mendorong pekerja/buruh bermigrasi untuk mencari pekerjaan. Tingkat pendidikan yang rendah serta pengetahuan yang sempit menjadi faktor pendorong tambahan yang menyebabkan mereka tidak mendapatkan pekerjaan di dalam negeri. Di samping itu pula terdapat faktor penarik yang tak kalah pentingnya, yakni gaji/upah yang cukup besar (terutama di Hong Kong) serta faktor gengsi pergi ke luar negeri juga menjadi penyemarak alasan untuk bekerja di luar negeri.

   Ketersediaan lapangan pekerjaan yang terbatas di dalam negeri, penulis menilainya sebagai sumber dari terjadinya migrasi buruh/pekerja. Selama pasokan lapangan pekerjaan masih terbatas, migrasi yang tujuannya mencari lapangan pekerjaan akan terus terjadi. Dan dengan demikian penulis menyimpulkan bahwa terbatasnya lapangan pekerjaan menyebabkan timbulnya globalisasi dalam bidang pekerjaan. Oleh karena itu, penulis sepakat dengan Benda-Beckmann bahwa pekerja/buruh migran adalah salah satu aktor dari adanya globalisasi.

2. Penempatan di negara lain.

   Sistem penempatan di negara lain adalah konsekuensi mutlak untuk pekerja/buruh migran. Ini bukanlah faktor pendorong ataupun

[106] Keebet von Benda-Beckmann, *Globalisation and Legal Pluralism*, (Netherlands: Kluwer International, 2002), hal 20.

[107] Penulis menyimpulkan hal ini setelah melakukan penelitian terkait dengan latar belakang dan alur dari keberangkatan hingga kepulangan pekerja/buruh migran Indonesia.

faktor penarik, tetapi karena mereka ditempatkan di negara lain, maka mereka akan menemui perbedaan-perbedaan, baik adat istiadat/kebiasaan maupun hukum. Perbedaan-perbedaan inilah yang kemudian akan menimbulkan perbenturan diantaranya. Mengapa perbenturan? Karena pekerja/buruh migran memiliki adat istiadat/kebiasaan dan hukum yang biasa mereka gunakan di negara asal, sementara itu sesampainnya mereka di negara penerima harus menggunakan istiadat/kebiasaan dan hukum yang berbeda dengan yang mereka gunakan sehari-hari. Hal ini dapat digambarkan dari hasil wawancara penulis:

> "…. enam bulan pertama saya kebingungan dengan kehidupan di Hong Kong. Di Hong Kong di dalam bus tidak boleh merokok dan buang ludah. Ada itu teman saya, sudah dua tahun di Hong Kong masih suka kelupaan."[108]

> "….pembantu disuruh mengambil 'ikan' kok malah membawakan daging. Ditanyakan kenapa membawakan daging, dia bilang di daerahnya 'ikan' itu sama dengan daging. Alhasil pembantu tersebut dimarahi majikannya"[109]

Selain adat isitiadat/kebiasaan yang berbeda dengan negara asal pekerja/buruh migran, terdapat perbedaan yang lain yang terkait dengan wilayah negara, yakni hukum. Hukum yang berlaku di Indonesia berbeda dengan hukum yang berlaku di negara penerima tempat pekerja/buruh migran bekerja. Perbedaan hukum ini menciptakan ketidaknyamanan bagi pekerja/buruh migran. Kondisi seakan tak terlindungi, bekerja seorang diri, dan posisi yang tak seimbang dengan majikan menambah rasa ketidaknyamanan tersebut.

Rasa tak terlindungi ini menyebabkan mereka tidak tahu harus berbuat apa, terutama apabila pekerja/buruh migran mendapatkan tekanan dari majikan.

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[108] Hasil wawancara dengan Yana, seorang TKW Indonesia yang bekerja di Hong Kong. Wawancara dilakukan pada 1 Mei 2012.

[109] Hasil wawancara dengan Agus Triyanto, Atase Ketenagakerjaan di KBRI Malaysia. Wawancara dilakukan pada 12 April 2012.

> "… saya menemani majikan saya bermain mahyong dan bertemu dengan TKW Indonesia yang ngeliatin saya terus. Dia ngeliatin saya sedikit, langsung dimarahin sama majikannya. Sedikit-sedikit dimarahin…… Akhirnya saya berkomunikasi lewat surat dan ternyata dia tidak pernah mendapatkan hari libur selama kerja."[110]

Ketidakberdayaan ini menimbulkan rasa pasrah dari pekerja/buruh migran, pasrah apabila gaji tidak dibayar, pasrah tidak mendapatkan hari libur, hingga pasrah mendapatkan tekanan fisik dari majikan. Rasa tak terlindungi hingga rasa pasrah ini sebetulnya tidak perlu terjadi apabila pekerja/buruh migran memiliki pengetahuan yang cukup terkait dengan hukum yang berlaku di negara penerima serta pengetahuan terkait dengan hak dan kewajiaban pekerja/buruh migran dan majikan di tempat ia bekerja.

Permasalahan-permasalahan yang kemudian ditimbulkan akan diselesaikan dengan cara mereka masing-masing. Perjanjian Kerja (PK) yang ada hanya menjadi formalitas belaka setelah mereka sampai di negara tujuan tempat mereka bekerja. Penyelesaian permasalahan bermacam-macam, seperti pemotongan gaji di Hong Kong:

> "….kalau di Hong Kong diperbolehkan memotong gaji TKW maksimal 300 HKD per-bulan….. Apabila terdapat permasalahan, seperti mengutil, maka konsekuensinya ditentukan oleh majikan, biasanya pemotongan gaji. Mereka tidak bisa dipecat dengan alasan yang tidak kuat. Apabila hal tersebut terjadi, maka dapat dibawa ke *court*."[111]

Cara menyelesaikan permasalahan seperti inilah yang tidak diatur secara jelas di dalam PK maupun peraturan Hong Kong. Penemuan hukum ini kemudian penulis simpulkan sebagai salah satu bentuk dari globalisasi hukum, hukum yang terjadi akibat adanya globalisasi. Dengan demikian,

[110] Hasil wawancara dengan Yana, seorang TKW Indonesia yang bekerja di Hong Kong. Wawancara dilakukan pada 1 Mei 2012.

[111] Hasil wawancara dengan Adzimattinur Siregar, seorang aktifis Dompet Dhuafa yang kerap kali membantu permasalahan terkait dengan TKW Indonesia. Wawancara dilakukan pada 31 Maret 2012.

globalisasi hukum ini kemudian menjadi salah satu pilihan hukum yang dapat dipilih, baik oleh pekerja/buruh migran maupun majikan.

Pada dasarnya pekerja/buruh migran yang bekerja di luar negeri dijadikan komoditi ekonomi dan komiditi politik. Mereka dijadikan komoditi ekonomi karena banyak sekali kepentingan yang terdapat di dalam pemberangkatannya.

> "Menlu menyarankan untuk menghentikan pengiriman TKI secara total kepada Pak SBY. Pak SBY pun menyetujui dan menyuruh kami (Kemenakertrans) untuk menghentikan pengiriman. Tetapi tidak bisa begitu saja karena apabila pengiriman TKI dihentikan maka akan terjadi gejolak perekonomian karena meningkatnya angkata kerja yang tidak bekerja."[112]

Sejalan dengan hasil wawancara tersebut:

> "TKI itu dapat dijadikan komoditi ekonomi dan komoditi politik. Komoditi ekonomi diperas oleh *agency* dan menjadi komoditi politik saat terjadi masalah."[113]

Pekerja/buruh migran ini tidak hanya menjadi komoditi ekonomi bagi *agency* yeng merekrut mereka, tetapi juga oleh pemerintah. Pemerintah memiliki kepentingan dalam pengiriman. Mengapa demikian? Pasalnya dalam pengiriman pekerja/buruh migran pemerintah akan mendapatkan pemasukan negara melalui remiten. Remiten dikirimkan oleh pekerja/buruh migran dari luar negeri. Remiten adalah dana yang dibawa masuk oleh pekerja/buruh migran ke negara asalnya. Remiten ini berupa pajak dan biaya admistrasi serta bunga yang ditimbulkan akibat pengiriman uang antar negara. Remiten ini sangat besar pengaruhnya kepada anggaran keuangan negara karena menyumbang daya tahan dari postur anggaran yakni berupa kiriman dana yang akan mengalir secara langsung ke faktor konsumsi dan

[112] Hasil wawancara dengan Endang, Kasubdit Penempatan Kementrian Tenaga Kerja dan Transmigrasi Republik indonesia. Wawancara dilakukan pada 25 April 2012.

[113] Hasil wawancara dengan Agus Triyanto, Atase Ketenagakerjaan di KBRI Malaysia. Wawancara dilakukan pada 12 April 2012.

investasi. Menurut *World Bank*, remiten adalah penghasilan terbesar kedua di negara-negara berkembang.

Apabila kita melihat fenomena pekerja/buruh migran, kita dapat melihat manusia disamakan dengan barang atau *goods*. Barang yang berpindah dan apabila sudah tidak dapat bekerja secara maksimal akan dibuang begitu saja. Perkembangan teknologi dan pergerakan manusia yang begitu cepat mendorong hal ini terjadi.

Pekerja/buruh migran sebagai salah satu aktor yang mendorong terjadinya globalisasi, termasuk di dalamnya bidang hukum. Hal ini salah satunya dapat terlihat dalam hal sistem penggajian. Sistem penggajian pekerja/buruh migran Indonesia terletak di dalam Perjanjian Kerja (PK) yang disepakati oleh pekerja/buruh migran dengan majikannya. Pada kenyataannya permasalahan terkait dengan *underpayment* dan *unpaid* adalah mayoritas permasalahan yang dialami oleh kebanyakan pekerja/buruh migran. Proses penyelesaian kasus untuk memperoleh *win-win solution* yang mana tidak diatur di dalam peraturan perundang-undangan kedua belah negara (negara asal pekerja/buruh migran dan negara asal majikan) inilah yang kemudian menjadi salah satu terobosan hukum yang tidak bisa disentuh oleh negara. Mengapa demikian? Karena pekerja/buruh migran dan majikannya terikat PK yang sudah ditandatangani. *Lex specialist derogate legi generalis.*[114] Asas hukum inilah yang kemudian berlaku.

Terobosan hukum yang telah diambil menjadi pilihan hukum bagi si pekerja/buruh migran dengan majikannya. Mereka tidak melanggar hukum tetapi mereka menciptakan hukum baru yang menurut mereka adil bagi mereka. Inilah yang kemudian disebut sebagai globalisasi hukum sebagai salah satu dari pilihan hukum yang tersedia.

Pekerja/buruh migran sebagai komoditi politik apabila terjadi suatu permasalahan yang menyangkut dengan mereka akan di-*blow up* oleh media Indonesia untuk menjatuhkan pemerintahan yang ada. Partai oposisi menjadi dalang dari ini semua:

[114] Hukum yang khusus mengalahkan hukum yang umum.

> "…bahkan media pun sebenarnya terlalu membesar-besarkan berita buruk mengenai TKI. Padahal berita mengenai TKI kita ga selalu buruk. Kita tidak pernah mendapat pemberitaan tentang keberhasilan TKI kita, misalnya ada yang berhasil membangun rumah untuk keluarganya dan keberhasilan-keberhasilan lain yang sebenarnya cukup signifikan namun tidak diberitakan."[115]

Keberpihakan media menjadi hal yang sangat penting dalam hal ini. Dengan media, opini masyarakat menjadi tergiring dan juga memberikan tekanan kepada pemerintah. Hal ini sangat terlihat saat penulis berada di Malaysia tidak ada satu pun berita menyangkut pekerja/buruh migran Indonesia yang meninggal ataupun bermasalah, tetapi di Indonesia sangat ramai terkait dengan adanya berita tiga pekerja/buruh migran Indonesia yang dijual organ tubuhnya.

Di sini dapat terlihat bahwa pemerintah Malaysia sangat melindungi warga negaranya terkait dengan pekerja/buruh migran Indonesia yang ada di sana, sementara oposisi di indonesia menggunakan berita ini untuk menyerang pemerintah dan menggiring opini publik. Dengan demikian, pekerja/buruh migran dijadikan alat politik terkait dengan permasalahan-permasalahan yang melingkupi mereka.

Banyak pilihan hukum yang tersedia bagi pekerja/buruh migran. Tetapi permasalahannya adalah mereka tidak diberikan kesempatan untuk memilih hukum tersebut. Pilihan tersebut ada saat pembentukan PK, tetapi mereka tidak diberikan keleluasaan untuk membuat PK mereka sendiri. Kekuasaan pemerintah untuk menentukan isi PK lebih kuat, dikarenakan kepentingan pemerintah dalam hal ini sangat besar, yakni menjaga kedaulatan negara. Masalah perlindungan pekerja/buruh migran menjadi alasan kedua dalam penyelerasan PK yang ada. Klausula baku/klausula yang tidak bisa diubah ini memberikan kepastian

[115] Hasil wawancara dengan Endang, Kasubdit Penempatan Kementrian Tenaga Kerja dan Transmigrasi Republik indonesia. Wawancara dilakukan pada 25 April 2012.

perlindungan secara menyeluruh kepada seluruh pekerja/buruh migran Indonesia yang bekerja di luar negeri.

Perjanjian Kerja yang diberlakukan untuk pekerja/buruh migran adalah PK lintas negara yang tentunya Indonesia dan negara penerima memiliki aturan hukum yang berbeda (asas teritorialitas). Perjanjian Kerja yang diberlakukan tidak boleh bertentangan dengan hukum negara penerima, yang belum tentu sesuai dengan apa yang diinginkan oleh pekerja/buruh migran dan majikan yang akan mempekerjakan mereka. Sempitnya pilihan hukum inilah yang kemudian membatasi ruang gerak bagi pekerja/buruh migran.

V.2. Ketentuan Hukum yang Berlaku terkait Sistem Pembayaran Gaji Pekerja/Buruh Migran

Di Indonesia mengenai pekerja/buruh migran di atur di dalam UU No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri yang sejalan UU No. 13 Tahun 2003 tentang Ketenagakerjaan. Kedua undang-undang tersebut didasari oleh UU No. 39 Tahun 1999 tentang Hak Asasi Manusia. Sementara itu, di Malaysia belum ada undang-undang yang mengatur mengenai pekerja/buruh migran secara khusus. Pekerja/buruh migran Indonesia di Malaysia terikat dengan *Employment Act* Tahun 1955 yang merupakan peraturan perburuhan yang diberlakukan kepada seluruh pekerja/buruh, baik warga negara Malaysia, maupun pekerja/buruh migran dari negara lain. Berbeda halnya dengan Hong Kong, di Hong Kong ketentuan mengenai pekerja/buruh migran diatur dengan jelas sekali. Mengapa demikian? Karena Hong Kong menganggap bahwa pekerjaan rumah tangga sebagai pekerjaan formal yang sudah jelas *job description*-nya. Pekerja/buruh migran di Hong Kong diatur di dalam *Employment Ordinance Chapter 57,* termasuk di dalamnya mengenai pembayaran gaji.

Ketentuan hukum di Malaysia tidak mengatur mengenai perjanjian kerja dan standar besaran gaji, yang kemudian berdampak pada timbulnya pelanggaran yang merugikan pekerja/buruh migran. Kondisi ketiadaan ini

kemudian berdampak pada tidak adanya proteksi bagi pekerja/buruh migran Indonesia. Pemerintah Indonesia melihat hal ini sebagai masalah, sehingga kemudian membentuk MoU denggan Pemerintah Malaysia untuk menentukan standar-standar tertentu mengenai pengiriman pekerja/buruh migran Indonesia serta hak yang mereka dapatkan.

Sementara itu, pemerintah Hong Kong memiliki pengaturan mengenai perjanjian kerja yang diatur secara ketat yang kemudian memberikan proteksi hukum kepada pekerja/buruh migran Indonesia yang bekerja di sana. Hong Kong juga memberikan standar besaran gaji bagi pekerja/buruh migran. Besaran gaji tersebut adalah sebesar 3.740 HKD, yang kemudian besaran tersebut menjadi standar besaran bagi penggajian pekerja/buruh migran yang bekerja disana. Peraturan Hong Kong memeberikan perlindungan yang menyeluruh dan mendetil kepada pekerja/buruh migran. Hal ini dikarenakan pengakuan pemerintah Hong Kong kepada profesi pekerja rumah tangga.

V.3. Dampak dari Sistem Pembayaran Gaji Pekerja/Buruh Migran Indonesia di Malaysia dan Hong Kong

V.3.1. Keberlakuan Perjanjian Kerja

Dalam pembuatan PK antara calon pekerja/buruh migran dengan calon majikan, seharusnya kedua belah pihak memiliki kekuasaan untuk membuat PK yang mereka kehendaki, tanpa adanya campur tangan dari pihak lain. Pemerintah seharusnya mememiliki kewenangan yang terbatas terkait keikutsertaannya dalam pembuatan klausula yang terdapat di dalam PK. Mengapa demikian? Pasalnya PK adalah suatu perbuatan hukum yang bersifat privat yang mana mengikat pribadi dengan pribadi dan mengatur kepentingan para pihak. Adanya keikutsertaan negara dalam klausula PK ini membuktikan bahwa negara memasuki ranah privat yang seharusnya ranah ini hanya ditentukan oleh para pihak. Memang negara memiliki kepentingan di dalam hal ini, yakni melindungi warga negaranya,

mengingat PK pekerja/buruh migran dengan majikannya adalah K yang dibuat dengan dua ketentuan hukum yang berbeda. Negara menjadi penengah/pihak ketiga untuk membatasi isi PK demi melindungi warga negaranya. Namun, ini berdampak pada keikutsertaan pembuatan PK oleh pekerja/buruh migran maupun majikan. Mereka dalam membuat PK hanya mengisi bagian tertentu saja yang memang sengaja dikosongkan, misalnya terkait dengan besaran gaji.

Keikutsertaan yang minim dari pekerja ini, dimanfaatkan oleh PPTKIS atau *agency* dalam mendapatkan keuntungan. Keikutsertaan yang minim ini juga tidak bisa disalahkan kepada pekerja sepenuhnya, karena pada dasarnya mereka berada di bawah kendali PPTKIS sebelum disalurkan. Sehingga dengan demikian, PPTKIS mengelabui calon pekerja/buruh migran dengan cara memaksakan penandatanganan PK. Dampak hukum pun tidak diketahui secara gamblang oleh pekerja/buruh migran, mereka hanya menjalankan prosedur tanpa tahu maksud dari prosedur tersebut.

Dalam hal penandatanganan PK, terlihat sekali bahwa calon pekerja/buruh migran dijadikan alat untuk meraup keuntungan. Mengapa penulis berani berkata demikian? Karena pasalnya setelah PK ditandatangani, maka telah terjadi kesepakatan antara PPTKIS dengan *agency* negara penerima yang mana kemudian dalam hal ini terjadi pembayaran-pembayaran tertentu sebagai penggantian uang yang dikeluarkan.

Dengan keikutsertaan yang minim dari calon pekerja/buruh migran dalam pembuatan PK, maka jangan diharapkan mereka mengetahui isi jelas dari PK mereka. Mereka bahkan tidak mengetahui dampak hukum dan bagaimana penyelesaian sengketa apabila terjadi sengketa antara mereka dengan pekerja/buruh migran. Dalam hal ini pekerja/buruh migran hanya menjadi koraban. Korban dari sistem yang tidak jelas alurnya yang mana disertai ketidaktransparanan.

Apakah kemudian PK tersebut menjadi sah? Menurut penulis, PK tersebut tetap sah, karena adanya persetujuan dari kedua belah pihak, meskipun terdapat ketidaktahuan pekerja/buruh migran atas isi dalam PK tersebut. Ketidaktahuan ini seharusnya dilanjuti dengan protes dengan adanya pembatalan perjanjian kepada pengadilan apabila tidak sesuai dengan keinginan si 'seharusnya' pembuat perjanjian. Tetapi apakah kemudian hal tersebut terjadi? Tidak. Tidak semua calon pekerja/buruh migran adalah orang yang 'melek' hukum, sehingga paham mengenai kewenangannya dalam pembuatan PK tersebut.

Hal ini juga dipengaruhi oleh posisi tawar pekerja/buruh migran yang lemah. Mereka diposisikan sebagai orang yang membutuhkan pekerjaan, bukan yang memiliki kepentingan. Posisi inilah yang kemudian membuat psikologis dari calon pekerja/buruh migran menerima apapun yang diberlakukan kepadanya. Asal bisa bekerja, disalurkan, dan mendapatkan uang; apapun boleh.

Dengan demikian, PK dalam hubungan hukum antara pekerja/buruh migran dengan majikan tetap berlaku dan mengikat kedua belah pihak. Dengan catatan bahwa si pekerja/buruh migran dapat membatalkan ke pengadilan apabila mereka merasa bahwa isi dari PK tersebut merugikan mereka. Hal ini dimungkinkan karena ada intervensi dari pihak ketiga yang mana menyebabkan si pekerja/buruh migran sebagai salah satu pihak pembuat PK tidak mengetahui pasti isi dari PK.

V.3.2. Sistem Pembayaran Gaji di Malaysia

Malaysia tidak memiliki standar PK, PK yang ditepakan di Malaysia adalah PK buatan pemerintah Indonesia yang mana isi dari PK tersebut merupakan kesepakatan MoU antara pemerintah Indonesia dengan Malaysia. Malaysia juga tidak memiliki standar gaji/upah minimum, gaji/upah diserahkan kepada mekanisme pasar. Hal ini yang membuat ketidakpastian pekerja/buruh migran Indonesia

untuk mendapatkan haknya yang sesuai. Mekanisme pasar dapat ditentukan dengan banyak faktor, mulai dari ekonomi hingga politik, dan inilah yang membuat ketidakpastian besaran tersebut.

Perjanjian Kerja pekerja/buruh migran Indonesia yang bekerja di Malaysia mayoritas menekankan kewajiban pekerja/buruh migran, sedikit sekali isi yang mengenai perlindungan pekerja/buruh migran. Perjanjian Kerja tersebut berisikan teknis dari kewajiban si pekerja/buruh migran dan apa yang akan di dapatkan oleh pekerja/buruh migran apabila tidak melaksanakan kewajibannya. Hal ini tentunya sangat tidak berimbang. Mengingat PK adalah pedoman dasar yang diikat oleh kesepakatan yang mana pedoman tersebut harus berisikan kepentingan para pihak secara seimbang. Klausula PK di Malaysia dibuat kaku oleh pemerintah Indonesia. Pekerja/buruh migran Indonesia sedikit sekali diberikan ruang gerak untuk menentukan isi dari PK. Belum lagi adanya campur tangan PPTKIS yang mana semakin membuat ruang gerak pekerja/buruh migran hanya sebatas persetujuan saja.

Ketidaktahuan isi dari PK membuat pekerja/buruh migran tidak mengetahui secara jelas apa saja hak-hak mereka, bahkan ada yang tidak mengetahui besaran gaji yang mereka dapatkan. Keadaan seperti inilah yang mendorong permasalahan-permasalahan yang terjadi kemudian, mulai dari miskomunikasi hingga permasalahan kekerasan. Lantas diperlukanlah suatu kejelasan terkait dengan sistem kesepakatan menyangkut PK dan juga memeperjelas isi dari PK yang berlaku di Malaysia, yang mana tidak hanya difokuskan kepada teknis-teknis yang menyangkut kewajiban pekerja/buruh migran, tetapi juga hak-hak yang mereka dapatkan dan juga hak dan kewajiban majikan.

Hal yang lebih parah terjadi pada pekerja/buruh migran yang *undocumented* yang mana mereka tidak memiliki berkas resmi dan izin sebagai pekerja. Mereka tidak memiliki PK dalam melakukan pekerjaan dengan majikannya. Inilah yang seringkali menjadi salah

satu penyebab eksploitasi pekerja/buruh migran Indonesia oleh majikan Malaysia. Mereka mengancam akan memulangkan dengan melaporkan si pekerja kepada pihak yang berwajib apabila tidak mau menuruti perintah majikan. Hal ini seharusnya tidak terjadi, pengiriman pekerja/buruh migran seharusnya diperketat dengan membuat standar pemberangkatan pekerja/buruh migran Indonesia ke Malaysia tidak terlalu rumit dan murah sehingga calon pekerja/buruhh migran yang berencana berangkat ke Malaysia secara *undocumented* dapat mengikuti proses pelatihan dan pengiriman yang sesuai yang mana secara tidak langsung akan mengurangi angka ekploitasi pekerja/buruh migran Indonesia yang bekerja di Malaysia.

Proses penyelesaian permasalahan di Malaysia menurut penulis tidak hanya terhambat dari faktor pengetahuan hukum pekerja/buruh migran yang minim, tetapi juga dari faktor KBRI Malaysia. Tidak adanya keinginan melayani yang tulus inilah yang menjadi dasar kurangnya rasa peduli yang murni. Mereka melindungi pekerja/buruh migran hanya atas dasar pekerjaan, bukan keinginan untuk melayani dan berbuat baik. Mereka juga tidak memiliki instrumen pendukung untuk menyelesaikan permasalahan pekerja/buruh migran Malaysia, SDM yang terbatas dan juga dana yang terbatas. Inilah yang selalu saja menjadi alasan bagi mereka untuk tidak menyelesaikan permasalahan-permasalahan yang ada.

V.3.3. Sistem Pembayaran Gaji di Hong Kong

Perjanjian Kerja di Hong Kong dibuat oleh pemerintah Hong Kong dengan mendasarkannya kepada peraturan Hong Kong terkait dengan pekerja/buruh migran. Hong Kong adalah daerah yang sudah mengakui pekerja rumah tangga sebagai pekerjaan formal, sehingga segala sesuatu mengenai pekerja rumah tangga diatur secara jelas di dalam peraturan tersebut.

Perjanjian Kerja di Hong Kong sangat berorientasi kepada perlindungan pekerja/buruh migran dalam mendapatkan hak-haknya,

bahkan hanya sedikit sekali yang mengatur mengenai majikan (hanya kewajiaban-kewajiban majikan dalam memenuhi hak pekerja/buruh migran yang bekerja padanya dan pekerjaan apa saja yang akan dilakukan oleh pekerja/buruh migran kepada majikannya). Perjanjian Kerja dibuat sangat ketat, mengingat penegakan hukum di Hong Kong juga sangat ketat.

Besaran gaji pekerja/buruh migran di Hong Kong pun jelas, minimal 3.740 HKD. Inilah salah satu daya tarik pekerja/buruh migran Indonesia ingin bekerja di Hong Kong. Permasalahan yang kerap kali timbul kemudian adalah majikan yang tidak sanggup membayar pekerja/buruh migrannya. Di Hong Kong permasalahan sistem PK dan penggajian sudah bukan menjadi masalah utama, tetapi permasalahannya jatuh kepada majikan yang lalai atau sengaja tidak membayar gaji. Proses penyelesaian permasalahan pun terjamin dengan ditegakkannya hukum Hong Kong. Pemerintah Hong Kong tidak memihak warganya dalam menegakan hukum sehinggaapabila pihak majikan bersalah, maka tetap akan dikenakan hukuman, baik berupa denda ataupun kurungan.

Inilah yang menyebabkan perbedaan pekerja/buruh migran yang bekerja di Malaysia dengan yang bekerja di Hong Kong. Mengenai kepastian akan gaji, perlindungan hukum PK, dan juga perlindungan hukum apabila terjadi permasalahan. Meskipun KJRI di Hong Kong pola kerjanya sama dengan di Malaysia dalam menyelesaikan permasalahan, yakni memulangkan, tidak menyurutkan pekerja/buruh migran Indonesia mencari bantuan. Bantuan bisa didapatkan dari serikat pekerja ataupun LSM yang memiliki bidang kerja membatu pekerja/buruh migran yang bermasalah. Inilah perbedaan lainnya antara pekerja/buruh migran yang bekerja di Malaysia dengan yang bekerja di Hong Kong. Di Hong Kong, pekerja/buruh migran diperbolehkan untuk berserikat sehingga mereka dapat menyalurkan apresiasi dan permasalahannya masing-masing kepada teman sekampung. Di Malaysia mengenai hal ini tidak diperbolehkan di

Malaysia. Peraturan Malaysia belum memperbolehkan pekerja/buruh migran memiliki serikat, padahal ini sangat penting bagi pekerja/buruh migran dalam berkreasi dan berekspresi, selain untuk kesehatan psikologisnya.

Untuk lebih mudah, inilah komparasi antara pekerja/buruh migran Indonesia yang bekerja di Malaysia dan pekerja/buruh migran yang bekerja di Hong Kong:

No	Aspek	Malaysia	Hong Kong
1.	Hukum atau regulasi	Diatur di dalam *Employment Act* Tahun 1955. Tidak diatur secara spesifik, menggunakan peraturan yang mengatur ketenagakerjaan secara umum.	Diatur di dalam *Employment Ordinance Chapter* 57 Tahun 1997. Diatur secara spesifik di dalam peraturan tersebut. Sudah mengakui PRT sebagai pekerjaan formal.
2.	Sistem Penggajian	Upah minimum ditentukan oleh mekanisme pasar sehingga tidak ada besaran gaji minimum yang pasti. Seharusnya dibayarkan melalui bank tetapi mengenai hal ini belum diberlakukan.	Upah minimum 3.740 HKD. Pembayaran gaji dilakukan melalui bank dengan adanya tanda bukti pembayaran.
3.	Perlindungan hukum	Perlindungan hukum yang didapatkan oleh pekerja/buruh migran	Perlindungan hukum yang didapatkan oleh pekerja/buruh migran

		di Malaysia dibuat sangat ketat. Tetapi pada kenyataannya pekerja/buruh migran mendapatkan diskriminasi apabila mendapatkan permasalahan hukum. Banyak kasus yang berakhir dipengadilan dengan kemenangan majikan. Dengan alasan itulah pekerja/buruh migran di Malaysia enggan maju ke pengadilan apbila mendapatkan masalah hukum.	yang bekerja di Hong Kong adalah proteksi yang menyeluruh tanpa membedakan antara pekerja/buruh migran dengan warga negara Hong Kong. Perlindungan hukum meliputi perlindungan gaji hingga akses untuk mendapatkan keadilan.
4.	Insentif kultural	Malaysia adalah negara multikultural yang terdiri dari suku bangsa: India, Cina, dan orang asli. Dengan adanya perpaduan kultur tersebut maka perlakuan kepada pekerja/buruh migran berbeda-beda sesuai dengan pembawaan masing-masing kultur.	Hong Kong merupakan daerah yang masuk ke wilayah Cina dan memiliki peraturan yang berbeda dengan Cina daratan. Hal ini dikarenakan Hong Kong merupakan Daerah Administrasi Khusus yang mana profesionalitas dan modernitas dijunjung tinggi. Oleh karena itu pekerja/buruh migran

			yang bekerja di Hong Kong adalah pekerja/buruh migran yang memiliki kualifikasi khusus dengan pelatihan yang cukup untuk dapat beradaptasi dengan lingkungan Hong Kong.
5.	Birokrasi dan administrasi	Syarat kerja di Malaysia pada umumnya sama saja dengan syarak kerja di negara lain, tetapi banyak sekali pekerja/buruh migran yang masuk ke Malaysia melewati jalur tidak resmi yang berada di sepanjang perbatasan Indonesia dengan Malaysia.	Syarat kerja di Hong Kong sangat sulit. Hal ini dikarenakan Hong Kong memiliki peraturan mengenai pekerja/buruh migran yang sangat ketat. Selain itu, Hong Kong juga merupakan negara modern yang mana menuntut profesionalisme dari pekerja/buruh migran yang bekerja pada majikan warga negara Hong Kong.
6.	Peran eksternal	Lembaga eksternal yang sangat berperan adalah LSM. LSM berfokus kepada perjuangan hak-hak pekerja/buruh migran.	Lembaga eksternal yang sangat berperan adalah LSM. Tidak hanya memberikan bantuan pelatihan, tetapi juga memberikan bantuan hukum apabila

			pekerja/buruh migran memiliki masalah hukum. Pelatihan yang diberikan tidak hanya terfokus kepada pengembangan kinerja pekerja/buruh migran, tetapi juga pelatihan kemampuan yang menunjang pekerjaannya, seperti: les bahasa.

BAB VI
PENUTUP

Suatu identitas dipertanyakan hanya ketika ia terancam, seperti ketika si perkasa mulai runtuh, atau ketika yang celaka mulai bangkit, atau ketika si orang asing masuk lewat gerbang

-James Baldwin

VI.1.Kesimpulan

Dengan adanya globalisasi hukum, maka khasanah hukum menjadi semakin banyak. Pilihan hukum dan penunjuk kepastian semakin beragam. Globalisasi hukum tidak hanya dilihat sebagai suatu penyatuan hukum saja tetapi juga menyemarakkan sistem hukum yang ada. Keadilan akan memiliki arti yang begitu banyak sehingga kesepakatan sebagai penanda keadilan dibutuhkan di banyak tempat.

Salah satu aktor yang menyebabkan globalisasi hukum adalah pekerja/buruh migran, baik yang bekerja secara permanen maupun semi-permanen. Pekerja/buruh yang berasal dari suatu negara kemudian bekerja di negara lain dihadapkan pada pilihan-pilihan atas hukum: hukum negara asal, hukum negara penerima, hukum internasional yang ada, ataukah hukum yang didasarkan atas kesepakatan para pihak. Pilihan-pilihan atas hukum ini mengharuskan mereka untuk memilih salah satu hukum sebagai pilihan hukum yang digunakan untuk suatu peristiwa hukum yang mereka jalani. Hal ini sangat terlihat dalam hal perjanjian kerja yang mereka buat, klausula-klausula yang tertera di dalam perjanjian kerja mereka dengan majikan/pemberi kerja menunjukkan pilihan-pilihan hukum yang mereka buat, terlebih terkait dengan permasalahan gaji.

Di Indonesia mengenai pekerja/buruh migran di atur di dalam UU No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri yang sejalan UU No. 13 Tahun 2003 tentang

Ketenagakerjaan. Kedua undang-undang tersebut didasari oleh UU No. 39 Tahun 1999 tentang Hak Asasi Manusia. Sementara itu, di Malaysia belum ada undang-undang yang mengatur mengenai pekerja/buruh migran secara khusus. Pekerja/buruh migran Indonesia di Malaysia terikat dengan *Employment Act* Tahun 1955 yang merupakan peraturan perburuhan yang diberlakukan kepada seluruh pekerja/buruh, baik warga negara Malaysia, maupun pekerja/buruh migran dari negara lain. Berbeda halnya dengan Hong Kong, di Hong Kong ketentuan mengenai pekerja/buruh migran diatur dengan jelas sekali. Mengapa demikian? Karena Hong Kong menganggap bahwa pekerjaan rumah tangga sebagai pekerjaan formal yang sudah jelas *job description*-nya. Pekerja/buruh migran di Hong Kong diatur di dalam *Employment Ordinance Chapter 57* Tahun 1997, termasuk di dalamnya mengenai pembayaran gaji.

Pembayaran gaji pekerja/buruh migran Indonesia di Malaysia tidak memiliki standar minimum. Hal ini dikarenakan Malaysia tidak mengenal standar minimum untuk pekerja/buruh. Pembayaran gaji diserahkan kepada mekanisme pasar. Malaysia juga tidak memiliki standar PK untuk pekerja/buruh migran yang bekerja disana. Alhasil pemerintah Indonesia dan pemerintah Malaysia menentukan PK standar, khusus untuk pekerja/buruh migran Indonesia yang bekerja di Malaysia. Inilah kemudian yang memberikan ketidakpastian hukum bagi pekerja/buruh migran Indonesia yang bekerja di Malaysia. Mereka mengalami banyak permasalahan, terutama permasalahan *underpayment* dan *unpaid.* Proses penyelesaian sengketa di Malaysia sudah cukup jelas, tetapi pekerja/buruh migran Indonesia lebih memilih 'cara damai' atau bahkan pasrah pada keadaan. Hal ini dikarenakan penegakan hukum di Malaysia belum cukup kuat untuk berpihak pada pekerja/buruh migran.

Berbeda halnya dengan penggajian pekerja/buruh migran Indonesia yang bekerja di Hong Kong. Mereka memiliki standar gaji, yakni 3.740 HKD per bulan. Permasalahan yang terjadi terkait dengan *unpaid* dan *underpayment.* Permasalahan itu pun bukan berasal dari sistem tetapi dari majikan 'nakal'. Proses penyelesaian permasalahannya pun sungguh jelas

dan tidak memihak. Mayoritas kasus yang masuk ke pengadilan di Hong Kong, 90% dimenangkan oleh pekerja/buruh migran.

VI.2.Rekomendasi

Berdasarkan pembahasan dan penelitian lapangan yang penulis lakukan, penulis mengharapkan adanya perbaikan dalam sistem penggajian pekerja/buruh migran Indonesia di kemudian hari. Adapun hal yang dapat menjadi bahan pertimbangan adalah sebagai berikut:

1. BNP2TKI
   a. Alur penandatanganan PK sebaiknya diperjelas dengan mengikutsertakan pekerja/buruh migran dalam proses perundingan isi dari PK. Mengapa demikian? Karena pada dasarnya pekerja/buruh migran lah yang akan menjalankan PK tersebut dan PK tersebut merupakan perlindungan hukum baginya di negara tujuan, sehingga sudah semestinya mereka turut membuat dan mengetahui isi dari PK.
   b. Penguatan *data base* siapa saja pekerja/buruh migran Indonesia di luar negeri, sehingga tidak ada alasan perwakilan pemerintah Indonesia di luar negeri tidak mengetahui siapa saja warga negaranya yang bekerja di negara tersebut.
   c. Pemberian materi yang jelas kepada calon pekerja/buruh migran Indonesia, mulai dari penjelasan PK, bagaimana cara bekerja dengan alat-alat elektronik, bahasa yang digunakan hingga tata cara penyelesaian permasalahan di negara tujuan. Hal ini dimungkinkan untuk mencegah terjadinya permasalahan di negara tujuan.
   d. Proses penandatanganan PK yang dilakukan di depan pejabat berwenang dengan melibatkan pekerja/buruh migran dalam penentuan besaran gaji yang akan diterima mereka.
   e. Pengawasan dan pendaftaran yang ketat terhadap PK yang ditandatangani oleh pekerja/buruh migran.
2. Kemenakertrans
   a. Memperkuat instrumen hukum nasional dengan merevisi UU No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja

Indonesia di Luar Negeri yang pada saat ini lebih berpihak pada penempatan, bukan perlindungan. Diharapkan dengan adanya revisi UU ini pengaturan terkait dengan perlindungan menjadi semakin jelas dan rinci.

b. Pembaharuan standar PK pekerja/buruh migran Indonesia yang akan dan bekerja di Malaysia dengan jalan memperinci isi dari PK seperti PK untuk pekerja/buruh migran yang bekerja di Hong Kong yang diterapkan oleh pemerintah Hong Kong.

3. KBRI di Malaysia dan KJRI di Hong Kong
   a. Menambah sumber daya manusia dan pendanaan untuk perlindungan pekerja/buruh migran Indonesia di KBRI/KJRI, sehingga dikemudian hari tidak ada alasan KBRI/KJRI tidak melindungi warga negara Indonesia yang berada di negara tempat KBRI/KJRI tersebut berada.
   b. Menegaskan standar majikan yang bisa mempekerjakan pekerja/buruh migran Indonesia dengan persyaratan standar gaji pada jumlah tertentu. Hal ini akan berdampak pada pengurangan permasalahan *underpayment* dan *unpaid* pekerja/buruh migran Indonesia.
   c. Mempertegas alur penyelesaian sengketa pekerja/buruh migran Indonesia dengan mempertegas proses penyelesaian sengketa melewati KBRI/KJRI sebagai perwakilan pemerintah Indonesia di luar negeri. Sistem yang dibuat bukanlah suatu sistem yang mempersulit dengan membebankan banyak biaya, melainkan sistem solutif mengenai akses keadilan si pekerja/buruh migran Indonesia dan pemenuhan hak pekerja/buruh migran Indonesia yang telah dilanggar.

DAFTAR PUSTAKA

Buku

Asshidiqie, Jimly. *Gagasan Kedaulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia*. Jakarta: PT. Ikhtiar Baru Van Hoeve, 1994.

Benda-Beckmann, Keebet von. *Globalisation and Legal Pluralism*. Netherlands: Kluwer International, 2002.

Blackett dalam Organisasi Perburuhan Internasional, *Pekerja Rumah Tangga di Asia Tenggara Prioritas Pekerjaan yang Layak*. Jakarta: Kantor Perburuhan Internasional, 2006.

Direktorat Analisis Dampak Kependudukan Badan Kependudukan dan Keluarga Bencana Nasional. *Fenomena Kemiskinan dan Tenaga Kerja Indonesia ke Luar Negeri*. Jakarta: BKKBN, 2011.

Forum Warga Kota Jakarta. *Bunga Trotoar, Sebuah Tinjauan terhadap Keberadaan Pedagang Kaki Lima dalam Roda Pembangunan Ibukota*. Jakarta : FAKTA, 2004.

Friedman, Lawrence M. *American Law*. New York - London : W.W. Norton & Company. 1984.

Friedman, Thomas L. *Understanding Globalization: Lexus and Olive Tree*. Paperback: Anchor Books, 2000.

Giddens, Anthony Giddens. Runway World: *How Globalization Is Reshaping Our Lives*. New York: Routledge, 2000.

Irianto, Sulistyowati. *Akses Keadilan dan Migrasi Global*. Jakarta: Obor, 2011.

Komnas Perempuan. *Migrasi Tanpa Dokumen*. Jakarta: Publikasi Komnas Perempuan, 2005.

Munir, *Migrasi*. Jakarta: Lembaga Penerbit UI, 2000.

Organisasi Perburuhan Internasional, *Pekerja Rumah Tangga di Asia Tenggara Prioritas Pekerjaan yang Layak*. Jakarta: Kantor Perburuhan Internasional, 2006.

Rositawati, Dian. *Kedaulatan Negara dalam Pembentukan Hukum di Era Globalisasi* dalam buku *Hukum yang Bergerak*. Jakarta: Obor, 2009.

Sreberny, Annabelle – Mohammadi. *The Global and The Local in International Communication*. Oxford: Blackwell Publishing, 2002.

Trimmer, Joseph F. dan Tilly Warnock, *Undertanding Others: Cultural and Cross-Cultural Studies and The Teaching of Literature*. National Council of Teachers of English, 1992.

World Commission on the Social Dimension of Globalization. *A Fair Globalization: Creating Opportunities for All*. Jenewa: International Labour Office, 2004.

Artikel, Jurnal, Makalah, dan Essay

Antons, Christoph. "*Law and Development in East and Southeast Asia*." (1998).

Boyd, D. "*Glocalization: When Global Information and Local Interaction Collide*." San Diego. (O'Reilly Emerging Technology Confrence 2006).

Bryant, Christopher G. A. dan David Jary. "*The Contemporary Giddens: Social Theory in a Globalizing Age*." MIS Quarterly. (Volume 32 Issue 1 Maret 2008).

Geist, Micheal A. "*Toward A General Agreement on the Regulation of Foreign Direct Investment*, Law & Policy in International Business." (Volume 26 1995).

Goddard, David. "*Gonvergence in Corporations Law-Towards A Facilititave Model*." VUWLR (Volume 26 1996).

Guttal, Shalmali. "*Globalisation.*" Development in Practice. (Volume 17 Nomor Agustus 2007).

International Organization for Migration. "*Glossary on Migration*." International Migration Law Series. (Volume No. 25, 2011).

Kulkarni, Manu N. "*Glocalisation.*" Economic and Political Weekly. (Volume 38 Nomor 31 Agustus 2003).

Manning-Cabral, Denine. "*The Eminent Death of the Calvo Clause and the Rebirth of the Calvo Principle : Equality of Foreign and National Investors.*" Law & Policy in International Business. (Volume 26 1995).

National Gheographic. "*What is Human Migration?*." (Expeditions Human Migration Guide Nomor 6-8 2005).

Rajagukguk, Erman. "*Peranan Hukum dalam Pembangunan pada Era Globalisasi: Implikasinya bagi Pendidikan Hukum Indonesia*." Essay.

Wood, William B. *"Forced Migration: Local Conflict adnd International Dilemmas."* Annals of the Association of American Geographers. (Volume 84 Nomor 4 Desember 1994).

Zamora, Stephen. "*The Americanization of Mexican Law : Non-Trade Issues in The North American Free Trade Agreement*." Law & Policy in International Business. (1993).

Wawancara

Endang. Kasubdit Penempatan Kementrian Tenaga Kerja dan Transmigrasi Republik indonesia. 25 April 2012.

Iqbal, Muhammad. Direktur Lembaga Swadaya Masyarakat Union Migrant (UNIMIG). 6 Maret 2012.

Siregar, Adzimattinur. Aktifis Dompet Dhuafa. 31 Maret 2012.

Triyanto, Agus. Atase Ketenagakerjaan di KBRI Malaysia. April 2012.

Yana. TKW Indonesia yang bekerja di Hong Kong. 1 Mei 2012.

Sumber Internet dan Lain-lain

Anonimous. "Tiga Tahun Jadi TKI Gaji Tak Dibayar." http://www.batamtoday.com/berita11905-Tiga-Tahun-Jadi-TKI-Gaji-Tak-Dibayar.html. Diunduh pada tanggal 9 Maret 2012.

_____. "Malaysia Deportasi 83 TKI Bermasalah Awal 2012." http://www.antaranews.com/berita/291852/malaysia-deportasi-83-tki-bermasalah-awal-2012 Diunduh pada 9 Maret 2012.

_____. "TKI Sumbang Devisa Negara Terbesar Kedua setelah Migas." http://www.fahmina.or.id/artikel-a-berita/berita/845-tki-sumbang-devisa-negara-terbesar-kedua-setelah-migas-.html. Diunduh pada tanggal 2 Januari 2012.

_____. "Pengertian dan Definisi Hukum Menurut Para Ahli." http://carapedia.com/pengertian_definisi_hukum_menurut_para_ahli_info489.html. Diunduh pada tanggal 2 Januari 2012.

_____. "Masyarakat Madani: Aktualisasi Profesionalisme *Community* dalam Mewujudkan Masyarakat yang Berkeadilan."

http://www.policy.hu/suharto/modul_a/makindo_16.htm. Diunduh pada tanggal 26 April 2012.

_____. "Protes Gaji TKI, Bukti Publik Malaysia Tak Siap Terima PRT Indonesia." http://news.detik.com/read/2012/03/20/183611/1872586/10/protes-gaji-tki-bukti-publik-malaysia-tak-siap-terima-prt-indonesia?9922022. Diunduh pada tanggal 24 Maret 2012.

_____. "Informasi Negara Tujuan TKI: Hong Kong." http://buruhmigran.or.id/2011/05/15/informasi-negara-tujuan-tki-hongkong/. Diunduh pada tanggal 20 Maret 2012.

Badan Penempatan dan perlindungan Tenaga Kerja Indonesia (BNP2TKI). Slide Presentasi.

Badan Penempatan dan perlindungan Tenaga Kerja Indonesia (BNP2TKI), Pusat Penelitian dan Pengembangan Informasi (PUSLITFO). Data-Data Penempatan dan Perlindungan TKI. 6 Januari 2011.

Laporan Migrant Care (AMC), Indonesian Migrant Worker Union (IMWU), dan The Hong Kong of Indonesia Migrant Workers Organization (KOTKIHO). "*Underpayment 2*." 2006.

Nurtjahyo, Lidwina Inge. "*Pluralisme Hukum*." Slides Perkuliahan Antropologi Hukum. Fakultas Hukum Universitas Indonesia. 7 Maret 2011.

Triyanto, Agus. Slide KBRI oleh Atase Ketenagakerjaan.

Peraturan Perundang-undangan

Indonesia. *Undang-Undang Dasar Negara Republik Indonesia*. UUD NRI 1945.

Indonesia. *Undang-undang Hak Asasi Manusia*. UU No. 39 Tahun 1999. LN No. 165 Tahun 1999. TLN No. 3886.

Indonesia. *Undang-Undang Ketenagakerjaan*. UU No. 13 Tahun 2003. LN Nomor 39 Tahun 2003. TLN Nomor 4279.

Indonesia. *Undang-Undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*. UU No. 39 Tahun 2004. LN Nomor 133 Tahun 2004. TLN Nomor 4445.

Daftar Perjanjian, Konvensi Internasional, dan Peraturan Perundang-undangan Asing

ASEAN *Declaration on the Protection and Promotion of the Rights of Migrant Workers.*

Domestic Workers Convention. 2011.

Equal Remuneration Convention. 1951.

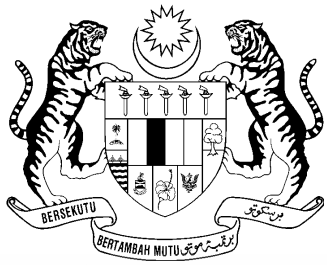
International Covenant on Economic, Social and Cultural Rights.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. 1990.

Laws of Hong Kong. Hong Kong Employment Ordinance. Chapter 57.

Laws of Malaysia. Malaysian Employment Act. 1955.

Memorandum of Understanding (MoU) on The Recruitment and Placement of Indonesian Domestic Workers yang ditandatangani di Bali tahun 2006.



LAWS OF MALAYSIA

REPRINT

Act 265

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LAWS OF MALAYSIA

Act 265

EMPLOYMENT ACT 1955

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY

Section

1. Short title and application
2. Interpretation
2A. Minister may prohibit employment other than under contract of service
2B. General power to exempt or exclude
3. Appointment of officers
4. Appeals
5. Effect on Act of other written laws

PART II

CONTRACTS OF SERVICE

6. Saving of existing contracts
7. More favourable conditions of service under the Act to prevail
7A. Validity of any term or condition of service which is more favourable
7B. Removal of doubt in respect of matters not provided for by or under this Act
8. Contracts of service not to restrict rights of employees to join, participate in or organize trade unions
9. (*Deleted*)
10. Contracts to be in writing and to include provision for termination
11. Provision as to termination of contracts

`Section

12. Notice of termination of contract

13. Termination of contract without notice

14. Termination of contract for special reasons

15. When contract is deemed to be broken by employer and employee

16. Employees on estates to be provided with minimum number of days' work in each month

17. (*Omitted*)

17A. Apprenticeship contracts excluded from sections 10 to 16

PART III

PAYMENT OF WAGES

18. Wage period

19. Time of payment of wages

20. Payment on normal termination of contract

21. Payment on termination of contract in special circumstances and on breach of contract

22. Limitation on advances to employees

23. Wages not due for absence from work through imprisonment or attendance in court

PART IV

DEDUCTIONS FROM WAGES

24. Lawful deductions

PART V

RELATING TO THE TRUCK SYSTEM

25. Wages to be paid in legal tender

25A. Payment of wages through bank

26. Conditions restricting place at which, manner in which and person with whom wages paid to be spent, illegal

27. Interest on advances forbidden

28. Restriction on places at which wages may be paid

29. Remuneration other than wages

30. (*Deleted*)

PART VI

PRIORITY OF WAGES

Section
31. Priority of wages over other debts
32. Reference by the court to Director General

PART VII

CONTRACTORS AND PRINCIPALS

33. Liability of principals and contractors for wages

PART VIII

EMPLOYMENT OF WOMEN

34. Prohibition of night work
35. Prohibition of underground work
36. Prohibition of employment by Minister

PART IX

MATERNITY PROTECTION

37. Length of eligible period and entitlement to maternity allowance
38. Payment of maternity allowance
39. Payment of allowance to nominee on death of female employee
40. Loss of maternity allowance for failure to notify employer
41. Payment of allowance to nominee
42. Restriction on dismissal of female employee after eligible period
43. Conditions contrary to Part void
44. Register of allowances paid
44A. (*Omitted*)

PART X

EMPLOYMENT OF CHILDREN AND YOUNG PERSONS

45-56. (*Deleted*)

PART XI

DOMESTIC SERVANTS

57. Termination of contract

PART XII

REST DAYS, HOURS OF WORK, HOLIDAYS AND OTHER CONDITIONS OF SERVICE

Section

58. (*Omitted*)
58A. Non-application of Part XII
59. Rest day
60. Work on rest day
60A. Hours of work
60B. Task work
60C. Shift work
60D. Holidays
60E. Annual leave
60F. Sick leave
60G. (*Omitted*)
60H. (*Omitted*)
60I. Interpretation

PART XIIA

TERMINATION, LAY-OFF, AND RETIREMENT BENEFITS

60J. Termination, lay-off and retirement benefits

PART XIIB

EMPLOYMENT OF FOREIGN EMPLOYEES

60K. Duty to furnish information and returns
60L. Director General may inquire into complaint
60M. Prohibition on termination of local for foreign employee
60N. Termination of employment by reason of redundancy
60O. Permanent resident exempted from this Part

PART XIII

REGISTERS, RETURNS AND NOTICE BOARDS

61. Duty to keep registers
62. Power to make regulations requiring information as to wages
63. Duty to submit returns
63A. Duty to give notice and other information
64. Duty to display notice boards

PART XIV

INSPECTION

Section

65. Powers of inspection and inquiry
66. Inspecting officer to notify presence
67. Powers of inspecting officers
68. Officers to be authorized by the Director General

PART XV

COMPLAINTS AND INQUIRIES

69. Director General's power to inquire into complaints
69A. Limitation on power conferred by section 69
69B. Additional powers of Director General to inquire into complaints
69C. Claims for indemnity for termination of contract without notice
69D. Order of Director General may be in writing
69E. Penalty for offence
70. Procedure in Director General's inquiry
71. Director General's record of inquiry
72. Joinder of several complaints in one complaint
73. Prohibitory order by Director General to third party
74. No fees for summons: service of summons
75. Enforcement of Director General's order by Sessions Court
76. Submission by Director General to High Court on point of law
77. Appeal against Director General's order to High Court
78. Employee's remedy when employer about to abscond
79. Powers of Director General to investigate possible offences under this Act
80. Examination on summons by the Director General
81. Right of employee to appear before the Director General

PART XVI

PROCEDURE

82. Service of summons issued under Part XV
83. Power to make reciprocal provisions between Malaysia and Singapore for the service, execution and enforcement of summonses, warrants and orders

Section

84. Jurisdiction
85. Prosecution
85A. Right of audience
86. Saving clause as to civil jurisdiction of courts
87. Power of court imposing fine
88. Effect of imprisonment
89. Incapacity of Director General hearing inquiry
90. Officers acting under Act deemed public servants

PART XVII

OFFENCES AND PENALTIES

91. Under Parts III and IV
92. Under Part V
93. Under Part VIII
94. Under Part IX
95. (*Deleted*)
96. (*Deleted*)
97. Under Part XIII
98. Under Part XIV
99. Under Part XV
99A. General penalty
100. Penalties for failure or non-compliance in relation to rest days, overtime, holidays, annual leave, and sick leave
101. Offence in connection with inquiry or inspection
101A. Power to compound offences

PART XVIII

REGULATIONS

102. Regulations

PART XIX

REPEAL AND SAVING

103. Repeal and saving

FIRST SCHEDULE

SECOND SCHEDULE

LAWS OF MALAYSIA

Act 265

EMPLOYMENT ACT 1955

An Act relating to employment.

[*Peninsular Malaysia—1 June 1957, L.N. 228/1957; Federal Territory of Labuan—1 November 2000, P.U. (A) 400/2000*]

PART I

PRELIMINARY

Short title and application

1. (1) This Act may be cited as the Employment Act 1955.

(2) This Act shall apply to *Peninsular Malaysia only.

Interpretation

2. (1) In this Act, unless the context otherwise requires—

"agricultural undertaking" means any work in which any employee is employed under a contract of service for the purposes of agriculture, horticulture or silviculture, the tending of domestic animals and poultry or the collection of the produce of any plants or trees;

"apprenticeship contract" means a written contract entered into by a person with an employer who undertakes to employ the person and train or have him trained systematically for a trade for a specified period which shall not be less than two years in the course of which the apprentice is bound to work in the employer's service;

**NOTE*—This Act has been extended to the Federal Territory of Labuan–*see* subsection 1(2) of the Federal Territory of Labuan (Extension and Modification of Employment Act) Order 2000 [P.U. (A) 400/2000] w.e.f. 1 November 2000.

"approved amenity or approved service" means any amenity or service—

(*a*) approved by the Director General under subsection 29(2) on application made to him by an employer for its inclusion in a contract of service; or

(*b*) provided for in any award made by the Industrial Court or in any collective agreement;

"approved incentive payment scheme" means an incentive payment scheme approved by the Director General under, and for the purposes of, section 60I;

"collective agreement" has the same meaning assigned thereto in the Industrial Relations Act 1967 [*Act 177*];

"confinement" means parturition resulting after at least twenty-eight weeks of pregnancy in the issue of a child or children, whether alive or dead, and shall for the purposes of this Act commence and end on the actual day of birth and where two or more children are born at one confinement shall commence and end on the day of the birth of the last-born of such children, and the word "confined" shall be construed accordingly;

"constructional contractor" means any person, firm, corporation or company who or which is established for the purpose of undertaking, either exclusively or in addition to or in conjunction with any other business, any type of constructional work, and who or which is carrying out such constructional work for or on behalf of some other person under a contract entered into by him or them with such other person, and includes his or their heirs, executors, administrators, assigns and successors;

"constructional work" includes the construction, reconstruction, maintenance, repair, alteration or demolition of any building, railway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, dredge, wireless, telegraphic or telephonic installation, electrical undertaking, gaswork, waterwork or other work of construction, as well as the preparation for, or the laying of, the foundations of any such work or structure, and also any earthworks both in excavation and in filling;

"contract of service" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees

to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract;

"contractor" means any person who contracts with a principal to carry out the whole or any part of any work undertaken by the principal in the course of or for the purposes of the principal's trade or business;

"day" means—

(*a*) a continuous period of twenty-four hours beginning at midnight; or

(*b*) for the purposes of Part XII in respect of an employee engaged in shift work or in work where the normal hours of work extend beyond midnight, a continuous period of twenty-four hours beginning at any point of time;

"Director General" means the Director General of Labour appointed under subsection 3(1);

"domestic servant" means a person employed in connection with the work of a private dwelling-house and not in connection with any trade, business, or profession carried on by the employer in such dwelling-house and includes a cook, house-servant, butler, child's nurse, valet, footman, gardener, washerman or washerwoman, watchman, groom and driver or cleaner of any vehicle licensed for private use;

"employee" means any person or class of persons—

(*a*) included in any category in the First Schedule to the extent specified therein; or

(*b*) in respect of whom the Minister makes an order under subsection (3) or section 2A;

"employer" means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word "employ", with its grammatical variations and cognate expressions, shall be construed accordingly;

"foreign employee" means an employee who is not a citizen;

"Industrial Court" has the same meaning assigned thereto in the Industrial Relations Act 1967;

"industrial undertaking" includes—

(*a*) disturbing, removing, carting, carrying, washing, sifting, melting, refining, crushing or otherwise dealing with any rock, stone, gravel, clay, sand, soil, night-soil or mineral by any mode or method whatever;

(*b*) industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, packed or otherwise prepared for delivery, broken up, or demolished, or in which materials are transformed or minerals treated, including shipbuilding and the generation, transformation and transmission of electricity or motive power of any kind;

(*c*) constructional work;

(*d*) transport of passengers or goods by road, rail, water or air, including the handling of goods at docks, quays, wharves, warehouses or airports;

(*e*) any industry, establishment or undertaking, or any activity, service or work, declared under subsection (5) to be an industrial undertaking;

"intoxicating liquor" has the same meaning as that assigned to "intoxicating liquor" under section 2 of the Customs Act 1967 [*Act 235*];

"machinery" has the same meaning as in the Factories and Machinery Act 1967 [*Act 139*];

"medical officer" means a registered medical practitioner who is employed in a medical capacity by the Federal Government, or by the Government of a State;

"part-time employee" means a person included in the First Schedule whose average hours of work as agreed between him and his employer do not exceed seventy per centum of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise whether the normal hours of work are

calculated with reference to a day, a week, or any other period as may be specified by regulations;

"Peninsular Malaysia" has the meaning assigned thereto by section 3 of the Interpretation Acts 1948 and 1967 [*Act 388*], and includes the Federal Territory;

"permanent resident" means a person, not being a citizen, who is permitted to reside in Malaysia without any limit of time imposed under any law relating to immigration, or who is certified by the Federal Government to be treated as such in Malaysia;

"place of employment" means any place where work is carried on for an employer by an employee;

"principal" means any person who in the course of or for the purposes of his trade or business contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal;

"registered medical practitioner" means a medical practitioner registered under the Medical Act 1971 [*Act 50*];

"shift work" means work which by reason of its nature requires to be carried on continuously or continually, as the case may be, by two or more shifts;

"spread over period of ten hours" means a period of ten consecutive hours to be reckoned from the time the employee commences work for the day, inclusive of any period or periods of leisure, rest or break within such period of ten consecutive hours;

"sub-contractor" means any person who contracts with a contractor for the execution by or under the sub-contractor of the whole or any part of any work undertaken by the contractor for his principal, and includes any person who contracts with a sub-contractor to carry out the whole or any part of any work undertaken by the sub-contractor for a contractor;

"sub-contractor for labour" means any person who contracts with a contractor or sub-contractor to supply the labour required for the execution of the whole or any part of any work which a contractor or sub-contractor has contracted to carry out for a principal or contractor, as the case may be;

"underground working" means any undertaking in which operations are conducted for the purpose of extracting any substance from below the surface of the earth, the ingress to and egress from which is by means of shafts, adits or natural caves;

"wage period" means the period in respect of which wages earned by an employee are payable;

"wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include—

(*a*) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(*b*) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;

(*c*) any travelling allowance or the value of any travelling concession;

(*d*) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(*e*) any gratuity payable on discharge or retirement; or

(*f*) any annual bonus or any part of any annual bonus;

"week" means a continuous period of seven days;

"year of age" means a year from the date of a person's birth.

(2) The Minister may by order amend the First Schedule.

(3) The Minister may by order declare such provisions of this Act and any other written law as may be specified in the order to be applicable to any person or class of persons employed, engaged or contracted with to carry out work in any occupation in any agricultural or industrial undertaking, constructional work, statutory body, local government authority, trade, business or place of work, and upon the coming into force of any such order—

(*a*) any person or class of persons specified in the order shall be deemed to be an employee or employees;

(*b*) the person, statutory body or local government authority employing, engaging or contracting with every such person or class of persons shall be deemed to be an employer;

(*c*) the employer and the employee shall be deemed to have entered into a contract of service with one another;

(*d*) the place where such employee carries on work for his employer shall be deemed to be a place of employment; and

(*e*) the remuneration of such employee shall be deemed to be wages,

for the purposes of such specified provisions of this Act and any other written law.

(4) The Minister may make regulations in respect of the terms and conditions upon which the person or class of persons specified pursuant to subsection (3) may be employed.

(4A) Notwithstanding the provisions of this Act, the Minister may make regulations—

(*a*) in respect of the terms and conditions of service of a part-time employee; and

(*b*) prescribing the manner in which the hours of work of an employee are to be computed for the purposes of determining whether that employee falls within the definition of a "part-time employee".

(5) The Minister may, from time to time, by notification published in the *Gazette*, declare any particular industry, establishment or undertaking, or any class, category or description of industries, establishments or undertakings or any particular activity, service or work, or any class, category or description of activities, services or works, to be an industrial undertaking for the purposes of this Act.

Minister may prohibit employment other than under contract of service

2A. (1) The Minister may by order prohibit the employment, engagement or contracting of any person or class of persons to

carry out work in any occupation in any agricultural or industrial undertaking, constructional work, statutory body, local government authority, trade, business or place of work other than under a contract of service entered into with—

(*a*) the principal or owner of that agricultural or industrial undertaking, constructional work, trade, business or place of work; or

(*b*) that statutory body or that authority.

(2) Upon the coming into force of any such order, the person or class of persons employed, engaged or contracted with to carry out the work shall be deemed to be an employee or employees and—

(*a*) the principal or owner of the agricultural or industrial undertaking, constructional work, trade, business or place of work; or

(*b*) the statutory body or local government authority,

shall be deemed to be the employer for the purposes of such provisions of this Act and any other written law as may be specified in the order.

(3) Notwithstanding subsection (1), the Minister may by order approve the employment of any person or class of persons by such other person or class of persons (not being the principal or owner) as he may specify but subject to such conditions as he may deem fit to impose.

(4) Any person who contravenes any order made under this section commits an offence.

General power to exempt or exclude

2B. The Minister may by order exempt or exclude, subject to such conditions as he may deem fit to impose, any person or class of persons from all or any of the provisions of this Act.

Appointment of officers

3. (1) The Yang di-Pertuan Agong may appoint an officer to be styled the Director General of Labour, in this Act referred to as "the Director General".

(2) The Yang di-Pertuan Agong may appoint, to such number as he considers necessary for carrying out the provisions of this Act, officers of the following categories, that is to say—

(*a*) Deputy Directors General of Labour;

(*b*) Directors of Labour, Deputy Directors of Labour, Senior Assistant Directors of Labour and Assistant Directors of Labour; and

(*c*) Labour Officers.

(3) Subject to such limitations, if any, as may be prescribed by regulations made under this Act, any officer appointed under subsection (2) shall perform all the duties imposed and may exercise all the powers conferred upon the Director General by this Act, and every duty so performed and power so exercised shall be deemed to have been duly performed and exercised for the purposes of this Act.

Appeals

4. Any person affected by any decision or order, other than an order under section 69 or section 73, given or made by an officer appointed under subsection 3(2), may, if he is dissatisfied with such decision or order, within fourteen days of such decision or order being communicated to him appeal in writing therefrom to the Director General.

Effect on Act of other written laws

5. Nothing in this Act shall be construed as relieving any person who has entered into a contract of service, either as the employer or as the person employed, of any duty or liability imposed upon him by the provisions of any other written law for the time being in force in Malaysia or any part thereof or to limit any power which may be exercised by any public officer or any right conferred upon any such person as aforesaid under or by virtue of any such written law.

PART II

CONTRACTS OF SERVICE

Saving of existing contracts

6. Every agreement lawfully entered into between an employer and an employee before the coming into force of this Act shall if it is still legally binding upon the parties continue in force for such period as may be specified in the agreement and the parties thereto shall be subject to, and shall be entitled to the benefits of, this Act.

More favourable conditions of service under the Act to prevail

7. Subject to section 7A, any term or condition of a contract of service or of an agreement, whether such contract or agreement was entered into before or after the coming into force of this Act, which provides a term or condition of service which is less favourable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be void and of no effect to that extent and the more favourable provisions of this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be substituted therefor.

Validity of any term or condition of service which is more favourable

7A. Subject to any express prohibition under this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder, nothing in section 7 shall be construed as preventing an employer and an employee from agreeing to any term or condition of service under which an employee is employed, or shall render invalid any term or condition of service stipulated in any collective agreement or in any award of the Industrial Court, which is more favourable to the employee than the provisions of this Act or any regulations, order, or other subsidiary legislation whatsoever made thereunder.

Removal of doubt in respect of matters not provided for by or under this Act

7B. For the removal of doubt it is hereby declared that if no provision is made in respect of any matter under this Act or any

subsidiary legislation made thereunder, or if no regulations, order or other subsidiary legislation has been made on any matter in respect of which regulations, or an order or other subsidiary legislation may be made under this Act, it shall not be construed as preventing such matter from being provided for in a contract of service, or from being negotiated upon between an employer and an employee.

Contracts of service not to restrict rights of employees to join, participate in or organize trade unions

8. Nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract—

(*a*) to join a registered trade union;

(*b*) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or

(*c*) to associate with any other persons for the purpose of organizing a trade union in accordance with the Trade Unions Act 1959 [*Act 262*].

9. *(Deleted by *Act 40 of 1966)*

Contracts to be in writing and to include provision for termination

10. (1) A contract of service for a specified period of time exceeding one month or for the performance of a specified piece of work, where the time reasonably required for the completion of the work exceeds or may exceed one month, shall be in writing.

(2) In every written contract of service a clause shall be included setting out the manner in which such contract may be terminated by either party in accordance with this Part.

Provision as to termination of contracts

11. (1) A contract of service for a specified period of time or for the performance of a specified piece of work shall, unless otherwise terminated in accordance with this Part, terminate when the period of time for which such contract was made has expired or when the piece of work specified in such contract has been completed.

(2) A contract of service for an unspecified period of time shall continue in force until terminated in accordance with this Part.

**NOTE*—The Children and Young Persons (Employment) Act 1966 [*Act 40 of 1966*] has since been revised as the Children and Young Persons (Employment) Act 1966 [*Act 350*].

Notice of termination of contract

12. (1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

(2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than—

(*a*) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;

(*b*) six weeks' notice if he has been so employed for two years or more but less than five years on such date;

(*c*) eight weeks' notice if he has been so employed for five years or more on such date:

Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

(3) Notwithstanding anything contained in subsection (2),where the termination of service of the employee is attributable wholly or mainly to the fact that—

(*a*) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed;

(*b*) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;

(*c*) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;

(*d*) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;

(*e*) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or

(f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,

the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under paragraph(2)*(a), (b)* or *(c),* as the case may be, regardless of anything to the contrary contained in the contract of service.

(4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

Termination of contract without notice

13. (1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with section 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

(2) Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

Termination of contract for special reasons

14. (1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry—

(*a*) dismiss without notice the employee;

(*b*) downgrade the employee; or

(*c*) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

(2) For the purposes of an inquiry under subsection (1), the employer may suspend the employee from work for a period not

exceeding two weeks but shall pay him not less than half his wages for such period:

Provided that if the inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.

(3) An employee may terminate his contract of service with his employer without notice where he or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run.

When contract is deemed to be broken by employer and employee

15. (1) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Part III.

(2) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

Employees on estates to be provided with minimum number of days' work in each month

16. (1) Where an employee is employed in any agricultural undertaking on an estate on a contract of service under which he earns wages calculated by reference to the number of days' work performed in each month of his service, his employer shall be bound either to provide him with work suitable to his capacity on not less than twenty-four days in each month during the whole of which he is so employed, or if the employer is unable or fails to provide work on twenty-four days in each month whereon the employee is willing and fit to work, the employer shall nevertheless be bound to pay to the employee in respect of each of such days wages at the same rate as if such employee had performed a day's work:

Provided that any dispute as to whether an employee was willing or fit to work shall be referred to the Director General for his decision:

Provided further that in computing twenty-four days for the purposes of this subsection account shall not be taken of more than six days in any week.

(2) A contract of service shall be deemed to be broken by an employer if he fails to provide work or pay wages in accordance with subsection (1).

17. (*Omitted*).

Apprenticeship contracts excluded from sections 10 to 16

17A. Sections 10 to 16 shall not apply to apprenticeship contracts which are in a form approved by and of which a copy has been filed with the Director General.

PART III

PAYMENT OF WAGES

Wage period

18. (1) A contract of service shall specify a wage period not exceeding one month.

(2) If in any contract of service no wage period is specified the wage period shall for the purposes of the contract be deemed to be one month.

Time of payment of wages

19. Every employer shall pay to each of his employees not later than the seventh day after the last day of any wage period the wages, less lawful deductions, earned by such employee during such wage period:

Provided that if the Director General is satisfied that payment within such time is not reasonably practicable, he may, on the application of the employer, extend the time of payment by such number of days as he thinks fit.

Payment on normal termination of contract

20. The wages, less lawful deductions, earned by but not yet paid to an employee whose contract of service terminates in accordance with subsection 11(1) or of section 12 shall be paid to such employee not later than the day on which such contract of service so terminates.

Payment on termination of contract in special circumstances and on breach of contract

21. (1) Where an employer terminates the contract of service of an employee without notice in accordance with subsection 13(1) or (2) and paragraph 14(1)*(a)*—

(*a*) the wages, less any deductions which the employer is entitled to make under section 24, earned by such employee up to and including the day immediately preceding the day on which the termination of the contract of service takes effect; and

(*b*) in addition, where the employer terminates the contract of service under subsection 13(1), the indemnity payable to the employee under that subsection,

shall be paid by the employer to the employee not later than the day on which such contract of service is so terminated.

(2) Where an employee terminates his contract of service with an employer without notice in accordance with subsection 13(1) or (2) or subsection 14(3), the wages, less any deductions which the employer is entitled to make under section 24, earned by such employee up to and including the day immediately preceding the day on which the termination of the contract of service takes effect shall be paid by the employer to the employee not later than the third day after the day on which the contract of service is so terminated.

Limitation on advances to employees

22. No employer shall during any one month make to an employee an advance or advances of wages not already earned by such employee which exceeds in the aggregate the amount of wages which the employee earned in the preceding month from his employment with such employer, or if he has not been so long in

the employment of such employer, the amount which he is likely to earn in such employment during one month, unless such advance is made to the employee—

(a) to enable him to purchase a house or to build or improve a house;

(b) to enable him to purchase land;

(c) to enable him to purchase livestock;

(d) to enable him to purchase a motorcar, a motorcycle or a bicycle;

(da) to enable him to purchase shares of the employer's business offered for sale by the employer;

(e) for any other purpose—

(i) in respect of which an application in writing is made by the employer to the Director General;

(ii) which is, in the opinion of the Director General, beneficial to the employee; and

(iii) which is approved in writing by the Director General, provided that in granting such approval, the Director General may make such modifications thereto or impose such conditions thereon as he may deem proper;

(*f*) for such other purpose as the Minister may, from time to time, by notification in the *Gazette*, specify either generally in respect of all employees, or only in respect of any particular employee, or any class, category or description of employees.

Wages not due for absence from work through imprisonment or attendance in court

23. Wages shall not become payable to or recoverable by any employee from his employer for or on account of the term of any sentence of imprisonment undergone by him or for any period spent by him in custody or for or on account of any period spent by him in going to or returning from prison or other place of custody or for or on account of any period spent by him in going to, attending before or returning from a court otherwise than as a witness on his employer's behalf.

PART IV

DEDUCTIONS FROM WAGES

Lawful deductions

24. (1) No deductions shall be made by an employer from the wages of an employee otherwise than in accordance with this Act.

(2) It shall be lawful for an employer to make the following deductions—

(*a*) deductions to the extent of any overpayment of wages made during the immediately preceding three months from the month in which deductions are to be made, by the employer to the employee by the employer's mistake;

(*b*) deductions for the indemnity due to the employer by the employee under subsection 13(1);

(*c*) deductions for the recovery of advances of wages made under section 22 provided no interest is charged on the advances; and

(*d*) deductions authorized by any other written law.

(3) The following deductions shall only be made at the request in writing of the employee—

(*a*) deductions in respect of the payments to a registered trade union or co-operative thrift and loan society of any sum of money due to the trade union or society by the employee on account of entrance fees, subscriptions, instalments and interest on loans, or other dues; and

(*b*) deductions in respect of payments for any shares of the employer's business offered for sale by the employer and purchased by the employee.

(4) The following deductions shall not be made except at the request in writing of the employee and with the prior permission in writing of the Director General:

(*a*) deductions in respect of payments into any superannuation scheme, provident fund, employer's welfare scheme or insurance scheme established for the benefit of the employee;

(*b*) deductions in respect of repayments of advances of wages made to an employee under section 22 where interest is levied on the advances and deductions in respect of the payments of the interest so levied;

(*c*) deductions in respect of payments to a third party on behalf of the employee;

(*d*) deductions in respect of payments for the purchase by the employee of any goods of the employer's business offered for sale by the employer; and

(*e*) deductions in respect of the rental for accommodation and the cost of services, food and meals provided by the employer to the employee at the employee's request or under the terms of the employee's contract of service.

(5) The Director General shall not permit any deduction for payments under paragraph (4)*(e)* unless he is satisfied that the provision of the accommodation, services, food or meals is for the benefit of the employee.

(6) Where an employee obtains foodstuff, provisions or other goods on credit from a shop the business of which is carried on by a co-operative society registered under the Co-operative Societies Act 1993 [*Act 502*], it shall be lawful for his employer, at the request in writing of the employee and with the agreement of the manager of the co-operative shop, to make deductions from the wages of the employee of an amount not exceeding the amount of the credit and to pay the amount so deducted to the manager in satisfaction of the employee's debt.

(7) Notwithstanding subsections (2), (3), (4) and (6) the Director General, on an application by an employer or a specified class or classes of employers, may permit any deduction for a specified purpose from the wages of an employee or a specified class or classes of employees subject to such conditions as he may deem fit to impose.

(8) The total of any amounts deducted under this section from the wages of an employee in respect of any one month shall not exceed fifty per centum of the wages earned by that employee in that month.

(9) The limitation in subsection (8) shall not apply to—

(*a*) deductions from the indemnity payable by an employer to an employee under subsection 13(1);

(*b*) deductions from the final payment of the wages of an employee for any amount due to the employer and remaining unpaid by the employee on the termination of the employee's contract of service; and

(*c*) deductions for the repayment of a housing loan which, subject to the prior permission in writing of the Director General, may exceed the fifty per centum limit by an additional amount of not more than twenty-five per centum of the wages earned.

PART V

RELATING TO THE TRUCK SYSTEM

Wages to be paid in legal tender

25. (1) Except as otherwise expressly permitted by this Act, the entire amount of the wages earned by, or payable to, any employee in respect of any work done by him shall be actually paid to him in legal tender, and every payment of, or on account of, any such wages made in any other form shall be illegal, null and void.

(2) Every employee shall be entitled to recover in the courts or before the Director General acting under section 69 so much of his wages, exclusive of sums lawfully deducted under Part IV, as shall not have been actually paid to him in legal tender or paid to him by any of the ways under section 25A.

Payment of wages through bank

25A. (1) Nothing in subsection 25(1) shall operate so as to render unlawful or invalid any payment of wages by the employer to the employee with the employee's written consent in any of the following ways—

(*a*) payment into an account at a bank or a finance company licensed under the Banking and Financial Institutions Act 1989 [*Act 372*] in any part of Malaysia being an

account in the name of the employee or an account in the name of the employee jointly with one or more other persons;

(*b*) payment by cheque made payable to or to the order of the employee.

(2) The consent of the employee under this section may be withdrawn by him at any time by notice in writing given to the employer. Such notice shall take effect at but not before the end of the period of four weeks beginning with the day on which the notice is given.

(3) The consent of the employee to the mode of payment of wages under subsection (l) shall not be unreasonably withheld or, if granted, shall not be unreasonably withdrawn by the employee notwithstanding subsection (2).

(4) Any dispute as to whether an employee has unreasonably withheld or withdrawn his consent to the mode of payment of his wages under subsection (1) shall be referred to the Director General whose decision on the matter shall be final.

Conditions restricting place at which, manner in which and person with whom wages paid to be spent, illegal

26. No employer shall impose any condition in any contract of service as to the place at which, or the manner in which, or the person with whom, any wages paid to the employee are to be expended and any such condition in a contract of service shall be void and of no effect.

Interest on advances forbidden

27. No employer shall—

(*a*) make any deduction; or

(*b*) receive any payment,

from any employee by way of discount, interest or any similar charge on account of any advance or advances of wages made to an employee in anticipation of the regular date for the payment of wages, where such advance or advances do not exceed in the aggregate one month's wages.

Restriction on places at which wages may be paid

28. No employer shall pay wages to employees in taverns or other similar establishments or in places of amusement or in shops or stores for the retail sale of merchandise except in the case of employees employed therein.

Remuneration other than wages

29. **(1)** Nothing in this Part shall render illegal a contract of service with an employee under which the employer agrees to provide the employee with house accommodation, food, fuel, light, water, medical attendance, or any approved amenity or approved service in addition to wages but no employer shall provide any employee with any intoxicating liquor as part of the terms of a contract of service.

(2) The Director General may, on application made to him in writing by an employer, approve in writing any amenity or service as an approved amenity or approved service, and in granting such approval the Director General may make such modifications thereto or impose such conditions thereon as he may deem proper.

(3) Any person who is dissatisfied with any decision of the Director General under subsection (2) may, within thirty days of such decision being communicated to him, appeal in writing therefrom to the Minister.

(4) On any appeal made to him under subsection (3), the Minister may make such decision or order thereon as appears just, and such decision or order shall be final.

30. (*Deleted by Act A1026*).

Part VI

PRIORITY OF WAGES

Priority of wages over other debts

31. (1) Where by order of a court made upon the application of any person holding a mortgage, charge, lien or decree (hereinafter referred to as "the secured creditor") or in the exercise of rights under a debenture the property of any person (hereinafter referred

to as "the person liable") liable under any of the provisions of this Act to pay the wages due to any employee or to pay money due to any sub-contractor for labour is sold, or any money due to the person liable is attached or garnished, the court or the receiver or manager shall not authorize payment of the proceeds of the sale, or of the money so attached or garnished, to the secured creditor or the debenture holder until the court or the receiver or manager shall have ascertained and caused to be paid, out of such proceeds or money, the wages of such employee, or the money due to any sub-contractor for labour under a contract between him and the person liable, which the person liable was liable to pay at the date of such sale, attachment or garnishment:

Provided that this section shall only apply to the sale of a place of employment on which—

(*a*) any employee to whom wages are due as aforesaid;

(*b*) any employee to whom wages are due by such sub-contractor for labour as aforesaid;

(*c*) any sub-contractor for labour to whom money is owed on account of the sub-contract by the sub-contractor for labour as aforesaid,

was employed or worked at the time when such wages were earned or such money accrued due, and to the proceeds of the sale of any products of such place of employment and of any movable property therein used in connection with such employment and to any money due to the person liable on account of work performed by such employee or sub-contractor for labour or derived from the sale of the products of such work:

Provided further that—

(*a*) where the person liable is an employer the total amount of the wages of any employee to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by the employer to the employee as wages for any four consecutive months' work;

(*b*) where the person liable is a principal and where the wages are claimed from such principal under section 33 the total amount of the wages of any employees to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by the principal

to the contractor at the date of the sale, attachment or garnishment unless the contractor is also a sub-contractor for labour;

(*c*) where the person liable is a contractor or sub-contractor who owes money to a sub-contractor for labour the total amount due to such sub-contractor for labour to which priority over the claim of a secured creditor is given by this section shall not exceed the amount due by such subcontractor for labour to his employees (including any further sub-contractors for labour under such first-mentioned sub-contractor for labour) for any four consecutive months' work.

(2) In this section, except for the second proviso, "wages" includes termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance.

Reference by the court to Director General

32. (1) For the purposes of ascertaining the amount due to any employee or sub-contractor for labour under section 31, the court or the receiver or manager may refer the question to the Director General with a request that he hold an inquiry thereinto and forward his findings in respect thereof to the court or the receiver or manager, and the Director General shall comply with any such request.

(2) For the purpose of any inquiry under subsection (1) the Director General shall have all the powers conferred upon him by paragraph 70(*f*) and section 80 shall have effect as if the inquiry were being held under section 69.

PART VII

CONTRACTORS AND PRINCIPALS

Liability of principals and contractors for wages

33. (1) Where a principal in the course of or for the purposes of his trade or business, contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, and any wages are due to any employee by the contractor or any sub-contractor under the contractor for work done in the course of the performance of the contract, the

principal and the contractor and any such subcontractor (not being the employer) shall be jointly and severally liable with the employer to pay such wages as if that employee had been immediately employed by the principal and by the contractor and any such sub-contractor:

Provided that—

(*a*) in the case of a contract for constructional work the principal shall not be liable for the payment of wages under this subsection unless he is also a constructional contractor or a housing developer;

(*b*) the principal, and the contractor and any sub-contractor (not being the employer), shall not be liable to any employee under this subsection for more than the wages due to him for any three consecutive months; and

(*c*) the employee shall have instituted proceedings against the principal for the recovery of his wages or made a complaint to the Director General under Part XV with in ninety days from the date on which such wages became due for payment by his employer in accordance with the provisions for the payment of wages contained in Part III.

(2) Any person, other than the employer, who has paid wages under this section to the employee of any employer may institute civil proceedings against such employer for the recovery of the amount of wages so paid.

PART VIII

EMPLOYMENT OF WOMEN

Prohibition of night work

34. (1) Except in accordance with regulations made under this Act or any exemption granted under the proviso to this subsection no employer shall require any female employee to work in any industrial or agricultural undertaking between the hours of ten o'clock in the evening and five o'clock in the morning nor commence work for the day without having had a period of eleven consecutive hours free from such work:

Provided that the Director General may, on application made to him in any particular case, exempt in writing any female employee or class of female employees from any restriction in this subsection, subject to any conditions he may impose.

(2) Any person—

(*a*) who is affected by any decision made or condition imposed under the proviso to subsection (1); and

(*b*) who is dissatisfied with such decision or condition,

may within thirty days of such decision or condition being communicated to him appeal in writing therefrom to the Minister.

(3) In deciding any appeal made to him under subsection (2), the Minister may make such decision or order thereon, including the alteration or removal of any condition imposed or the imposition of any further condition, as appears just and such decision or order shall be final.

Prohibition of underground work

35. No female employee shall be employed in any underground working.

Prohibition of employment by Minister

36. Notwithstanding the provisions of this Part the Minister may by order prohibit or permit the employment of female employees in such circumstances or under such conditions as may be described in such order.

PART IX

MATERNITY PROTECTION

Length of eligible period and entitlement to maternity allowance

37. (1) *(a)* Every female employee shall be entitled to maternity leave for a period of not less than sixty consecutive days (also referred to in this Part as the eligible period) in respect of each

confinement and, subject to this Part, she shall be entitled to receive from her employer a maternity allowance to be calculated or prescribed as provided in subsection (2) in respect of the eligible period.

(*aa)* Where a female employee is entitled to maternity leave under paragraph *(a)* but is not entitled to receive maternity allowance from her employer for the eligible period under paragraph *(c)*, or because she has not fulfilled the conditions set out in paragraph (2)*(a)*, she may, with the consent of the employer, commence work at any time during the eligible period if she has been certified fit to resume work by a registered medical practitioner.

(*b)* Subject to section 40, maternity leave shall not commence earlier than a period of thirty days immediately preceding the confinement of a female employee or later than the day immediately following her confinement:

Provided that where a medical officer or the registered medical practitioner appointed by the employer certifies that the female employee as a result of her advanced state of pregnancy is unable to perform her duties satisfactorily, the employee may be required to commence her maternity leave at any time during a period of fourteen days preceding the date of her confinement as determined in advance by the medical officer or the registered medical practitioner appointed by the employer.

(*bb)* Where a female employee abstains from work to commence her maternity leave on a date earlier than the period of thirty days immediately preceding her confinement, such abstention shall not be treated as maternity leave and she shall not be entitled to any maternity allowance in respect of the days during which she abstains from work in excess of the period of thirty days immediately preceding her confinement.

(*c)* Notwithstanding paragraph *(a)*, a female employee shall not be entitled to any maternity allowance if at the time of her confinement she has five or more surviving children.

(*d)* For the purposes of this Part, "children" means all natural children, irrespective of age.

(2) *(a)* A female employee shall be entitled to receive maternity allowance for the eligible period from her employer if—

(i) she has been employed by the employer at any time in the four months immediately before her confinement; and

(ii) she has been employed by the employer for a period of, or periods amounting in the aggregate to, not less than ninety days during the nine months immediately before her confinement.

(*b*) A female employee who is eligible for maternity allowance under paragraph (1)*(a)* shall be entitled to receive from the employer for each day of the eligible period a maternity allowance at her ordinary rate of pay for one day, or at the rate prescribed by the Minister under paragraph 102(2)*(c)*, whichever is the greater.

(*c*) A female employee employed on a monthly rate of pay shall be deemed to have received her maternity allowance if she continues to receive her monthly wages during her abstention from work during the eligible period without abatement in respect of the abstention.

(*d*) Where a female employee claims maternity allowance under this section from more than one employer, she shall not be entitled to receive a maternity allowance of an amount exceeding in the aggregate the amount which she would be entitled to receive if her claim was made against one employer only.

(3) Where there are more employers than one from whom the female employee would be entitled to claim maternity allowance in accordance with subsection (2) the employer who pays the maternity allowance shall be entitled to recover from such other employer, as a civil debt, a contribution which shall bear the same proportion to the amount of the maternity allowance paid to the female employee as the number of days on which she worked for such other employer during the period of nine months immediately preceding her confinement bears to the total number of days on which she worked during the said period:

Provided that if the female employee has failed to comply with subsection 40(1) or (2), the employer who pays the maternity allowance shall not thereby be prevented from recovering contribution calculated in accordance with this subsection.

Payment of maternity allowance

38. The maternity allowance referred to in subsection 37(2) and accruing in each wage period under the contract of service of the female employee shall be paid in the same manner as if such allowance were wages earned during such wage period as provided in section 19.

Payment of allowance to nominee on death of female employee

39. If a female employee, after giving notice to her employer that she expects to be confined, commences her maternity leave and dies from any cause during the eligible period, her employer or any employer who would have been, but for the death of the female employee, liable to pay any maternity allowance shall pay to the person nominated by her under section 41 or, if there is no such person, to her legal personal representative, an allowance at the rate calculated or prescribed as provided in subsection 37(2) from the day she commenced her maternity leave to the day immediately preceding her death.

Loss of maternity allowance for failure to notify employer

40. (1) A female employee who is about to leave her employment and who knows or has reason to believe that she will be confined within four months from the date upon which she leaves shall before leaving her employment notify her employer of her pregnancy and if she fails so to do, she shall not be entitled to receive any maternity allowance from such employer.

(2) A female employee shall within a period of sixty days immediately preceding her expected confinement notify her employer of it and the date from which she intends to commence her maternity leave and if she commences such leave without so notifying her employer, the payment of maternity allowance to her may be suspended, notwithstanding section 38, until such notice is given to her employer.

(3) Any employer who dismisses a female employee from her employment during the period in which she is entitled to maternity leave commits an offence.

(4) Any female employee whose employer provides free medical treatment for his employees and who when she is pregnant persistently refuses or fails to submit to such medical treatment offered free

by her employer as a registered medical practitioner certifies to be necessary or desirable in connection with her pregnancy, expected confinement or confinement shall, if she would otherwise be entitled to receive any maternity allowance, forfeit such allowance to the extent of seven days.

(5) The want of or any defect or inaccuracy in any notice required to be given in accordance with this section shall not be a bar to the maintenance of any claim to maternity allowance unless the employer is proved to have been prejudiced by the want, defect or inaccuracy of such notice.

(6) The failure to give any such notice within the period specified in this section shall not prejudice the right of a female employee to receive any maternity allowance if it is found that the failure was occasioned by mistake or other reasonable cause:

Provided that any dispute as to whether such failure was occasioned by mistake or other reasonable cause shall be referred under section 69 to the Director General for his decision.

(7) Notice to an employer or, if there is more than one employer, to one of such employers, may be given either in writing or orally or to the foreman or other person under whose supervision the female employee was employed or to any person designated for the purpose by the employer.

Payment of allowance to nominee

41. A female employee may nominate some other person to whom the maternity allowance may be paid on her behalf and any payment of the maternity allowance made to the person so nominated shall, for the purposes of this Act, be deemed to be a payment to the female employee herself.

Restriction on dismissal of female employee after eligible period

42. (1) Where a female employee remains absent from her work after the expiration of the eligible period as a result of illness certified by a registered medical practitioner to arise out of her pregnancy and confinement and to render her unfit for her work, it shall be an offence, until her absence exceeds a period of ninety

days after the expiration of the eligible period, for her employer to terminate her services or give her notice of termination of service.

(2) Subject to subsection (1), where a female employee is dismissed from her employment with wages in lieu of notice at any time during the period of four months immediately preceding her confinement, she shall, in computing the period of her employment for the purposes of this Part, be deemed to have been employed as if she had been given due notice instead of wages in lieu thereof.

Conditions contrary to Part void

43. Any condition in a contract of service whereby a female employee relinquishes or is deemed to relinquish any right under this Part shall be void and of no effect and the right conferred under this Part shall be deemed to be substituted for such condition.

Register of allowances paid

44. Every employer shall keep a register, in a form to be prescribed by the Minister by regulations made under this Act, of all payments made to female employees under this Part and of such other matters incidental thereto as may be prescribed by such regulations.

44A. (*Omitted*).

PART X

EMPLOYMENT OF CHILDREN AND YOUNG PERSONS

45–56. (*Deleted by *Act 40 of 1966*).

PART XI

DOMESTIC SERVANTS

Termination of contract

57. Subject to any express provision to the contrary contained therein, a contract to employ and to serve as a domestic servant

**NOTE*—The Children and Young Persons (Employment) Act 1966 [*Act 40 of 1966*] has since been revised as the Children and Young Persons (Employment) Act 1966 [*Act 350*].

may be terminated either by the person employing the domestic servant or by the domestic servant giving the other party fourteen days' notice of his intention to terminate the contract, or by the paying of an indemnity equivalent to the wages which the domestic servant would have earned in fourteen days:

Provided that any such contract may be terminated by either party without notice and without the paying of an indemnity on the ground of conduct by the other party inconsistent with the terms and conditions of the contract.

PART XII

REST DAYS, HOURS OF WORK, HOLIDAYS AND OTHER CONDITIONS OF SERVICE

58. (*Omitted*).

Non-application of Part XII

58A. This Part shall not apply to any term or condition of service which is provided for in any collective agreement entered into before the coming into operation of this Part and taken cognizance of by the Industrial Court or in any award made by the Industrial Court while such collective agreement or award remains in force.

Rest day

59. (1) Every employee shall be allowed in each week a rest day of one whole day as may be determined from time to time by the employer, and where an employee is allowed more than one rest day in a week the last of such rest days shall be the rest day for the purposes of this Part:

Provided that this subsection shall not apply during the period in which the employee is on maternity leave as provided under section 37, or on sick leave as provided under section 60F, or during the period of temporary disablement under the Workmen's Compensation Act 1952 [*Act 273*], or under the Employees Social Security Act 1969 [*Act 4*].

(1A) Notwithstanding subsection (1) and the interpretation of the expression "day" in subsection 2(1), in the case of an employee engaged in shift work any continuous period of not less than thirty hours shall constitute a rest day.

(1B) Notwithstanding subsection (1), the Director General, on a written application by an employer and subject to any conditions he may deem fit to impose, may permit the employer to grant the rest day for each week on any day of the month in which the rest days fall and the day so granted shall be deemed to be the employee's rest day for the purposes of this section.

(2) The employer shall prepare a roster before the commencement of the month in which the rest days fall informing the employee of the days appointed to be his rest days therein, and where the same day in each week has been appointed as the rest day for all employees in the place of employment, the employer may, in lieu of preparing a roster, display a notice at a conspicuous place in the place of employment informing the employee of the fixed rest day so appointed.

(3) Every such roster and every particular recorded therein shall be preserved and shall be made available for inspection for a period not exceeding six years from the last day of the month in respect of which the roster was prepared or cause to be prepared.

(4) Any employer who contravenes any of the provisions of this section commits an offence.

Work on rest day

60. (1) Except as provided in subsection 60A(2), no employee shall be compelled to work on a rest day unless he is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts:

Provided that in the event of any dispute the Director General shall have power to decide whether or not an employee is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts.

(2) (*Omitted*).

(3) *(a)* In the case of an employee employed on a daily, hourly or other similar rate of pay who works on a rest day, he shall be paid for any period of work—

(i) which does not exceed half his normal hours of work, one day's wages at the ordinary rate of pay; or

(ii) which is more than half but does not exceed his normal hours of work, two days' wages at the ordinary rate of pay.

(*b*) In the case of an employee employed on a monthly rate of pay who works on a rest day, he shall be paid for any period of work—

(i) which does not exceed half his normal hours of work, wages equivalent to half the ordinary rate of pay for work done on that day; or

(ii) which is more than half but which does not exceed his normal hours of work, one day's wages at the ordinary rate of pay for work done on that day.

(c) For any work carried out in excess of the normal hours of work on a rest day by an employee mentioned in paragraph *(a)* or *(b)*, he shall be paid at a rate which is not less than two times his hourly rate of pay.

(*d*) In the case of an employee employed on piece rates who works on a rest day, he shall be paid twice his ordinary rate per piece.

Hours of work

60A. (1) Except as hereinafter provided, an employee shall not be required under his contract of service to work—

(a) more than five consecutive hours without a period of leisure of not less than thirty minutes duration;

(b) more than eight hours in one day;

(c) in excess of a spread over period of ten hours in one day;

(d) more than forty-eight hours in one week:

Provided that—

(i) for the purpose of paragraph (1)*(a)*, any break of less than thirty minutes in the five consecutive hours shall not break the continuity of that five consecutive hours;

(ii) an employee who is engaged in work which must be carried on continuously and which requires his continual attendance may be required to work for eight consecutive

hours inclusive of a period or periods of not less than forty-five minutes in the aggregate during which he shall have the opportunity to have a meal; and

(iii) where, by agreement under the contract of service between the employee and the employer, the number of hours of work on one or more days of the week is less than eight, the limit of eight hours may be exceeded on the remaining days of the week, but so that no employee shall be required to work for more than nine hours in one day or forty-eight hours in one week.

(1A) The Director General may, on the written application of an employer, grant permission to the employer to enter into a contract of service with any one or more of his employees, or with any class, category or description of his employees, requiring the employee or employees, or the class, category or description of employees, as the case may be, to work in excess of the limit of hours prescribed under paragraph (1)*(a), (b), (c)* and *(d)* but subject to such conditions, if any, as the Director General may deem proper to impose, if he is satisfied that there are special circumstances pertaining to the business or undertaking of the employer which renders it necessary or expedient to grant such permission:

Provided that the Director General may at any time revoke the approval given under this subsection if he has reason to believe that it is expedient to do so.

(1B) Any person who is dissatisfied with any decision of the Director General under subsection (1A) may, within thirty days of such decision being communicated to him, appeal in writing there from to the Minister.

(1C) On an appeal made to him under subsection (1B) the Minister may make such decision or order thereon as appears just and such decision or order shall be final.

(2) An employee may be required by his employer to exceed the limit of hours prescribed in subsection (1) and to work on a rest day, in the case of—

(a) accident, actual or threatened, in or with respect to his place of work;

(b) work, the performance of which is essential to the life of the community;

(c) work essential for the defence or security of Malaysia;

(d) urgent work to be done to machinery or plant;

(e) an interruption of work which it was impossible to foresee; or

(f) work to be performed by employees in any industrial undertaking essential to the economy of Malaysia or any essential service as defined in the Industrial Relations Act 1967:

Provided that the Director General shall have the power to enquire into and decide whether or not the employer is justified in calling upon the employee to work in the circumstances specified in paragraphs *(a)* to *(f)*.

(3) *(a)* For any overtime work carried out in excess of the normal hours of work, the employee shall be paid at a rate not less than one and half times his hourly rate of pay irrespective of the basis on which his rate of pay is fixed.

(*b)* In this section "overtime" means the number of hours of work carried out in excess of the normal hours of work per day:

Provided that if any work is carried out after the spread over period of ten hours, the whole period beginning from the time that the said spread over period ends up to the time that the employee ceases work for the day shall be deemed to be overtime.

(*c)* For the purposes of this section, section 60, paragraph 60D(3)*(a)* and section 60I, "normal hours of work" means the number of hours of work as agreed between an employer and an employee in the contract of service to be the usual hours of work per day and such hours of work shall not exceed the limits of hours prescribed in subsection (1).

(4) *(a)* No employer shall require or permit an employee to work overtime exceeding such limit as may be prescribed by the Minister from time to time by regulations made under this Act, and the regulations so made may provide different limits for different classes, categories or descriptions of employees, and such regulations

may also provide for such classes, categories or description of employees, as may be specified, to be excluded from their application:

Provided that any work carried out on a rest day, or any of the gazetted public holidays referred to in subsection 60D(1), or on any paid holiday substituted there for under section 60D, shall not be construed as overtime work for the purposes of this subsection;

And provided further that the Director General may, on application made to him in writing by an employer or by an employee or a group of employees, permit any particular employee, or any group, class, category or description of employees in any particular industry, undertaking or establishment to work overtime in excess of the limit of hours so prescribed, subject to such conditions, if any, as he may deem proper to impose.

(aa) Any person who is dissatisfied with any decision of the Director General made under paragraph *(a)* may, within thirty days of such decision being communicated to him, appeal in writing therefrom to the Minister.

(ab) In deciding any appeal made to him under paragraph *(aa)*, the Minister may make such decision or order thereon as appears just and such decision or order shall be final.

(b) For the purposes of the restriction on overtime under this subsection "overtime" shall have the meaning assigned thereto in paragraph (3)*(b)*.

(5) (*Omitted*).

(6) The Minister may make regulations for the purpose of calculating the payment due for overtime to an employee employed on piece rates.

(7) Except in the circumstances described in paragraph (2)*(a),(b), (c), (d)* and *(e)*, no employer shall require any employee under any circumstances to work for more than twelve hours in any one day.

(8) This section shall not apply to employees engaged in work which by its nature involves long hours of inactive or stand-by employment.

(9) For the purposes of this Part "hours of work" means the time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements.

Task work

60B. Nothing contained in this Part shall prevent any employer from agreeing with any employee that the wages of such employee shall be paid at an agreed rate in accordance with the task, that is the specific amount of work to be performed, and not by the day or by the piece.

Shift work

60C. (1) Notwithstanding paragraph 60A(1)*(b), (c)* and *(d)*, but subject to paragraph (1)*(a)* thereof, an employee who is engaged under his contract of service in shift work may be required by his employer to work more than eight hours in any one day or more than forty-eight hours in any one week but the average number of hours worked over any period of three weeks, or over any period exceeding three weeks as may be approved by the Director General, shall not exceed forty-eight per week.

(1A) The approval of the Director General in subsection (l) may be granted if the Director General is satisfied that there are special circumstances pertaining to the business or undertaking of the employer which render it necessary or expedient for him to grant the permission subject to such conditions as he may deem fit to impose.

(1B) The Director General may revoke the approval given under subsection (1A) at any time if he has reason to believe that it is expedient so to do.

(2) Except in the circumstances described in paragraph 60A(2)*(a), (b), (c), (d)* and *(e),* no employer shall require any employee who is engaged under his contract of service in shift work to work for more than twelve hours in any one day.

(3) (*Omitted*).

Holidays

60D. (1) Every employee shall be entitled to a paid holiday a this ordinary rate of pay on the following days in any one calendar year:

(a) on ten of the gazetted public holidays, four of which shall be—

(i) the National Day;

(ii) the Birthday of the Yang di-Pertuan Agong;

(iii) the Birthday of the Ruler or the Yang di-Pertua Negeri, as the case may be, of the State in which the employee wholly or mainly works under his contract of service, or the Federal Territory Day, if the employee wholly or mainly works in the Federal Territory; and

(iv) the Workers' Day; and

(b) on any day declared as a public holiday under section 8 of the Holidays Act 1951 [*Act 369*]:

Provided that if any of the public holidays referred to in paragraphs *(a)* and *(b)* falls on a rest day the working day following immediately the rest day shall be a paid holiday in substitution of that public holiday.

(1A) The employer shall exhibit conspicuously at the place of employment before the commencement of each calendar year a notice specifying the remaining six gazetted public holidays provided for in paragraph (1)*(a)* in respect of which his employees shall be entitled to paid holidays under paragraph (1)*(a)*:

Provided that by agreement between the employer and an employee any other day or days may be substituted for one or more of the remaining six gazetted public holidays provided for in paragraph (1)*(a)*:

And provided further that the employer may grant the employee any other day as a paid public holiday in substitution for any of the public holidays referred to in paragraph (1)*(b)*.

(1B) Where any of the public holidays or any other day substituted therefor as provided in subsection (1) or (1A) falls within the

period during which an employee is on sick leave or annual leave to which the employee is entitled under this Act, or falls during the period of temporary disablement under the Workmen's Compensation Act 1952, or under the Employees Social Security Act 1969, the employer shall grant another day as a paid holiday in substitution for such public holiday or the day substituted therefor.

(2) Any employee who absents himself from work on the working day immediately preceding or immediately succeeding a public holiday or two or more consecutive public holidays or any day or days substituted therefor under this section without the prior consent of his employer shall not be entitled to any holiday pay for such holiday or consecutive holidays unless he has a reasonable excuse for such absence.

(2A) An employee on a monthly rate of pay shall be deemed to have received his holiday pay if he receives from his employer his monthly wages, without abatement (other than as provided under subsection (2)) in respect of the holiday, for the month in which the holiday falls.

(3) *(a)* Notwithstanding subsections (1), (1A) and (1B), any employee may be required by his employer to work on any paid holiday to which he is entitled under the said subsections and in such event he shall, in addition to the holiday pay he is entitled to for that day—

(i) in the case of an employee employed on a monthly, weekly, daily, hourly, or other similar rate of pay, be paid two days' wages at the ordinary rate of pay; or

(ii) in the case of an employee employed on piece rates, be paid twice the ordinary rate per piece,

regardless that the period of work done on that day is less than the normal hours of work.

(aa) For any overtime work carried out by an employee referred to in subparagraph *(a)*(i) in excess of the normal hours of work on a paid public holiday, the employee shall be paid at a rate which is not less than three times his hourly rate of pay.

(aaa) For any overtime work carried out by an employee referred in to in subparagraph *(a)*(ii) in excess of the normal hours of work on any paid holiday, the employee shall be paid not less than three times the ordinary rate per piece.

(*b*) An employee who works on a holiday shall be entitled to a travelling allowance for that day if payable to him under the terms of his agreement with his employer but such employee shall not be entitled under this subsection to receive an increased rate of any housing allowance or food allowance.

(4) For the purposes of this section if any such holiday falls on a half working day, the ordinary rate of pay payable shall be that of a full working day.

Annual leave

60E. (1) An employee shall be entitled to paid annual leave of—

(*a*) eight days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of less than two years;

(*b*) twelve days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of two years or more but less than five years; and

(*c*) sixteen days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of five years or more,

and if he has not completed twelve months of continuous service with the same employer during the year in which his contract of service terminates, his entitlement to paid annual leave shall be in direct proportion to the number of completed months of service:

Provided that any fraction of a day of annual leave so calculated which is less than one-half of a day shall be disregarded, and where the fraction of a day is one-half or more it shall be deemed to be one day;

And provided further that where an employee absents himself from work without the permission of his employer and without reasonable excuse for more than ten per centum of the working days during the twelve months of continuous service in respect of which his entitlement to such leave accrues he shall not be entitled to such leave.

(1A) The paid annual leave to which an employee is entitled under subsection (1) shall be in addition to rest days and paid holidays.

(1B) Where an employee who is on paid annual leave becomes entitled to sick leave or maternity leave while on such annual leave, the employee shall be granted the sick leave or the maternity leave, as the case may be, and the annual leave shall be deemed to have not been taken in respect of the days for which sick leave or maternity leave is so granted.

(2) The employer shall grant and the employee shall take such leave not later than twelve months after the end of every twelve months continuous service and any employee who fails to take such leave at the end of such period shall thereupon cease to be entitled thereto:

Provided that an employee shall be entitled to payment in lieu of such annual leave if, at the request of his employer, he agrees in writing not to avail himself of any or all of his annual leave entitlement.

(2A) Notwithstanding subsection (2), upon the termination of an employee's contract of service, the employee shall be entitled to take before such termination takes place the paid annual leave due to be taken in the year in which the termination takes place in respect of the twelve months of service preceding the year in which the termination takes place, and, in addition, the leave accrued in respect of the completed months of service during the year in which the termination takes place.

(3) The employer shall pay the employee his ordinary rate of pay for every day of paid annual leave, and an employee on a monthly rate of pay shall be deemed to have received the annual leave pay if he receives his monthly wages, without abatement in respect of such annual leave, for the month in which he takes such annual leave.

(3A) If the contract of service has been terminated by either party before an employee has taken the paid annual leave to which he is entitled under this section, the employer shall pay the

employee his ordinary rate of pay in respect of every day of such leave:

Provided that this subsection shall not apply where an employee is dismissed under paragraph 14(1)*(a)*.

(3B) Where an employee is granted leave of absence without pay by his employer during any period of twelve months and the period of absence exceeds in the aggregate thirty days, that period of leave of absence shall be disregarded for the purpose of computing his length of service with the employer under this section.

(4) The Minister may, by notification in the *Gazette*, fix the periods when and prescribe the manner in which annual leave shall be granted to employees in different types of employment or in different classes of industries.

Sick leave

60F. (1) An employee shall, after examination at the expense of the employer—

(a) by a registered medical practitioner duly appointed by the employer; or

(b) if no such medical practitioner is appointed or, if having regard to the nature or circumstances of the illness, the services of the medical practitioner so appointed are not obtainable within a reasonable time or distance, by any other registered medical practitioner or by a medical officer,

be entitled to paid sick leave,—

(aa) where no hospitalization is necessary,—

(i) of fourteen days in the aggregate in each calendar year if the employee has been employed for less than two years;

(ii) of eighteen days in the aggregate in each calendar year if the employee has been employed for two years or more but less than five years;

(iii) of twenty-two days in the aggregate in each calendar year if the employee has been employed for five years or more; or

(bb) of sixty days in the aggregate in each calendar year if hospitalization is necessary, as may be certified by such registered medical practitioner or medical officer:

Provided that the total number of days of paid sick leave in a calender year which an employee is entitled to under this section shall be sixty days in the aggregate;

And provided further that if an employee is certified by such registered medical practitioner or medical officer to be ill enough to need to be hospitalized but is not hospitalized for any reason whatsoever, the employee shall be deemed to be hospitalized for the purposes of this section.

(1A) An employee shall also be entitled to paid sick leave under paragraphs (1)*(aa)* and *(bb)* after examination by a dental surgeon as defined in the Dental Act 1971 [*Act 51*]:

Provided that the entitlement for such sick leave shall be inclusive of the number of days provided for under paragraphs (1)*(aa)* and *(bb)*.

(2) An employee who absents himself on sick leave—

(a) which is not certified by a registered medical practitioner or a medical officer as provided under subsection (1) or a dental surgeon as provided under subsection (1A); or

(b) which is certified by such registered medical practitioner or medical officer or dental surgeon, but without informing or attempting to inform his employer of such sick leave within forty-eight hours of the commencement thereof,

shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work.

(3) The employer shall pay the employee his ordinary rate of pay for every day of such sick leave, and an employee on a monthly rate of pay shall be deemed to have received his sick leave pay if he receives from his employer his monthly wages, without abatement in respect of the days on which he was on sick leave, for the month during which he was on such sick leave.

(4) No employee shall be entitled to paid sick leave for the period during which the employee is entitled to maternity allowance under Part IX, or for any period during which he is receiving any compensation for disablement under the Workmen's Compensation Act 1952 [*Act 273*], or any periodical payments for temporary disablement under the Employees Social Security Act 1969 [*Act 4*].

60G. (*Omitted*).

60H. (*Omitted*).

Interpretation

60I. (1) For the purposes of this Part and Part IX—

(a) "ordinary rate of pay" means wages as defined in section 2, whether calculated by the month, the week, the day, the hour, or by piece rate, or otherwise, which an employee is entitled to receive under the terms of his contract of service for the normal hours of work for one day, but does not include any payment made under an approved incentive payment scheme or any payment for work done on a rest day or on any gazetted public holiday granted by the employer under the contract of service or any day substituted for the gazetted public holiday; and

(b) "hourly rate of pay" means the ordinary rate of pay divided by the normal hours of work.

(1A) Where an employee is employed on a monthly rate of pay, the ordinary rate of pay shall be calculated according to the following formula:

$$\frac{\text{monthly rate of pay}}{26}.$$

(1B) Where an employee is employed on a weekly rate of pay, the ordinary rate of pay shall be calculated according to the following formula:

$$\frac{\text{weekly rate of pay}}{6}.$$

(1C) Where an employee is employed on a daily rate of pay or on piece rates, the ordinary rate of pay shall be calculated by dividing the total wages earned by the employee during the preceding wage period (excluding any payment made under an approved incentive payment scheme or for work done on any rest day, any gazetted public holiday granted by the employer under the contract of service or any day substituted for the gazetted public holiday) by the actual number of days the employee had worked during that wage period (excluding any rest day, any gazetted public holiday or any paid holiday substituted for the gazetted public holiday).

(1D) For the purposes of payment of sick leave under section 60F, the calculation of the ordinary rate of pay of an employee employed on a daily rate of pay or on piece rates under subsection (1C) shall take account only of the basic pay the employee receives or the rate per piece he is paid for work done in a day under the contract of service.

(2) An employer may adopt any method or formula other than the method or formula in subsection (1A), (1B) or (1C) for calculating the ordinary rate of pay of an employee; but the adoption of any other method or formula shall not result in a rate which is less than any of the rates provided in the subsections.

(3) For the purpose of this section, the Director General may, on application made to him in writing by an employer, approve in writing any incentive payment scheme as an approved incentive payment scheme.

PART XIIA

TERMINATION, LAY-OFF, AND RETIREMENT BENEFITS

Termination, lay-off and retirement benefits

60J. (1) The Minister may, by regulations made under this Act, provide for the entitlement of employees to, and for the payment by employers of—

(a) termination benefits;

(b) lay-off benefits;

(c) retirement benefits.

(2) Without prejudice to the generality of subsection (1), regulations made by virtue of subsection (1) may provide—

(a) for the definition of the expression "termination benefits", "lay-off benefits", or "retirement benefits", as the case may be, and for the circumstances in which the same shall be payable;

(b) for the application thereof to employees who were in employment under a contract of service immediately before the commencement of such regulations and who continue in such employment after the commencement thereof;

(c) for the application thereof to all employees generally or to any particular class, category or description of employees;

(d) for the exclusion from the application thereof of any particular employee or employees, or any class, category or description of employees;

(e) for the payment of different rates or amounts of termination benefits, lay-off benefits, or retirement benefits, as the case may be, to different classes, categories or descriptions of employees.

PART XIIB

EMPLOYMENT OF FOREIGN EMPLOYEES

Duty to furnish information and returns

60K. (1) An employer who employs a foreign employee shall, within fourteen days of the employment, furnish the nearest office of the Director General with the particulars of the foreign employee in such manner as may be determined by the Director General.

(2) An employer or any specified class or classes of employers, whenever required to do so by the Director General, shall furnish returns of particulars relating to the employment of a foreign employee in such manner and at such intervals as the Director General may direct.

Director General may inquire into complaint

60L. (1) The Director General may inquire into any complaint from a local employee that he is being discriminated against in

relation to a foreign employee, or from a foreign employee that he is being discriminated against in relation to a local employee, by his employer in respect of the terms and conditions of his employment; and the Director General may issue to the employer such directives as may be necessary or expedient to resolve the matter.

(2) An employer who fails to comply with any directive of the Director General issued under subsection (1) commits an offence.

Prohibition on termination of local for foreign employee

60M. No employer shall terminate the contract of service of a local employee for the purpose of employing a foreign employee.

Termination of employment by reason of redundancy

60N. Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

Permanent resident exempted from this Part

60O. For the purposes of this Part, the term "foreign employee" shall not include a foreign employee who is a permanent resident of Malaysia.

PART XIII

REGISTERS, RETURNS AND NOTICE BOARDS

Duty to keep registers

61. (1) Every employer shall prepare and keep one or more registers containing such information regarding each employee employed by him as may be prescribed by regulations made under this Act.

(2) Every such register shall be preserved for such period that every particular recorded therein shall be available for inspection for not less than six years after the recording thereof.

(3) Notwithstanding subsections (1) and (2), the Director General, on a written application by an employer, may permit the employer to keep the information required under subsection (1) in any other manner as may be approved by the Director General subject to such conditions as he may deem fit to impose.

Power to make regulations requiring information as to wages

62. The Minister may, by regulations made under this Act, provide that every employer or any specified class or classes of employers shall make available, in such form and at such intervals as may be prescribed, to every employee employed by him or them or to such class or classes of employees as may be specified such particulars as may be specified relating to the wages of such employees or any of them.

Duty to submit returns

63. (1) The Director General may, by notification in the *Gazette* or by notice in writing require every employer or such class or classes of employers as may be specified, and every owner or occupier of land upon which employees are employed or such class or classes of owners or occupiers as may be specified, to forward to the Director General at such times as he may direct a return or returns, in such form or forms as he may prescribe, giving such particulars relating to the employees of the employers, or to the employees employed on the land, as may be prescribed.

(2) Notwithstanding the provisions of this Act, the powers of the Director General under subsection (1) extends to every employee employed under a contract of service irrespective of the monthly wages of the employee.

Duty to give notice and other information

63A. (1) Any person or employer who proposes—

(a) to operate any agricultural or industrial undertaking or any establishment where any commerce, trade, profession or business of any description is carried on; or

(b) to take over or commence business in such undertaking or establishment, or

(c) to change the name or the location of such undertaking or establishment,

in which any employee is employed or is likely to be employed shall, within ninety days of such commencing of operation, taking over or commencing of business, or changing the name or the location of the undertaking or establishment, as the case may be, give notice in writing thereof to the nearest office of the Director of Labour having jurisdiction for the area in which that undertaking or establishment is located and furnish such office of the Director of Labour with—

(i) the registered name, address and nature of business of;

(ii) the name of the manager or person in charge of; and

(iii) a statement of the categories and total number of employees employed in,

that undertaking or establishment.

(1A) For the purposes of this section the expressions "commencing of operation" and "commencing of business" each means the date on which the undertaking or establishment is registered under any written law, or the date on which the first employee is employed in furtherance of the operation, commerce, trade or business of such undertaking or establishment, whichever is earlier.

(2) Where any undertaking or establishment as is referred to in subsection (1) is already in operation or has commenced business, such notice shall be given within ninety days of the coming into force of this section.

(3) Any person or employer who fails to give notice as required by this section or gives such notice containing any false particulars commits an offence.

Duty to display notice boards

64. The owner of any—

(a) estate of twenty hectares or more;

(b) mine;

(c) factory;

(d) trade, business or manufacturing activity carried on in any premises,

on or in which not less than five employees are employed shall, if such estate, mine, factory or premises is outside the limits of a City, Municipality, Town Council, Town Board or other local authority, cause to be erected where practicable in a conspicuous place at or adjacent to the place where the access road to such estate, mine, factory or premises joins the main road or a railway or river, as the case may be, a notice board on which shall be set out in the national language the name of such estate, mine, factory, trade, business or manufacturing activity and the address of the registered or other office thereof.

PART XIV

INSPECTION

Powers of inspection and inquiry

65. The Director General shall have power to enter without previous notice at all times any place of employment where he has reasonable grounds for believing that employees are employed and to inspect any building occupied or used for any purpose connected with such employment and to make any inquiry which he considers necessary in relation to any matter within the provisions of this Act.

Inspecting officer to notify presence

66. On the occasion of any inspection under this Part the Director General shall where practicable notify the owner or occupier of the place of employment, and the employer of any employees employed thereat, of his presence unless he has reasonable grounds for believing that such notification might be prejudicial to the performance of his duties.

Powers of inspecting officers

67. In the course of an inspection under this Part—

(a) the Director General may examine orally any person whom he believes to be acquainted with the facts and circumstances of any matter within the provisions of this Act;

(b) the person so examined shall be legally bound to answer truthfully all questions put to him;

(c) the Director General examining a person under paragraph *(a)* shall first inform that person of the provisions of paragraph *(b)*;

(d) a statement made by a person under this section shall, whenever possible, be reduced into writing and signed by the person making it or affixed with his thumb print, as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any correction he may wish; and

(e) any statement made and recorded under this section shall be admissible as evidence in any proceedings in Court.

(2) Notwithstanding subsection (1), a person examined under that subsection may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(3) The Director General, in addition to the powers conferred on him under subsection (1), may—

(a) require the employer to produce before him all or any of the employees employed by him together with any contracts of service, books of account of wages, registers and other documents relating to the employees or their employment and to answer such questions in respect o the employees or their employment as he may think fit to ask;

(b) copy or make extracts from the contracts of service, books of account of wages, registers and other documents relating to the employees or their employment;

(c) take possession of the contracts of service, books of account of wages, registers and other documents relating to the employees or their employment where, in his opinion—

(i) the inspection, copying or the making of extracts from the contracts of service, books of account of wages, registers or other documents cannot reasonably be undertaken without taking possession of them;

(ii) the contracts of service, books of account of wages, registers or other documents may be interfered with or destroyed unless he takes possession of them; or

(iii) the contracts of service, books of account of wages, registers or other documents may be needed as evidence in any legal proceedings under this Act.

(4) Notwithstanding paragraph (3)*(a)*, no employee shall be required to leave or to cease from performing any work on which he is engaged if his absence or cessation from such work would endanger life or property or seriously disrupt any operation being carried on by his employer.

Officers to be authorized by the Director General

68. An officer appointed under subsection 3(2) shall not exercise any of the powers of the Director General under this Part unless he is in possession of an official identification card signed by the Director General authorizing him to exercise such powers, and any officer so authorized shall produce his official identification card on demand to the owner or occupier of the place of employment and to the employer of any employees employed thereat.

PART XV

COMPLAINTS AND INQUIRES

Director General's power to inquire into complaints

69. (1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under—

(a) any term of the contract of service between such employee and his employer;

(b) any of the provisions of this Act or any subsidiary legislation made thereunder; or

(c) the provisions of the Wages Councils Act 1947 [*Act 195*] or any order made thereunder,

and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.

(2) The powers of the Director General under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Part, any claim by—

(i) an employee against any person liable under section 33;

(ii) a sub-contractor for labour against a contractor or subcontractor for any sum which the sub-contractor for labour claims to be due to him in respect of any labour provided by him under his contract with the contractor or sub-contractor; or

(iii) an employer against his employee in respect of indemnity due to such employer under subsection 13(1),

and to make such consequential orders as may be necessary to give effect to his decision.

(3) In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under subsection 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:

Provided that if the decision of the employer under paragraph 14(1)*(a)* is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity in lieu of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:

Provided further that the Director General shall not set aside any decision made by an employer under paragraph 14(1)*(c)* if such decision has not resulted in any loss in wages or other payments payable to the employee under his contract of service:

And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within sixty days from the date on which the decision under section 14 is communicated to him either orally or in writing by his employer.

(3A) An order made by the Director General for the payment of money under this section shall carry interest at the rate of eight per centum per annum, or at such other rate not exceeding eight per centum per annum as the Director General may direct, the interest to be calculated commencing on the thirty-first day from the date of the making of the order until the day the order is satisfied:

Provided that the Director General, on an application by an employer made within thirty days from the date of the making of the order, if he is satisfied that special circumstances exist, may determine any other date from which the interest is to be calculated.

(4) Any person who fails to comply with any decision or order of the Director General made under this section commits an offence and shall be liable, on conviction, to a fine not exceeding ten thousand ringgit; and shall also, in the case of a continuing offence, be liable to a daily fine not exceeding one hundred ringgit for each day the offence continues after conviction.

Limitation on power conferred by section 69

69A. Notwithstanding section 69, the Director General shall not inquire into, hear, decide or make any order in respect of any claim, dispute or purported dispute which, in accordance with the Industrial Relations Act 1967—

(a) is pending in any inquiry or proceedings under that Act;

(b) has been decided upon by the Minister under subsection 20(3) of that Act; or

(c) has been referred to, or is pending in any proceedings before, the Industrial Court.

Additional powers of Director General to inquire into complaints

69B. (1) Notwithstanding the provisions of this Act, the powers of the Director General under paragraph 69(1)*(a)* shall extend to employees whose wages per month exceed one thousand five hundred ringgit but does not exceed five thousand ringgit.

(2) For the purposes of this section, the term "wages" means wages as defined in section 2 but does not include any payment by way of commission, subsistence allowance or overtime payment.

(3) Save for Parts XV and XVI which shall apply with the necessary modifications, the other provisions of this Act shall not apply to the employees referred to in subsection (1).

Claims for indemnity for termination of contract without notice

69C. (1) In the exercise of his powers under subsection 69B(1),the Director General may inquire into and decide any claim concerning any indemnity due to the employer or employee where the contract of service is terminated by either party without notice, or if notice was given, without waiting for the expiry of that notice.

(2) The indemnity due to the employer or employee under subsection (1) shall be a sum equal to the amount of wages which would have accrued to the employee during the term of the notice or during the unexpired term of the notice.

Order of Director General may be in writing

69D. Notwithstanding subsection 69(1), an order of the Director General made under subsection 69B(1) or 69C(1) for the payment by or to the employer or employee of a sum of money as the Director General deems just, without any limitation of amount, may be made in writing.

Penalty for offence

69E. A person who fails to comply with a decision or an order of the Director General made under subsection 69B(1) or 69C(1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit; and shall also, in the case of a continuing offence, be liable to a daily fine not exceeding one hundred ringgit for each day the offence continues after conviction.

Procedure in Director General's inquiry

70. The procedure for disposing of questions arising under sections 69, 69B and 69C shall be as follows:

(a) the person complaining shall present to the Director General a written statement of his complaint and of the remedy which he seeks or he shall in person make a statement to the Director General of his complaint and of the remedy which he seeks;

(b) the Director General shall as soon as practicable thereafter examine the complainant on oath or affirmation and shall record the substance of the complainant's statement in his case book;

(c) the Director General may make such inquiry as he deems necessary to satisfy himself that the complaint discloses matters which in his opinion ought to be inquired into and may summon in the prescribed form the person complained against, or if it appears to him without any inquiry that the complaint discloses matters which ought to be inquired into he may forthwith summon the person complained against:

Provided that if the person complained against attends in person before the Director General it shall not be necessary to serve a summons upon him;

(d) when issuing a summons to a person complained against the Director General shall give such person notice of the nature of the complaint made against him and the name of the complainant and shall inform him of the date, time and place at which he is required to attend and shall inform him that he may bring with him any witnesses he may wish to call on his behalf and that he may apply to the Director General for summonses to such persons to appear as witnesses on his behalf;

(e) when the Director General issues a summons to a person complained against he shall inform the complainant of the date, time and place mentioned therein and shall instruct the complainant to bring with him any witnesses he may wish to call on his behalf and may, on the request of the complainant and subject to any conditions as he may deem fit to impose, issue summonses to such witnesses to appear on behalf of the complainant;

(f) when at any time before or during an inquiry the Director General has reason to believe that there are any persons whose financial interests are likely to be affected by such decision as he may give on completion of the inquiry or who he has reason to believe have knowledge of the matters in issue or can give any evidence relevant thereto he may summon any or all of such persons;

(g) the Director General shall, at the time and place appointed, examine on oath or affirmation those persons summoned or otherwise present whose evidence he deems material to the matters in issue and shall then give his decision on the matters in issue;

(h) if the person complained against or any person whose financial interests the Director General has reason to believe are likely to be affected and who has been duly summoned to attend at the time and place appointed in the summons shall fail so to attend the Director General may hear and decide the complaint in the absence of such person notwithstanding that the interests of such person may be prejudicially affected by his decision;

(i) in order to enable a court to enforce the decision of the Director General, the Director General shall embody his decision in an order in such form as may be prescribed.

Director General's record of inquiry

71. The Director General shall keep a case book in which he shall record the evidence of persons summoned or otherwise present and his decision and order in each matter in issue before him and shall authenticate the same by attaching his signature thereto and the record in such case book shall be sufficient evidence of the giving of any decision; and any person interested in such decision or order shall be entitled to a copy thereof free of charge and to a copy of the record upon payment of the prescribed fee.

Joinder of several complaints in one complaint

72. Where it appears to the Director General in any proceedings under this Part that there are more employees than one having a common cause for complaint against the same employer or person liable, it shall not be necessary for each such employee to make a separate complaint under this Part, but the Director General may, if he thinks fit, permit one or more of them to make a complaint and to attend and act on behalf of and generally to represent the others, and the Director General may proceed to a decision on the joint complaint or complaints of each and all such employees:

Provided that, where the Director General is of opinion that the interests of the employer or person liable are likely to be prejudiced

by the non-attendance of any employee, he shall require the personal attendance of such employee.

Prohibitory order by Director General to third party

73. (1) Whenever the Director General shall have made an order under section 69, 69B or 69C against any employer or any person liable for the payment of any sum of money to any employee or sub-contractor for labour and the Director General has reason to believe that there exists between such employer or person liable and any other person a contract in the course of the performance of which the employee or sub-contractor performed the work in respect of which the order was made, the Director General may summon such other person and, if after enquiry he is satisfied that such a contract exists, may make an order in the prescribed form prohibiting him from paying to the employer or person liable and requiring him to pay to the Director General any money (not exceeding the amount found due to such employee or subcontractor for labour) admitted by him to be owing to the employer or person liable in respect of such contract:

Provided that where such other person admits to the Director General in writing that money is owing by him under such contract to the employer or person liable he need not be summoned to attend before the Director General and the Director General may make such order in his absence:

Provided further that where such other person is liable as a principal under subsection 33(1) to pay any wages due by the employer or person liable and where the money admitted by him to be owing to the employer or person liable is not sufficient to pay the whole of such wages nothing in this subsection shall relieve him of his liability for the balance of such wages up to the amount for which he is liable under proviso *(b)* to the said subsection.

(2) The payment of any money in pursuance of an order under subsection (1) shall be a discharge and payment up to the amount so paid of money due to the employer or person liable under the contract.

No fees for summons: service of summons

74. (1) No fee shall be charged by the Director General in respect of any summons issued by him under this Part.

(2) Any such summons may be served by a Sessions Court or a Magistrates' Court on behalf of the Director General, or in such other manner, and by such person, as the Director General may deem fit.

Enforcement of Director General's order by Sessions Court

75. Where any order has been made by the Director General under this Part, and the same has not been complied with by the person to whom it is addressed, the Director General may send a certified copy thereof to the Registrar of a Sessions Court, or to the Court of a First Class Magistrate, having jurisdiction in the place to which the order relates or in the place where the order was made, and the said Registrar or Court, as the case may be, shall cause the said copy to be recorded and thereupon the said order shall for all purposes be enforceable as a judgment of the Sessions Court, or of the Court of the First Class Magistrate, as the case may be, notwithstanding that the same may in respect of amount or value be in excess of the ordinary jurisdiction of the said Court:

Provided that no sale of immovable property shall for the purposes of such enforcement be ordered except by the High Court.

Submission by Director General to High Court on point of law

76. (1) In any proceedings under this Part the Director General may, if he thinks fit, submit any question of law for the decision of a Judge of the High Court and if he does so he shall decide the proceedings in conformity with such decision.

(2) An appeal shall lie to the Court of Appeal from any decision of a Judge under subsection (1).

Appeal against Director General's order to High Court

77. (1) If any person whose financial interests are affected is dissatisfied with the decision or order of the Director General under section 69, 69B, 69C or 73 such person may appeal to the High Court.

(2) Subject to any rules made under section 4 of the Subordinate Court Rules Act 1955 [*Act 55*], the procedure in an appeal to the

High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require.

Employee's remedy when employer about to abscond

78. (1) If any employee complains to a Magistrate that he has reasonable grounds for believing that his employer, in order to evade payment of his wages, is about to abscond, the Magistrate may summon such employer and direct him to show cause why he should not be required to give security by bond to remain in Malaysia until such wages are paid; and if, after hearing the evidence of such employer, the Magistrate decides that such bond shall be given the Magistrate may order such employer to give security by bond in such sum as to the Magistrate seems reasonable, that he will not leave Malaysia until the Magistrate is satisfied that all the just claims of such employee against him for wages have been paid or settled.

(2) If the employer fails to comply with the terms of such order to give security, he shall be detained in prison until arrangements have been made to the satisfaction of the Magistrate for settling the claims of such employee:

Provided that—

(a) such employer shall be released at any time by the committing Magistrate on security being furnished or on his paying either the whole or such part as to the Magistrate seems reasonable of all just claims of such employee against him for wages or on the filing of a petition in bankruptcy by or against him; and

(b) in no case shall the period of such detention exceed three months.

(3) The bond to be given by an employer shall be a personal bond with one or more sureties, and the penalty for breach of the bond shall be fixed with due regard to the circumstances of the case and the means of the employer.

(4) If on or after a complaint by any employee under subsection (1) it appears to the Magistrate that there is good ground for believing that the employer complained against has absconded or is absconding or is about to abscond, the Magistrate may issue a warrant for the arrest of such employer and such employer shall

be detained in custody pending the hearing of the complaint unless he finds good and sufficient security to the satisfaction of the Magistrate for his appearance to answer the complaint.

(5) For the purposes of this section a certificate purporting to be signed by the Director General and issued to the Magistrate to the effect that wages claimed have been paid or settled shall be sufficient evidence of the payment or settlement thereof.

Powers of Director General to investigate possible offences under this Act

79. (1) Whenever the Director General has reasonable grounds for suspecting that an offence under this Act has been committed, or wishes to inquire into any matter dealt with by this Act or into any dispute as to such matter or into the death of or injury to an employee (not the subject of an investigation under the *Electricity Act 1949 [*Act 116*], or the Factories and Machinery Act 1967, or any written law relating to mining for the time being in force in Malaysia or any part thereof) or into any matter connected with the keeping of registers and other documents, or whenever any person complains to the Director General of any breach of any provision of this Act, the Director General may summon any person who he has reason to believe can give information respecting such offence or the subject matter of such inquiry or complaint.

(2) If upon inquiry as aforesaid the Director General is of opinion that an offence has been committed, he may institute such criminal proceedings as he may deem necessary.

(3) A summons issued under this section shall be in such form as may be prescribed.

Examination on summons by the Director General

80. Any person summoned by the Director General under this Part shall be legally bound to attend at the time and place specified in the summons and to answer truthfully all questions which the Director General may put to him.

*NOTE—The Electricity Act 1949 [*Act 116*] has since been repealed by the Electricity Supply Act 1990 [*Act 447*]–*see* Act 447, subsection 56(1).

Right of employee to appear before Director General

81. No employer shall prevent or attempt to prevent any employee from appearing before the Director General in pursuance of this Part.

PART XVI

PROCEDURE

Service of summons issued under Part XV

82. (1) Any summons issued by the Director General under Part XV may be served on any person by delivering or tendering to him a copy thereof signed by the Director General:

Provided that—

(a) if the person to be summoned cannot be found and has an agent empowered to accept service of the summons on his behalf, service on such agent shall be sufficient;

(b) if the person to be summoned cannot be found and has no agent empowered to accept service of the summons on his behalf, service on any adult male member, not being a domestic servant, of the family of the person to be summoned who is residing with him shall be deemed good and sufficient service.

(2) When such summons is addressed to a corporation, it may be served—

(a) by leaving a copy thereof, signed by the Director General, at the registered office, if any, of the corporation;

(b) by sending such copy by registered post in a letter addressed to the corporation at its principal office, whether such office be situated within Malaysia or elsewhere; or

(c) by delivering such copy to any director, secretary or other principal officer of the corporation.

(3) When such summons is addressed to a firm, it may be served—

(a) by leaving a copy thereof, signed by the Director General, at the principal place at which the partnership business is carried on;

(b) by sending such copy by registered post in a letter addressed

to the firm at its principal office, whether such office be situated within Malaysia or elsewhere; or

(c) by delivering such copy to any one or more of the partners in such firm or to any person having, at the time of service, the control or management of the partnership business at the principal place at which the partnership business is carried on within Malaysia.

(4) When the person serving such summons delivers or tenders a copy of the summons to the person to be summoned or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

(5) If—

(a) such person refuses or is unable to sign the acknowledgement; or

(b) the serving officer cannot find the person to be summoned and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom the service can be made,

the serving officer shall affix a copy of the summons on the outer door of the house in which the person to be summoned ordinarily resides and then return the original to the Director General with a return endorsed thereon or annexed thereto stating that he has so affixed the copy and the circumstances under which he did so.

(6) The person serving such summons shall, in all cases in which the summons has been served under subsection (4) endorse or annex, or cause to be endorsed or annexed, on or to the original summons a return stating the time when and the manner in which the summons was served.

(7) When a summons is returned under subsection (5), the Director General shall, if the return under that subsection has not been verified by the affidavit of the person serving it, and may, if it has been so verified, examine such person on affirmation touching the manner of service and may make such further inquiry in the matter as he thinks fit and shall either declare that the summons has been duly served or order such service as he thinks fit.

(8) When the Director General is satisfied that there is reason to believe that the person to be summoned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way, the Director General may order the summons to be served by affixing a copy thereof in some conspicuous place in or near the office of the Director General and also upon some conspicuous part of the house in which the person to be summoned is known to have last resided, or in such other manner as the Director General thinks fit, or may order the substitution for service of notice by advertisement in the *Gazette* and in such local newspaper or newspapers as the Director General may think fit.

(9) The service substituted by order of the Director General shall be as effectual as if it had been made personally on the person to be summoned.

(10) Whenever service is substituted by order of the Director General, the Director General shall fix such time for the appearance of the person to be summoned as he may deem fit.

(11) Any order or notice in writing made and issued by the Director General in the exercise of the powers conferred by this Act may be served as if the same were a summons, and the provisions of this section, other than subsection (10) thereof, shall apply to the service of such order or notice.

Power to make reciprocal provisions between Malaysia and Singapore for the service, execution and enforcement of summonses, warrants and orders

83. If the Minister is satisfied that arrangements have been made by or under any legislation in force in the Republic of Singapore for the service, execution or enforcement in the Republic of Singapore of summonses, warrants or orders issued or made under this Act he may, by regulations made under this Act—

(a) prescribe the procedure for sending such summonses, warrants and orders to the Republic of Singapore for service, execution or enforcement, and specify the conditions under which any such summons shall be deemed to have been served; and

(b) make reciprocal provisions for the service, execution or enforcement in Malaysia of summonses, warrants or orders issued or made in the Republic of Singapore under any corresponding or similar legislation in force therein.

Jurisdiction

84. Notwithstanding the provisions of the Subordinate Courts Act 1948 [*Act 92*], all penalties for offences against this Act may be had and recovered in the Sessions Court or the Court of a First Class Magistrate on complaint by any person aggrieved or by the Director General or any person authorized by him in writing in that behalf.

Prosecution

85. No prosecution shall be instituted for an offence under this Act or any regulation made under this Act without the consent in writing of the Public Prosecutor.

Right of audience

85A. The Director General, or any officer authorized in writing by the Director General, shall have the right to appear and be heard before a Magistrate Court or a Sessions Court in any civil proceedings under or arising out of this Act, or any regulation made under this Act; and such right shall include the right to appear and represent an employee in any such proceedings.

Saving clause as to civil jurisdiction of courts

86. Nothing in this Act shall be construed as preventing any employer or employee from enforcing his civil rights and remedies for any breach or non-performance of a contract of service by any suit in court in any case in which proceedings have not been instituted before the Director General under section 69 or, if instituted, have been withdrawn.

Power of court imposing fine

87. When under this Act any court imposes a fine or enforces the payment of any sum secured by bond, the court may, if it thinks fit, direct that the whole or any part of such fine or sum when recovered be paid to the party complaining.

Effect of imprisonment

88. From and after the determination of any imprisonment suffered under this Act for non-payment of the amount of any fine, together with the costs assessed and directed to be paid by any order of court, the amount so ordered shall be deemed to be liquidated and discharged, and the order shall be annulled.

Incapacity of Director General hearing inquiry

89. Where the Director General has, for the purpose of inquiring into any matter under this Act, taken down any evidence or made any memorandum and is prevented by death, transfer or other cause from concluding such inquiry, any successor to such Director General or other officer may deal with such evidence or memorandum as if he had taken it down or made it and proceed with the inquiry from the stage at which such Director General left it.

Officers acting under Act deemed public servants

90. For the purposes of this Act the Director General and any other officer appointed or acting under this Act shall be deemed to be public servants within the meaning of the Penal Code [*Act 574*].

PART XVII

OFFENCES AND PENALTIES

Under Parts III and IV

91. Any employer who—

(*a*) fails to pay the wages or indemnity due to any employee within the time prescribed in sections 19, 20 and 21;

(*b*) makes to any employee any advance of wages in excess of that permitted under section 22; or

(*c*) makes deductions from the wages of an employee other than such deductions as are authorized by section 24,

commits an offence.

Under Part V

92. Any employer who—

(*a*) pays wages, imposes any conditions in a contract of service or makes any deduction or receives any payment in contravention of section 25, 25A, 26, 27 or 28; or

(*b*) provides any employee as part of the terms of his contract of service with any amenity or service, or any intoxicating liquor in contravention of section 29,

(c) *(Deleted by Act A1026)*,

commits an offence.

Under Part VIII

93. An employer of a female employee commits an offence if the female employee is employed contrary to section 34, 35 or 36.

Under Part IX

94. Any employer who—

(*a*) fails to grant maternity leave to a female employee employed by him and entitled thereto under Part IX;

(*b*) fails to pay the maternity allowance to a female employee employed by him and entitled thereto under Part IX, or to her nominee, or to her personal legal representative;

(*c*) fails to pay maternity allowance in the manner prescribed in section 38; or

(*d*) contravenes section 42 or 44,

commits an offence, and shall also—

(*aa*) in the event of a conviction for an offence under paragraph *(a)*, be ordered by the court before which he is convicted to pay to the female employee concerned the maternity allowance to which she may be entitled under Part IX in respect of every day on which the female employee had worked during the eligible period referred to in paragraph 37(1)*(a)*, the payment so ordered being in addition to the

wages payable to her, and the amount of maternity allowance so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court; and

(*bb*) in the event of a conviction for an offence under paragraph *(b),* be ordered by the court before which he is convicted to pay to the female employee concerned the maternity allowance to which she is entitled under Part IX, and the amount of maternity allowance so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court.

95. *(Deleted by *Act No. 40 of 1966).*

96. *(Deleted by *Act No. 40 of 1966).*

Under Part XIII

97. An employer who—

(*a*) fails to keep a register required under section 61, or to preserve the register for a period of not less than six years;

(*b*) destroys, alters or mutilates the register referred to in paragraph *(a),* or causes or permits the register to be destroyed, altered or mutilated;

(*c*) fails to comply with any regulations made under section 62;

(*d*) fails, without reasonable cause (proof of which shall lie on him), to forward to the Director General such returns as are prescribed under section 63 or forwards any of the returns knowing that it contains any false particulars; or

(e) being an owner of any estate, mine or factory to which section 64 applies, fails to comply with the requirements of the section,

commits an offence.

**NOTE*—The Children and Young Persons (Employment) Act 1966 [*40 of 1966*] has since been revised as the Children and Young Persons (Employment)Act 1966 [*Act 350*].

Under Part XIV

98. Any person who—

(a) refuses the Director General exercising his powers under Part XIV, access to any premises or part thereof;

(b) assaults, obstructs, hinders or delays the Director General in effecting any entrance into any premises or part thereof which he is entitled to effect;

(c) furnishes the Director General as true, information which he knows or has reason to believe to be false; or

(d) fails to produce, or conceals or attempts to conceal any document which he may be required to produce under Part XIV, or hinders or obstructs the Director General in effecting possession of the documents,

commits an offence.

Under Part XV

99. Any employer who prevents or attempts to prevent any employee from appearing before the Director General under Part XV commits an offence.

General penalty

99A. Any person who commits any offence under, or contravenes any provision of, this Act, or any regulations, order, or other subsidiary legislation whatsoever made thereunder, in respect of which no penalty is provided, shall be liable, on conviction, to a fine not exceeding ten thousand ringgit.

Penalties for failure or non-compliance in relation to rest days, overtime, holidays, annual leave, and sick leave

100. (1) Any employer who fails to pay to any of his employees wages for work done by his employee on a rest day or pays wages less than the rate provided under section 60 commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the wages due

for work done on every rest day at the rate provided under section 60, and the amount of such wages shall be recoverable as if it were a fine imposed by such court.

(2) Any employer who fails to pay to any of his employees any overtime wages as provided under this Act or any subsidiary legislation made thereunder commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the overtime wages due, and the amount of overtime wages so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court.

(3) Any employer who fails to pay to any of his employees wages as provided under section 60D, commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the wages due for any work done on any such holiday at the rate provided under section 60D, and the amount of wages so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court.

(4) Any employer who fails to grant to any of his employees annual leave or any part thereof as provided under section 60E commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the ordinary rate of pay in respect of every day of such leave not so granted, the payment so ordered being in addition to the wages payable to the employee for the work done on any such day, and the amount so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court.

(5) Any employer who fails to grant sick leave, or fails to pay sick leave pay, to any of his employees, as provided under section 60F commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the sick leave pay for every day of such sick leave at the rate provided under section 60F, and the amount so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court.

Offence in connection with inquiry or inspection

101. In any inquiry, investigation, entry or inspection made by the Director General, or by any officer lawfully exercising the powers of the Director General under this Act, any person committing with respect to such inquiry, investigation, entry or inspection any offence described in Chapter X of the Penal Code shall on conviction be punished as prescribed in such Chapter.

Power to compound offences

101A. (1) The Director General or a Deputy Director General appointed under paragraph 3(2)*(a)* may, with the consent in writing of the Public Prosecutor, compound any offence committed by a person which is punishable under this Act or any regulation made under this Act.

(2) The Director General or the Deputy Director General may, in a case where he deems it fit and proper so to do, compound an offence by making a written offer to the person who has committed the offence to compound the offence on payment to the Director General or the Deputy Director General, as the case may be, within such time as may be specified in the offer, of such sum of money, as may be specified in the offer, which shall not exceed fifty per centum of the amount of the maximum fine (including the daily fine, if any, in the case of a continuing offence) to which the person would have been liable if he had been convicted of the offence.

(3) An offer under subsection (2) may be made at any time after the offence has been committed, but before any prosecution for it has been instituted, and where the amount specified in the offer is not paid within the time specified in the offer, or within such extended period as the Director General or the Deputy Director General may grant, prosecution for the offence may be instituted at any time thereafter against the person to whom the offer was made.

(4) Where an offence has been compounded under sub-section (2)—

(a) no prosecution shall thereafter be instituted in respect of the offence against the person to whom the offer to compound was made; and

(b) any book, register or document seized in connection with the offence shall be released immediately.

(5) Any moneys paid to the Director General or a Deputy Director General pursuant to subsection (2) shall be paid into and form part of the Federal Consolidated Fund.

PART XVIII

REGULATIONS

Regulations

102. (1) The Minister may from time to time make such regulations as may be necessary or expedient for giving full effect to the provisions of this Act, or for the further, better or more convenient implementation of the provisions of this Act.

(2) Without prejudice to the generality of the foregoing the Minister may make regulations—

(a) limiting the powers of officers appointed under subsection 3(2);

(b) prescribing the conditions under which female employees may work at night;

(c) prescribing the rate of the maternity allowance to which female employees shall be entitled during the eligible period;

(d) prescribing the maximum period during which notice of dismissal given by her employer to a female employee who is absent from her work as a result of illness certified by a registered medical practitioner to arise out of her pregnancy or confinement shall not expire;

(da) (*Omitted*).

(e) (*Deleted by *Act No. 40 of 1966*).

**NOTE*—The Children and Young Persons (Employment) Act 1966 [*40 of 1966*] has since been revised as the Children and Young Persons (Employment) Act 1966 [*Act 350*].

(f) prescribing the times which employees shall be entitled to take off from work for meals and which they shall be entitled or required to take off for rest;

(g) prescribing the form of any register, summons or order required to be kept, issued or made under this Act;

(h) prescribing the procedure for sending summonses, warrants and orders issued or made under this Act in Malaysia for service or execution in the Republic of Singapore, and making provisions for the service or execution in Malaysia of summonses, warrants and orders issued or made in the Republic of Singapore;

(i) prescribing fees to be paid for filing of claims under section 69 and for copies of notes of evidence recorded under Part XV;

(j) prescribing penalties for failure to comply with or contravention of any regulation made under this section.

PART XIX

REPEAL AND SAVING

Repeal and saving

103. The written laws specified in the first and second columns of the Second Schedule are hereby repealed to the extent set out in the third column of the said Schedule:

Provided that any appointment made under such written law hereby repealed shall be deemed to be made under this Act:

Provided further that references to any provision of any written law hereby repealed in any other written law or in any contract or other instrument in writing shall, in so far as such provision is not inconsistent with the corresponding provision of this Act, be construed as references to such corresponding provision.

FIRST SCHEDULE

[Subsection 2(1)]

Employee	Provision of the Act not applicable
1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed one thousand five hundred 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: Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period;	
(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 and who—	Part XII
(a) is not an officer certificated under the Merchant Shipping Acts of the United Kingdom as amended from time to time;	
(b) is not the holder of a local certificate as defined in Part VII of the Merchant Shipping Ordinance 1952 [*F.M. 70/1952*]; or	
(c) has not entered into an agreement under Part III of the Merchant Shipping Ordinance 1952; or	

Employee	Provision of the Act not applicable
(5) he is engaged as a domestic servant.	Sections 12, 14, 16, 22, 61 and 64, and Parts IX, XII and XIIA

3. For the purpose of this Schedule "wages" means wages as defined in section 2, but shall not include any payment by way of commissions, subsistence allowance and overtime payment.

SECOND SCHEDULE

[Section 103]

(1)	(2)	(3)
S.S Cap. 69	The Labour Ordinance	The whole, except section 1, the definitions under section 2 of "Agreement", "Employer", "Health Officer", "Labourer", "Lines", "Local Authority", "Place of employment", sections 3, 4, 6, 27, 28, 33, 39, 43, 50, 111–113, 123, 124, 143, 145–163, 185–188, 194–196, 198–201, paragraphs 202*(a)*, *(b)*, *(c)* and *(e)*, sections 203– 206, 222–228, 230– 233, 235–237, paragraph 239(1)*(e)–(i)*, *(k)*, subsections (2)–(4).
F.M.S. Cap. 154	The Labour Code	The whole, except section1, the definitions under section 2 of "agreement", "Court", "employer", "Health Officer", "labourer", "lines", "place of employment", "State Medical and Health Officer", sections 3, 4, 70, 71, 76, 82, 87, 91, 117–119, 129, 130, 159–166, 168–191, 197–199, 201–203, paragraphs 204*(a)*, *(b)*, *(c)* and *(e)*, sections 205–212, 220–222, 224–227, 229, 230, 231, 233, 234, 236, subparagraphs 238*(i)(h)–(k)*, (ii)–(iv).
Johor Enactment No. 82	The Labour Code	The whole, except section 1, the definitions under section 2 of "agreement", "Court", "employer", "Health Officer", "labourer", "lines", "place of employment", sections 3, 4, 5, 71, 72, 77, 83, 88, 92, 119–121, 131, 132, 149– 156, 158–181, 187–189, 191–193, paragraphs 194*(a)*,

(1)	(2)	(3)
		(b), *(c)* and *(e)*, sections 195–202, 210– 212, 214–217, 219–220, 222, 223, 225, subparagraphs 227*(i)(h)–(k)*, (ii)–(v).
Kelantan Enactment No. 2 of 1936	The Labour Code, 1936	The whole, except sections 1 and 2, the definitions under section 3 of "Agreement", "Colony", "Court", "Employer", "Health Officer", "Labourer", "Lines", "Medical Practitioner", "Place of employment", sections 4, 5, 47, 48, 53, 59, 64, 68, 95–97, 107, 124–131, 133–156, 162– 164, 166–168, paragraphs 169*(a)*, *(b)*, *(c)* and *(e)*, sections 170–179, 187–189, 191–194, 196– 198, 200, 201, 203, subparagraphs 205(i)*(c)–(f)*, (ii).
Kedah Enactment No. 2 of 1345	Enactment No. 55 (Labour)	The whole, except section 1, the definitions under section 2 of "Agreement", "Court", "Employer", "Labourer", "Lines", "Health Officer", "Place of employment", sections 3, 4, 45, 46, 51, 57, 62, 66, 94–96, 106, 107, 124–132, 134–157, 163–165, 167–169, paragraphs 170*(a)*, *(b)*, *(c)* and *(e)*, sections 171– 173, 181–183, 185–188, 190, 191, 193, 194, 196, paragraphs 198(1)*(b)–(e)*, subsection (2).
Trengganu Enactment No. 60 of 1356	The Labour Code	The whole, except sections 1 and 2, the definitions under section 3 of "agreement", "Court", "employer", "Health Officer", "labourer", "lines", "Medical Officer", "medical practitioner", "place of employment", sections 4, 5, 47, 48, 53, 59, 64, 68, 95–97, 107, 124–131, 133–156, 162–164, 166–168, paragraphs 169*(a)*, *(b)*, *(c)* and *(e)*, sections 170–179, 187–189, 191–194, 196–198, 200, 201, 203, subparagraphs 205(i)*(c)–(f)*, (ii).
Perlis Enactment No. 3 of 1345	The Labour Code, 1345	The whole, except sections 1-3, the definitions under section 5 of "Agreement", "Court", "Employer", "Labourer", "Lines", "Health Officer", "Place of employment", sections 6, 7, 47, 48, 53, 59, 64, 67, 95–97, 109, 110, 127–134, 136–159, 165–167, 169–171, paragraphs 172*(a)*, *(b)*, *(c)* and *(e)*, sections 173–175, 183–185, 187–190, 192, 194, 196, 197, 199, subparagraphs 201(i)*(b)–(e)*, (ii).

LAWS OF MALAYSIA

Act 265

EMPLOYMENT ACT 1955

LIST OF AMENDMENTS

Amending law	Short title	In force from
Ord. 43/1956	Employment (Amendment) Ordinance 1956	20-12-1956
L.N. 332/1958	Federal Constitution (Modification of Laws) (Ordinances and Proclamations) Order 1958	13-11-1958
Act 9/1966	Employment (Amendment) Act 1966	27-01-1966
Act 40/1966	Children and Young Persons (Employment) Act 1966	01-10-1966
Act 37/1967	Employment (Amendment) Act 1967	21-08-1967
P.U. (B) 324/1970	Notification under s. 3 of the Titles of Office Ordinance 1949	01-01-1971
Act A91	Employment (Amendment) Act 1971	01-10-1971
Act A360	Employment (Amendment) Act 1976	01-01-1977
Act A497	Employment (Amendment) Act 1980	01-10-1980
Act A610	Employment (Amendment) Act 1984	01-03-1985
Act A716	Employment (Amendment) Act 1989	10-02-1989
P.U. (A) 326/1995	Employment (Amendment of First Schedule) Order 1995	01-10-1995
Act A1026	Employment (Amendment) Act 1998	01-08-1998
Act A1085	Employment (Amendment) Act 2000	05-10-2000
P.U. (A) 400/2000	Federal Territory of Labuan (Extension and Modification of Employment Act) Order 2000	01-11-2000
P.U. (A) 279/2002	Revision of Laws (Rectification of Employment Act 1955) Order 2002	12-07-2002
P.U. (A) 380/2002	Revision of Laws (Rectification of Employment Act 1955) Order 2002	13-09-2002

LAWS OF MALAYSIA

Act 265

EMPLOYMENT ACT 1955

LIST OF SECTIONS AMENDED

Section	Amending authority	In force from
2	Ord. 43/1956	20-12-1956
	Act A91	01-10-1971
	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
2A	Act A360	01-01-1977
	Act A1026	01-08-1998
2B	Act A360	01-01-1977
3	Act A360	01-01-1977
	Act A716	10-02-1989
	Act A1026	01-08-1998
6	Act A360	01-01-1977
7	Act A91	01-10-1971
	Act A360	01-01-1977
	Act A497	01-10-1980
7A	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
7B	Act A497	01-10-1980
12	Act A91	01-10-1971
	Act A497	01-10-1980
13	Act A91	01-10-1971
	Act A497	01-10-1980
14	Act A91	01-10-1971
	Act A360	01-10-1977

Section	Amending authority	In force from
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
15	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
16	Ord. 43/1956	20-12-1956
17	Act A360	01-10-1977
17A	Ord. 43/1956	20-12-1956
	Act A360	01-10-1977
18	Act A1026	01-08-1998
20	Act A497	01-10-1980
21	Act A360	01-10-1977
	Act A497	01-10-1980
22	Act A497	01-10-1980
	Act A1026	01-08-1998
24	Act A360	01-10-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
25	Act A91	01-10-1971
25A	Act A91	01-10-1971
	Act A716	10-02-1989
	Act A1026	01-08-1998
27	Act A497	01-10-1980
29	Act A360	01-01-1977
	Act A497	01-10-1980
30	Act A1026	01-08-1998
31	Act A716	10-02-1989
	Act A1026	01-08-1998
	Act A1085	05-10-2000
32	Act A1085	05-10-2000

Section	Amending authority	In force from
33	Act A360	01-10-1977
	Act A1026	01-08-1998
34	Ord. 43/1956	20-12-1956
	Act A360	01-10-1977
	Act A716	10-02-1989
36	Act A360	01-10-1977
37	Ord. 43/1956	20-12-1956
	Act A860	01-10-1977
	Act A497	01-10-1980
	Act A610	01-03-1985
	Act A1026	01-08-1998
38	Act A360	01-10-1977
39	Ord. 43/1956	20-12-1956
	Act A360	01-10-1977
	Act A497	01-10-1980
40	Ord. 43/1956	20-12-1956
	Act A360	01-10-1977
	Act A1026	01-08-1998
42	Act A360	01-10-1977
	Act A497	01-10-1980
43	Act A360	01-10-1977
44	Act A360	01-10-1977
44A	Act A497	01-10-1980
52	Ord. 43/1956	20-12-1956
53	Ord. 43/1956	20-12-1956
56	Ord. 43/1956	20-12-1956
57	Ord. 43/1956	20-12-1956
58	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
58A	Act A91	01-10-1971

Section	Amending authority	In force from
59	Ord. 43/1956	20-11-1958
	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
60	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
60A	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
	Act A1085	05-10-2000
60B	Act A91	01-10-1971
60C	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
60D	Act A91	01-10-1971
	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
	Act A1085	05-10-2000
60E	Act A91	01-10-1971
	Act A360	01-01-1997
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
60F	Act A91	01-10-1971
	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
60G	Act A91	01-10-1971
	Act A360	01-01-1977
60H	Act A360	01-10-1977

Section	Amending authority	In force from
60I	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
	Act A1085	05-10-2000
60J	Act A91	01-10-1971
	Act A360	01-10-1977
	Act A497	01-10-1980
60K-60D	Act A1026	01-08-1998
61	Act 9/1966	27-01-1966
	Act 37/1967	21-08-1967
	Act A360	01-01-1977
	Act A1026	01-08-1998
63	Act A1026	01-08-1998
	Act A1085	05-10-2000
63A	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
64	Act A360	01-01-1977
	Act A1026	01-08-1998
65	Act A360	01-01-1977
67	Act A716	10-02-1989
	Act A1026	01-08-1998
69	Act 37/1967	21-08-1967
	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
69A	Act A360	01-01-1977
	Act A716	10-02-1989
	Act A1026	01-08-1998
69B	Act A1026	01-08-1998
69C	Act A1026	01-08-1998
	Act A1085	05-10-2000
69D	Act A1026	01-08-1998
69E	Act A1026	01-08-1998

Section	Amending authority	In force from
70	Act A1026	01-08-1998
73	Ord. 43/1956	20-12-1956
	Act A1026	01-08-1988
75	Act A497	01-10-1980
76	Act A716	10-02-1989
	Act A1026	01-08-1998
77	Act A1026	01-08-1998
79	Ord. 43/1956	20-12-1956
85	Act 37/1967	21-08-1967
	Act A1026	01-08-1998
85A	Act A1026	01-08-1998
86	Act 37/1967	21-08-1967
Part XVII	Act A360	01-01-1977
91	Act A1026	01-08-1998
92	Act A497	01-10-1980
	Act A1026	01-08-1998
93	Act A360	01-01-1977
	Act A1026	01-08-1998
94	Act A497	01-10-1980
	Act A1026	01-08-1998
95	Ord. 43/1956	20-12-1956
	Act 40/1966	01-10-1966
96	Ord. 43/1956	20-12-1956
	Act 40/1966	01-10-1966
97	Ord. 43/1956	20-12-1956
	Act 37/1967	21-08-1967
	Act A497	01-10-1980
	Act A1026	01-08-1998
98	Act A716	10-02-1989
	Act A1026	01-08-1998

Section	Amending authority	In force from
99	Act A1026	01-08-1998
99A	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A1026	01-08-1998
100	Act 40/1966	01-10-1966
	Act A497	01-10-1980
	Act A1026	01-08-1998
101A	Act A1026	01-08-1998
102	Ord. 43/1956	20-12-1956
	Act 40/1966	01-10-1966
	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A716	10-02-1989
	Act A1026	01-08-1998
First Schedule	Ord. 43/1956	20-12-1956
	Act A360	01-01-1977
	Act A497	01-10-1980
	Act A610	01-03-1985
	Act A716	01-02-1989
	P.U. (A) 326/1995	01-10-1995
Second Schedule	Ord. 43/1956	20-12-1956

DICETAK OLEH
PERCETAKAN NASIONAL MALAYSIA BERHAD,
KUALA LUMPUR
PNMB BAGI PIHAK DAN DENGAN PERINTAH KERAJAAN MALAYSIA

Chapter:	57	EMPLOYMENT ORDINANCE	Gazette Number	Version Date

		Long title		30/06/1997

To provide for the protection of the wages of employees, to regulate general conditions of employment and employment agencies, and for matters connected therewith.

(Amended 5 of 1970 s. 2)

[27 September 1968]

(Originally 38 of 1968)

Part:	I	PRELIMINARY		30/06/1997

Section:	1	Short title		30/06/1997

This Ordinance may be cited as the Employment Ordinance.

Section:	2	Interpretation	L.N. 203 of 2006	01/12/2006

(1) In this Ordinance, unless the context otherwise requires- (Amended 48 of 1984 s. 2)

"alternative holiday" (另定假日) means a holiday granted or to be granted under section 39(2) and (2A); (Added 39 of 1973 s. 2. Amended 137 of 1997 s. 2)

"annual leave" (年假) means the annual leave provided for in Part VIIIA; (Added 53 of 1977 s. 2)

"annual leave pay" (年假薪酬) means the annual leave pay required by this Ordinance to be paid in respect of a period of annual leave and any sum required to be paid under section 41D; (Added 53 of 1977 s. 2)

"business" (業務) includes a trade or profession and any like activity carried on by a person; (Added 76 of 1985 s. 2)

"cease" (停止), in relation to Part VA, Part VB, the Third Schedule and the Sixth Schedule, means cease either permanently or temporarily and from whatsoever cause, and "diminish" (縮減) has a corresponding meaning; (Added 76 of 1985 s. 2)

"child" (兒童) means a person under the age of 15 years; (Replaced 41 of 1990 s. 2)

"Commissioner" (處長) means the Commissioner for Labour and includes a Deputy Commissioner for Labour and an Assistant Commissioner for Labour; (Amended L.N. 142 of 1974; 61 of 1993 s. 2)

"confinement" (分娩) means the delivery of a child; (Added 5 of 1970 s. 3)

"contract of employment" (僱傭合約) means any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee and also a contract of apprenticeship;

"dangerous drug" (危險藥物) has the meaning assigned to it in the Dangerous Drugs Ordinance (Cap 134);

"Director" (署長) means the Director of Health; (Added 39 of 1973 s. 2. Amended L.N. 76 of 1989)

"domestic servant" (家庭傭工) includes a garden servant, chauffeur and boat-boy and any other personal servant of a like class; (Added 76 of 1985 s. 2)

"employee" (僱員) means an employee to whom, by virtue of section 4, this Ordinance applies;

"employer" (僱主) means any person who has entered into a contract of employment to employ any other person as an employee and the duly authorized agent, manager or factor of such first mentioned person;

"holiday" (假日) means-

(a) a statutory holiday;
(b) an alternative holiday;
(c) a substituted holiday; or
(d) a day on which an employee is required by section 39(4) to be granted a holiday; (Added 39 of 1973 s.

2. Amended 137 of 1997 s. 2)

"holiday pay" (假日薪酬) means the holiday pay provided for by section 40; (Added 39 of 1973 s. 2)

"issue" (後嗣) means a child whether under the age of majority or not of a deceased employee and-

(a) includes a step-child;

(b) includes a child adopted by the employee, but (subject to paragraph (ba)) does not include a child of the employee adopted by another person; (Amended 28 of 2004 s. 35)

(ba) includes a child of the employee adopted by another person under an adoption order granted under paragraph (c) of section 5(1) of the Adoption Ordinance (Cap 290) where the employee is the parent referred to in that paragraph; (Added 28 of 2004 s. 35)

(c) does not include an illegitimate child; and

(d) where polygamy lawfully subsists, does not include a child who is not an adopted child of the employee unless his mother was, at the time of his birth, the employee's principal wife-

(i) in case the relevant marriage or, where appropriate, each such marriage constitutes a customary marriage for the purposes of the Marriage Reform Ordinance (Cap 178), according to Chinese law and custom; or

(ii) in any other case, according to the law which, as regards the relevant marriage or marriages, was the proper personal law of the employee; (Added 52 of 1988 s. 2)

"Labour Tribunal" (勞資裁處) means the Labour Tribunal established by section 3 of the Labour Tribunal Ordinance (Cap 25); (Added 76 of 1985 s. 2)

"lock-out" (閉廠) has the meaning assigned to it by section 2 of the Trade Unions Ordinance (Cap 332); (Added 76 of 1985 s. 2)

"long service payment" (長期服務金) means the long service payment payable by an employer to an employee under section 31R or to a person entitled to such payment under section 31RA; (Added 76 of 1985 s. 2. Amended 41 of 1990 s. 2)

"mandatory provident fund scheme" (強制性公積金計劃) means a provident fund scheme registered under the Mandatory Provident Fund Schemes Ordinance (Cap 485); (Added 4 of 1998 s. 5)

"maternity leave" (產假) means absence from work, in accordance with the provisions of Part III, by a female employee because of her pregnancy or confinement; (Added 5 of 1970 s. 3)

"maternity leave pay" (產假薪酬) means pay in respect of maternity leave payable to a female employee under section 14; (Added 22 of 1981 s. 2)

"Minor Employment Claims Adjudication Board" (小額薪酬索償仲裁處) means the Minor Employment Claims Adjudication Board established by section 3 of the Minor Employment Claims Adjudication Board Ordinance (Cap 453); (Added 61 of 1994 s. 49)

"miscarriage" (流產) means the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy; (Added 22 of 1981 s. 2)

"occupational retirement scheme" (職業退休計劃) means a scheme or arrangement under which benefits, based on length of service, are payable in respect of employees on retirement, death, incapacity or termination of service, but does not include a mandatory provident fund scheme; (Added 4 of 1998 s. 5)

"outworker" (外發工) means a person to whom articles or materials are, for payment or reward, given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the articles or materials; (Added 76 of 1985 s. 2)

"paid sickness day" (有薪病假日) means a sickness day in respect of which an employee is entitled to be paid sickness allowance; (Added 39 of 1973 s. 2)

"recognized scheme of medical treatment" (認可醫療計劃) means a scheme of medical treatment operated by an employer and approved by the Director for the purposes of this Ordinance under section 34(1); (Added 39 of 1973 s. 2)

"registered Chinese medicine practitioner" (註冊中醫) has the meaning assigned to it by section 2 of the Chinese Medicine Ordinance (Cap 549); (Added 16 of 2006 s. 2)

"registered dentist" (註冊牙醫) has the same meaning as in section 2(1) of the Dentists Registration Ordinance (Cap 156); (Added 5 of 1995 s. 2)

"registered medical practitioner" (註冊醫生) has the same meaning as in section 2 of the Medical Registration Ordinance (Cap 161); (Added 61 of 1993 s. 2)

"relevant date" (有關日期), in relation to the termination of employment of an employee, means-

(a) where the employee's contract of employment is terminated by notice in accordance with section 6, the date on which that notice expires;

(b) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date up to which such wages are calculated;

(c) where the employee terminates his contract of employment without notice or payment in lieu in accordance with section 10, the date on which termination takes effect;

(d) where the employee is employed under a contract for a fixed term and that term expires, the date on which that term expires;

(e) where a continuous contract of employment specifies an age of retirement and the employee retires at that age, the date of retirement;

(f) where the employee dies, the date of his death; and

(g) where the employee's contract of employment is terminated other than in accordance with the provisions of this Ordinance, the date of termination; (Replaced 52 of 1988 s. 2)

"relevant mandatory provident fund scheme benefit" (有關強制性公積金計劃權益), in relation to an employee, means the accrued benefits of the employee held by the approved trustee of a mandatory provident fund scheme in respect of the employee, but does not include any part of the benefit that is attributable to the contributions paid to the scheme by the employee; (Added 4 of 1998 s. 5)

"relevant occupational retirement scheme benefit" (有關職業退休計劃利益), in relation to an employee, means a benefit payable under an occupational retirement scheme on the retirement, death, incapacity or termination of service of the employee, but does not include any part of the benefit that is attributable to the contributions paid to the scheme by the employee; (Added 4 of 1998 s. 5)

"renewal" (續訂) includes extension, and any reference to renewing a contract shall be construed accordingly; (Added 76 of 1985 s. 2)

"rest day" (休息日) means a continuous period of not less than 24 hours during which an employee is entitled under Part IV to abstain from working for his employer; (Added 23 of 1970 s. 2. Amended 71 of 1976 s. 2)

"severance payment" (遣散費) means the severance payment payable by an employer to an employee under section 31B(1); (Added 76 of 1985 s. 2)

"sickness allowance" (疾病津貼) means the sickness allowance provided for by section 33; (Added 39 of 1973 s. 2)

"sickness day" (病假日) means a day on which an employee is absent from his work by reason of his being unfit therefor on account of injury or sickness; (Added 39 of 1973 s. 2)

"spouse" (配偶) means, in relation to a married employee, the person to whom the employee is lawfully married; (Added 52 of 1988 s. 2)

"statutory holiday" (法定假日) means a holiday specified as a statutory holiday in section 39(1); (Added 39 of 1973 s. 2. Amended 71 of 1976 s. 2; 137 of 1997 s. 2)

"strike" (罷工) has the meaning assigned to it by section 2 of the Trade Unions Ordinance (Cap 332); (Added 76 of 1985 s. 2)

"substituted holiday" (代替假日) means a holiday granted or to be granted under section 39(3); (Added 39 of 1973 s. 2. Amended 137 of 1997 s. 2)

"tips and service charges" (小費及服務費), in relation to wages, means sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are-

(a) paid or derived from payments made by persons other than the employer; and

(b) recognized by the employer as part of the employee's wages; (Added 48 of 1984 s. 2)

"wage period" (工資期) means the period in respect of which wages are payable under a contract of employment or under section 22;

"wages" (工資) subject to subsections (2) and (3), means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, but does not include- (Amended 48 of

1984 s. 2; 76 of 1985 s. 2; 74 of 1997 s. 3)

(a) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;

(b) any contribution paid by the employer on his own account to any retirement scheme; (Amended 41 of 1990 s. 2)

(c) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer; (Replaced 74 of 1997 s. 3)

(ca) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer; (Added 74 of 1997 s. 3)

(cb) any travelling allowance which is of a non-recurrent nature; (Added 74 of 1997 s. 3)

(cc) any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment; (Added 74 of 1997 s. 3)

(cd) the value of any travelling concession; (Added 74 of 1997 s. 3)

(d) any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;

(da) any end of year payment, or any proportion thereof, which is payable under Part IIA; (Added 48 of 1984 s. 2)

(e) any gratuity payable on completion or termination of a contract of employment; or

(f) any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer;

"week" (星期), for the purposes of section 11 and Parts VA and VB, means the period between midnight on Saturday night and midnight on the succeeding Saturday night; (Added 76 of 1985 s. 2. Amended 41 of 1990 s. 2)

"young person" (青年) means a person who has attained the age of 15 years but not the age of 18 years. (Replaced 41 of 1990 s. 2)

(Amended 4 of 1998 s. 5)

(2) No account of overtime pay shall be taken in calculating the wages of an employee for the purpose of-

(a) any end of year payment under Part IIA;

(b) any maternity leave pay under Part III;

(c) any severance payment under Part VA;

(ca) any long service payment under Part VB; (Added 76 of 1985 s. 2)

(d) any sickness allowance under Part VII;

(e) any holiday pay under Part VIII; or

(f) any annual leave pay under Part VIIIA,

unless the overtime pay is of a constant character or the monthly average of the overtime pay over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the respective dates specified in subsections (2A) and (2B) is equivalent to or exceeds 20% of his average monthly wages during the same period. (Added 48 of 1984 s. 2. Amended 74 of 1997 s. 3)

(2A) In the calculation of the monthly average of the overtime pay under subsection (2), the date specified for the purpose of that subsection is-

(a) in relation to any end of year payment under Part IIA, the expiry date of the payment period;

(b) in relation to any maternity leave pay under Part III, the commencement date of maternity leave;

(c) in relation to any severance payment under Part VA and any long service payment under Part VB-

(i) subject to subparagraph (ii), the relevant date;

(ii) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect;

(d) in relation to any sickness allowance under Part VII, the first sickness day;

(e) in relation to any holiday pay under Part VIII, the first day of the holiday; and

(f) in relation to any annual leave pay under Part VIIIA, the first day of the annual leave. (Added 74 of 1997 s. 3)

(2B) Notwithstanding anything contained in subsection (2A), the date specified for the purpose of subsection (2) in relation to any termination of employment is-

(a) subject to paragraph (b), the relevant date;

(b) where the employee's contract of employment is terminated by payment in lieu of notice in accordance with section 7, the date on which the termination takes effect. (Added 74 of 1997 s. 3)

(3) Where an employee who has been employed under a continuous contract-

(a) is dismissed; or

(b) is laid off within the meaning of section 31E; or

(c) terminates his contract of employment in circumstances specified in section 10(aa) or 31R(1)(b); or

(d) dies in circumstances specified in section 31RA(1),

and for any period of that contract he had not been paid his wages, or his full wages, by reason of any leave taken by him in accordance with the provisions of this Ordinance or the Employees' Compensation Ordinance (Cap 282) or with the agreement of his employer, or by reason of his not being provided by his employer with work on any normal working day, then the employee shall be deemed, for the purposes of Parts VA and VB and notwithstanding any other provision of this Ordinance, to have been paid, for that period, his full wages under, and at the frequency required by, that contract as if he had continued in the normal course in the employment to which that contract relates, and any calculation under section 31G or 31V shall be made accordingly. (Replaced 62 of 1992 s. 2)

Section:	3	Meaning of continuous contract and onus of proof thereof		30/06/1997

(1) In this Ordinance, "continuous contract" (連續性合約) means a contract of employment under which an employee is deemed by virtue of the provisions of the First Schedule to be in continuous employment.

(2) In any dispute as to whether a contract of employment is a continuous contract the onus of proving that it is not a continuous contract shall be on the employer.

(Added 5 of 1970 s. 4. Amended 71 of 1970 s. 2)

Section:	4	Application of Ordinance		30/06/1997

(1) Subject to subsection (2) and section 69, this Ordinance applies to every employee engaged under a contract of employment, to an employer of such employee and to a contract of employment between such employer and employee.

(2) Subject to Part IVA, this Ordinance does not apply- (Amended 51 of 1974 s. 2)

(a) (Repealed 41 of 1990 s. 3)

(b) to a person who is a member of the family of the proprietor of the business in which he is employed and who dwells in the same dwelling as the proprietor;

(c) to an employee as defined in the Contracts for Employment Outside Hong Kong Ordinance (Cap 78); (Amended 33 of 1992 s. 15)

(d) to a person who is serving under a crew agreement within the meaning of the Merchant Shipping (Seafarers) Ordinance (Cap 478), or on board a ship which is not registered in Hong Kong. (Replaced 44 of 1995 s. 143)

(e) (Repealed 8 of 1976 s. 49)

(2A) This Ordinance shall not apply to contracts of apprenticeship registered under the Apprenticeship Ordinance (Cap 47) except to the extent provided in that Ordinance. (Added 8 of 1976 s. 49)

(3) For the avoidance of doubt it is hereby declared that the provisions of section 5(3) shall not apply to any contract of employment made before 1 April 1965.

Section:	4A	Authorization of public officers		30/06/1997

The Commissioner may in writing authorize any public officer or class of public officer to exercise or perform any or all of the powers, functions or duties conferred or imposed on the Commissioner under this Ordinance.

(Added 10 of 1980 s. 2)

Section:	4B	Chief Executive may give directions	56 of 2000	01/07/1997

Remarks:
Adaptation amendments retroactively made - see 56 of 2000 s. 3

(1) The Chief Executive may give such directions as he thinks fit, either generally or in any particular case, with respect to the exercise or performance by any public officer of any powers, functions or duties under this

Ordinance.

(2) A public officer shall, in the exercise or performance of his powers, functions or duties under this Ordinance, comply with any directions given by the Chief Executive under subsection (1).

(Added 10 of 1980 s. 2. Amended 56 of 2000 s. 3)

Part:	II	CONTRACTS OF EMPLOYMENT		30/06/1997

Section:	5	Duration of contracts of employment		30/06/1997

(1) Every contract of employment, which is a continuous contract, shall, in the absence of any express agreement to the contrary, be deemed to be a contract for 1 month renewable from month to month.

(2) Notwithstanding that it is proved that a contract of employment is for a period in excess of 1 month such contract shall be deemed to be a contract for 1 month renewable from month to month unless the contract is evidenced in writing signed by each of the parties thereto.

(3) Notwithstanding any other provision of this section, a contract of employment entered into by a manual worker for a period of 6 months or more or for a number of working days equivalent to 6 months or more shall be deemed to be a contract for 1 month renewable from month to month.

(4) Where any contract of employment for a period in excess of 1 month is deemed by virtue of the provisions of subsection (2) or (3) to be a contract from month to month the wages per month shall be such proportion of the total wages agreed under the contract as 1 month bears to the agreed duration of the contract.

Section:	6	Termination of contract by notice	7 of 2001	12/04/2001

(1) Subject to subsections (2), (2A), (2B), (3) and (3A) and sections 15 and 33, either party to a contract of employment may at any time terminate the contract by giving to the other party notice, orally or in writing, of his intention to do so. (Amended 5 of 1970 s. 5; 57 of 1983 s. 2; 48 of 1984 s. 4; 55 of 1987 s. 2; 103 of 1995 s. 2; 7 of 2001 s. 2)

(2) The length of notice required to terminate a contract of employment shall be-

(a) in the case of a contract which is deemed by virtue of the provisions of section 5 to be a contract for 1 month renewable from month to month and which does not make provision for the length of notice required to terminate the contract, not less than 1 month; (Amended 44 of 1971 s. 2)

(b) in the case of a contract which is deemed by virtue of the provisions of section 5 to be a contract for 1 month renewable from month to month and which makes provision for the length of notice required to terminate the contract, the agreed period, but not less than 7 days; (Added 44 of 1971 s. 2)

(c) in every other case, the agreed period, but not less than 7 days in the case of a continuous contract.

(2A) Without prejudice to section 41D, annual leave to which an employee is entitled under section 41AA shall not be included under subsection (2) in the length of notice required to terminate a contract of employment. (Added 48 of 1984 s. 4. Amended 53 of 1990 s. 5)

(2B) The period of maternity leave to which a female employee is entitled under section 12 shall not be included under subsection (2) in the length of notice required to terminate a contract of employment. (Added 55 of 1987 s. 2)

(3) Where in any contract of employment, whether in writing or oral, it has been expressly agreed that the employment is on probation and the contract does not make provision for the length of notice required for its termination such contract may be terminated- (Amended 44 of 1971 s. 2)

(a) by either party at any time during the first month of such employment without notice or payment in lieu;

(b) by either party at any time after the first month of such employment by giving to the other party notice of not less than 7 days. (Amended 48 of 1984 s. 4)

(3A) Where in any contract of employment, whether in writing or oral, it has been expressly agreed that the employment is on probation and the contract makes provision for the length of notice required for its termination such contract may be terminated-

(a) notwithstanding the length of notice provided for in the contract, by either party at any time during the first month of such employment without notice or payment in lieu;

(b) by either party at any time after the first month of such employment by giving to the other party notice of the agreed period, but not less than 7 days. (Added 48 of 1984 s. 4)

(4) For the purposes of this section the expression "month" (月) means a period of time commencing on the day when notice of termination of a contract of employment is given or when employment begins, as the case may be, and ending at the end of the day before the corresponding date in the following month or, where there is no corresponding date in the following month or where the commencing day is the last day of a month, at the end of the last day of the following month.

Section:	7	Termination of contract by payment in lieu of notice	L.N. 94 of 2007	13/07/2007

(1) For the purposes of subsections (1A), (1B) and (1C), "wages" (工資) includes any sum paid by an employer in respect of—

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of his employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282). (Replaced 7 of 2007 s. 3)

(1A) Subject to sections 15 and 33, either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party—

(a) where the length of notice required to terminate the contract under section 6 is a period expressed in days or weeks, a sum calculated by multiplying the number of days in the period for which wages would normally be payable to the employee by the daily average of the wages earned by the employee during—

(i) the period of 12 months immediately before the date on which the party terminating the contract gives notice of the termination to the other party ("date of notification"); or

(ii) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of notification, the shorter period; or

(b) where the length of notice required to terminate the contract under section 6 is a period expressed in months, a sum calculated by multiplying the number of months required by the monthly average of the wages earned by the employee during—

(i) the period of 12 months immediately before the date of notification; or

(ii) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of notification, the shorter period. (Added 7 of 2007 s. 3)

(1B) In calculating the daily average or monthly average of the wages earned by an employee during the period of 12 months or the shorter period—

(a) any period therein for which the employee was not paid his wages or full wages by reason of—

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded. (Added 7 of 2007 s. 3)

(1C) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (1) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (1B). (Added 7 of 2007 s. 3)

(1D) Despite subsection (1A), if for any reason it is impracticable to calculate the daily average or monthly average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of notification, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of notification. (Added 7 of 2007 s. 3)

(2) Either party to a contract of employment, having given proper notice in accordance with section 6, may at

any time thereafter terminate the contract by agreeing to pay to the other party such proportion of the sum referred to in subsection (1) as is proportionate to the period between the termination of the contract and the time when the notice given would have expired. (Amended 44 of 1971 s. 3)

(3) (Repealed 7 of 2007 s. 3)

(4) For the purposes of this section, and notwithstanding any other provision of this Ordinance, the term "wages" (工資)—

(a) includes overtime pay of a constant character or the monthly average of which over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the date on which the termination takes effect is equivalent to or exceeds 20% of his monthly average wages during the same period;

(b) except as provided in paragraph (a), shall be deemed not to include overtime pay. (Replaced 74 of 1997 s. 4)

Section:	8	Saving of rights		30/06/1997

Nothing in section 6 or 7 shall be taken-

(a) to prevent either party to a contract of employment from waiving, at the time notice is required to be given for the purposes of section 6(2), (3) or (3A), his right to notice or to payment in lieu of notice; (Amended 48 of 1984 s. 5)

(b) to affect the right of a party to a contract of employment to terminate the contract without notice or payment in lieu under section 9, 10 or 11(2).

Section:	8A	Damages for wrongful termination of contract	L.N. 94 of 2007	13/07/2007

(1) Without prejudice to section 9, 10 or 11(2), where a contract of employment is terminated otherwise than in accordance with section 6 or 7, a sum equal to the amount of wages that would have been payable had the contract been terminated in accordance with section 7 shall be payable by the party terminating the contract to the other party.

(2) Without prejudice to section 9, 10 or 11(2), where a party to a contract of employment, having given proper notice in accordance with section 6 thereafter terminates the contract before the expiry of the period of notice otherwise than in accordance with section 7, such proportion of the sum referred to in subsection (1) as is proportionate to the period between the termination of the contract and the time when the notice given would have expired shall be payable by the party terminating the contract to the other party.

(3) For the purpose of calculating the sum referred to in subsection (1), where the party terminating the contract has not given notice of the termination to the other party, in calculating the daily average or monthly average of the wages earned by the employee in accordance with section 7, the reference in that section to the date on which the party terminating the contract gives notice of the termination to the other party or to the date of notification is to be construed as a reference to the date of termination of the contract. (Added 7 of 2007 s. 4)

(Added 14 of 1975 s. 2. Amended 7 of 2007 s. 4)

Section:	9	Termination of contract without notice by employer	51 of 2000	07/07/2000

(1) An employer may terminate a contract of employment without notice or payment in lieu- (Amended 51 of 2000 s. 2)

(a) if an employee, in relation to his employment-

(i) wilfully disobeys a lawful and reasonable order;

(ii) misconducts himself, such conduct being inconsistent with the due and faithful discharge of his duties;

(iii) is guilty of fraud or dishonesty; or

(iv) is habitually neglectful in his duties; or

(b) on any other ground on which he would be entitled to terminate the contract without notice at common law.

(2) The fact that an employee takes part in a strike does not entitle his employer to terminate under subsection (1) the employee's contract of employment. (Added 51 of 2000 s. 2)

Section:	10	Termination of contract without notice by employee	L.N. 203 of 2006	01/12/2006

An employee may terminate his contract of employment without notice or payment in lieu-

(a) if he reasonably fears physical danger by violence or disease such as was not contemplated by his contract of employment expressly or by necessary implication;

(aa) if-

(i) he has been employed under the contract for not less than 5 years; and (Amended 41 of 1990 s. 4; 62 of 1992 s. 3)

(ii) by a certificate in the form specified by the Commissioner under section 49 and issued by a registered medical practitioner or registered Chinese medicine practitioner, he is certified as being permanently unfit for a particular type of work specified in the certificate for a reason or reasons stated therein; and (Amended 68 of 1990 s. 24; 61 of 1993 s. 3; 16 of 2006 s. 3)

(iii) he is engaged in that type of work under the contract; (Added 52 of 1988 s. 4)

(b) if he is subjected to ill-treatment by the employer; or

(c) on any other ground on which he would be entitled to terminate the contract without notice at common law.

Section:	10A	Deemed termination of contract under section 7		30/06/1997

(1) Without prejudice to the rights of an employee under common law, an employee may terminate his contract of employment without notice or payment in lieu of notice if any wages are not paid within one month from the day on which they become due to him under section 23.

(2) Where a contract of employment is terminated under subsection (1), the contract shall be deemed to be terminated by the employer in accordance with section 7 and the employer shall be deemed to have agreed to pay to the employee the sum specified in section 7.

(Added 74 of 1997 s. 5)

Section:	11	Suspension from employment in certain cases		30/06/1997

(1) Notwithstanding any other provision of this Ordinance or of any other law, an employer may without notice or payment in lieu suspend from employment any employee for a period not exceeding 14 days-

(a) as a disciplinary measure for any reason for which the employer could have terminated the contract of employment under section 9;

(b) pending a decision by the employer as to whether or not he will exercise his right to terminate the contract of employment under section 9; or

(c) pending the outcome of any criminal proceedings against the employee arising out of or connected with his employment:

Provided that where such criminal proceedings are not concluded within the period of 14 days such suspension may be extended till the conclusion of the criminal proceedings.

(2) An employee who is suspended from employment under subsection (1) may at any time during the period of his suspension, notwithstanding sections 6 and 7, terminate his contract of employment without notice or payment in lieu.

(3) Without prejudice to the provisions of subsection (1), an employer may lay-off an employee for such periods as are expressly agreed in, or may be implied from, the contract of employment.

(4) Notwithstanding subsection (3), the period of lay-off shall in no case exceed-

(a) a total of half of the total number of normal working days in any period of 4 consecutive weeks; or

(b) a total of one-third of the total number of normal working days in any period of 26 consecutive weeks. (Added 41 of 1990 s. 5)

Part:	IIA	END OF YEAR PAYMENT	L.N. 94 of 2007	13/07/2007

(Part IIA added 48 of 1984 s. 6)

Section:	11A	Interpretation	L.N. 94 of 2007	13/07/2007

(1) In this Part, unless the context otherwise requires— (Amended 7 of 2007 s. 5)

"end of year payment" (年終酬金) means any annual payment (whether described as "thirteenth month payment", "fourteenth month payment", "double pay", "end of year bonus" or otherwise) or annual bonus of a contractual nature, but does not include any annual payment or any annual bonus, or any proportion thereof, which is of a gratuitous nature or which is payable only at the discretion of the employer; (Amended 74 of 1997 s. 6)

"lunar year" (農歷年) means a Chinese lunar year ending immediately before a Lunar New Year's Day;

"payment period" (酬金期) has the meaning assigned to it by section 11C;

"proportion of the end of year payment" (部分年終酬金) means the proportion of the end of year payment calculated in accordance with section 11F.

(Amended 7 of 2007 s. 5)

(2) For the purposes of subsections (3), (4) and (5), "wages" (工資) includes any sum paid by an employer in respect of—

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of his employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282). (Added 7 of 2007 s. 5)

(3) In this Part, a reference to the full month's wages of an employee is to be construed as a reference to the monthly average of the wages earned by the employee during—

(a) the period of 12 months immediately before the day on which the end of year payment becomes due to the employee under section 11E(1) or (2) or the day on which the proportion thereof becomes due to the employee under section 11F(3) or (4) (as appropriate) ("due day"); or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the due day, the shorter period. (Added 7 of 2007 s. 5)

(4) In calculating the monthly average of the wages earned by an employee during the period of 12 months or the shorter period—

(a) any period therein for which the employee was not paid his wages or full wages by reason of—

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded. (Added 7 of 2007 s. 5)

(5) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (2) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (4). (Added 7 of 2007 s. 5)

(6) Despite subsection (3), if for any reason it is impracticable to calculate the monthly average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the due day, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the due day. (Added 7 of 2007 s. 5)

Section:	11AA	Presumption		30/06/1997

(1) It shall be presumed that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless there is a written term or condition in the contract of employment to the contrary.

(2) For the avoidance of doubt, it is hereby declared that subsection (1) shall not apply to any contract of employment made before the commencement of this section.

(Added 74 of 1997 s. 7)

Section:	11B	Application of Part IIA		30/06/1997

(1) Subject to any agreement to the contrary and to subsection (2), this Part shall apply to an employee employed under a continuous contract if an end of year payment is payable by the employer to that employee by virtue of a term or condition (whether written or oral, express or implied) of the contract of employment.

(2) In the case of an employee to whom this Part applies, any term or condition of the contract of employment which purports to prevent the payment under section 11F of a proportion of the end of year payment shall be void.

Section:	11C	Payment period		30/06/1997

The payment period in respect of which an end of year payment is payable under this Part shall be-

(a) the payment period specified in that behalf in the contract of employment; or

(b) if a payment period is not so specified, a lunar year.

Section:	11D	Amount of end of year payment		30/06/1997

An end of year payment payable to an employee to whom this Part applies who has been employed by the same employer for the whole of a payment period shall be-

(a) the end of year payment specified in that behalf in the contract of employment; or

(b) if an end of year payment is not so specified, a sum equivalent to a full month's wages of the employee.

Section:	11E	Time of payment of end of year payment		30/06/1997

(1) An end of year payment payable to an employee to whom this Part applies in respect of a payment period shall become due to the employee-

(a) subject to subsection (2), on the day specified in that behalf in the contract of employment; or

(b) if a day is not so specified, on the last day of the payment period,

and shall be paid as soon as is practicable but in any case not later than 7 days after that day but nothing in this section shall be construed as preventing the payment of the end of year payment at any time before that day.

(2) Where the contract of employment of an employee to whom this Part applies who has been employed for the whole of a payment period is terminated after the expiry of the payment period but before the end of year payment becomes due on the day specified in the contract, the end of year payment shall, notwithstanding that a day is so specified, become due to the employee-

(a) on the day on which the contract of employment terminates; or

(b) in the case of an end of year payment that falls to be calculated by reference to any profits of the employer, on the day on which the profits of the employer are ascertained,

and shall be paid as soon as is practicable but in any case not later than 7 days after that day.

Section:	11F	Proportion of the end of year payment	7 of 2001	12/04/2001

(1) Subject to subsections (1A) and (1B), where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period- (Amended 74 of 1997 s. 8; 7 of 2001 s. 4)

(a) the contract of employment is terminated-

(i) at any time during the payment period; or

(ii) on the expiry of the payment period; or (Replaced 7 of 2001 s. 4)

(b) the employee continues to be employed by the employer after the expiry of the payment period,

the employee shall be paid a proportion, calculated in accordance with subsection (2), of the end of year payment that would have been payable under this Part if he had been employed by the same employer for the whole of the payment

period.

(1A) If it is a term or condition of a contract of employment that the employee is on probation, the period of such probation or a period of 3 months, whichever is the shorter, shall be excluded from the calculation of the 3 months' period under subsection (1). (Added 74 of 1997 s. 8)

(1B) Subsection (1)(a) shall not apply where a contract of employment is terminated-

(a) by the employee (except such a termination which is in accordance with section 10); or

(b) in accordance with section 9. (Added 7 of 2001 s. 4)

(2) The proportion of the end of year payment payable under subsection (1) shall be-

(a) the proportion specified in that behalf in the contract of employment; or

(b) if a proportion is not so specified, the sum which bears the same proportion to a full month's wages of the employee as his period of service under the contract of employment in the payment period bears to that payment period.

(3) The proportion of the end of year payment payable under subsection (1) shall become due to the employee-

(a) under paragraph (a) of that subsection-

(i) on the day on which the contract of employment terminates; or

(ii) in the case of a proportion of an end of year payment that falls to be calculated by reference to any profits of the employer, on the day on which the profits of the employer are ascertained; or

(b) under paragraph (b) of that subsection-

(i) subject to subsection (4), on the day specified in the contract of employment as the day on which the end of year payment becomes due; or

(ii) if a day is not so specified, on the last day of the payment period,

and shall be paid as soon as is practicable but in any case not later than 7 days after that day but nothing in this subsection shall be construed as preventing the payment of the proportion of the end of year payment at any time before that day.

(4) Where the contract of employment of an employee to whom subsection (1)(b) applies is terminated after the expiry of the payment period but before the end of year payment becomes due on the day specified in the contract, the proportion of the end of year payment payable under subsection (1) shall, notwithstanding that a day is so specified, become due to the employee-

(a) on the day on which the contract of employment terminates; or

(b) in the case of a proportion of an end of year payment that falls to be calculated by reference to any profits of the employer, on the day on which the profits of the employer are ascertained,

and shall be paid as soon as is practicable but in any case not later than 7 days after that day.

Part:	III	MATERNITY PROTECTION		30/06/1997

(Part III added 5 of 1970 s. 7)

Section:	12A	Interpretation		30/06/1997

In this Part, unless the context otherwise requires-

"pregnant employee" (懷孕僱員) means a female employee whose pregnancy has been confirmed by a medical certificate.

(Added 73 of 1997 s. 2)

Section:	12	Maternity leave		30/06/1997

(1) A female employee employed under a continuous contract immediately before taking any leave under this Part shall be entitled to maternity leave under this Part. (Replaced 73 of 1997 s. 3)

(2) Maternity leave shall be the aggregate of-

(a) a continuous period of 10 weeks from and inclusive of-

(i) the date of commencement of maternity leave as determined under section 12AA; or

(ii) the actual date of confinement, if confinement occurs before the date of commencement mentioned in subparagraph (i);

(b) a further period equal to the number of days, if any, beginning on the day after the expected date of

confinement up to and including the actual date of confinement; such further period of leave is to be taken immediately following the period of leave under paragraph (a); and

(c) a further period, not exceeding 4 weeks, on grounds of illness or disability arising out of the pregnancy or confinement. (Replaced 73 of 1997 s. 3)

(3) The period of maternity leave under subsection (2)(c) may be taken-

(a) wholly or in part immediately before the period mentioned in subsection (2)(a);

(b) wholly or in part immediately after the period mentioned in subsection (2)(a) or (b), as the case may be. (Replaced 73 of 1997 s. 3)

(4) Before taking leave, a female employee who intends to take any period of maternity leave under subsection (2) shall give notice of her pregnancy and of her intention to take maternity leave to her employer after her pregnancy has been confirmed by a medical certificate; the presentation of a medical certificate to the employer by the female employee confirming her pregnancy shall be a notice for the purpose of this subsection. (Replaced 73 of 1997 s. 3)

(4A) A female employee who has given notice under subsection (4) shall, if her pregnancy ceases otherwise than by reason of confinement, give notice of such cessation of pregnancy to her employer as soon as is reasonably practicable. (Added 55 of 1987 s. 3)

(5) If her confinement takes place-

(a) before notice under subsection (4) is given; or

(b) after notice under subsection (4) is given but before the commencement of the period of maternity leave under subsection (2)(a)(i),

the female employee shall, within 7 days of her confinement, give notice to her employer of the date of confinement and of her intention to take any period of maternity leave under subsection (2)(a). (Replaced 73 of 1997 s. 3)

(6) A female employee who gives notice under subsection (4) shall, if so required by her employer, produce a medical certificate specifying the expected date of confinement. (Replaced 73 of 1997 s. 3)

(7) A female employee who gives notice under subsection (5) shall, if so required by her employer, produce a medical certificate specifying the date of confinement. (Replaced 73 of 1997 s. 3)

(7A) A female employee who may take any period of maternity leave under subsection (2)(b) shall, if so required by her employer, produce a medical certificate specifying the date of confinement. (Added 73 of 1997 s. 3)

(8) A female employee who intends to take any period of maternity leave under subsection (2)(c) shall give notice to that effect to her employer and shall, if so required by her employer, produce a medical certificate certifying as to the illness or disability. (Amended 73 of 1997 s. 3)

(9) (Repealed 73 of 1997 s. 3)

(10) The continuity of employment of a female employee shall not be treated as broken by her taking maternity leave. (Added 22 of 1981 s. 3)

(11) For the avoidance of doubt it is declared that maternity leave is, and shall be granted, in addition to annual leave to which a female employee is entitled under this Ordinance and that any rest day or holiday that falls due during maternity leave shall be counted as part of the maternity leave and shall not give rise to any entitlement to an additional or other rest day or holiday or to holiday pay in the case of a female employee who is paid maternity leave pay for that holiday; and where no maternity leave pay is paid to the female employee for that holiday she shall be paid holiday pay for that holiday. (Added 22 of 1981 s. 3. Amended 48 of 1984 s. 7)

Section:	12AA	Commencement of maternity leave		30/06/1997

(1) With the agreement of her employer, a pregnant employee may decide on the date of commencement of her 10 weeks maternity leave, provided that such date is within a period of not less than 2 weeks before, and not more than 4 weeks before, the expected date of confinement.

(2) If the employee does not exercise her option to decide on the date of commencement in subsection (1), or if she fails to secure her employer's agreement to her proposed leave schedule, the date of commencement of maternity leave shall be 4 weeks immediately before the expected date of confinement.

(Added 73 of 1997 s. 4)

Section:	13	Authority to issue medical certificates	L.N. 203 of 2006	01/12/2006

(1) A medical certificate for the purposes of section 12(4) or (6) or 12AA shall be issued by—

(a) a registered medical practitioner;

(b) a registered Chinese medicine practitioner; or

(c) notwithstanding section 16 of the Midwives Registration Ordinance (Cap 162), a midwife registered under section 8, or deemed to be registered under section 25, of that Ordinance.

(2) A medical certificate for the purposes of section 12(7) or (7A) shall be issued by—

(a) a registered medical practitioner; or

(b) notwithstanding section 16 of the Midwives Registration Ordinance (Cap 162), a midwife registered under section 8, or deemed to be registered under section 25, of that Ordinance.

(3) A medical certificate for the purposes of section 12(8) or 15AA shall be issued by—

(a) a registered medical practitioner; or

(b) a registered Chinese medicine practitioner.

(Replaced 16 of 2006 s. 4)

Section:	14	Payment for maternity leave	L.N. 94 of 2007	13/07/2007

(1) A female employee shall not be entitled to wages in respect of the period of her maternity leave except as provided in this section or as provided in her contract of employment if such contract provides for paid maternity leave on terms better than in this section.

(2) An employer shall pay a female employee maternity leave pay for the period of maternity leave taken by her and to which she is entitled under section 12(2)(a) if she— (Amended 73 of 1997 s. 6)

(a) has been employed by that employer under a continuous contract for a period of not less than 40 weeks immediately before the date of her commencement of maternity leave as determined under section 12AA; (Amended 5 of 1995 s. 4; 73 of 1997 s. 6)

(b) has given notice under section 12(4) or (5);

(c) has complied with any requirement by her employer under section 12(6) or (7); and

(d) (Repealed 73 of 1997 s. 6)

(3) For the purposes of subsections (3A), (3B) and (3C), "wages" (工資) includes any sum paid by an employer in respect of—

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of her employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282). (Replaced 7 of 2007 s. 6)

(3A) Maternity leave pay payable under this section is to be calculated at four-fifths of the daily average of the wages earned by the female employee during—

(a) the period of 12 months immediately before the date of commencement of her maternity leave; or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of commencement of her maternity leave, the shorter period,

but no maternity leave pay is payable in respect of a day on which the female employee would not have worked had she not been on maternity leave and for which no wages would normally be payable by the employer. (Added 7 of 2007 s. 6)

(3B) In calculating the daily average of the wages earned by a female employee during the period of 12 months or the shorter period—

(a) any period therein for which the employee was not paid her wages or full wages by reason of—

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of her employer;

(iii) her not being provided by her employer with work on any normal working day; or

(iv) her absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to her for the period referred to in paragraph (a),

are to be disregarded. (Added 7 of 2007 s. 6)

(3C) For the avoidance of doubt, if the amount of the wages paid to a female employee in respect of a day specified in subsection (3) is only a fraction of the amount earned by the employee on a normal working day, the

wages and the day are to be disregarded in accordance with subsection (3B). (Added 7 of 2007 s. 6)

(3D) Despite subsection (3A), if for any reason it is impracticable to calculate the daily average of the wages earned by a female employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of commencement of the employee's maternity leave, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of commencement of the employee's maternity leave. (Added 7 of 2007 s. 6)

(4) Maternity leave pay under this section shall be paid by an employer on the same day and in the same manner as he would have been required to pay wages to the female employee if she had not taken maternity leave and had continued in his employ.

(5) A female employee who, without the prior permission of her employer, works for another employer during any period of maternity leave under section 12(2)(a) shall forfeit her entitlement to maternity leave pay during that period of maternity leave. (Amended 73 of 1997 s. 6)

(6) (Repealed 73 of 1997 s. 6)

(7) If, pursuant to the terms of her contract of employment or any other agreement or for any other reason, a female employee is paid by her employer a sum of money in respect of any period of her maternity leave, the maternity leave pay payable to the employee in respect of that period is to be reduced by that sum. (Added 7 of 2007 s. 6)

(Replaced 22 of 1981 s. 4)

Section:	15	Prohibition against termination of employment	L.N. 94 of 2007	13/07/2007

(1) Subject to subsections (1A) and (1B)-

(a) after a pregnant employee has served notice of pregnancy on her employer, the employer shall not terminate her continuous contract of employment otherwise than in accordance with section 9 during the period from the date on which her pregnancy is confirmed by a medical certificate to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of pregnancy (otherwise than by reason of confinement);

(b) if a pregnant employee has served such notice on her employer immediately after being informed of the termination of her contract of employment where the termination was made otherwise than in accordance with section 9 by her employer, the employer shall immediately withdraw the termination or notice of termination in which event the termination or notice of termination shall be treated as if it had not taken place. (Replaced 7 of 2001 s. 5)

(1A) Where in a contract of employment of a pregnant employee, whether in writing or oral, it has been expressly agreed that the employment is on probation, subsection (1) shall not prevent the termination by an employer of such contract for reasons other than pregnancy during the period of probation if the period does not exceed 12 weeks, or during the first 12 weeks of probation if the period of probation exceeds 12 weeks. (Replaced 73 of 1997 s. 7)

(1B) An employer who terminates the continuous contract of employment of a pregnant employee shall be taken for the purposes of subsection (1)(a) or (b) to terminate the contract otherwise than in accordance with section 9-

(a) unless the contrary is proved; or

(b) subject to subsection (1C), unless the employer proves that-

(i) he purported to terminate the contract in accordance with that section; and

(ii) at the time of such termination, he reasonably believed that he had a ground to do so. (Added 7 of 2001 s. 5)

(1C) Subsection (1B)(b) shall not apply in the case of civil proceedings. (Added 7 of 2001 s. 5)

(1D) For the purposes of subsections (2)(b), (2A) and (2B), "wages" (工資) includes any sum paid by an employer in respect of-

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of her employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is

payable under section 10 of the Employees' Compensation Ordinance (Cap 282). (Added 7 of 2007 s. 7)

(2) An employer who contravenes subsection (1)(a) or (b) shall be liable to pay to the female employee- (Amended 7 of 2001 s. 5)

(a) the sum which would have been payable if the contract had been terminated by the employer under section 7 provided that she has not received any such payment under that section; (Amended 73 of 1997 s. 7)

(b) a further sum equivalent to the monthly average of the wages earned by the employee during-

(i) the period of 12 months immediately before the date of termination of the contract of employment; or

(ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract, the shorter period; and (Replaced 7 of 2007 s. 7)

(c) where the employee is or would have been entitled to maternity leave pay, maternity leave pay for 10 weeks. (Added 22 of 1981 s. 5)

(2A) In calculating the monthly average of the wages earned by a female employee during the period of 12 months or the shorter period-

(a) any period therein for which the employee was not paid her wages or full wages by reason of-

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of her employer;

(iii) her not being provided by her employer with work on any normal working day; or

(iv) her absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to her for the period referred to in paragraph (a),

are to be disregarded. (Added 7 of 2007 s. 7)

(2B) For the avoidance of doubt, if the amount of the wages paid to a female employee in respect of a day specified in subsection (1D) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (2A). (Added 7 of 2007 s. 7)

(2C) Despite subsection (2)(b), if for any reason it is impracticable to calculate the monthly average of the wages earned by a female employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of termination of the employee's contract of employment, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of termination of the employee's contract of employment. (Added 7 of 2007 s. 7)

(3) (Repealed 7 of 2007 s. 7)

(4) Any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. (Replaced 7 of 2001 s. 5)

Section:	15AA	Prohibition of assignment of heavy, hazardous or harmful work	L.N. 94 of 2007	13/07/2007

(1) A pregnant employee may, on producing a medical certificate with an opinion as to her unfitness to handle heavy materials, or to work in places where gas injurious to pregnancy is generated, or to do other work injurious to pregnancy, request her employer to refrain from giving her such work during her pregnancy period.

(2) On receipt of a request under subsection (1), the employer may not allocate to the employee the work specified in the medical certificate and, if the employee is already performing such work, the employer shall remove her from such work as soon as practicable but in any case not later than 14 days after the date of the receipt of the request under subsection (1) notwithstanding that-

(a) the result of the medical examination referred to in subsection (3); or

(b) the determination of the Commissioner in subsection (6),

may be pending.

(3) Where an employee has produced a medical certificate for the purposes of subsection (1), the employer may arrange for the employee to attend another medical examination, at the employer's expense, to obtain a second opinion

as to the employee's fitness to undertake the work at issue. (Replaced 16 of 2006 s. 5)

(3A) A medical examination referred to in subsection (3) shall be conducted by a registered medical practitioner or registered Chinese medicine practitioner named by the employer, regardless of whether the medical certificate produced by the employee was issued by a registered medical practitioner or registered Chinese medicine practitioner. (Added 16 of 2006 s. 5)

(4) The employer shall give the employee at least 48 hours' notice of the examination under subsection (3) which is to be carried out within a period of 14 days after the date of the receipt of the employee's request made under subsection (1).

(5) If the second medical opinion provides that the employee is fit to do the specified work referred to in subsection (1) or if the employee refuses to attend the medical examination as arranged by the employer under subsection (3), the employer may refer the employee's request made under subsection (1) to the Commissioner; the Commissioner shall take appropriate action, including seeking further medical advice, to assist him in bringing about a determination.

(6) When the Commissioner receives the employer's reference under subsection (5), he may make a determination to-

(a) uphold the employee's request;

(b) rule that the employee's request is not supported;

(c) make such other rulings as he considers reasonable.

(7) The employer and the employee concerned in the reference shall comply with any determination made by the Commissioner.

(8) Despite any change in the earnings of the employee as a result of her transfer from heavy, hazardous or harmful work in accordance with this section, payment for maternity leave under section 14(3A) or payment for termination of employment under section 15(2)(a), (b) or (c) is to be calculated on the basis of the daily average or monthly average (as appropriate) of the wages earned by the employee during-

(a) the period of 12 months immediately before her transfer from heavy, hazardous or harmful work in accordance with this section; or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before her transfer from heavy, hazardous or harmful work in accordance with this section, the shorter period,

and those sections are to be construed accordingly. (Replaced 7 of 2007 s. 8)

(9) Where-

(a) an employee is transferred from heavy, hazardous or harmful work in accordance with this section; and

(b) section 7(1D), 14(3D) or 15(2C) is applicable in calculating the maternity leave pay or any payment for termination of employment under section 15 payable to the employee,

for the purpose of the calculation, the reference in section 7(1D), 14(3D) or 15(2C) to a person who was employed at the same work is to be construed as a reference to a person who was employed at the work performed by the employee immediately before her transfer. (Added 7 of 2007 s. 8)

(Added 73 of 1997 s. 8)

Section:	15A	Offences		30/06/1997

(1) Any employer who fails to-

(a) grant maternity leave;

(b) pay maternity leave pay in accordance with section 14; or (Amended 5 of 1995 s. 5)

(c) pay sickness allowance under section 33(3C),

shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 4)

(2) Any employer who, without any reasonable excuse, fails to comply with-

(a) the requirements under section 15AA(2); or

(b) the determination made by the Commissioner under section 15AA(6),

shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Replaced 73 of 1997 s. 9)

(Added 22 of 1981 s. 6)

Section:	15B	Records		30/06/1997

Every employer who employs females shall maintain, in a form specified by the Commissioner, a record of maternity leave taken by and maternity leave pay paid to his female employees.

(Added 22 of 1981 s. 6)

Section:	15C	Restriction on pay in lieu of maternity leave		30/06/1997

Save as provided in section 15(2), no payment of maternity leave pay or other sum may be made in lieu of the grant of maternity leave.

(Added 22 of 1981 s. 6)

Part:	IV	REST DAYS		30/06/1997

(Part IV added 23 of 1970 s. 3)

Section:	16	(Repealed 10 of 1980 s. 3)		30/06/1997

(Repealed 10 of 1980 s. 3)

Section:	17	Grant of rest days		30/06/1997

(1) Subject to the provisions of this Part, every employee who has been employed by the same employer under a continuous contract shall be granted not less than 1 rest day in every period of 7 days. (Amended 71 of 1976 s. 3)

(2) Rest days shall be in addition to any statutory holiday, or alternative holiday or substituted holiday, to which an employee is entitled under section 39. (Replaced 39 of 1973 s. 3)

Section:	18	Appointment of rest days		30/06/1997

(1) Rest days shall be appointed by an employer and he may appoint different rest days for different employees. (Amended 71 of 1976 s. 4)

(2) Subject to subsection (4), every employer shall, before the commencement of every month, inform each employee orally or in writing of his rest days in that month.

(3) The provisions of subsection (2) shall be deemed to be complied with if an employer exhibits in a conspicuous place in the place of employment and for so long as it applies a roster showing the days appointed to be rest days for each employee during the month.

(4) Subsection (2) shall not apply where rest days are appointed on fixed days in each period of 7 days on a regular basis. (Amended 71 of 1976 s. 4)

(5) An employer may, with the consent of his employee, substitute for any rest day appointed under this section some other rest day-

(a) within the same month and before the rest day so appointed; or

(b) within the period of 30 days next following the rest day so appointed.

Section:	19	Compulsory work on rest days		30/06/1997

(1) Subject to subsection (2), no employer shall require an employee to work on any of his rest days.

(2) An employer may require an employee to work on his rest day if it is necessary to do so by reason of a breakdown of machinery or plant or other unforeseen emergency of any nature.

(3) An employer shall substitute for any rest day on which an employee is required to work under subsection (2) some other rest day within the period of 30 days next following, notice of which shall be given to the employee within 48 hours after the employee is so required to work.

Section:	20	Voluntary work on rest days		30/06/1997

(1) An employee may, at his own request and if the employer agrees, work for his employer on a rest day.
(2) An employee may, at the request of his employer, work for his employer on a rest day.

Section:	21	Void conditions		30/06/1997

Any condition in a contract of employment which makes the payment of any annual bonus, or any end of year payment or any proportion thereof, subject to working on rest days granted under this Part shall be void.

(Amended 48 of 1984 s. 10)

Part:	IVA	PROTECTION AGAINST ANTI-UNION DISCRIMINATION		30/06/1997

(Part IVA added 51 of 1974 s. 3)

Section:	21A	Application of Part IVA		30/06/1997

Section 21C shall apply to every person to whom an offer of employment is made or is about to be made or who otherwise is a prospective employee.

(Replaced 41 of 1990 s. 7)

Section:	21B	Rights of employees in respect of trade union membership and activities	135 of 1997	31/10/1997

(1) Every employee shall as between himself and his employer have the following rights-
  (a) the right to be or to become a member or an officer of a trade union registered under the Trade Unions Ordinance (Cap 332);
  (b) where he is a member or an officer of any such trade union, the right, at any appropriate time, to take part in the activities of the trade union;
  (c) the right to associate with other persons for the purpose of forming or applying for the registration of a trade union in accordance with the provisions of the Trade Unions Ordinance (Cap 332); (Amended 101 of 1997 s. 26)
  *(d) (Repealed 135 of 1997 s. 14)
(2) Any employer, or any person acting on behalf of an employer, who-
  (a) prevents or deters, or does any act calculated to prevent or deter, an employee from exercising any of the rights conferred on him by subsection (1); or
  (b) terminates the contract of employment of, penalizes, or otherwise discriminates against, an employee by reason of his exercising any such right,

shall be guilty of an offence and shall be liable on conviction to a fine at level 6. (Amended 24 of 1988 s. 2; 103 of 1995 s. 5)

(3) In this section-

"appropriate time" (適當時間) means, in relation to an employee taking part in any activities of a trade union, time which either-
  (a) is outside his working hours; or
  (b) is a time within his working hours at which, in accordance with arrangements agreed with or consent given by or on behalf of his employer, it is permissible for him to take part in those activities;

"working hours" (工作時間) means, in relation to an employee, any time when, in accordance with his contract with his employer, he is required to be at work.

[cf. 1971 c. 72 s. 5(1), (2) & (5) U.K.]

Note:

*** This paragraph was added by 101 of 1997. As to the suspension of operation of 101 of 1997, please see s. 4(1) and (2) of Cap 538. On 31 October 1997, that s. 4(1) and (2), to the extent that it was in effect**

immediately before 31 October 1997, ceased to have effect. Please see s. 14(2) of 135 of 1997.

Section:	21C	Offer of employment conditional on offeree not being member of trade union		30/06/1997

Any person who, acting on his own or another's behalf, in the engagement of persons for employment includes in an offer of employment to any person a condition or requirement that the person to whom the offer is made shall undertake-

(a) if he is a member or officer of such a trade union, that he will relinquish his membership thereof or office therein;

(b) not to become a member of, or officer in, such a trade union; or

(c) not to associate with other persons for the purpose of forming or applying for the registration of a trade union in accordance with the provisions of the Trade Unions Ordinance (Cap 332),

shall be guilty of an offence and shall be liable on conviction to a fine at level 6. (Amended 24 of 1988 s. 2; 103 of 1995 s. 6)

Section:	21D	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and (2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Section:	21E	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and (2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Section:	21F	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and (2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Section:	21G	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and (2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Section:	21H	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and (2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Section:	21I	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and

(2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Section:	21J	*(Repealed 135 of 1997 s. 3)	135 of 1997	31/10/1997

* Ss. 21D to 21J were added by 98 of 1997. As to the suspension of operation of 98 of 1997, please see s. 5(1) and (2) of Cap 538. On 31 October 1997, that s. 5(1) and (2), to the extent that it was in effect immediately before 31 October 1997, ceased to have effect (please see s. 4(2) of 135 of 1997). As to the transitional provisions in relation to s. 3 of 135 of 1997, please see s. 4(1)(b) and Part I of Schedule 2 of 135 of 1997.

Part:	V	PAYMENT OF WAGES		30/06/1997

Section:	22	Wage period		30/06/1997

The wage period in respect of which wages are payable under a contract of employment shall, until the contrary is proved, be deemed to be 1 month.

Section:	23	Time of payment of wages		30/06/1997

Wages shall become due on the expiry of the last day of the wage period and shall be paid as soon as is practicable but in any case not later than 7 days thereafter.

Section:	24	Payment on completion		30/06/1997

Wages of an employee on completion of his contract of employment and any other sum payable in respect of his contract shall be due to him on the day of the completion of the contract and shall be paid as soon as is practicable but in any case not later than 7 days thereafter.

Section:	25	Payment on termination	7 of 2001	12/04/2001

(1) Subject to section 31O, where a contract of employment is terminated any sum due to the employee shall be paid to him as soon as is practicable and in any case not later than 7 days after the day of termination. (Amended 44 of 1971 s. 4; 67 of 1974 s. 4)

(2) The sum referred to in subsection (1) shall be-

(a) the equivalent of the amount earned by the employee for work done over the period commencing on the expiry of his wage period next preceding the time of termination up to that time;

(b) the sum (if any) payable under sections 7, 15(2) and 33(4BA); (Amended 57 of 1983 s. 4; 76 of 1985 s. 3; 103 of 1995 s. 7; 7 of 2001 s. 6)

(ba) any long service payment due to the employee; and (Added 76 of 1985 s. 3. Amended L.N. 34 of 1990)

(c) any other sum due to the employee in respect of his contract of employment.

(3) In addition to any deduction which may be made under section 32, and subject to any order made by a court, an employer may deduct from any sum payable under subsection (1) to an employee who terminates his employment otherwise than under section 6, 7 or 10 such sum as the employee would have been liable to pay if he had terminated his employment under section 7. (Replaced 44 of 1971 s. 4. Amended 14 of 1975 s. 3; 48 of 1984 s. 12)

Section:	25A	Interest on late payment of wages		30/06/1997

(1) Subject to subsection (3), if any wages or any sum referred to in section 25(2)(a) are not paid within 7 days from the day on which they become due under sections 23, 24 and 25, the employer shall pay interest at the rate specified in subsection (2) on the outstanding amount of wages or sum from the date on which such wages or sum become due up to the date of actual payment.

(2) The rate of interest specified for the purpose of subsection (1) shall be the rate fixed by the Chief Justice by notice in the Gazette under section 50 of the District Court Ordinance (Cap 336).

(3) No interest shall be payable in respect of any period before the commencement* of this section.

(Added 74 of 1997 s. 9)

Note:

*** Commencement date: 27 June 1997.**

Section:	26	Manner and place of payment of wages		30/06/1997

(1) Subject to this Ordinance, wages shall be paid on a working day directly to an employee in legal tender at his place of employment or at any office or other place customarily used by the employer for the purpose of payment of wages or at any other place mutually agreed.

(2) With the consent of an employee wages may be paid-

(a) by cheque, money order or postal order;

(b) into an account in his name with any bank within the meaning of section 2 of the Banking Ordinance (Cap 155); or (Amended 49 of 1995 s. 53)

(c) to his duly appointed agent.

Section:	27	Payment not to be made in certain places	17 of 2006	01/09/2006

Wages, or any sum due to an employee in respect of his contract of employment on the completion or termination thereof, shall not be paid-

(a) in any place of amusement;

(b) in any place where cash-sweeps, fixed odds betting or pari-mutuel betting is organized or conducted with the permission or authorization under the Betting Duty Ordinance (Cap 108); (Amended 17 of 2006 s. 23)

(c) in any place where intoxicating liquor or any dangerous drug is sold; or

(d) in any shop or store for the retail sale of merchandise,

except where the employee is employed in such place, shop or store.

Section:	28	Remuneration other than wages	17 of 2006	01/09/2006

(1) A contract of employment may provide for giving to an employee food, accommodation or other allowances or privileges in addition to wages as remuneration for his services.

(2) No employer shall give to an employee any intoxicating liquor, dangerous drug, or any ticket or other substitute for ticket for any cash-sweep, fixed odds betting or pari-mutuel betting organized or conducted with the permission or authorization under the Betting Duty Ordinance (Cap 108) as remuneration for his services. (Amended 17 of 2006 s. 23)

Section:	29	Prohibition of agreements as to manner of spending		30/06/1997

No employer shall in any contract of employment or agreement in consideration of a contract of employment make any provision as to the place at which, the manner in which, or the person with whom, wages paid to an employee are to be expended.

Section:	30	Provision of shops, etc. by employers for sale of commodities to employees		30/06/1997

An employer may establish shops, stores or places for the sale of commodities to his employees, but no employer shall bind any employee by contract, agreement or other obligation, written or oral, express or implied, to make use of any such shop, store or place for the purchase of commodities.

Section:	31	Employer not to enter into contract of employment without reasonable belief that he can pay wages		30/06/1997

(1) No person shall enter into, renew or continue a contract of employment as an employer unless he believes upon reasonable grounds that he will be able to pay all wages due under the contract of employment as they become due.

(2) An employer shall, if he ceases to believe upon reasonable grounds that he will be able to pay all the wages due by him under a contract of employment as they become due, forthwith take all necessary steps to terminate the contract in accordance with its terms.

(Added 71 of 1970 s. 3)

Part:	VA	SEVERANCE PAYMENTS		30/06/1997

(Part VA added 67 of 1974 s. 5)

Section:	31A	(Repealed 76 of 1985 s. 4)		30/06/1997

(Repealed 76 of 1985 s. 4)

Section:	31B	General provisions as to right to severance payment		30/06/1997

(1) Where an employee who has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date- (Amended 76 of 1985 s. 5)

(a) is dismissed by his employer by reason of redundancy; or

(b) is laid off within the meaning of section 31E,

the employer shall, subject to this Part and Part VC, be liable to pay to the employee a severance payment calculated in accordance with section 31G. (Amended 52 of 1988 s. 5)

(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that-

(a) his employer has ceased, or intends to cease, to carry on the business-

(i) for the purposes of which the employee was employed by him; or

(ii) in the place where the employee was so employed; or

(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish. (Replaced 62 of 1992 s. 4)

(3) For the purposes of the application of this Part to an employee who is employed as a domestic servant in, or in connection with, a private household, this Part (except section 31J) shall apply as if the household were a business and the maintenance of the household were the carrying on of that business by the employer.

[cf. 1965 c. 62 ss. 1 & 19(1) U.K.]

Section:	31C	General exclusions from right to severance payment by reason of dismissal	51 of 2000	07/07/2000

(1) An employee shall not be entitled to a severance payment by reason of dismissal where his employer, being so entitled by reason of the employee's conduct, terminates his contract of employment without notice or payment in lieu in accordance with section 9. (Amended 51 of 2000 s. 3)

(2) An employee shall not be entitled to a severance payment by reason of dismissal if, not less than 7 days before the relevant date, the employer has offered to renew his contract of employment, or to re-engage him under a new contract, so that-

(a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the contract as in force immediately before his dismissal; and

(b) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer.

(3) An employee shall not be entitled to a severance payment by reason of dismissal if, not less than 7 days before the relevant date, the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would differ (wholly or in part) from the corresponding provisions of the contract as in force immediately before his dismissal, but-

(a) the offer constitutes an offer of suitable employment in relation to the employee;

(b) the offer constitutes an offer of employment no less favourable to the employee than hitherto; and

(c) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer.

(4) Where the relevant date falls on a rest day or holiday, the references in subsection (2)(b) and subsection (3)(c) to the relevant date shall be construed as references to the next day after that rest day or holiday. (Amended 75 of 1997 s. 2)

(5) An employee shall not be entitled to a severance payment by reason of dismissal where, having been given notice of the termination of his contract of employment by his employer in accordance with section 6, he leaves the service of his employer before the expiration of that notice unless he so leaves-

(a) with the prior consent of the employer; or

(b) after having made a payment in lieu to the employer in accordance with section 7. (Replaced 75 of 1997 s. 2)

[cf. 1965 c. 62 s. 2 U.K.]

Section:	31D	Dismissal by employer		30/06/1997

(1) For the purposes of and subject to this Part, an employee shall be taken to be dismissed by his employer if, but only if-

(a) the contract under which he is employed is terminated by the employer with or without notice or payment in lieu thereof other than in accordance with section 9;

(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract; or

(c) the employee terminates that contract with or without notice or payment in lieu, in circumstances such that he is entitled to terminate it without notice or payment in lieu in accordance with section 10 by reason of the employer's conduct. (Replaced 62 of 1992 s. 5)

(2) An employee shall not be taken for the purposes of this Part to be dismissed by his employer if-

(a) his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment; and

(b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract.

(3) For the purposes of the application of subsection (2) to a contract under which the employment ends on a rest day or holiday, the renewal or re-engagement shall be treated as taking effect immediately on the ending of the employment under the previous contract if it takes effect on or before the next day after that rest day or holiday.

[cf. 1965 c. 62 s. 3 U.K.]

Section:	31E	Lay-off		30/06/1997

(1) Where an employee is employed under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind he is employed to do, he shall for the purposes of section 31B(1) be taken to be laid off where the total number of days on each of which such work is not provided for him by the employer exceeds-

(a) half of the total number of normal working days in any period of 4 consecutive weeks; or

(b) one-third of the total number of normal working days in any period of 26 consecutive weeks,

and he is not paid a sum equivalent to the wages which he would have earned if work had been provided on the days on which no work was provided. (Amended 41 of 1990 s. 8)

(1A) Notwithstanding subsection (1), any period during which an employee is not provided with work because of a lock-out by his employer, or as a result of a rest day, a statutory holiday or a day of annual leave, shall not be taken

into account as normal working days in determining whether an employee has been laid off. (Added 41 of 1990 s. 8. Amended 61 of 1993 s. 4)

(2) The continuity of a contract of employment of an employee shall not be treated as broken by any lay-off as a result of which no severance payment has been made.

(3) For the purposes of this Part the "relevant date" (有關日期) in respect of the right of an employee to a severance payment arising by reason of lay-off means any day on which the period of 4 consecutive weeks or 26 consecutive weeks, as the case may be, referred to in subsection (1) has expired. (Amended 41 of 1990 s. 8)

[cf. 1965 c. 62 s. 5(1) U.K.]

Section:	31F	Excluded classes of employees		30/06/1997

Section 31B shall not apply-

(a) where the employer is the husband or wife of the employee;

(b) to any outworker;

(c) (Repealed 76 of 1985 s. 6)

(d) to any person, employed by a government other than the Hong Kong Government, who is a subject or citizen of the state under whose government he is employed; or

(e) without prejudice to paragraph (a), to any person in respect of employment as a domestic servant in, or in connection with, a private household, where the employer is the father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother or half-sister of the employee.

[cf. 1965 c. 62 s. 16 U.K.]

Section:	31G	Amount of severance payment		30/06/1997

(1) Subject to this Part, the amount of a severance payment to which an employee is entitled in any case shall be calculated by allowing-

(a) in the case of a monthly rated employee, two-thirds of this last full month's wages, or two-thirds of $22500, whichever is less; and

(b) in any other case, 18 days' wages based on any 18 days chosen by the employee and occurring during his last 30 normal working days, or two-thirds of $22500, whichever is less, (Amended L.N. 264 of 1995)

for every year (and pro rata as respects an incomplete year) of employment under a continuous contract by his employer subject in all cases to a maximum payment not exceeding, where the relevant date occurs in a period specified in column 1 of Table A in the Seventh Schedule, the amount specified in column 2 of that table opposite to the period. (Amended 5 of 1995 s. 6)

(1A) Notwithstanding subsection (1), where-

(a) the relevant date occurs in a period specified in column 1 of Table B in the Seventh Schedule; and

(b) the employee has been employed under a continuous contract by his employer for a period ("employment period") which immediately precedes the relevant date and is longer than the period specified in column 2 of that table opposite to the period in which the relevant date occurs,

that part of the employment period exceeding the period so specified in column 2 of that table shall be reduced by one half for the purpose of calculating his entitlement under subsection (1). (Added 5 of 1995 s. 6)

(2) Notwithstanding subsection (1), the employee may elect to have his wages averaged over the period of 12 months immediately preceding the relevant date, but where he so elects, then-

(a) in the case of a monthly rated employee, the monthly average shall not exceed $22500; and

(b) in any other case, the total wages for the period of 12 months shall, for the purpose of calculating the daily average, not exceed 12 times $22500. (Amended L.N. 264 of 1995)

(3) For the purposes of this section, in the case of an employee who was employed under a continuous contract otherwise than by way of manual labour and whose average monthly wages during the period of 12 months immediately preceding the date of commencement of the Employment (Amendment) Ordinance 1990 (41 of 1990) exceed $15000, a reference to the period of employment under a continuous contract shall not include a reference to any such employment occurring more than-

(a) 3 years prior to 1 January 1990, where the relevant date occurs in 1990;

(b) 4 years prior to 1 January 1990, where the relevant date occurs in 1991;
(c) 5 years prior to 1 January 1990, where the relevant date occurs in 1992;
(d) 6 years prior to 1 January 1990, where the relevant date occurs in 1993;
(e) 7 years prior to 1 January 1990, where the relevant date occurs in 1994;
(f) 8 years prior to 1 January 1990, where the relevant date occurs in 1995;
(g) 9 years prior to 1 January 1990, where the relevant date occurs in 1996;
(h) 10 years prior to 1 January 1990, where the relevant date occurs in 1997 or any year thereafter.

(Replaced 41 of 1990 s. 9)

Section:	31H	(Repealed 51 of 2000 s. 4)	51 of 2000	07/07/2000

Section:	31I	Severance payment to be reduced by amount of gratuities and benefits in certain cases	18 of 2001	25/05/2001

Remarks:
For transitional and savings provisions relating to the amendment of this section made by the Employment (Amendment) (No. 2) Ordinance 2001 (18 of 2001), see section 5 of that Ordinance.

If an employee becomes entitled to payment of a severance payment under this Part and-

(a) because of the operation of the employee's contract of employment, one or more gratuities based on length of service or one or more relevant occupational retirement scheme benefits have been paid to the employee; or
(b) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee, or has been paid to or in respect of the employee,

the severance payment is to be reduced by the total amount of all of the gratuities and benefits to or in respect of the employee to the extent that they relate to the employee's years of service for which the severance payment is payable.

(Replaced 4 of 1998 s. 5. Amended 18 of 2001 s. 2)

Section:	31IA	Gratuity or benefit to be reduced by amount of severance payment in certain cases	L.N. 120 of 2000	01/12/2000

(1) If-

(a) because of the operation of the employee's contract of employment, an employee has become entitled to payment of a gratuity based on length of service, or to payment of a relevant occupational retirement scheme benefit; or
(b) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee,

and the employee has been paid a severance payment under this Part, the gratuity or benefit is, to the extent that it is attributable to the same years of service as those for which the severance payment is payable, to be reduced by the whole amount of the severance payment.

(2) Subsection (1) has effect even though the years of service for which the severance payment was made exceed those to which the gratuity or benefit is attributable.

(3) Section 70A of the Occupational Retirement Schemes Ordinance (Cap 426) and section 12A of the Mandatory Provident Fund Schemes Ordinance (Cap 485) have effect in relation to this section.

(Replaced 4 of 1998 s. 5)

Section:	31J	Change of ownership of business		30/06/1997

(1) This section shall have effect where-

(a) a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which a person is employed, or of a part of such a business; and
(b) in connection with that change the person by whom the employee is employed immediately before the

change occurs (in this section referred to as "the previous owner") terminates the employee's contract in accordance with section 6 or 7.

(2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be (in this section referred to as "the new owner") renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, section 31D(2) shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner).

(3) If the new owner offers to renew the employee's contract of employment (with the substitution of the new owner for the previous owner) or to re-engage him under a new contract of employment, but the employee refuses the offer, section 31C(2) or (3) (as the case may be) shall have effect, subject to subsection (4), in relation to that offer and refusal as it would have had effect in relation to the like offer made by the previous owner and a refusal of that offer by the employee.

(4) For the purposes of the operation, in accordance with subsection (3), of section 31C(2) or (3) in relation to an offer made by the new owner-

(a) the offer shall not be treated as one whereby the provisions of the contract as renewed, or of the new contract, as the case may be, would differ from the corresponding provisions of the contract as in force immediately before the dismissal by reason only that the new owner would be substituted for the previous owner as the employer; and

(b) no account shall be taken of that substitution in determining whether the refusal of the offer was unreasonable.

(5) This section shall have effect (subject to the necessary modifications) in relation to a case where-

(a) the person by whom a business, or part of a business, is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change; or

(b) the persons by whom a business, or part of a business, is owned immediately before a change (whether as partners, trustees or otherwise) include the person or one or more of the persons by whom it is owned immediately after the change,

as this section has effect where the previous owner and the new owner are wholly different persons.

(6) Nothing in this section shall be construed as requiring any variation of a contract of employment by agreement between the parties to be treated as constituting a termination of the contract.

[cf. 1965 c. 62 s. 13 U.K.]

Section:	31K	Associated companies		30/06/1997

(1) Where the employer is a company, any reference in this Part to re-engagement by the employer shall be construed as a reference to re-engagement by that company or by any associated company, and any reference in this Part to an offer made by the employer shall be construed as including a reference to an offer made by an associated company.

(2) Subsection (1) shall not affect the operation of section 31J in a case where the previous owner and the new owner (as defined by that section) are associated companies; and where that section applies, subsection (1) shall not apply.

(3) Where an employee is dismissed by his employer, and the employer is a company (in this subsection referred to as "the employing company") which has one or more associated companies, then if-

(a) none of the conditions specified in section 31B(2) is fulfilled;

(b) one or other of those conditions would be fulfilled if the business of the employing company and the business of the associated company (or, if more than one, each of the associated companies) were treated as together constituting one business,

that condition shall for the purposes of this Part be taken to be fulfilled in relation to the dismissal of the employee.

(4) Where an employee of a company is taken into the employment of another company which, at the time when he is taken into its employment, is an associated company of the first-mentioned company, his period of employment at that time shall count as a period of employment with the associated company, and the change of employer shall not break the continuity of the period of employment.

(5) For the purposes of this section 2 companies shall be taken to be associated companies if one is a subsidiary of the other, or both are subsidiaries of a third company, and "associated company" (相聯公司) shall be construed

accordingly.

(6) In this section "company" (公司) and "subsidiary" (附屬公司) have the meanings respectively assigned thereto by section 2 of the Companies Ordinance (Cap 32). (Amended 76 of 1985 s. 7)

[cf. 1965 c. 62 s. 48 U.K.]

Section:	31L	Implied or constructive termination of contract		30/06/1997

(1) Where in accordance with any enactment or rule of law-

(a) any act on the part of the employer; or

(b) any event affecting an employer (including, in the case of an individual, his death),

operates so as to terminate a contract under which an employee is employed by him, that act or event shall for the purposes of this Part be treated as a termination of the contract by the employer, if apart from this subsection it would not constitute a termination of the contract by him.

(2) Where subsection (1) applies, and the employee's contract of employment is not renewed, and he is not re-engaged under a new contract, as mentioned in section 31D(2), he shall for the purposes of this Part be taken to be dismissed by reason of redundancy if the circumstances in which the contract is not renewed and he is not re-engaged as mentioned in section 31D(2), are wholly or mainly attributable to one or other of the facts specified in section 31B(2).

(3) For the purposes of subsection (2), section 31B(2)(a), in so far as it relates to the employer ceasing or intending to cease to carry on the business, shall be construed as if the reference to the employer included a reference to any person to whom, in consequence of the act or event in question, power to dispose of the business has passed.

(4) In this section any reference to section 31D(2) includes a reference to section 31D(2) as applied by section 31J(2).

[cf. 1965 c. 62 s. 22 U.K.]

Section:	31M	Death of employer or of employee		30/06/1997

Part I of the Third Schedule shall have effect in relation to the death of an employer; and Part II of that Schedule shall have effect in relation to the death of an employee.

[cf. 1965 c. 62 s. 23 U.K.]

Section:	31N	Claims for severance payments		30/06/1997

Notwithstanding anything in this Part, an employee shall not be entitled to a severance payment unless, before the end of the period of 3 months beginning with the relevant date, or within such extended period as the Commissioner may agree- (Amended 19 of 1984 s. 3)

(a) the payment has been agreed and paid;

(b) the employee has made a claim for payment by notice in writing given to the employer; or

(c) a question as to the right of the employee to the payment, or as to the amount of the payment, has been made the subject of a claim filed with-

(i) the Registrar of the Minor Employment Claims Adjudication Board in accordance with Part IV of the Minor Employment Claims Adjudication Board Ordinance (Cap 453); or

(ii) the Registrar of the Labour Tribunal in accordance with Part IV of the Labour Tribunal Ordinance (Cap 25). (Amended 61 of 1994 s. 50)

[cf. 1965 c. 62 s. 21 U.K.]

Section:	31O	Making of severance payment	L.N. 70 of 2010	29/10/2010

(1) Where an employee is entitled to a severance payment under this Part, his employer shall make the severance payment to him not later than 2 months from the receipt of a notice in accordance with paragraph (b) of section 31N unless either the employer or the employee has, before the expiration of that period, made the severance payment the subject of a claim filed with-

(a) the Registrar of the Minor Employment Claims Adjudication Board in accordance with Part IV of the Minor Employment Claims Adjudication Board Ordinance (Cap 453); or

(b) the Registrar of the Labour Tribunal in accordance with Part IV of the Labour Tribunal Ordinance (Cap 25). (Amended 61 of 1994 s. 51)

(1A) (Repealed 9 of 2010 s. 3)

(2) A severance payment shall be made in legal tender except that, where the employee so consents, payment may be made-

(a) by cheque, money order or postal order;

(b) into an account in his name with any bank within the meaning of section 2 of the Banking Ordinance (Cap 155); or (Amended 49 of 1995 s. 53)

(c) to his duly appointed agent.

(3) (a) An employer who without reasonable excuse fails to comply with subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 9 of 2010 s. 3)

(b) An employer who without reasonable excuse fails to comply with subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine at level 3. (Replaced 103 of 1995 s. 8)

Section:	31P	Written particulars of severance payment		30/06/1997

(1) On making any severance payment, otherwise than in pursuance of a decision of the Minor Employment Claims Adjudication Board or Labour Tribunal which specifies the amount of the payment to be made, the employer shall give to the employee a written statement indicating how the amount of the payment has been calculated. (Amended 61 of 1994 s. 52)

(2) (a) An employer who without reasonable excuse fails to comply with subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 3.

(b) An employer who in a statement under subsection (1) includes anything which to his knowledge is false in a material particular, or recklessly includes anything which is false in a material particular shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Replaced 103 of 1995 s. 9)

(3) Without prejudice to any proceedings for an offence under subsection (2)(a), if an employer fails to comply with the requirements of subsection (1), the employee may by notice in writing to the employer require the employer to give to the employee a written statement complying with those requirements within such period (not being less than 1 week beginning with the day on which the notice was given) as may be specified in the notice.

(4) If, without reasonable excuse, an employer fails to comply with a notice under subsection (3) he shall be guilty of an offence and shall be liable-

(a) in the case of a first conviction to a fine at level 3; or

(b) in the case of a second or subsequent conviction, to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 9)

[cf. 1965 c. 62 s. 18 U.K.]

Section:	31Q	Presumption		30/06/1997

For the purposes of this Part an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

[cf. 1965 c. 62 s. 9(2) U.K.]

Part:	VB	LONG SERVICE PAYMENTS	L.N. 203 of 2006	01/12/2006

(Part VB added 76 of 1985 s. 8)

Section:	31R	General provisions as to employee's right to long service payment	L.N. 203 of 2006	01/12/2006

(1) Where an employee who has been employed under a continuous contract-

(a) for not less than 5 years of service at the relevant date- (Amended 74 of 1997 s. 10)

(i) is dismissed and his employer is not liable to pay him a severance payment by reason thereof; or

(ii) subject to subsections (3) to (5), terminates his contract in the circumstances specified in section

10(aa); or (Amended 61 of 1993 s. 5)

(b) terminates his contract and, at the relevant date, he is not less than 65 years of age and has been employed under that contract for not less than 5 years, (Amended 65 of 1995 s. 2)

the employer shall, subject to this Part and Part VC, pay to the employee a long service payment calculated in accordance with section 31V(1). (Amended 105 of 1991 s. 2)

(2) (Repealed 74 of 1997 s. 10)

(3) Where an employee has terminated his contract in the circumstances specified in section 10(aa) upon being certified as being permanently unfit for a particular type of work, the employer may require the employee to undergo a medical examination, at the employer's expense, to obtain a second opinion as to whether or not the employee is permanently unfit for that type of work. (Replaced 16 of 2006 s. 6)

(3A) A medical examination referred to in subsection (3) shall be conducted by a registered medical practitioner or registered Chinese medicine practitioner named by the employer, regardless of whether the certificate issued in respect of the employee for the purposes of section 10(aa)(ii) was issued by a registered medical practitioner or registered Chinese medicine practitioner. (Added 16 of 2006 s. 6)

(4) An employer shall forfeit his right to exercise the option under subsection (3) unless-

(a) he makes arrangements for a medical examination to take place not more than 14 days after the employer receives a copy of a certificate issued under section 10(aa); and

(b) he notifies the employee in writing, not less than 48 hours before the examination is to take place, giving him details of the appointment. (Added 61 of 1993 s. 5)

(5) An employee referred to in subsection (3) who, without reasonable excuse, refuses to undergo a medical examination forfeits his right to a long service payment under this Part. (Added 61 of 1993 s. 5)

(6) Where the second opinion obtained by an employer under subsection (3) comes to the opposite conclusion from the certificate issued under section 10(aa), the employer shall submit the certificate and the second opinion to the Commissioner and the Commissioner shall, after such consultation with such medical experts as he considers necessary, rule whether or not the employee is entitled to a long service payment under this Part. (Added 61 of 1993 s. 5)

(Replaced 52 of 1988 s. 6. Amended 41 of 1990 s. 11)

Section:	31RA	Death of employee	74 of 1997	27/06/1998

(1) Where an employee dies and he had been at the time of his death employed under a continuous contract for not less than 5 years of service on the date of his death, the employer shall, subject to this Part and Part VC, pay a long service payment calculated in accordance with section 31V(1) to- (Amended 105 of 1991 s. 3; 74 of 1997 s. 11)

(a) the spouse of the employee, if the employee leaves a spouse; or

(b) the issue of the employee, if the employee leaves any issue but no spouse; or

(c) a parent of the employee, if the employee leaves neither a spouse nor issue; or

(d) the personal representative of the employee, if the employee does not leave any spouse, issue or parent.

(1A) (Repealed 74 of 1997 s. 11)

(2) A person referred to in paragraph (a), (b), (c) or (d) of subsection (1) shall not be entitled to such payment unless-

(a) that person serves an application in the form specified by the Commissioner under section 49 on the relevant employer within the period of 30 days beginning on the day next following the date of death of the employee or within such extended period as the Commissioner may allow; and

(b) the applicant's relationship (being a relationship mentioned in paragraph (a), (b), (c) or (d) of subsection (1)) to the deceased employee is supported by documentary evidence.

(3) The Commissioner may extend the time for serving an application under subsection (2) although the application for extension is not made until after the expiration of the period of 30 days after the date of death of an employee.

(4) Where a person referred to in paragraph (a) or (b) of subsection (1) is a minor, the application under subsection (2) shall be made by the guardian of that person.

(5) Where a person is entitled to a long service payment under this section, the employer shall pay such person the long service payment to which he is entitled-

(a) where the person so entitled is a spouse, not later than 7 days after the receipt of the application; or

(b) where the person so entitled is not a spouse, not earlier than the day (hereinafter in this paragraph called "the said day") next following the date of expiration of the period which, as regards the

particular case, was the period during which an application under subsection (2)(a) could be served but not later than 7 days after the said day.

(6) An employer who without reasonable excuse fails to pay a long service payment on or before the latest date for payment as required by subsection (5) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 103 of 1995 s. 10)

(7) Where 2 or more persons are entitled to a long service payment under this section, the long service payment shall be divided equally between such persons.

(8) A long service payment is payable in accordance with this Part by an employer on the death of an employee from whatever cause and is payable in addition to any compensation payable by the employer under the Employees' Compensation Ordinance (Cap 282).

(Added 52 of 1988 s. 6)

Section:	31RB	Application to domestic servants		30/06/1997

This Part (except section 31Z) shall apply to an employee who is employed as a domestic servant in, or in connection with, a private household as if the household were a business and the maintenance of the household were the carrying on of that business by the employer.

(Added 52 of 1988 s. 6)

Section:	31S	General exclusions from right to long service payment by reason of dismissal	51 of 2000	07/07/2000

(1) An employee shall not be entitled to a long service payment by reason of dismissal where his employer, being so entitled by reason of the employee's conduct, terminates his contract of employment without notice or payment in lieu in accordance with section 9. (Amended 51 of 2000 s. 5)

(2) An employee shall not be entitled to a long service payment by reason of dismissal where, having been given notice of the termination of his contract of employment by his employer in accordance with section 6, he leaves the service of his employer before the expiration of that notice unless he so leaves-

(a) with the prior consent of the employer; or

(b) after having made a payment in lieu to the employer in accordance with section 7. (Replaced 75 of 1997 s. 3)

(3) Subject to subsection (6), an employee employed under a contract for a fixed term shall not be entitled to a long service payment where he is taken to be dismissed by his employer under section 31T(1)(b) if, not less than 7 days before the relevant date, the employer has offered to renew his contract of employment, or to re-engage him under a new contract, so that-

(a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the contract as in force immediately before his dismissal; and

(b) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer. (Added 75 of 1997 s. 3)

(4) Subject to subsection (6), an employee employed under a contract for a fixed term shall not be entitled to a long service payment where he is taken to be dismissed by his employer under section 31T(1)(b) if, not less than 7 days before the relevant date, the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would differ, wholly or in part, from the corresponding provisions of the contract as in force immediately before his dismissal, but-

(a) the offer constitutes an offer of suitable employment in relation to the employee;

(b) the offer constitutes an offer of employment no less favourable to the employee than hitherto; and

(c) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer. (Added 75 of 1997 s. 3)

(5) Where the relevant date falls on a rest day or holiday, the references in subsections (3)(b) and (4)(c) to the relevant date shall be construed as references to the next day after that rest day or holiday. (Added 75 of 1997 s. 3)

(6) Without affecting the application of section 31R(1)(a)(ii) and (b) and (2)(b), where an employee employed

under a contract for a fixed term, on or before the day on which the contract for a fixed term expires, refuses an offer of any of the descriptions mentioned in subsection (3) or (4)-

(a) the employee is entitled to terminate that contract under section 31R(1)(a)(ii) or (2)(b) as appropriate, that expiration shall be regarded as termination of contract by the employee under section 31R(1)(a)(ii) or (2)(b) for the purposes of the application of this Part; or

(b) the employee is entitled to terminate that contract under section 31R(1)(b), that expiration shall be regarded as termination of contract by the employee under section 31R(1)(b) for the purposes of the application of this Part. (Added 75 of 1997 s. 3)

Section:	31T	Dismissal by employer		30/06/1997

(1) For the purposes of and subject to this Part, an employee shall be taken to be dismissed by his employer if, but only if-

(a) the contract under which he is employed is terminated by the employer with or without notice or payment in lieu thereof other than in accordance with section 9;

(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract; or

(c) the employee terminates that contract with or without notice or payment in lieu, in circumstances such that he is entitled to terminate it without notice or payment in lieu in accordance with section 10 by reason of the employer's conduct. (Replaced 62 of 1992 s. 9)

(2) An employee shall not be taken for the purposes of this Part to be dismissed by his employer if-

(a) his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment; and

(b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract.

(3) For the purposes of the application of subsection (2) to a contract under which the employment ends on a rest day or holiday, the renewal or re-engagement shall be treated as taking effect immediately on the ending of the employment under the previous contract if it takes effect on or before the next day after that rest day or holiday.

Section:	31U	Excluded classes of employees		30/06/1997

Sections 31R and 31RA shall not apply- (Amended 52 of 1988 s. 7)

(a) where the employer is the husband or wife of the employee;

(b) to any outworker;

(c) to any person, employed by a government other than the Hong Kong Government, who is a subject or citizen of the state under whose government he is employed; or

(d) without prejudice to paragraph (a), to any person in respect of employment as a domestic servant in, or in connection with, a private household, where the employer is the father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother or half-sister of the employee.

Section:	31V	Amount of long service payment	74 of 1997	27/06/1998

(1) Subject to this Part, the amount of a long service payment payable under section 31R(1) or 31RA(1) shall be calculated by allowing- (Amended 105 of 1991 s. 4)

(a) in the case of a monthly rated employee, two-thirds of his last full month's wages, or two-thirds of $22500, whichever is less; and

(b) in any other case, 18 days' wages based on any 18 days chosen by the employee and occurring during his last 30 normal working days, or two-thirds of $22500, whichever is less, (Amended L.N. 264 of 1995)

for every year (and pro rata as respects an incomplete year) of employment under a continuous contract by his employer subject in all cases to a maximum payment not exceeding, where the relevant date occurs in a period specified in column 1 of Table A in the Seventh Schedule, the amount specified in column 2 of that table opposite to the period. (Replaced 41 of 1990 s. 12. Amended 5 of 1995 s. 7)

(1AA) Notwithstanding subsection (1), where-

(a) the relevant date occurs in a period specified in column 1 of Table B in the Seventh Schedule; and
(b) the employee has been employed under a continuous contract by his employer for a period ("employment period") which immediately precedes the relevant date and is longer than the period specified in column 2 of that table opposite to the period in which the relevant date occurs,

that part of the employment period exceeding the period so specified in column 2 of that table shall be reduced by one half for the purpose of calculating his entitlement under subsection (1). (Added 5 of 1995 s. 7)

(1A) Notwithstanding subsection (1), the employee may elect to have his wages averaged over the period of 12 months immediately preceding the relevant date, but where he so elects, then-

(a) in the case of a monthly rated employee, the monthly average shall not exceed $22500; and
(b) in any other case, the total wages for the 12 months shall, for the purpose of calculating the daily average, not exceed 12 times $22500. (Added 41 of 1990 s. 12. Amended L.N. 264 of 1995)

(2) Subject to this Part, the amount of a long service payment payable under section 31R(2) or 31RA(1A) shall be-

(a)-(c) (Repealed 74 of 1997 s. 12)
(d)-(e) (Repealed 74 of 1997 s. 13)

(3) (Repealed 41 of 1990 s. 12)

Section:	31W	Calculation of period of employment		30/06/1997

(1) For the purposes of this Part, a reference to the period of employment under a continuous contract shall not include a reference to any such employment occurring more than- (Amended 41 of 1990 s. 13)

(a) 6 years prior to 1 January 1986, where the relevant date occurs in 1986;
(b) 7 years prior to 1 January 1986, where the relevant date occurs in 1987;
(c) 8 years prior to 1 January 1986, where the relevant date occurs in 1988; and
(d) 9 years prior to 1 January 1986, where the relevant date occurs in 1989 or any year thereafter.

(1A) Subsection (1) shall cease to have effect on the commencement of the Employment (Amendment) Ordinance 1995 (5 of 1995). (Added 5 of 1995 s. 8)

(2) Notwithstanding subsection (1), for the purposes of this Part, in the case of an employee who was employed under a continuous contract otherwise than by way of manual labour and whose average monthly wages during the period of 12 months immediately preceding the date of commencement of the Employment (Amendment) Ordinance 1990 (41 of 1990) exceed $15000, a reference to the period of employment under a continuous contract shall not include a reference to any such employment occurring more than-

(a) 3 years prior to 1 January 1990, where the relevant date occurs in 1990;
(b) 4 years prior to 1 January 1990, where the relevant date occurs in 1991;
(c) 5 years prior to 1 January 1990, where the relevant date occurs in 1992;
(d) 6 years prior to 1 January 1990, where the relevant date occurs in 1993;
(e) 7 years prior to 1 January 1990, where the relevant date occurs in 1994;
(f) 8 years prior to 1 January 1990, where the relevant date occurs in 1995;
(g) 9 years prior to 1 January 1990, where the relevant date occurs in 1996;
(h) 10 years prior to 1 January 1990, where the relevant date occurs in 1997 or any year thereafter. (Added 41 of 1990 s. 13)

Section:	31X	(Repealed 51 of 2000 s. 4)	51 of 2000	07/07/2000

Section:	31Y	Long service payment to be reduced by amount of gratuities and benefits in certain cases	18 of 2001	25/05/2001

Remarks:
For transitional and savings provisions relating to the amendment of this section made by the Employment (Amendment) (No. 2) Ordinance 2001 (18 of 2001), see section 5 of that Ordinance.

If an employee becomes entitled to payment of a long service payment under this Part and-

(a) because of the operation of the employee's contract of employment, one or more gratuities based on length of service or one or more relevant occupational retirement scheme benefits have been paid to

the employee; or

(b) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee, or has been paid to or in respect of the employee,

the long service payment is to be reduced by the total amount of all of the gratuities and benefits to or in respect of the employee to the extent that they relate to the employee's years of service for which the long service payment is payable.

(Replaced 4 of 1998 s. 5. Amended 18 of 2001 s. 3)

Section:	31YAA	Gratuity or benefit to be reduced by amount of long service payment in certain cases	L.N. 120 of 2000	01/12/2000

(1) If-

(a) because of the operation of the employee's contract of employment, an employee has become entitled to payment of a gratuity based on length of service, or to payment of a relevant occupational retirement scheme benefit; or

(b) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee,

and the employee has been paid a long service payment under this Part, the gratuity or benefit is, to the extent that it is attributable to the same years of service as those for which the long service payment is payable, to be reduced by the whole of the long service payment.

(2) Subsection (1) has effect even though the years of service for which the long service payment was made exceed those to which the gratuity or benefit is attributable.

(3) Section 70A of the Occupational Retirement Schemes Ordinance (Cap 426) and section 12A of the Mandatory Provident Fund Schemes Ordinance (Cap 485) have effect in relation to this section.

(Replaced 4 of 1998 s. 5)

Section:	31YA	Reduction of long service payment and other amounts on employee's death	L.N. 120 of 2000	01/12/2000

(1) If-

(a) an employee has died; and

(b) as a result of the death, a person becomes entitled to payment of a long service payment and-

(i) because of the operation of the employee's contract of employment, one or more gratuities based on length of service or one or more relevant occupational retirement scheme benefits have been paid to the person in respect of the employee; or

(ii) a relevant mandatory provident fund scheme benefit is being held in a mandatory provident fund scheme in respect of the employee, or has been paid to or in respect of the employee,

the long service payment is to be reduced by the total amount of all of the gratuities and benefits to or in respect of the employee to the extent that they relate to the employee's years of service for which the long service payment is payable.

(2) If-

(a) an employee has died; and

(b) as a result of the death, a person-

(i) because of the operation of the employee's contract of employment, becomes entitled to payment of a gratuity based on length of service or to payment of a relevant occupational retirement scheme benefit; or

(ii) becomes entitled to payment of a relevant mandatory provident fund scheme benefit; and

(c) a long service payment under this Part has been paid to the person in respect of the employee,

the gratuity or benefit is, to the extent that it is attributable to the same years of service as those for which the long service payment is payable, to be reduced by the whole of the long service payment.

(3) Subsection (2) has effect even though the years of service for which the long service payment was made exceed those to which the gratuity or benefit is attributable.

(4) If-

(a) the employer of an employee who has died is, as a result of the employee's death, required to make a long service payment under section 31RA to a person; and

(b) another person is entitled to one or more gratuities, relevant occupational retirement scheme benefits or relevant mandatory provident fund scheme benefits as a result of that death,

that other person is entitled to be paid the gratuities, relevant occupational retirement scheme benefits and relevant mandatory provident fund scheme benefits relating to the employee's years of service only to the extent that the total amount of those gratuities and benefits exceeds the amount of the long service payment.

(5) If-

(a) the employer of an employee who has died has made a long service payment under section 31RA to a person as a result of the employee's death; and

(b) the administrator of an occupational retirement scheme has paid a relevant occupational retirement scheme benefit, or the approved trustee of a mandatory provident fund scheme has paid a relevant mandatory provident fund scheme benefit, to another person as a result of that death,

that other person must repay the benefit to that administrator or trustee except for the amount of the excess referred to in subsection (4).

(6) On being repaid the benefit, the administrator or trustee must pay it to the employer concerned.

(7) Section 70A of the Occupational Retirement Schemes Ordinance (Cap 426) and section 12A of the Mandatory Provident Fund Schemes Ordinance (Cap 485) have effect in relation to this section.

(Replaced 4 of 1998 s. 5)

Section:	31Z	Change of ownership of business		30/06/1997

(1) This section shall have effect where-

(a) a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which a person is employed, or of a part of such a business; and

(b) in connection with that change the person by whom the employee is employed immediately before the change occurs (in this section referred to as "the previous owner") terminates the employee's contract in accordance with section 6 or 7.

(2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be, (in this section referred to as "the new owner") renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, section 31T(2) shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner).

(3) This section shall have effect (subject to the necessary modifications) in relation to a case where-

(a) the person by whom a business, or part of a business, is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change; or

(b) the persons by whom a business, or part of a business, is owned immediately before a change (whether as partners, trustees or otherwise) include the person or one or more of the persons by whom it is owned immediately after the change,

as this section has effect where the previous owner and the new owner are wholly different persons.

(4) Nothing in this section shall be construed as requiring any variation of a contract of employment by agreement between the parties to be treated as constituting a termination of the contract.

Section:	31ZA	Associated companies		30/06/1997

(1) Where the employer is a company, any reference in this Part to re-engagement by the employer shall be construed as a reference to re-engagement by that company or by any associated company.

(2) Subsection (1) shall not affect the operation of section 31Z in a case where the previous owner and the new owner (as defined by that section) are associated companies; and where that section applies, subsection (1) shall not apply.

(3) Where an employee of a company is taken into the employment of another company which, at the time when he is taken into its employment, is an associated company of the first-mentioned company, his period of employment at that time shall count as a period of employment with the associated company, and the change of employer shall not break the continuity of the period of employment.

(4) For the purposes of this section, 2 companies shall be taken to be associated companies if one is a subsidiary of the other, or both are subsidiaries of a third company, and "associated company" (相聯公司) shall be construed accordingly.

(5) In this section "company" (公司) and "subsidiary" (附屬公司) have the meanings respectively assigned thereto by section 2 of the Companies Ordinance (Cap 32).

Section:	31ZB	Implied or constructive termination of contract		30/06/1997

Where in accordance with any enactment or rule of law-

(a) any act on the part of the employer; or

(b) any event affecting an employer (including, in the case of an individual, his death),

operates so as to terminate a contract under which an employee is employed by him, that act or event shall for the purposes of this Part be treated as a termination of the contract by the employer, if apart from this section it would not constitute a termination of the contract by him.

Section:	31ZC	Death of employer		30/06/1997

The Sixth Schedule shall have effect in relation to the death of an employer.

(Replaced 52 of 1988 s. 11)

Section:	31ZD	Making of long service payment		30/06/1997

(1) A long service payment shall be made in legal tender except that, where the person entitled to the payment so consents, payment may be made- (Amended 52 of 1988 s. 12)

(a) by cheque, money order or postal order;

(b) into an account in his name with any bank within the meaning of section 2 of the Banking Ordinance (Cap 155); or (Amended 49 of 1995 s. 53)

(c) to his duly appointed agent.

(2) Any employer who without reasonable excuse fails to comply with subsection (1) commits an offence and is liable to a fine at level 3. (Amended 24 of 1988 s. 2; 103 of 1995 s. 11)

Section:	31ZE	Written particulars of long service payment		30/06/1997

(1) On making any long service payment, the employer shall give to the person entitled to the payment a written statement indicating how the amount of the payment has been calculated. (Amended 52 of 1988 s. 13)

(2) (a) An employer who without reasonable excuse fails to comply with subsection (1) shall be guilty of an offence and shall be liable to a fine at level 3.

(b) An employer who in a statement under subsection (1) includes anything which to his knowledge is false in a material particular, or recklessly includes anything which is false in a material particular shall be guilty of an offence and shall be liable to a fine at level 5. (Replaced 103 of 1995 s. 12)

(3) Without prejudice to any proceedings for an offence under subsection (2)(a), if an employer fails to comply with the requirements of subsection (1), the person entitled to the payment may by notice in writing to the employer require the employer to give to the person entitled to the payment a written statement complying with those requirements within such period (not being less than 1 week beginning with the day on which the notice was given) as may be specified in the notice. (Amended 52 of 1988 s. 13)

(4) If, without reasonable excuse, an employer fails to comply with a notice under subsection (3) he commits an offence and is liable-

(a) in the case of a first conviction, to a fine at level 3; or

(b) in the case of a second or subsequent conviction, to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 12)

Part:	VC	SUPPLEMENTARY PROVISIONS TO PARTS VA AND VB	74 of 1997	27/06/1998

(Part VC added 52 of 1988 s. 14)

Section:	31ZF	Re-employment after retirement at a specified age	74 of 1997	27/06/1998

(1) Subject to subsection (2), where a continuous contract of employment specifies an age of retirement and-
(a) the employee retires at that age; and
(b) the employee has been employed under that contract for not less than 5 years of service ending at the relevant date; and (Amended 74 of 1997 s. 14)
(c) he receives in relation to the years of service in respect of which long service payment would have been payable, had the employee been dismissed at the relevant date,-
(i) by virtue of the terms of his contract of employment, any gratuity based upon length of service; or
(ii) by virtue of a retirement scheme, any payment thereunder ; and
(d) the total sum he receives under paragraph (c) is not less than the long service payment to which he would have been entitled had he been dismissed at the relevant date; and
(e) immediately after his retirement, the employee is re-employed by the person by whom he was employed immediately before his retirement,

then for the purposes of Parts VA and VB of this Ordinance, the employment after retirement shall be regarded as a fresh employment.

(2) For the purposes of subsection (1), any reference therein to a retirement scheme payment shall not include that part, if any, of the payment which represents a return of an employee's own contributions, including any sum payable in respect of interest thereon.

(Amended 41 of 1990 s. 16)

Note:
The operation of this section is affected by the transitional provisions contained in s. 31ZG.

Section:	31ZG	Transitional	74 of 1997	27/06/1998

The amendment made by section 14 of the Employment (Amendment) (No. 2) Ordinance 1997 (74 of 1997) to section 31ZF shall not affect employees who retired before the commencement of that amendment; and the provisions of section 31ZF as they read immediately before such commencement shall continue to apply as regards such employees as if it had not been so amended.

(Added 74 of 1997 s. 15)

Note:
S. 14 of 74 of 1997 amended s. 31ZF(1)(b) and came into operation on 27 June 1998. S. 31ZF(1)(b) as it reads immediately before 27 June 1998 is reproduced as follows:

"(b) the employee has been employed under that contract for not less than the number of years of service, ending at the relevant date, specified in column 2 of the table in the Fifth Schedule opposite his age at the relevant date specified in column 1 of that table;"

Part:	VIA	EMPLOYMENT PROTECTION		30/06/1997

(Part VIA added 75 of 1997 s. 4)

Section:	32A	Employee's entitlement to employment protection		30/06/1997

(1) An employee may be granted remedies against his employer under this Part-
(a) where he has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date and he is dismissed by the employer because the employer intends to

extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance;

(b) where he is employed under a continuous contract and the employer, without his consent and, in the absence of an express term in his contract of employment which so permits, varies the terms of his contract of employment because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance; or

(c) where he is dismissed by the employer other than for a valid reason within the meaning of section 32K and in contravention of-

(i) section 15(1), 21B(2)(b), 33(4B) or 72B(1);

(ii) section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59); or

(iii) section 48 of the Employees' Compensation Ordinance (Cap 282),

whether or not the employer has been convicted of an offence in respect of the dismissal.

(2) For the purposes of subsection (1)(a), an employee who has been dismissed by the employer shall, unless a valid reason is shown for that dismissal within the meaning of section 32K, be taken to have been so dismissed because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance.

(3) For the purposes of subsection (1)(b), the variation of the terms of the contract of employment by the employer as referred to in that subsection shall, unless a valid reason is shown for that variation within the meaning of section 32K, be taken to be a variation of the terms of the contract of employment by the employer by reason that the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance.

(4) For the purposes of subsection (1)(c)-

(a) it shall not be necessary for an employee to show in relation to-

(i) subsection (1)(c)(i), that his contract of employment was terminated by reason of his exercising any of the rights vested in an employee by or by virtue of section 21B(1) or by reason of the fact of his doing any of the things mentioned in section 72B(1);

(ii) subsection (1)(c)(ii), that his contract of employment was terminated by reason of the fact of his doing any of the things mentioned in section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59); and

(b) an employee who has been dismissed by the employer shall be taken to have been dismissed without a valid reason unless a valid reason is shown for that dismissal within the meaning of section 32K.

(5) For the purposes of subsection (1)(c), an employee shall be entitled to remedies under this Part if and only if-

(a) in relation to a dismissal in contravention of section 21B(2)(b), the employee has exercised any of the rights mentioned in section 21B(1) within a period of 12 months immediately preceding such dismissal by the employer;

(b) in relation to a dismissal in contravention of section 72B(1), the employee has done any of the things mentioned in that section within a period of 12 months immediately preceding such dismissal by the employer;

(c) in relation to a dismissal in contravention of section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59), the employee has done any of the things mentioned in that section within a period of 12 months immediately preceding such dismissal by the employer.

Section:	32B	Dismissal by employer		30/06/1997

(1) For the purposes of section 32A(1)(a) and subject to this Part, where an employee is dismissed because the employer intends to extinguish or reduce his right to a severance payment or to a long service payment, he shall be taken to be dismissed by his employer if, but only if-

(a) the contract under which he is employed is terminated by the employer with or without notice or payment in lieu otherwise than in accordance with section 9;

(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract; or

(c) the employee terminates that contract with or without notice or payment in lieu, in circumstances such that he is entitled to terminate it without notice or payment in lieu in accordance with section 10 by reason of the employer's conduct.

(2) Subject to subsection (1), an employee shall be taken for the purposes of section 32A(1)(a) and (c) to be dismissed by his employer when the contract under which he is employed is terminated by the employer with or without notice or payment in lieu otherwise than in accordance with section 9.

(3) An employee shall not be taken for the purposes of section 32A(1)(a) to be dismissed by his employer if-

(a) his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment; and

(b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract.

(4) For the purposes of the application of subsection (3) to a contract under which the employment ends on a rest day or holiday, the renewal or re-engagement shall be treated as taking effect immediately on the ending of the employment under the previous contract if it takes effect on or before the next day after that rest day or holiday.

Section:	32C	General exclusions from right to remedies		30/06/1997

(1) An employee shall not be entitled to remedies under this Part if, not less than 7 days before the relevant date, the employer has offered to renew his contract of employment, or to re-engage him under a new contract so that-

(a) the provisions of the contract as renewed, or of the new contract, as the case may be, would not differ from the corresponding provisions of the contract as in force immediately before the dismissal; and

(b) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer.

(2) An employee shall not be entitled to remedies under this Part if, not less than 7 days before the relevant date, the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, would differ, wholly or in part, from the corresponding provisions of the contract as in force immediately before the dismissal, but-

(a) the offer constitutes an offer of suitable employment in relation to the employee;

(b) the offer constitutes an offer of employment no less favourable to the employee than hitherto; and

(c) the renewal or re-engagement would take effect on or before the relevant date,

and the employee has unreasonably refused that offer.

(3) Where the relevant date falls on a rest day or holiday, the references in subsections (1)(b) and (2)(c) to the relevant date shall be construed as references to the next day after that rest day or holiday.

(4) An employee shall not be entitled to remedies under this Part by reason of dismissal where, having been given notice of the termination of his contract of employment by his employer in accordance with section 6, he leaves the service of his employer before the expiration of that notice unless he so leaves-

(a) with the prior consent of the employer; or

(b) after having made a payment in lieu to the employer in accordance with section 7.

(5) Subsections (1) to (3) shall not apply where an employee is dismissed in any of the circumstances mentioned in section 32A(1)(c).

Section:	32D	Change of ownership of business		30/06/1997

(1) This section shall have effect where-

(a) a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which a person is employed, or of a part of such a business; and

(b) in connection with that change the person by whom the employee is employed immediately before the change occurs (in this section referred to as "the previous owner") terminates the employee's contract in accordance with section 6 or 7.

(2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be (in this section referred to as "the new owner"), renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, section 32B(3) shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner).

(3) If the new owner offers to renew the employee's contract of employment (with the substitution of the new

owner for the previous owner) or to re-engage him under a new contract of employment, but the employee refuses the offer, section 32C(1) or (2) (as the case may be) shall have effect, subject to subsection (4), in relation to that offer and refusal as it would have had effect in relation to the like offer made by the previous owner and a refusal of that offer by the employee.

(4) For the purposes of the operation, in accordance with subsection (3), of section 32C(1) or (2) in relation to an offer made by the new owner-

(a) the offer shall not be treated as one whereby the provisions of the contract as renewed, or of the new contract, as the case may be, would differ from the corresponding provisions of the contract as in force immediately before the dismissal by reason only that the new owner would be substituted for the previous owner as the employer; and

(b) no account shall be taken of that substitution in determining whether the refusal of the offer was unreasonable.

(5) This section shall have effect (subject to the necessary modifications) in relation to a case where-

(a) the person by whom a business, or part of a business, is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change; or

(b) the persons by whom a business, or part of a business, is owned immediately before a change (whether as partners, trustees or otherwise) include the person or one or more of the persons by whom it is owned immediately after the change,

as this section has effect where the previous owner and the new owner are wholly different persons.

(6) Nothing in this section shall be construed as requiring any variation of a contract of employment by agreement between the parties to be treated as constituting a termination of the contract.

Section:	32E	Associated companies		30/06/1997

(1) Where the employer is a company, any reference in section 32B**,** 32C or 32D to renewal or re-engagement by the employer shall be construed as a reference to renewal or re-engagement by that company or by any associated company, and any reference in section 32B, 32C or 32D to an offer made by the employer shall be construed as including a reference to an offer made by an associated company.

(2) Subsection (1) shall not affect the operation of section 32D in a case where the previous owner and the new owner are associated companies; and where that section applies, subsection (1) shall not apply.

(3) For the purposes of this section, 2 companies shall be taken to be associated companies if one is a subsidiary of the other, or both are subsidiaries of a third company, and "associated company" shall be construed accordingly.

(4) In this section, "company" (公司) and "subsidiary" (附屬公司) have the meanings respectively assigned to them by section 2 of the Companies Ordinance (Cap 32).

Section:	32F	Relevant date		30/06/1997

For the purposes of and subject to this Part, "relevant date" (有關日期)-

(a) in relation to the termination of employment of an employee, has the same meaning as in section 2(1); and

(b) in relation to the employer varying the terms of the contract of employment of an employee, means the date on which that variation takes effect.

Section:	32G	Death of employer or employee		30/06/1997

For the purposes of this Part, Part I of the Eighth Schedule shall have effect in relation to the death of an employer and Part II of that Schedule shall have effect in relation to the death of an employee.

Section:	32H	(Repealed 51 of 2000 s. 4)	51 of 2000	07/07/2000

Section:	32I	Claim for remedies		30/06/1997

Notwithstanding anything in this Part, an employee shall not be entitled to remedies under this Part unless-

(a) the employee has made a claim for such remedies by notice in writing given to the employer before the end of the period of 3 months beginning with the relevant date, or within such extended period not exceeding 6 months as the Commissioner may permit; or

(b) a question as to the right of the employee to such remedies has been made the subject of a claim filed with the Registrar of the Labour Tribunal in accordance with Part IV of the Labour Tribunal Ordinance (Cap 25) before the end of the period of 9 months beginning with the relevant date.

Section:	32J	Jurisdiction of Labour Tribunal	25 of 1998	01/07/1997

Remarks:
Adaptation amendments retroactively made - see 25 of 1998 s. 2

(1) Subject to this section, the Labour Tribunal established under the Labour Tribunal Ordinance (Cap 25) shall have jurisdiction to inquire into, hear and determine a claim made by an employee under this Part in accordance with this Part and with that Ordinance.

(2) Notwithstanding section 9 of the Labour Tribunal Ordinance (Cap 25), the Labour Tribunal shall not have jurisdiction to inquire into, hear and determine a claim or part of a claim under this Part if the relevant date in respect of that claim falls more than 9 months before the date on which the claim is filed with the Registrar of the Labour Tribunal, unless the parties to the claim, by a memorandum signed by them and filed with the Registrar, have agreed that the Tribunal shall have jurisdiction.

(3) Where the Labour Tribunal has jurisdiction by virtue of subsection (2), the Labour Tribunal may transfer the claim to the Court of First Instance or the District Court under section 10 of the Labour Tribunal Ordinance (Cap 25) and thereupon the court may make all or any of the orders or awards provided under sections 32N to 32P but there is no jurisdiction in either of those courts apart from such a transfer and section 9(3) of the Labour Tribunal Ordinance (Cap 25) does not apply. (Amended 25 of 1998 s. 2)

Section:	32K	Reasons for the dismissal or the variation of the terms of the contract of employment		30/06/1997

For the purposes of this Part, it shall be a valid reason for the employer to show that the dismissal of the employee or the variation of the terms of the contract of employment with the employee was by the reason of-

(a) the conduct of the employee;

(b) the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

(c) the redundancy of the employee or other genuine operational requirements of the business of the employer;

(d) the fact that the employee or the employer or both of them would, in relation to the employment, be in contravention of the law**,** if the employee were to continue in the employment of the employer or**,** were to so continue without that variation of the terms of his contract of employment; or

(e) any other reason of substance, which, in the opinion of the court or the Labour Tribunal, was sufficient cause to warrant the dismissal of the employee or the variation of the terms of that contract of employment.

Section:	32L	Determination of claim		30/06/1997

(1) On a claim for remedies under this Part, in determining whether or not an employer has shown that he has a valid reason for the dismissal of an employee or for the variation of the terms of the contract of employment with an employee within the meaning of section 32K, the court or the Labour Tribunal shall take into consideration the circumstances of the claim.

(2) Without affecting the generality of subsection (1), the circumstances of a claim include the length of time that the employee has been employed under that contract of employment with the employer as compared to the length

of qualifying service required for the right, benefit or protection conferred or to be conferred upon the employee by this Ordinance which is capable of being extinguished or reduced by means of the dismissal or the variation of the terms of the contract of employment.

Section:	32M	Remedies for employment protection		30/06/1997

(1) On a claim for remedies under this Part if the court or Labour Tribunal finds that the employer has not shown a valid reason as specified under section 32K, the employer is deemed to intend to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance and the dismissal or the variation is deemed to be unreasonable and the court or Labour Tribunal may make an order under section 32N or an award of terminal payments under section 32O.

(2) On a claim for remedies under this Part if, in relation to the dismissal of an employee in any of the circumstances mentioned in section 32A(1)(c), the court or Labour Tribunal finds that the employer has not shown a valid reason for that dismissal within the meaning of section 32K and, upon that finding the employer, after having been given an opportunity to do so, refuses or fails to show that the dismissal is not in contravention of-

(a) section 15(1), 21B(2)(b), 33(4B) or 72B(1);

(b) section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59); or

(c) section 48 of the Employees' Compensation Ordinance (Cap 282),

then the court or Labour Tribunal may make an order under section 32N or an award of terminal payments under section 32O and, in the case where the court or Labour Tribunal does not make an order under section 32N, the court or Labour Tribunal may, whether or not it has made an award of terminal payments under section 32O, make an award of compensation under and in accordance with section 32P to be payable to the employee by the employer as it considers just and appropriate in the circumstances.

(3) An order or award made under this Part shall not affect the civil or criminal liability of an employer otherwise than under this Part in respect of the dismissal or the variation of the terms of the contract of employment.

Section:	32N	Order for reinstatement and re-engagement		30/06/1997

(1) Subject to this section and to section 32M, an order under this section may be an order for reinstatement (in accordance with subsections (4) and (5)) or an order for re-engagement (in accordance with subsections (6) and (7)) as the court or Labour Tribunal may decide and on terms which it considers just and appropriate in the circumstances.

(2) The court or Labour Tribunal shall first consider whether to make an order for reinstatement, and if it decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement.

(3) Where the court or Labour Tribunal finds that an order for reinstatement or re-engagement, as the case may be, is appropriate, it shall explain to both the employer and the employee what order for reinstatement or re-engagement may be made, and shall ask them whether they agree to the court or Labour Tribunal making such an order. If the employer and the employee express such agreement, the court or Labour Tribunal shall make an order for reinstatement or re-engagement in accordance with that agreement.

(4) An order for reinstatement is an order that the employer shall treat the employee in all respects as if he had not been dismissed or as if there had been no such variation of the terms of the contract of employment, and on making such an order the court or Labour Tribunal shall specify the terms on which reinstatement is to take place including-

(a) any rights and privileges, including seniority and pension rights, which must be restored to the employee;

(b) the continuity of the period of employment of the employee shall not be treated as broken by any absence on his part from work between the relevant date or where the contract was terminated by the employer by payment in lieu of notice, the last date on which the employee renders services to the employer, and the date of reinstatement for the purpose of reckoning the existing and future entitlements under this Ordinance and his employment contract;

(c) the date by which the order must be complied with; and

(d) where the employer fails to comply with the order on or before the date specified in paragraph (c), the amount of terminal payments payable under section 32O and where appropriate, the amount of compensation payable under section 32P.

(5) On the making of an order for reinstatement, if the court or Labour Tribunal considers just and appropriate in the circumstances, it may specify-

(a) any amount payable by the employer to the employee in respect of any arrears of pay and statutory entitlements under this Ordinance which the employee might reasonably be expected to have had but for the dismissal or the variation of the terms of the contract of employment, for the period between the relevant date and the date of reinstatement; or

(b) any amount to be restored by the employee to the employer in respect of any statutory entitlements that the employee has been paid by the employer under this Ordinance and that the employee should not have had upon reinstatement.

(6) An order for re-engagement is an order that the employee shall be engaged by the employer, or by a successor of the employer or by an associated company, in an employment on terms comparable to his original terms of the employment or in other suitable employment, and on making such an order the court or Labour Tribunal shall specify the terms on which re-engagement is to take place including-

(a) the identity of the employer;

(b) the nature of the employment;

(c) the remuneration for the employment;

(d) any rights and privileges, including seniority and pension rights, which must be restored to the employee;

(e) the continuity of the period of employment of the employee shall not be treated as broken by any absence on his part from work between the relevant date or where the contract was terminated by the employer by payment in lieu of notice, the last date on which the employee renders services to the employer, and the date of re-engagement for the purpose of reckoning the existing and future entitlements under this Ordinance and his employment contract;

(f) the date by which the order must be complied with; and

(g) where the employer fails to comply with the order on or before the date specified in paragraph (f), the amount of terminal payments payable under section 32O and where appropriate, the amount of compensation payable under section 32P.

(7) On the making of an order for re-engagement, if the court or Labour Tribunal considers just and appropriate in the circumstances, it may specify-

(a) any amount payable by the employer to the employee in respect of any arrears of pay and statutory entitlements under this Ordinance which the employee might reasonably be expected to have had but for the dismissal or the variation of the terms of the contract of employment, for the period between the relevant date and the date of re-engagement; or

(b) any amount to be restored by the employee to the employer in respect of any statutory entitlements that the employee has been paid by the employer under this Ordinance and that the employee should not have had upon re-engagement.

(8) For the purposes of subsection (6)-

(a) "successor" (繼承人), in relation to the employer of an employee, means (subject to paragraph (b)) a person who in consequence of a change occurring (whether by virtue of a sale or other disposition or by operation of law) in the ownership of the undertaking, or of part of the undertaking, for the purposes of which the employee was employed, has become the owner of the undertaking or part;

(b) the definition in paragraph (a) has effect (subject to the necessary modifications) in relation to a case where-

(i) the person by whom an undertaking or part of an undertaking is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change; or

(ii) the persons by whom an undertaking or part of an undertaking is owned immediately before a change (whether as partners, trustees or otherwise) include the persons by whom, or include one or more of the persons by whom, it is owned immediately after the change, as it has effect where the previous owner and the new owner are wholly different persons;

(c) "associated company" shall be construed in accordance with section 32E.

Section:	32O	Award of terminal payments		30/06/1997

(1) Subject to section 32M, if no order for reinstatement or re-engagement is made under section 32N, the court or Labour Tribunal may make an award of terminal payments to be payable by the employer to the employee as it considers just and appropriate in the circumstances.

(2) Terminal payments under this section refer to the statutory entitlements under this Ordinance that the employee has not been paid and that the employee is entitled to upon the termination of the contract of employment, or that he might reasonably be expected to be entitled to upon the termination of the contract of employment had he been allowed to continue with his original employment or original terms of the contract of employment to attain the minimum qualifying length of service required for the entitlements under this Ordinance.

(3) Subject to subsection (4), terminal payments include-

(a) any wages and other payments due to the employee under his contract of employment;

(b) any payment in lieu of notice payable under Part II, in the case of a dismissal without due notice;

(c) any end of year payment payable under Part IIA;

(d) any maternity leave pay or sum payable under Part III;

(e) any severance payment payable under Part VA or any long service payment payable under Part VB;

(f) any sickness allowance or sum payable under Part VII;

(g) any holiday pay payable under Part VIII;

(h) any annual leave pay payable under Part VIIIA; and

(i) any other payments due to the employee under this Ordinance and under his contract of employment.

(4) Notwithstanding that the employee has not attained the qualifying length of service required for the entitlements under this Ordinance, the court or Labour Tribunal may make an award for terminal payments under subsection (1) or (5) which shall be reckoned according to the actual length of time that the employee has been employed under that contract of employment with the employer.

(5) For the purposes of this section, where no order for reinstatement or re-engagement is made for an unreasonable variation of the terms of the contract of employment, the court or Labour Tribunal may treat the unreasonable variation of the terms of the contract of employment as an unreasonable dismissal by the employer and make an award for terminal payments and such terminal payments should be calculated up to the last date on which the employee renders services to the employer or the date on which an award of terminal payments under this section is made by the court or Labour Tribunal, whichever is the earlier.

(6) The respective provisions governing the calculation of the statutory entitlements shall apply to the calculation of the terminal payments; and, subject to subsection (4), in the case of an employee aged at the relevant date less than 45 years who at that date has less than 5 years service with his employer, any long service payment payable by virtue of subsection (3)(e) shall be calculated in the same manner as any long service payment payable under Part VB to an employee aged at the relevant date less than 45 years who at that date has 5 years service with his employer.

(7) Sections 31I and 31IA shall apply to any severance payment paid under this section.

(8) Sections 31Y, 31YAA and 31YA shall apply to any long service payment paid under this section.

Section:	32P	Award of compensation		30/06/1997

(1) Subject to section 32M, the court or Labour Tribunal may, whether or not it has made an award of terminal payments under section 32O, make an award of compensation to be payable to the employee by the employer as it considers just and appropriate in the circumstances, if-

(a) neither order for reinstatement nor order for re-engagement under section 32N is made; and

(b) the employee is dismissed by the employer in contravention of section 15(1), 21B(2)(b), 33(4B) or 72B(1), section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59), or section 48 of the Employees' Compensation Ordinance (Cap 282), whether or not the employer has been convicted of the offence in respect of the dismissal.

(2) In determining an award of compensation and the amount of the award of compensation under this section, the court or Labour Tribunal shall take into account the circumstances of the claim.

(3) Without affecting the generality of subsection (2) the circumstances of a claim include-

(a) the circumstances of the employer and the employee;

(b) the length of time that the employee has been employed under the contract of employment with the employer;

(c) the manner in which the dismissal took place;

(d) any loss sustained by the employee which is attributable to the dismissal;

(e) possibility of the employee obtaining new employment;

(f) any contributory fault borne by the employee; and

(g) any payments that the employee is entitled to receive in respect of the dismissal under this Ordinance,

including any award of terminal payments under section 32O.

(4) The amount of an award of compensation under this section shall be such amount as the court or Labour Tribunal considers just and appropriate but no such award shall exceed an amount of $150000.

(5) The Commissioner for Labour may amend the amount specified in subsection (4) by notice in the Gazette.

Section:	32Q	Exclusion	L.N. 166 of 2009	10/07/2009

This Part shall not apply to acts of-

(a) sex discrimination within the meaning of the Sex Discrimination Ordinance (Cap 480);

(b) discrimination against persons on the ground of their or their associates' disability within the meaning of the Disability Discrimination Ordinance (Cap 487); (Amended 7 of 2001 s. 7)

(c) discrimination against persons on the ground of family status within the meaning of the Family Status Discrimination Ordinance (Cap 527); or (Added 7 of 2001 s. 7. Amended 29 of 2008 s. 87)

(d) discrimination against a person on the ground of the race of the person or his or her near relative within the meaning of the Race Discrimination Ordinance (Cap 602). (Added 29 of 2008 s. 87)

Part:	VI	DEDUCTIONS FROM WAGES	L.N. 199 of 1998	03/04/1998

Section:	32	Restriction on deductions from wages	L.N. 199 of 1998	03/04/1998

(1) No deductions shall be made by an employer from the wages of his employee or from any other sum due to the employee otherwise than in accordance with this Ordinance.

(2) The following deductions may be made by an employer from the wages of his employee-

(a) deductions for absence from work:

Provided that-

(i) in the case of a contract of employment under which wages are calculated on a basis of time, no such deduction shall exceed a sum proportionate to the period of time during which the employee was absent from work;

(ii) no such deduction shall be made for the purpose of defraying or partly defraying the cost of holiday pay or sickness allowance which the employer has paid or may be or may become liable to pay to the employee; (Replaced 39 of 1973 s. 4)

(b) deductions for damage to or loss of goods, equipment or property belonging to or in the possession or control of the employer or expressly entrusted to an employee for custody, or for loss of money for which an employee is required to account, where such damage or loss is directly attributable to his neglect or default:

Provided that-

(i) the total amount recoverable by deduction in any one case shall not exceed the equivalent in value of the damage or loss suffered by the employer or $300, whichever is the less; and

(ii) the total of such deductions in any one wage period shall not exceed one quarter of the wages payable to the employee in respect of that wage period;

(c) deductions in respect of meals supplied by the employer at the request of the employee not exceeding the cost to the employer of such meals including expenses of production and service;

(d) deduction for accommodation provided by the employer for the employee or his family made in respect of the period such accommodation has been in the occupation of the employee or his family;

(e) deductions for the recovery of any advance or over-payment of wages made by the employer to the employee:

Provided that-

(i) except with the approval in writing of the Commissioner, no such deductions shall be made by way of discount, interest or any similar charge in consideration of such advance or over-payment; and

(ii) the total of such deductions in any one wage period shall not exceed one quarter of the wages payable to the employee in respect of that wage period;

(f) deductions, with the written consent of an employee, for the recovery of any loan made by the employer to the employee;

(g) deductions made at the request in writing of the employee in respect of contributions to be paid by him through the employer for the purpose of any medical benefit scheme, superannuation scheme, retirement scheme or thrift scheme lawfully established for the benefit of the employee or his dependants; (Amended 41 of 1990 s. 17)

(h) deductions which are required or authorized under any enactment to be made from the wages of an employee;

(i) other deductions made at the request in writing of the employee and with the approval of the Commissioner, which may be signified in respect of any particular case in writing or in general by notice in the Gazette.

(3) Except with the approval in writing of the Commissioner, the total of all deductions, excluding deductions in respect of absence from work or any deduction pursuant to an attachment order made under section 20(1) of the Guardianship of Minors Ordinance (Cap 13), section 9A(1) of the Separation and Maintenance Orders Ordinance (Cap 16) or section 28(1) of the Matrimonial Proceedings and Property Ordinance (Cap 192), made under this section from the wages of an employee in any one wage period shall not exceed one half of the wages payable to the employee in respect of the wage period. (Amended 69 of 1997 s. 34)

(4) Nothing in this section shall be construed as preventing an employer from paying to an employee at any time before the due date the amount of wages and other remuneration proportionate to work done and adjusting any amount so paid against the total amount payable at the end of the wage period.

Part:	VII	SICKNESS ALLOWANCE	L.N. 94 of 2007	13/07/2007

(Part VII added 39 of 1973 s. 5)

Section:	33	Sickness allowance	L.N. 94 of 2007	13/07/2007

(1) An employee who has been employed by his employer under a continuous contract for a period of 1 month or more immediately preceding a sickness day shall be paid by his employer sickness allowance in accordance with this section and section 35. (Amended 1 of 1977 s. 2; 48 of 1984 s. 14)

(2) Subject to subsection (2A), an entitlement to sickness allowance shall accrue at the rate of-

(a) 2 paid sickness days for each completed month of the employee's employment under the continuous contract with his employer during the first 12 months of such employment; and

(b) 4 paid sickness days for each such month thereafter,

and may be accumulated from time to time up to a maximum of 120 paid sickness days. (Replaced 57 of 1983 s. 5)

(2A)In the case of an employee who has been employed by his employer under a continuous contract for a period of 1 month or more immediately preceding the commencement* of the Employment (Amendment) Ordinance 1983 (57 of 1983), the employee's entitlement to sickness allowance shall, with effect from and without prejudice to the entitlement to sickness allowance accrued at such commencement, accrue at the rate prescribed by subsection (2) as amended by that Ordinance, and his employment for part of a month (if any) at such commencement shall be taken into account in calculating his entitlement to sickness allowance under and at the rate prescribed by that subsection. (Added 57 of 1983 s. 5)

(3) Subject to subsection (3C), an employee who takes less than 4 consecutive days as sickness days shall not be entitled to be paid sickness allowance in respect thereof. (Amended 22 of 1981 s. 7)

(3A) Where a female employee who is pregnant or who has given birth to a child and who is required to attend a medical examination in relation to her pregnancy or post confinement medical treatment, any day on which she is absent from work for such examination or treatment shall be a sickness day. (Added 22 of 1981 s. 7)

(3B) Where a female employee suffers a miscarriage, any day on which she is absent from work by reason of such miscarriage shall be a sickness day. (Added 22 of 1981 s. 7)

(3C) A female employee who has an entitlement to a sickness allowance under this section shall, notwithstanding subsection (3), be paid sickness allowance for every sickness day under subsection (3A) or (3B), and subsections (4), (4A), (5), (5A) and (7) shall apply to any such sickness day and sickness allowance in respect thereof. (Added 22 of 1981 s. 7. Amended 57 of 1983 s. 5)

(4) Subject to subsections (5) and (5A), an employee who takes 4 or more consecutive days as sickness days shall be entitled to be paid sickness allowance for the total number of sickness days taken by him, but not exceeding the number of paid sickness days accumulated by him, under subsections (2) and (2A), immediately before the commencement of the sickness days taken. (Replaced 57 of 1983 s. 5)

(4A) The number of sickness days in respect of which an employee has been paid sickness allowance under subsection (4) shall be deducted in accordance with section 37(1B) from the total number of paid sickness days accumulated by him. (Added 57 of 1983 s. 5)

(4B) Subject to subsection (4BAA), an employer shall not terminate a contract of employment of an employee otherwise than in accordance with section 9 on any sickness day taken by the employee in respect of which sickness allowance is payable under this section. (Replaced 7 of 2001 s. 8)

(4BAAA) For the purposes of subsections (4BA)(b), (4BAAB) and (4BAAC), "wages" (工資) includes any sum paid by an employer in respect of-

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of his employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282). (Added 7 of 2007 s. 9)

(4BA) An employer who contravenes subsection (4B) shall be liable to pay to the dismissed employee-

(a) the sum which would have been payable if the contract had been terminated by the employer under section 7; and

(b) a further sum equivalent to 7 times the daily average of the wages earned by the employee during-

(i) the period of 12 months immediately before the date of termination of the contract of employment; or

(ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract, the shorter period. (Replaced 7 of 2007 s. 9)

(4BAAB) In calculating the daily average of the wages earned by an employee during the period of 12 months or the shorter period-

(a) any period therein for which the employee was not paid his wages or full wages by reason of-

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded. (Added 7 of 2007 s. 9)

(4BAAC) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (4BAAA) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (4BAAB). (Added 7 of 2007 s. 9)

(4BAAD) Despite subsection (4BA)(b), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of termination of the employee's contract of employment, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of termination of the employee's contract of employment. (Added 7 of 2007 s. 9)

(4BAA) An employer who terminates the continuous contract of employment of an employee on any sickness day taken by the employee in respect of which sickness allowance is payable under this section shall be taken for the purposes of subsection (4B) to terminate the contract otherwise than in accordance with section 9-

(a) unless the contrary is proved; or

(b) subject to subsection (4BAB), unless the employer proves that-

(i) he purported to terminate the contract in accordance with that section; and

(ii) at the time of such termination, he reasonably believed that he had a ground to do so. (Added 7 of 2001 s. 8)

(4BAB) Subsection (4BAA)(b) shall not apply in the case of civil proceedings. (Added 7 of 2001 s. 8)

(4BB) Any employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. (Replaced 7 of 2001 s. 8)

(4C) Where an employer terminates a contract of employment of an employee on any sickness day taken by the employee, the employer shall, notwithstanding the termination of the contract of employment, pay to the employee sickness allowance for the total number of sickness days in respect of which the employee would have been entitled to be paid sickness allowance under subsection (4), and subsections (5), (5A) and (7) shall apply to any such sickness day and sickness allowance in respect thereof as if the contract of employment had not been terminated. (Added 57 of 1983 s. 5)

(5) An employer shall not be liable to pay sickness allowance to an employee in respect of any sickness day-

(a) subject to subsection (5A), unless such day is a day specified in the appropriate medical certificate as a day on which, in the opinion of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist who issued the certificate, the employee was, is or will be, as the case may be, unfit for work on account of sickness or injury; (Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7)

(b) if, where the employer is operating a recognized scheme of medical treatment, the employee, at any time during the sickness or injury, unless he is a patient in a hospital, refuses without reasonable excuse to submit himself for treatment under the scheme; (Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7)

(c) if, where the employer is operating a recognized scheme of medical treatment, the employee, having submitted himself for treatment by the registered medical practitioner, registered Chinese medicine practitioner or registered dentist engaged by the employer for the purposes of the scheme or being a patient in a hospital, at any time during the sickness or injury, without reasonable excuse, disregards- (Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7)

(i) the advice of such medical practitioner, Chinese medicine practitioner or dentist; or

(ii) the advice of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist who is attending him in the hospital; (Amended 16 of 2006 s. 7)

(d) if the unfitness for work of the employee is caused by his serious and wilful misconduct;

(e) if the unfitness for work of the employee is on account of an injury or occupational disease in respect of which compensation is payable in accordance with the Employees' Compensation Ordinance (Cap 282);

(f) in respect of which the employee has received holiday pay.

(5AA) Where a medical certificate issued for the purposes of subsection (5)-

(a) is issued by a registered medical practitioner, subsection (5)(b) applies only if the recognized scheme of medical treatment operated by the employer covers medical treatment given by a registered medical practitioner;

(b) is issued by a registered Chinese medicine practitioner, subsection (5)(b) applies only if the recognized scheme of medical treatment operated by the employer covers medical treatment given by a registered Chinese medicine practitioner; or

(c) is issued by a registered dentist, subsection (5)(b) applies only if the recognized scheme of medical treatment operated by the employer covers medical treatment given by a registered dentist. (Added 16 of 2006 s. 7)

(5A) Where an employee takes paid sickness days entered in category 2 of the record kept in respect of him under section 37(1A), he shall, if so required by his employer, produce to the employer, in respect of each such sickness day, a medical certificate that is issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist attending the employee as an out-patient or in-patient in a hospital. (Added 57 of 1983 s. 5. Amended 5 of 1995 s. 9; 16 of 2006 s. 7)

(6) For the purposes of this section-

(a) the expression "hospital" (醫院) means a hospital or specialist clinic maintained by the Crown, a public hospital within the meaning of the Hospital Authority Ordinance (Cap 113) or a hospital in respect of which a person is registered under the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap 165); (Amended 81 of 1991 s. 2)

(b) in subsection (5)(a), the expression "appropriate medical certificate" (適當的醫生證明書) means-

(i) where, on the day on which the certificate is issued, the employer is operating a recognized scheme of medical treatment- (Amended 5 of 1995 s. 9; 16 of 2006 s. 7)

(A) a certificate issued by the registered medical practitioner, registered Chinese medicine practitioner or registered dentist engaged by the employer for the purposes of the scheme;

(B) (if the scheme does not cover medical treatment given by a registered medical practitioner) a certificate issued by any registered medical practitioner;

(C) (if the scheme does not cover medical treatment given by a registered Chinese medicine practitioner) a certificate issued by any registered Chinese medicine practitioner;

(D) (if the scheme does not cover medical treatment given by a registered dentist) a certificate issued by any registered dentist; or

(E) (if the employee refuses with reasonable excuse to submit himself for treatment under the scheme) a certificate issued by any registered medical practitioner, registered Chinese medicine practitioner or registered dentist; (Amended 16 of 2006 s. 7)

(ii) where, on the day on which the certificate is issued, the employee is a patient in a hospital, a certificate issued by the registered medical practitioner, registered Chinese medicine practitioner or registered dentist attending the employee in the hospital; or (Amended 5 of 1995 s. 9; 16 of 2006 s. 7)

(iii) in any other cases, a certificate issued by any registered medical practitioner, registered Chinese medicine practitioner or registered dentist. (Replaced 57 of 1983 s. 5. Amended 5 of 1995 s. 9; 16 of 2006 s. 7)

(7) Every medical certificate shall, in addition to specifying the number of days on which, in the opinion of the issuer of the certificate, the employee was, is or will be, as the case may be, unfit for work, specify the nature of the sickness or injury on account of which, in the opinion of the issuer of the certificate, the employee was, is or will be, as the case may be, unfit for work and, in the case of a medical certificate produced by an employee for the purposes of subsection (5A), the medical certificate shall, if so required by his employer, contain or be accompanied by a brief record of the investigation carried out and the treatment prescribed by the issuer of the certificate. (Amended 57 of 1983 s. 5; 5 of 1995 s. 9; 16 of 2006 s. 7)

Note:

*** 1.11.1983-L.N. 349 of 1983.**

Section:	34	Recognized scheme of medical treatment	L.N. 203 of 2006	01/12/2006

(1) The Director may recognize for the purposes of this Ordinance a scheme of medical treatment operated by an employer, if he is satisfied that each employee, who is qualified to be paid sickness allowance by the employer by whom the scheme is operated, is provided, without expense to the employee, by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist with such medical treatment as an out-patient as the Director considers reasonable. (Amended 5 of 1995 s. 10;16 of 2006 s. 8)

(2) The Director may, having given to the employer by whom the scheme is operated not less than 1 month's notice of his intention so to do, withdraw his recognition of any scheme of medical treatment.

(3) Whenever the Director has recognized, or has withdrawn his recognition of, any scheme of medical treatment, he shall publish a notice thereof in the Gazette.

Section:	35	Rate of sickness allowance	L.N. 94 of 2007	13/07/2007

(1) For the purposes of subsections (2), (2A) and (2B), "wages" (工資) includes any sum paid by an employer in respect of—

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of his employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282). (Replaced 7 of 2007 s. 10)

(2) The daily rate of sickness allowance is a sum equivalent to four-fifths of the daily average of the wages earned by the employee during—

(a) the period of 12 months immediately before the sickness day or first sickness day (as appropriate); or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months

immediately before the sickness day or first sickness day (as appropriate), the shorter period,

but no sickness allowance is payable in respect of a day on which the employee would not have worked had he not been sick and for which no wages would normally be payable by the employer. (Replaced 7 of 2007 s. 10)

(2A) In calculating the daily average of the wages earned by an employee during the period of 12 months or the shorter period—

(a) any period therein for which the employee was not paid his wages or full wages by reason of—

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded. (Added 7 of 2007 s. 10)

(2B) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (1) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (2A). (Added 7 of 2007 s. 10)

(2C) Despite subsection (2), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the employee's sickness day or first sickness day (as appropriate), or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the employee's sickness day or first sickness day (as appropriate). (Added 7 of 2007 s. 10)

(3) Where a contract of employment of an employee is terminated, sickness allowance payable under section 33(4C) shall be calculated in accordance with this section. (Added 48 of 1984 s. 15. Amended 7 of 2007 s. 10)

(4) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid by his employer a sum of money in respect of a paid sickness day taken by him, the sickness allowance payable to the employee in respect of that sickness day is to be reduced by the sum. (Added 7 of 2007 s. 10)

(Amended 1 of 1977 s. 3)

Section:	35A	Transitional		30/06/1997

Section 35 as in force immediately before the commencement* of the Employment (Amendment) Ordinance 1996 (60 of 1996) shall continue to apply in the calculation of sickness allowance payable to an employee under section 33 in respect of sickness days taken by that employee before that commencement.

(Added 60 of 1996 s. 3)

Note:

*** Commencement date: 1 November 1996**

Section:	36	Time for payment of sickness allowance		30/06/1997

(1) Except in the case of an employee who is normally paid his wages daily, sickness allowance shall be paid to the employee or his duly appointed agent in the manner and at the place specified in section 26 not later than the day on which the employee is next paid his wages.

(2) In the case of an employee who is normally paid his wages daily, sickness allowance shall be paid to him or his duly appointed agent in the manner and at the place specified in section 26 at least once in every 7 days.

(3) Where a contract of employment of an employee is terminated, sickness allowance payable under section 33(4C) shall be paid to that employee in accordance with subsection (1) or (2) whichever is applicable to the employee as if the contract of employment had not been terminated. (Added 48 of 1984 s. 16)

Section:	37	Employer to keep record of sickness days		30/06/1997

(1) Every employer shall keep a record-

(a) of the date of commencement and termination of the employment of each employee;

(b) in accordance with subsection (1A), of all paid sickness days accumulated by each employee under section 33;

(c) of all paid sickness days taken by each employee in respect of which sickness allowance is payable under section 33, and such sickness days shall be deducted in accordance with subsection (1B); and

(d) of all sickness allowance paid to each employee and the sickness days in respect of which the sickness allowance was paid. (Replaced 57 of 1983 s.6)

(1A) A record kept for the purposes of subsection (1)(b) shall contain the following heads and details-

Category 1: in which shall be entered the number of paid sickness days accumulated by an employee-

(a) under section 33(2A); and

(b) in respect of each month under section 33(2),

but so however that the total number of paid sickness days in this category does not at the time of entry exceed 36 days; and

Category 2: in which shall be entered every paid sickness day in excess of 36 days which cannot be entered in category 1, but so however that the total number of paid sickness days in this category does not at the time of entry exceed 84 days,

and references in this section to category 1 and category 2 shall be construed as references to category 1 and category 2 respectively in this subsection. (Added 57 of 1983 s. 6)

(1B) The number of paid sickness days taken consecutively by an employee shall be deducted from the total number of paid sickness days in category 1 accumulated by him immediately before the commencement of those sickness days and where the number of paid sickness days taken exceeds the total number of paid sickness days in that category, the excess paid sickness days shall be deducted from the total number of paid sickness days in category 2 accumulated by him immediately before such commencement. (Added 57 of 1983 s. 6)

(2) If an employer maintains a record under subsection (1)-

(a) an employee who returns to work after a sickness day shall, as soon as is practicable but not later than 7 days after his return to work, sign the entry in the record specifying the days on which he has been absent;

(b) an employee shall be entitled to inspect that part of the record which relates to him at any reasonable time during working hours and, where an employee has ceased to be employed by his employer, he may inspect that part of the record which relates to him at any reasonable time during working hours in the period of 2 months next following the date on which he ceased to be employed.

(3) If an employer fails to maintain the record under subsection (1) in respect of any employee employed by him, or if the record is lost or destroyed, the employee shall, notwithstanding any sickness allowance paid to him by his employer under section 33, be entitled to paid sickness days for each completed month of his employment in accordance with section 33. (Amended 57 of 1983 s. 6)

Section:	38	Records to be produced to Commissioner		30/06/1997

For the purposes of section 37, the Commissioner may, either by notice in writing served by registered post or by notice in the Gazette, require any employer or class of employers to send to him all or any records of sickness days in respect of any period not exceeding 2 years preceding the date of the notice.

Part:	VIII	HOLIDAYS WITH PAY	7 of 2001	12/04/2001

(Part VIII added 39 of 1973 s. 5)

Section:	39	Grant of holidays	L.N. 185 of 2011	24/02/2012

(1) Subject to subsections (1A), (2) and (3), an employee shall be granted a statutory holiday by his employer on each of the following days*-

(a) Lunar New Year's Day or, if that day falls on a Sunday, then the fourth day of Lunar New Year; (Amended

27 of 1982 s. 2; 23 of 2011 s. 5)

(b) the second day of Lunar New Year or, if that day falls on a Sunday, then the fourth day of Lunar New Year; (Amended 23 of 2011 s. 5)

(c) the third day of Lunar New Year or, if that day falls on a Sunday, then the fourth day of Lunar New Year; (Amended 23 of 2011 s. 5)

(d) Ching Ming (清明) Festival;

(da) Labour Day, being the first day of May; (Added 100 of 1997 s. 2. Amended 35 of 1998 s. 5)

(e) Tuen Ng (端午) Festival; (Amended 35 of 1998 s. 5)

(f) the day following the Chinese Mid-Autumn (中秋) Festival or, if that day falls on a Sunday, then the second day following that Festival; (Amended 27 of 1982 s. 2; 23 of 2011 s. 5);

(g) the Chung Yeung (重陽) Festival;

(h) the Chinese Winter Solstice Festival (冬節) or Christmas Day, at the option of the employer;

(i) the first day of January; (Replaced 53 of 1976 s. 2)

(j) Hong Kong Special Administrative Region Establishment Day, being the first day of July; and (Added 137 of 1997 s. 3. Amended 35 of 1998 s. 5)

(k) National Day, being the first day of October. (Added 137 of 1997 s. 3. Amended 35 of 1998 s. 5)

(1A) The operation of subsection (1)(da) shall be suspended for the year 1998. (Added 137 of 1997 s. 3)

(2) An employer may, instead of granting an employee a holiday on a statutory holiday, grant the employee an alternative holiday on another day (which is not a statutory holiday or a substituted holiday) within the period of 60 days immediately preceding or next following the statutory holiday, if the employer has notified the employee, either orally or in writing or by notice posted in a conspicuous place in the place of employment, of the day on which he will be granted the alternative holiday-

(a) where the alternative holiday is to be taken on a day within the period of 60 days immediately preceding the statutory holiday, not less than 48 hours before that day; or

(b) where the alternative holiday is to be taken on a day within the period of 60 days next following the statutory holiday, not less than 48 hours before the statutory holiday.

(2A) Subsection (2) shall apply to and in relation to a holiday under subsection (4) as it applies to and in relation to a statutory holiday. (Added 137 of 1997 s. 3)

(3) An employer and his employee may agree that another day shall be substituted for a statutory holiday or an alternative holiday or a holiday under subsection (4), if such substituted holiday falls within the period of 30 days of such statutory holiday, alternative holiday or holiday under subsection (4). (Amended 27 of 1982 s. 2)

(4) Where-

(a) a statutory holiday falls on a rest day, or in the case of an employee who is a young person, on a day on which, by virtue of the Employment of Young Persons (Industry) Regulations (Cap 57 sub. leg. C), the employment of the employee in an industrial undertaking is not allowed, the employee shall be granted a holiday on the next day thereafter which is not a statutory holiday or an alternative holiday or a substituted holiday or a rest day; or (Amended 7 of 2001 s. 9)

(b) a statutory holiday falls on the same day as that of another statutory holiday, an employee shall be granted a holiday on the next day thereafter which is not a statutory holiday or an alternative holiday or a substituted holiday or a rest day. (Replaced 137 of 1997 s. 3)

#(5)-(9) (Repealed 137 of 1997 s. 3)

(Amended 53 of 1976 s. 2; 137 of 1997 s. 3)

Note:

*** For additional statutory holidays in 1981, 1986 and 1997, see 39 of 1981, 35 of 1986, 84 of 1997 and s. 2(1) of 111 of 1997.**

 # For savings provisions, please see s. 6 of 137 of 1997.

Section:	40	Payment of holiday pay		30/06/1997

Subject to section 12(11), an employee who has been employed by his employer under a continuous contract for a period of 3 months immediately preceding a statutory holiday shall, not later than the day on which the employee is next paid his wages after that holiday, be paid by his employer holiday pay at the rate specified in section 41, whether the employee takes a holiday on the statutory holiday or on an alternative or substituted holiday or a holiday under

section 39(4).

(Amended 53 of 1976 s. 3; 71 of 1976 s. 6; 48 of 1984 s. 17)

Section:	40A	Restriction on pay in lieu of holiday	L.N. 94 of 2007	13/07/2007

(1) Subject to subsection (2), no payment of holiday pay payable under section 40, or other sum, shall be made in lieu of the grant of a holiday.

(2) Notwithstanding subsection (1), where a contract of employment of an employee is terminated, holiday pay in respect of a holiday granted as an alternative holiday or substituted holiday under section 39(2), (2A) or (3) prior to the termination of the contract of employment but falling after such termination shall be paid to that employee as soon as is practicable but in any case not later than 7 days after the day of termination; and such holiday pay shall be calculated in accordance with section 41 as if the contract of employment had not been terminated. (Amended 137 of 1997 s. 4; 7 of 2007 s. 11)

(Added 48 of 1984 s. 18)

Section:	41	Rate of holiday pay	L.N. 94 of 2007	13/07/2007

(1) For the purposes of subsections (2), (3) and (4), "wages" (工資) includes any sum paid by an employer in respect of—

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of his employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282).

(2) The daily rate of holiday pay is a sum equivalent to the daily average of the wages earned by the employee during—

(a) the period of 12 months immediately before the holiday or first day of the holidays (as appropriate); or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the holiday or first day of the holidays (as appropriate), the shorter period.

(3) In calculating the daily average of the wages earned by an employee during the period of 12 months or the shorter period—

(a) any period therein for which the employee was not paid his wages or full wages by reason of—

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded.

(4) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (1) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (3).

(5) Despite subsection (2), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the employee's holiday or first day of the holidays (as appropriate), or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the employee's holiday or first day of the holidays (as appropriate).

(6) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid by his employer a sum of money in respect of a holiday taken by him, the holiday pay payable to the employee in respect of that holiday is to be reduced by the sum.

(Replaced 7 of 2007 s. 12)

Part:	VIIIA	ANNUAL LEAVE WITH PAY	L.N. 94 of 2007	13/07/2007

(Part VIIIA added 53 of 1977 s. 3)

Section:	41A	Definitions (Part VIIIA)	L.N. 94 of 2007	13/07/2007

In this Part, in relation to an employee-

"appropriate day" (適用日) means-

(a) where the employee becomes entitled under section 41F(3) to any annual leave, the first day of the close down as regards which the entitlement arises or where he becomes so entitled more than once in any period of 12 months, the first day of the more or most recent, as appropriate, of such close downs; or

(b) where the employee does not become so entitled-

(i) the day following the end of the employee's last (or only) leave year; or

(ii) where there is no such leave year, the day on which his employment commenced;

"final employment period" (最終僱傭期) means the period beginning on the appropriate day and ending on the termination of his employment;

"leave year" (假期年), unless the context otherwise requires, means any period of 12 months- (Amended 61 of 1993 s. 6)

(a) commencing on-

(i) in case the employee is entitled under section 41F(3) to any annual leave, the first day of the close down as regards which the entitlement arose; or

(ii) in the case of any other employee, the day on which his employment commenced; or

(b) commencing on an anniversary of such day;

"notional leave pay" (假定假期薪酬) means an amount equal to the annual leave pay which would have been due to the employee had his contract of employment terminated, or been terminated, on the appropriate day's anniversary next following such contract's actual termination and had that pay been calculated in accordance with section 41C. (Amended 7 of 2007 s. 13)

(Replaced 53 of 1990 s. 2)

Section:	41AA	Annual leave	137 of 1997	12/12/1997

(1) Subject to this Part, every employee who has been in employment under a continuous contract for not less than 12 months shall, in respect of each leave year, be entitled to paid leave (in this Part referred to as "annual leave") calculated in accordance with subsection (2).

(2) Where an employee has been in employment under a continuous contract for a period specified in column (1) of the Table to this section, the amount of annual leave to which he shall be entitled in respect of any leave year in that period shall be the number of days specified in column (2) of such Table in respect of the period.

(3) Subject to subsection (5)(c), times at which annual leave is granted shall be determined by the employer after consultation with the employee concerned or his representatives.

(4) An employer shall give an employee not less than 14 days' notice in writing of the time he has determined for the grant of a period of annual leave, except where a shorter period of notice is agreed to by the employer and employee.

(5) Annual leave to which an employee is entitled-

(a) shall be granted by his employer and be taken by the employee within the period of 12 months beginning immediately after the expiration of the leave year to which it relates;

(b) subject to paragraph (c), shall be for an unbroken period; and

(c) subject to subsection (9), shall, if the employee so requests his employer, be divided as follows-

(i) where the leave entitlement does not exceed 10 days, it shall be granted on consecutive days except that not more than 3 days of the period of leave may be granted on any day or days (whether consecutive or not); and

(ii) where such entitlement exceeds 10 days, 7 days of the period of leave shall be granted on consecutive days and the remaining leave may be granted on any day or days (whether

consecutive or not).

(6) If a rest day or holiday falls within any period of annual leave granted in accordance with this section, it shall be counted as annual leave and another rest day or holiday shall be substituted in accordance with section 18(5) or section 39(2), (2A), (3) or (4), as the case may require. (Amended 137 of 1997 s. 5)

(7) No period of total incapacity for work by reason of sickness or injury occurring during a period of annual leave shall count as part of that annual leave unless it commences after the commencement of the period of annual leave.

(8) Where-

(a) an employer continues to employ an employee after the expiration of a period during which annual leave should have been granted to him and the employer has not granted that leave, then at the option of the employee but subject to paragraph (b) the employer shall (whether or not proceedings have been taken for an offence under section 63(4)(e))-

(i) pay to the employee, in addition to any pay due to him, compensation equal in amount to the annual leave pay which he would have received had the leave been granted so as to end on the expiration of the period during which it should have been granted; or

(ii) grant the employee paid leave equal to the leave which should have been granted;

(b) an employee opts under paragraph (a) to take paid leave, he shall take the leave on such day or days as may be agreed to by the employer and him or, if there is no such agreement, as shall be specified by the employer.

(9) Where-

(a) an employer proposes to close down his business or part thereof for the purpose of granting annual leave to any of his employees; and

(b) notice of the proposed close down is duly given under section 41F; and

(c) such close down will not result in any person who has been in employment in the business under a continuous contract for 12 months or more having to take annual leave on fewer consecutive days than-

(i) where his leave entitlement does not exceed 10 days, the number of consecutive days' leave that would be required to be granted under subsection (5)(c)(i) were his leave being divided under that subsection;

(ii) 7 days where his leave entitlement exceeds 10 days,

then nothing in this section shall prevent or restrict, or be construed as preventing or restricting, the close down.

(10) For the avoidance of doubt it is declared that annual leave is, and shall be granted, in addition to the rest days, holidays and maternity leave to which an employee is entitled under this Ordinance.

TABLE

(1)	(2) Number of days' annual leave for a leave year ending-				
Period of employment	in the part of 1990 beginning on the coming into operation of this Table and ending on the following 31 December	in 1991	in 1992	in 1993	in 1994 or in any subsequent year
At least 1 year but less than 3 years	7	7	7	7	7
At least 3 years but less than 4 years	8	8	8	8	8
At least 4 years but less than 5 years	9	9	9	9	9
At least 5 years but less than 6 years	10	10	10	10	10
At least 6 years but less than 7 years	10	11	11	11	11
At least 7 years but less than 8 years	10	11	12	12	12
At least 8 years but less than 9 years	10	11	12	13	13
At least 9 years	10	11	12	13	14

(Added 53 of 1990 s. 2)

Section:	41AB	Option for common leave year		30/06/1997

(1) Notwithstanding anything in this Part, an employer may, at his option, elect to use a 12 month period determined by him as the leave year for the purpose of calculating the annual leave of all of his employees and, in that case, each of his employees is entitled to an annual leave under this Part determined in accordance with this section.

(2) An employer shall, before making an election under this section, give 1 month's notice-

(a) to each of his employees in writing; or

(b) by posting a notice in a conspicuous place in the place of employment,

stating his intention to make the election, the 12 month period he intends to elect to use and the date from which he will commence using it.

(3) Where an employer makes an election under this section, he shall thenceforth use that 12 month period as the leave year for the purpose of calculating the annual leave entitlement of all of his employees and, where an employee has not been in employment under a continuous contract for the full period of a leave year-

(a) the employer shall calculate the leave entitlement on a pro rata basis, based on the number of calendar days between the day the employee commenced employment and the end of the leave year, divided by 365, and any fraction of a day resulting from the calculation shall be counted as a full day's leave; and

(b) the employee may, at his option-

(i) after consultation with his employer, take his leave entitlement for the pro rata portion referred to in paragraph (a); or

(ii) carry it forward and combine it with his leave entitlement for the next full leave year.

(4) Where an employee was already employed on the day an employer commences using a 12 month period for calculating annual leave for all of his employees under this section-

(a) the employee is entitled to an annual leave calculated on a pro rata basis, based on the number of calendar days between the day he commenced employment (or the anniversary of such day, as the case may be) and the day preceding the day on which the employer commenced using the 12 month period under this section, divided by 365, and any fraction of a day resulting from the calculation shall be counted as a full day's leave; and

(b) the employee may, at his option-

(i) after consultation with his employer, take his leave entitlement for the pro rata portion referred to in paragraph (a); or

(ii) carry it forward and combine it with his leave entitlement for the first full leave year calculated in accordance with this section.

(5) Where section 41F applies to an employer who has made an election under this section-

(a) the annual leave granted shall be in respect of the leave year immediately preceding the period of the close down; and

(b) section 41F(3) to (6) shall not apply to the calculation of the leave entitlement.

(Added 61 of 1993 s. 7)

Section:	41B	Payment of annual leave pay		30/06/1997

Where an employee is granted any period of annual leave, the employer shall pay him annual leave pay in respect of that period not later than the day on which he is next paid his wages after that period.

Section:	41C	Rate of annual leave pay	L.N. 94 of 2007	13/07/2007

(1) For the purposes of subsections (2), (3) and (4), "wages" (工資) includes any sum paid by an employer in respect of—

(a) a day of maternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;

(b) a day of leave taken by the employee with the agreement of his employer;

(c) a normal working day on which the employee is not provided with work;

(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282).

(2) The daily rate of annual leave pay is a sum equivalent to the daily average of the wages earned by the employee during—

(a) the period of 12 months immediately before the day of annual leave, the first day of the annual leave or the date of termination of the contract of employment (as appropriate); or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the day of annual leave, the first day of the annual leave or the date of termination of the contract (as appropriate), the shorter period.

(3) In calculating the daily average of the wages earned by an employee during the period of 12 months or the shorter period—

(a) any period therein for which the employee was not paid his wages or full wages by reason of—

(i) any maternity leave, rest day, sickness day, holiday or annual leave taken by the employee;

(ii) any leave taken by the employee with the agreement of his employer;

(iii) his not being provided by his employer with work on any normal working day; or

(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap 282); and

(b) any wages paid to him for the period referred to in paragraph (a),

are to be disregarded.

(4) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (1) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (3).

(5) Despite subsection (2), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the employee's day of annual leave, the first day of his annual leave or the date of termination of his contract of employment (as appropriate), or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the employee's day of annual leave, the first day of his annual leave or the date of termination of his contract of employment (as appropriate).

(6) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid by his employer a sum of money in respect of a day of annual leave taken by him, the annual leave pay payable to the employee in respect of that day of annual leave is to be reduced by the sum.

(Replaced 7 of 2007 s. 14)

Section:	41D	Payment of annual leave pay on cesser of employment		30/06/1997

(1) Where-

(a) an employee ceases to be employed; and

(b) annual leave is due to him,

the person by whom he was formerly employed shall, as soon as practicable and in any case not later than 7 days after such cesser, pay to him in respect of the annual leave compensation equal in amount to the annual leave pay he would have received had the leave so due been granted immediately after such cesser.

(2) Where-

(a) an employee ceases to be employed;

(b) the cesser occurs otherwise than on the expiration of a leave year of the employee;

(c) his contract of employment terminates or is terminated otherwise than under section 9 for any reason whatsoever (including his resignation); and

(d) the termination occurs at least 3 months after the appropriate day,

he shall, as soon as practicable and in any case not later than 7 days after the termination, be paid by the person by whom he was formerly employed, in addition to any sum due under subsection (1), a sum equal in amount to that which bears to the notional leave pay the same proportion as the number of days in the final employment period bears to 365.

(Replaced 53 of 1990 s. 3)

Section:	41E	Restriction on pay in lieu of leave		30/06/1997

(1) Where an employee is entitled to annual leave, subject to sections 41AA(8)(a) and 41D and to subsection (2), no remuneration shall be paid to him by his employer in lieu of his taking all or any part of the annual leave.

(2) Where an employee is entitled to more than 10 days' annual leave in respect of a particular leave year, he may, in lieu of taking part of the leave, work on not more than the number of days by which such annual leave exceeds 10, and in case an employee so agrees, the amount payable to him in respect of any such day shall not be less than the aggregate of the following-

(a) the wages receivable by him in respect of the period worked on that day; and

(b) the annual leave pay he would have received had he been granted leave on that day.

(Replaced 53 of 1990 s. 3)

Section:	41EA	Inclusion of certain provisions in contracts of employment prohibited		30/06/1997

The inclusion by any person in a contract of employment of any term or condition which purports to affect in any way the provisions of section 41E(2) in their application to such employee, is prohibited and any such term or condition, if so included, shall be void.

(Added 53 of 1990 s. 3)

Section:	41F	Annual leave shutdown		30/06/1997

(1) Every employer who intends to close down his business or part thereof for the purpose of granting annual leave to any of his employees shall give one month's notice in writing of his intention so to do to every employee who will as a result have to take annual leave or otherwise stop work during the period of closure.

(2) The provisions of subsection (1) shall be deemed to be complied with if not later than one month before commencement of the period of closure, the employer exhibits in a conspicuous place in the place of employment notice of the closure and of the names of all employees who will as a result have to take annual leave or otherwise stop working, or in lieu of such names, a description or other details enabling such employees to be clearly identified.

(3) Every person who is an employee at the commencement of the period during which the business or part thereof is closed down for the purpose specified in subsection (1), and who is not otherwise entitled to annual leave pay in respect of any day during that period, shall, as regards the period beginning on the appropriate day and ending on the day preceding the first day of the close down, be entitled to annual leave calculated in accordance with subsection (4). (Amended 53 of 1990 s. 4)

(4) The amount of annual leave to which an employee is entitled under subsection (3) shall be determined as follows-

(a) a calculation shall be made using the formula

$$\frac{A}{365} \times B$$

where-

A is the number of days in the period beginning on the relevant day and ending on the day preceding the first day of the close down as regards which the entitlement arose; and

B is the annual leave to which the employee would be entitled under this Ordinance had there been no close down (or partial close down) of the business concerned and had he been in his employment under a continuous contract for the period of 12 months beginning on the relevant day;

(b) where the result is not a whole number, the result shall be rounded up to the next whole number; and

(c) (i) if the result or, where appropriate, the result when rounded up (which result in this section referred to as "the calculated number") equals or is less than the number of days occurring during the relevant close down being days and as regards none of which the employee is, apart from subsection (3), entitled to annual leave (which days are in this section referred to as "relevant closure days"), the amount of annual leave shall equal the number of relevant closure days; or

(ii) if the calculated number exceeds the number of relevant closure days, the number of days of

annual leave shall equal the calculated number. (Added 53 of 1990 s. 4)

(5) Where an employee is entitled to annual leave under subsection (3) and such leave exceeds the relevant closure days, unless the employee and his employer otherwise agree, the remaining annual leave shall be granted by the employer and be taken by the employee during an unbroken period beginning on the working day next following the last day of the relevant close down or, in case there is only 1 day's remaining annual leave, it shall be so given and taken on such working day. (Added 53 of 1990 s. 4)

(6) For the avoidance of doubt it is hereby declared that where an employee is entitled to annual leave under subsection (3), no period shall, by reason only of the entitlement, be regarded for the purposes of this Ordinance as being a leave year. (Added 53 of 1990 s. 4)

(7) In this section "the relevant day" (有關日期) means, in relation to an employee-

(a) where the employee previously became entitled under subsection (3) to any annual leave in the immediately preceding period of 12 months, the first day of the close down as regards which the entitlement arose, to where he became so entitled more than once in such period of 12 months, the first day of the more or most recent, as appropriate, of such close downs; or

(b) in any other case-

(i) the day following the end of the employee's last (or only) leave year; or

(ii) where there is no such leave year, the day on which his employment commenced. (Added 53 of 1990 s. 4)

Section:	41G	Employer to keep annual leave records		30/06/1997

Every employer shall keep a record of-

(a) the date of commencement and termination of-

(i) the employment of each employee;

(ii) all periods of annual leave taken by each employee; and

(iii) all periods of closure of his business or part thereof for the purpose of granting any annual leave to any of his employees; and

(b) all annual leave pay received by each employee.

Part:	IX	ANCILLARY PROVISIONS RELATING TO SICKNESS ALLOWANCE AND HOLIDAYS AND ANNUAL LEAVE WITH PAY*	L.N. 94 of 2007	13/07/2007

(Part IX added 39 of 1973 s. 5)

Note:
***(Amended 53 of 1977 s. 4)**

Section:	42	(Repealed 7 of 2007 s. 15)	L.N. 94 of 2007	13/07/2007

Section:	43	Payment of holiday pay, etc. in event of bankruptcy, etc.		30/06/1997

For the purposes of section 38 of the Bankruptcy Ordinance (Cap 6) and section 265 of the Companies Ordinance (Cap 32), any holiday pay, annual leave pay, end of year payment or any proportion thereof, maternity leave pay or sickness allowance to which an employee is entitled shall, whenever the employee became or becomes entitled thereto, be deemed to be wages in respect of services rendered during the relevant period prescribed in the said section 38 or the said section 265 or in section 79 of the Companies Ordinance (Cap 32), as the case may be.

(Amended 53 of 1977 s. 6; 22 of 1981 s. 10; 48 of 1984 s. 21)

(Part IX added 39 of 1973 s. 5)

Part:	IXA	LIABILITY TO PAY WAGES OF SUB-CONTRACTOR'S AND NOMINATED SUB-CONTRACTOR'S EMPLOYEES		30/06/1997

(Part IXA added 54 of 1977 s. 2)

Section:	43A	Interpretation		30/06/1997

Interpretation and application

(1) In this Part, unless the context otherwise requires-

"building works" (建築工程) means the construction, site formation, reconstruction, maintenance (including redecoration and external cleaning), repairs, alteration or demolition of the whole or any part of-

(a) any building, dock, pier, bridge, viaduct or other structure; or

(b) any harbour or port works, reclamation, road, tunnel, sewer, drain, well or waterworks,

and any installation works in respect of such building works;

"main nominated sub-contractor" (主要指定次承判商) means a nominated sub-contractor who enters into a contract, express or implied, directly with a principal contractor to perform all or any part of the work which the principal contractor has contracted to perform;

"nominated sub-contractor" (指定次承判商) means-

(a) any person-

(i) who enters into a contract, express or implied, with a principal contractor to perform all or any part of the work which the principal contractor has contracted to perform; or

(ii) who enters into a contract, express or implied, to perform all or any part of the work which a person referred to in sub-paragraph (i) has contracted to perform,

who is nominated by an owner or occupier of property, or by an agent or authorized architect, surveyor or civil, municipal or structural engineer of such owner or occupier; and

(b) any person who subsequently enters into a contract, express or implied, to perform all or any part of the work agreed to be performed by a nominated sub-contractor within the meaning of paragraph (a) of this definition;

"principal contractor" (總承判商) means a person who enters into a contract directly with an owner or occupier of property, or with an agent or authorized architect, surveyor or civil, municipal or structural engineer of such owner or occupier, to perform any work for such owner or occupier;

"sub-contractor" (次承判商) means-

(a) any person who enters into a contract, express or implied, with a principal contractor to perform all or any part of the work which the principal contractor has contracted to perform; and

(b) any other person who enters into a contract, express or implied, to perform all or any part of the work which a sub-contractor within the meaning of paragraph (a) has contracted to perform,

but does not include a nominated sub-contractor;

"work" (工作) means-

(a) building works; and

(b) the supply of manual labour for the purposes of or in connection with building works.

(2) For the purposes of this Part-

(a) a sub-contractor is a superior sub-contractor to another sub-contractor if all or any part of the work which he contracted to perform is sub-contracted to that other sub-contractor, whether or not such work is performed by that other sub-contractor or further sub-contracted by that other sub-contractor;

(b) a nominated sub-contractor is a superior nominated sub-contractor to another nominated sub-contractor if all or any part of the work which he contracted to perform is sub-contracted to that other nominated sub-contractor, whether or not such work is performed by that other nominated sub-contractor or further sub-contracted by that other nominated sub-contractor.

Section:	43B	Application		30/06/1997

This Part shall not apply to wages for any work for which a contract was entered into by a principal contractor,

nominated sub-contractor or sub-contractor prior to the commencement* of the Employment (Amendment) (No. 4) Ordinance 1977 (54 of 1977).

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Note:

*** 1 November 1977-L.N. 207 of 1977**

Section:	43C	Liability of principal contractor and superior sub-contractor to pay wages of employees of sub-contractors		30/06/1997

Sub-contractor's employees' wages

(1) Subject to this Part, if any wages become due to an employee who is employed by a sub-contractor on any work which the sub-contractor has contracted to perform, and such wages are not paid within the period specified in section 23, 24 or 25, as the case may be, such wages shall be payable to the employee-

(a) where the sub-contractor has contracted with the principal contractor, by the principal contractor; and

(b) where the sub-contractor has contracted with a superior sub-contractor, by the principal contractor and every superior sub-contractor to the sub-contractor, jointly and severally.

(2) The liability of a principal contractor and of a principal contractor and superior sub-contractor or superior sub-contractors jointly and severally under subsection (1) shall be limited-

(a) to the wages of an employee whose employment relates wholly to the work which the principal contractor has contracted to perform and whose place of employment is wholly on the site of the building works; and

(b) to the wages due to such an employee for 2 months without any deductions under this Ordinance and such months shall be the first 2 months of the period in respect of which the wages are due to the employee.

(3) Subject to subsection (4) the wages payable under subsection (1) shall be paid by the principal contractor or superior sub-contractor, as the case may be, not later than 30 days after the date on which a notice under section 43D is received by him or service thereof is deemed to be effected on him.

(4) Where any claim in respect of the wages payable under subsection (1) is filed with the Minor Employment Claims Adjudication Board or Labour Tribunal and an award or order is made in favour of the employee, the wages shall be paid within such time as the Minor Employment Claims Adjudication Board or Labour Tribunal may direct, or, in the absence of any direction, not later than 30 days after the making of the award or order. (Amended 61 of 1994 s. 53)

Section:	43D	Notice by employee to principal contractor		30/06/1997

(1) Where the wages of an employee who is employed by a sub-contractor are not paid by his employer within the period specified in section 23, 24 or 25, as the case may be, the employee shall serve on the principal contractor, within 60 days (or such other additional period not exceeding 90 days as the Commissioner may permit) after the date on which the wages become due, a notice in writing stating the- (Amended 48 of 1984 s. 22)

(a) name and address of the employee;

(b) name and address of his employer;

(c) address of the place of employment of the employee;

(d) particulars of the work in respect of which the wages are due; and

(e) amount of wages due and the period to which they relate.

(2) A principal contractor who receives a notice under subsection (1) from an employee of a sub-contractor shall, within 14 days after the receipt of the notice, serve a copy of the notice on every superior sub-contractor to that sub-contractor (if any) of whom he is aware.

(3) A principal contractor and superior sub-contractor (if any) shall not be liable to pay any wages under section 43C to the employee of a sub-contractor if that employee fails to serve a notice on the principal contractor under subsection (1).

(4) A principal contractor who without reasonable excuse fails to comply with subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 14)

Section:	43E	Employer to supply information at request of employee		30/06/1997

(1) Where an employer who is a sub-contractor fails to pay, within the period specified in section 23, 24 or 25, as the case may be, any wages due to an employee employed by him on work which he has contracted to perform, he shall within 7 days of the receipt of a written request made by the employee supply to the employee the name and address of the principal contractor and every superior sub-contractor to him and shall, within such 7 days' period, deliver a copy of the written request to the principal contractor and every superior sub-contractor to him.

(2) An employer who without reasonable excuse fails to comply with subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 15)

Section:	43F	Recovery of wages paid by principal contractor or superior sub-contractor		30/06/1997

(1) If a principal contractor or superior sub-contractor pays to an employee any wages under section 43C, the wages so paid shall be a debt due by the employer of that employee to the principal contractor or superior sub-contractor, as the case may be.

(2) Any principal contractor or superior sub-contractor who pays to an employee any wages under section 43C may either-

(a) claim contribution from every superior sub-contractor to the employee's employer or from the principal contractor and every other such superior sub-contractor as the case may be; or

(b) deduct by way of set-off the amount paid by him from any sum due or which may become due-

(i) to any sub-contractor to whom he has sub-contracted all or any part of work that he contracted to perform being work upon which the employee was employed, and

(ii) in respect of the work that he has sub-contracted.

(3) For the purposes of this section any amount-

(a) paid by a principal contractor or a superior sub-contractor by way of contribution under subsection (2)(a), or

(b) deducted by a principal contractor or a superior sub-contractor from any sum due by him by way of set-off under subsection (2)(b),

shall be deemed to be payment by the principal contractor or superior sub-contractor who has paid the amount by way of contribution or by the superior sub-contractor who has suffered a deduction from any sum due to him by way of set-off to an employee of wages under section 43C.

Section:	43G	Liability of superior nominated sub-contractor to pay wages of employees of nominated sub-contractors		30/06/1997

Nominated sub-contractor's employees' wages

(1) Subject to this Part, if any wages become due to an employee who is employed by a nominated sub-contractor on any work which the nominated sub-contractor has contracted to perform, and such wages are not paid within the period specified in section 23, 24 or 25, as the case may be, such wages shall be payable to the employee by every superior nominated sub-contractor to the nominated sub-contractor by whom the employee is employed, jointly and severally.

(2) The liability of a superior nominated sub-contractor or superior nominated sub-contractors jointly and severally under subsection (1) shall be limited-

(a) to the wages of an employee whose employment relates wholly to the work which the main nominated sub-contractor has contracted to perform whether or not his place of employment is on the site of the building works; and

(b) to the wages due to such an employee for 2 months without any deductions under this Ordinance and such months shall be the first 2 months of the period in respect of which the wages are due to the employee.

(3) Subject to subsection (4) the wages payable under subsection (1) shall be paid by the superior nominated sub-contractor not later than 30 days after the date on which a notice under section 43H is received by him or service thereof is deemed to be effected on him.

(4) Where any claim in respect of the wages payable under subsection (1) is filed with the Minor Employment

Claims Adjudication Board or Labour Tribunal and an award or order is made in favour of the employee, the wages shall be paid within such time as the Minor Employment Claims Adjudication Board or Labour Tribunal may direct, or, in the absence of any direction, not later than 30 days after the making of the award or order. (Amended 61 of 1994 s. 54)

Section:	43H	Notice by employee to main nominated sub-contractor		30/06/1997

(1) Where the wages of an employee who is employed by a nominated sub-contractor are not paid by his employer within the period specified in section 23, 24 or 25, as the case may be, the employee shall serve on the main nominated sub-contractor, within 60 days (or such other additional period not exceeding 90 days as the Commissioner may permit) after the date on which the wages became due, a notice in writing containing the particulars specified in section 43D(1). (Amended 48 of 1984 s. 23)

(2) A main nominated sub-contractor who receives a notice under subsection (1) from an employee of a nominated sub-contractor shall, within 14 days after the receipt of the notice, serve a copy of the notice on every superior nominated sub-contractor to that nominated sub-contractor (if any) of whom he is aware.

(3) A superior nominated sub-contractor shall not be liable to pay any wages under section 43G to the employee of a nominated sub-contractor if that employee fails to serve a notice on the main nominated sub-contractor under subsection (1).

(4) A main nominated sub-contractor who without reasonable excuse fails to comply with subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 16)

Section:	43I	Employer to supply information at request of employee		30/06/1997

(1) Where an employer who is a nominated sub-contractor fails to pay, within the period specified in section 23, 24 or 25, as the case may be, any wages due to an employee employed by him on work which he has contracted to perform, he shall within 7 days of the receipt of a written request made by the employee supply to the employee the name and address of the main nominated sub-contractor and every superior nominated sub-contractor to him and shall, within such 7 days' period, deliver a copy of the written request to the main nominated sub-contractor and every superior nominated sub-contractor to him.

(2) An employer who without reasonable excuse fails to comply with subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 1995 s. 17)

Section:	43J	Recovery of wages paid by superior nominated sub-contractor		30/06/1997

(1) If a superior nominated sub-contractor pays to an employee any wages under section 43G, the wages so paid shall be a debt due by the employer of that employee to the superior nominated sub-contractor.

(2) Any superior nominated sub-contractor who pays to an employee any wages under section 43G may either-

(a) claim contribution from every other superior nominated sub-contractor to the employee's employer; or

(b) deduct by way of set-off the amount paid by him from any sum due or which may become due-

(i) to any nominated sub-contractor to whom he has sub-contracted all or any part of work that he contracted to perform being work upon which the employee was employed; and

(ii) in respect of the work that he has sub-contracted.

(3) For the purposes of this section any amount-

(a) paid by a superior nominated sub-contractor by way of contribution under subsection (2)(a), or

(b) deducted by a superior nominated sub-contractor from any sum due by him by way of set-off under subsection (2)(b),

shall be deemed to be payment by the superior nominated sub-contractor who has paid the amount by way of contribution or has suffered a deduction from any sum due to him by way of set-off to an employee of wages under section 43G.

Section:	43K	Cessation of employer's liability for wages paid by principal contractor, superior sub-contractor or superior nominated sub-contractor		30/06/1997

General

Where any wages are paid to an employee by a principal contractor or superior sub-contractor under section 43C or by a superior nominated sub-contractor under section 43G, the liability of the employer shall, subject to sections 43F(1) and 43J(1), cease.

Section:	43L	Service of notice		30/06/1997

(1) A notice under section 43D or 43H may be served on a principal contractor or a main nominated sub-contractor respectively and a request under section 43E or 43I may be served on an employer-

(a) by delivering it to him personally;

(b) by leaving it at his usual address or last known residential or business address; or

(c) by sending it to him by registered post to any address referred to in paragraph (b).

(2) Service under subsection (1)(b) shall be deemed to have been effected on the day on which the notice or request is left at the premises.

Section:	43M	Employee's rights against employer not affected		30/06/1997

Nothing in this Part shall prejudice the right of an employee to recover any wages due to him by an employer directly from the employer.

Part:	IXB	OFFENCE OF EMPLOYER'S FAILURE TO PAY ANY SUM PAYABLE UNDER AWARD OF LABOUR TRIBUNAL OR MINOR EMPLOYMENT CLAIMS ADJUDICATION BOARD	L.N. 70 of 2010	29/10/2010

(Part IXB added 9 of 2010 s. 4)

Section:	43N	Interpretation of Part IXB	L.N. 70 of 2010	29/10/2010

(1) In this Part—

"award" (判令) includes an order;

"registrar" (主任), in relation to a tribunal, means the Registrar of the Labour Tribunal or the Registrar of the Minor Employment Claims Adjudication Board (as the case may be);

"specified entitlement" (指明權利) means—

(a) any wages or any other sum payable under section 23, 24 or 25, or interest payable under section 25A on the wages or sum;

(b) any end of year payment payable under Part IIA;

(c) any maternity leave pay or sum payable under Part III;

(d) any severance payment payable under Part VA;

(e) any long service payment payable under Part VB;

(f) any sickness allowance or sum payable under Part VII;

(g) any holiday pay payable under Part VIII;

(h) any annual leave pay payable under Part VIIIA;

(i) any sum payable in respect of rest days, maternity leave, holiday or annual leave which the employer is required under this Ordinance to grant to an employee but fails to grant, to the extent that the sum is not covered by paragraph (a), (b), (c), (d), (e), (f), (g) or (h);

(j) any terminal payments payable under section 32O to the extent that—

(i) the terminal payments are entitlements referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h) or

(i) to which an employee is entitled upon the termination of the employee's contract of employment or, by virtue of section 32O(5), as a consequence of the unreasonable variation of the terms of that contract; or

(ii) the award of those terminal payments is made by virtue of section 32M(2); or

(k) any compensation payable under section 32P;

"tribunal" (審裁處) means the Labour Tribunal or Minor Employment Claims Adjudication Board.

(2) A reference in this Part to an award of a tribunal includes—

(a) a settlement treated as an award of the Labour Tribunal under section 15(9) of the Labour Tribunal Ordinance (Cap 25); and

(b) a settlement treated as an award of the Minor Employment Claims Adjudication Board under section 14(4) of the Minor Employment Claims Adjudication Board Ordinance (Cap 453).

(3) A reference in this Part to the date of an award means, in relation to a settlement referred to in subsection (2)—

(a) the date of filing of the settlement in the Labour Tribunal under section 15(8) of the Labour Tribunal Ordinance (Cap 25); or

(b) the date of filing of the settlement with the Registrar of the Minor Employment Claims Adjudication Board under section 14(3) of the Minor Employment Claims Adjudication Board Ordinance (Cap 453).

Section:	43O	Application	L.N. 70 of 2010	29/10/2010

(1) This Part applies to an award of a tribunal that is made on or after the commencement date.

(2) In this section, * "commencement date" (生效日期) means the date on which the Employment (Amendment) Ordinance 2010 (9 of 2010) comes into operation.

Note:

*** Commencement date: 29 October 2010.**

Section:	43P	Offence of employer's failure to pay any sum payable under award of tribunal	L.N. 70 of 2010	29/10/2010

(1) If—

(a) an award of a tribunal provides, in whole or in part, for the payment by an employer of any specified entitlement; and

(b) the employer wilfully and without reasonable excuse fails to pay—

(i) any sum payable under the award (other than a sum to which subparagraph (ii) applies) within 14 days after the date of the award; or

(ii) any sum payable under the award that is, by the terms of the award, payable otherwise than on the date of the award, within 14 days after the date on which the sum is, by those terms, payable,

the employer commits an offence and is liable on conviction to a fine of $350000 and to imprisonment for 3 years.

(2) A reference in subsection (1)(b)(i) or (ii) to any sum payable under an award includes—

(a) any part of a sum payable under the award; and

(b) in the case of a sum payable by instalments, any instalment or part of an instalment.

(3) For the purposes of subsection (1), if—

(a) an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement; and

(b) the claim to which the award relates consists, in whole or in part, of any specified entitlement,

then, unless there is evidence to the contrary, the award is to be treated as providing for the payment of a specified entitlement.

Section:	43Q	Liability of directors, partners, etc. for offence under section 43P	L.N. 70 of 2010	29/10/2010

(1) Where an offence under section 43P committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer commits the like offence.

(2) Where an offence under section 43P committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner in the firm or any other person concerned in the management of the firm, the other partner or the other person concerned in the management of the firm commits the like offence.

(3) An offence under section 43P committed by a body corporate is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, if it is proved that, at the time the offence was committed, the director, manager, secretary or other similar officer—

(a) was concerned in the management of the body corporate; or

(b) knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the body corporate.

(4) An offence under section 43P committed by a partner in a firm is presumed to have been committed with the consent or connivance of, or to be attributable to the neglect on the part of—

(a) any other partner in the firm, if it is proved that, at the time the offence was committed, the other partner was concerned in the management of the firm; or

(b) any other partner in the firm or any other person concerned in the management of the firm, if it is proved that, at the time the offence was committed, the other partner or the other person knew or ought to have known that the award of the tribunal in respect of which the offence was committed had been made against the firm.

(5) The presumption under subsection (3) or (4) is rebutted by a person charged with an offence under section 43P by virtue of that subsection if—

(a) there is sufficient evidence to raise an issue that the offence was committed without the person's consent or connivance and was not attributable to the person's neglect; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.

Section:	43R	Proof of certain matters in proceedings for offence under section 43P	L.N. 70 of 2010	29/10/2010

(1) For the purposes of proceedings for an offence under section 43P, a document ("first-mentioned document") purporting to be a copy of a specified document, and purporting to be certified by or on behalf of the registrar of a tribunal or the registrar of a court as a true copy of the specified document, is admissible in evidence on its production without further proof and, unless there is evidence to the contrary—

(a) the court before which the first-mentioned document is produced must presume—

(i) that the first-mentioned document is certified by or on behalf of the registrar of a tribunal or the registrar of a court; and

(ii) that the first-mentioned document is a true copy of the specified document;

(b) in the case of the first-mentioned document purporting to be a copy of a specified document referred to in subsection (2)(a) and prepared by an officer of a tribunal or of a court, the first-mentioned document is evidence of all matters contained in it; and

(c) in the case of the first-mentioned document purporting to be a copy of a specified document referred to in subsection (2)(b) and prepared by an officer of a tribunal or of a court, the first-mentioned document is evidence of the facts specified in subsection (4) or (5).

(2) In subsection (1), "specified document" (指明文件) means—

(a) a claim filed with a tribunal, or an award made by a tribunal, or any other document relating to proceedings before a tribunal or a court; or

(b) any document that is relevant to any fact specified in subsection (4) or (5).

(3) For the purposes of proceedings for an offence under section 43P, a certificate purporting to be issued by or on behalf of the registrar of a tribunal or the registrar of a court and stating any of the facts specified in subsection (4) or (5) is admissible in evidence on its production without further proof and, unless there is evidence to the contrary—

(a) the court before which the certificate is produced must presume that the certificate is issued by or on behalf of the registrar of a tribunal or the registrar of a court; and

(b) the certificate is evidence of the facts so stated.

(4) The following facts are specified for the purposes of subsection (3) in relation to a certificate purporting to be issued by or on behalf of the registrar of a tribunal—

(a) whether any payment has been made to the tribunal in full or partial discharge of an award of the tribunal and, if so, particulars of the payment (including the date, amount and, in the case of an award made in favour of 2 or more claimants, to which claimant the amount is paid);

(b) whether a decision has been made in any proceedings to set aside or review an award of the tribunal and, if so, the particulars of the decision;

(c) whether any proceedings are pending to set aside or review an award of the tribunal and, if so, the particulars of the pending proceedings;

(d) whether any person was present at the hearing of the tribunal at which an award of the tribunal was made or at any hearing of the claim to which the award relates; and

(e) whether any document relating to proceedings before the tribunal has been served on any person and, if so, the particulars of service (including the mode, time and address of service).

(5) The following facts are specified for the purposes of subsection (3) in relation to a certificate purporting to be issued by or on behalf of the registrar of a court—

(a) whether a decision has been made in an appeal (if any) against an award of a tribunal and, if so, the particulars of the decision; and

(b) whether an appeal is pending against an award of a tribunal and, if so, the particulars of the pending appeal.

(6) In this section, "registrar of a court" (司法常務官) means—

(a) the Registrar of the High Court; or

(b) the Registrar of the Court of Final Appeal.

(7) In subsections (1) and (3), a reference to a court before which a document or a certificate is produced includes a magistrate.

Section:	43S	Prosecution of offence under section 43P	L.N. 70 of 2010	29/10/2010

(1) No prosecution for an offence under section 43P may be commenced without the consent in writing of the Commissioner.

(2) Before giving consent to prosecute under subsection (1), the Commissioner must hear the person against whom the allegation is made, or give the person an opportunity of being heard.

(3) Subject to subsection (1), a prosecution for an offence under section 43P may be brought in the name of the Commissioner and may be commenced and conducted by any officer of the Labour Department authorized in that behalf in writing by the Commissioner.

(4) Nothing in this section derogates from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.

Part:	X	INFORMATION RESPECTING CONDITIONS OF SERVICE*		30/06/1997

Note:
*** (Amended 48 of 1984 s. 25)**

Section:	44	Information to persons entering employment		30/06/1997

(1) Every employer shall inform each person in detail before such person enters his employment, in a manner intelligible to such person, of the conditions with regard to-

(a) the wages and the wage period;
(b) where Part IIA applies to such person, the end of year payment or proportion of the end of year payment and the payment period; and
(c) the length of notice required to terminate the proposed contract of employment,

under which he is to be employed. (Replaced 48 of 1984 s. 25)

(2) Where the contract of employment is not in writing, upon receipt, before such employment is entered into, of a written request therefor from such person the employer shall forthwith deliver to him a notice in writing containing such conditions. (Amended 41 of 1990 s. 19)

(3) Where the contract of employment is in writing, the employer shall provide such person with a copy of the contract immediately after it is signed or immediately after the procedure to validate the contract is completed where such procedure is required. (Added 41 of 1990 s. 19)

Section:	45	Information to employees		30/06/1997

(1) Every employer shall inform his employee, in a manner intelligible to the employee-
(a) whenever any change takes place in the conditions referred to in section 44 or the conditions in force at any time, of such change;
(b) at the time of each payment to him of his wages, in so far as such particulars may be subject to change, of the particulars of his wages for the wage period concerned.

(2) Where there is no written amendment to a contract of employment, upon receipt of a written request from his employee the employer shall deliver to him- (Amended 41 of 1990 s. 20)
(a) where the request relates to changes in the conditions referred to in subsection (1)(a), forthwith; or
(b) where it relates to the particulars referred to in subsection (1)(b), at the time of the payment to him of his wages for the wage period concerned,

a notice in writing containing such changes in conditions or particulars, as the case may be.

(3) Where there is any written amendment made to a contract of employment, the employer shall provide his employee with a copy of the written amendment immediately after the amendment is reduced to writing or immediately after the procedure to validate the amendment is completed where such procedure is required. (Added 41 of 1990 s. 20)

Section:	46	Details of conditions and particulars of wages		30/06/1997

(1) The conditions referred to in sections 44 and 45 shall include the rate of wages, the overtime rate and any allowances, whether calculated by the piece, job, hour, day, week or otherwise, of the person or employee concerned.

(2) The particulars referred to in section 45 shall include-
(a) particulars of the amount earned, including overtime earnings (if any), by the employee; and
(b) particulars of any deductions made from the wages of the employee and the reasons therefor.

Part:	XI	RECORDS, FORMS AND RETURNS		30/06/1997

Section:	47	Records to be kept by employers		30/06/1997

(1) Every employer who is a member of a class specified under subsection (2) shall in respect of-
(a) each of his employees; or
(b) any class of them,

keep records in such form as may be specified to enable him to comply with Part X.

(2) For the purposes of subsection (1), the Commissioner may, by notice in the Gazette, specify any class of employers.

Section:	48	Returns to be made to Commissioner		30/06/1997

(1) For the purposes of this Ordinance, the Commissioner may, either by notice in writing served by registered post or by notice in the Gazette, require any employer or class of employers to make returns in such form and at such

times as he may in any such notice direct:

Provided that the Commissioner shall not require in any return information or particulars in respect of a time or period more than 6 months immediately preceding the date of the notice.

(2) Copies of any such form shall be supplied to an employer free of charge on application to the Commissioner.

Section:	49	Form of notices, records, etc.		30/06/1997

(1) The Commissioner may specify the form of any consent, request, notice in writing, certificate, application, record or return required for the purposes of this Ordinance. (Amended 52 of 1988 s. 15)

(2) The Commissioner may publish in the Gazette any forms specified by him under subsection (1).

Section:	49A	Requirement to keep wage and employment records	L.N. 147 of 2010	01/05/2011

(1) Every employer shall at all times keep and maintain a record in which is set out the wage and employment history of each employee covering the period of his employment during the preceding 12 months. (Amended L.N. 34 of 1990; 7 of 2007 s.16)

(2) The wage records referred to in subsection (1) shall be kept-

(a) at the employer's place of business or at the place where the employee is employed; and

(b) for a period of 6 months after the employee ceases to be employed.

(3) A record which includes particulars in relation to each employee of-

(a) his name and identity card number;

(b) the date he commenced his employment;

(c) his job title;

(d) the wages paid to him in respect of each wage period;

(e) his wage period;

(ea) if the employee is an employee within the meaning of the Minimum Wage Ordinance (Cap 608) and the wages payable to the employee in respect of any wage period are less than the amount specified in the Ninth Schedule (or the amount that bears the same ratio to that amount as the length of that wage period bears to the month in which that wage period falls, calculated where that wage period falls in more than one month according to the number of days of that wage period falling in each particular month), the total number of hours (including any part of an hour) that are hours worked by the employee in that wage period; (Added 15 of 2010 s. 20)

(f) periods of annual leave, sick leave, maternity leave and holidays-

(i) to which he is entitled; and

(ii) that he has taken together with details of payments made in respect of such period;

(g) the amount of any end of year payment payable under Part IIA and the period to which it relates;

(h) the period of notice required for termination of contract;

(i) the date of any termination of employment,

shall be a sufficient record for the purposes of subsection (1).

(4) Despite subsection (3), subsection (1) must also be taken to require an employer to keep-

(a) for an employee to whom the Minimum Wage Ordinance (Cap 608) does not apply because of section 7(4) of that Ordinance, a document (or copy of a document) issued by an institution showing that the period of work is arranged or endorsed by the institution in connection with a programme being provided by the institution to the employee that is of a kind covered by the definition of "student intern" in section 2 of that Ordinance; and

(b) for an employee to whom the Minimum Wage Ordinance (Cap 608) does not apply because of section 7(5) of that Ordinance, the statutory declaration (or a copy of the statutory declaration) provided by the employee under section 3(b) of that Ordinance and a document (or copy of a document) issued by an institution showing that the employee is at the commencement of the employment enrolled in a programme being provided by the institution that is of a kind covered by the definition of "work experience student" in section 2 of that Ordinance. (Added 15 of 2010 s. 20)

(5) Nothing in subsection (1) requires an employer to set out in a record particulars of a kind referred to in subsection (3)(ea) for any wage period, or part of a wage period, of an employee that occurred before the effective

date of the hourly wage rate first specified in column 1 of Schedule 3 to the Minimum Wage Ordinance (Cap 608) on or after the commencement* of section 16 of that Ordinance. (Added 15 of 2010 s. 20)

(6) The Commissioner may, by notice published in the Gazette, amend the Ninth Schedule. (Added 15 of 2010 s. 20)

(7) For the purposes of subsections (3)(ea) and (5), "hours worked" (工作時數), "wage period" (工資期) and "wages" (工資) have the same respective meanings as in the Minimum Wage Ordinance (Cap 608). (Added 15 of 2010 s. 20)

(Added 12 of 1985 s. 29)

Note:

*** Commencement date: 12 November 2010.**

Part:	XII	EMPLOYMENT AGENCIES	L.N. 130 of 2007	01/07/2007

(Part XII replaced 35 of 1973 s. 2)

Section:	50	Interpretation and application of Part	L.N. 130 of 2007	01/07/2007

Remarks:

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

(1) In this Part, unless the context otherwise requires-

"certificate of exemption" (豁免證明書) means a certificate issued under section 54;

"employment agency" (職業介紹所) means a person who operates a business the purpose of which is-

(a) to obtain employment for another person; or

(b) to supply the labour of another person to an employer,

whether or not the person who operates the business will derive any pecuniary or other material advantage from either the employer or such other person; (Amended 41 of 1990 s. 21)

"licence" (牌照) means a licence issued under section 52 and "licensee" (持牌人) shall be construed accordingly.

(2) Subject to subsection (3), this Part shall apply to any employment agency which is carried on in Hong Kong, whether the employment is to take place within or outside Hong Kong.

(3) This Part shall not apply to any employment agency-

(a) which is carried on or subvented by Her Majesty's Government or the Hong Kong Government;

(b) which is carried on under the terms of a permit to maintain a crew department granted or deemed to be granted under the Merchant Shipping (Seafarers) Ordinance (Cap 478); (Amended 44 of 1995 s. 143)

(c) (Repealed 41 of 1990 s. 21)

(d) (Repealed 10 of 1980 s. 4)

(e) which is carried on by an employer for the sole purpose of recruiting persons for employment on his own behalf;

(f) which is carried on by a contractor, or sub-contractor, who employs any person on work for another person;

(g) which is carried on by the proprietor of a newspaper or other publication if the operation of an employment agency is non-profit making and is not the principal purpose of the publication of the newspaper or other publication;

(h) which is-

(i) non-profit making;

(ii) wholly maintained or managed by the owner, staff or students of a school, college, university or other educational institution recognized by the Permanent Secretary for Education; and (Amended 3 of 2003 s. 41; L.N. 130 of 2007)

(iii) carried on solely for or in connection with the employment of the students or graduates of such school, college, university or other educational institution; or

(i) subject to any regulations which may be applicable thereto, in respect of which a certificate of exemption has been issued.

Section:	51	Prohibitions in respect of the operation of employment agencies		30/06/1997

(1) No person shall operate, manage or assist in the management of an employment agency unless-

(a) he is the holder of a licence or certificate of exemption issued in respect of the employment agency; or

(b) he is in the employment of the holder of a licence or certificate of exemption.

(2) No person shall operate, manage or assist in the management of an employment agency at any place other than the place of business specified in the licence or certificate of exemption issued in respect of the employment agency.

(3) (Repealed 28 of 1992 s. 2)

Section:	52	Application for and issue of licences		30/06/1997

(1) The Commissioner may issue a licence to operate an employment agency to any person who applies therefor in such manner as may be prescribed.

(1A) Where the applicant for a licence is a company, the application shall be submitted by a director of the company on its behalf. (Added 28 of 1992 s. 3)

(2) A licence issued under this section shall-

(a) be in a form determined by the Commissioner; and (Replaced 28 of 1992 s. 3)

(b) specify the place of business of the employment agency in respect of which it is issued. (Amended 28 of 1992 s. 3)

(c) (Repealed 28 of 1992 s. 3)

(2A) A licensee shall cause his licence to be displayed at all times in a conspicuous position at his place of business. (Added 28 of 1992 s. 3)

(2B) Where a licensee operates an employment agency at more than one place of business, he shall designate which place of business is the main location and shall obtain a duplicate licence for each branch location and cause the duplicate licence to be displayed at all times in a conspicuous position at the branch location. (Added 28 of 1992 s. 3)

(2C) Where a licensee operates an employment agency at more than one location using different names, the agencies shall be deemed to be separate entities and he shall obtain a separate licence for each name used. (Added 28 of 1992 s. 3)

(3) (Repealed 28 of 1992 s. 3)

(4) Subject to section 53, a licence issued under subsection (1) shall be valid for 12 months after the date on which it is issued.

(5) The Commissioner may, upon application in such manner as may be prescribed, renew a licence issued under subsection (1).

Section:	53	Refusal to issue, or revocation of, licences		30/06/1997

(1) The Commissioner may refuse to issue or renew a licence, or may revoke a licence, if he is satisfied on reasonable grounds-

(a) that the name under which the employment agency is operated or is intended to be operated-

(i) is identical with the name of another employment agency which is being, or has been, carried on by another person; or

(ii) so nearly resembles the name of another employment agency as to be likely to deceive the public;

(b) that the employment agency is being, or is likely to be, used for unlawful or immoral purposes; or

(c) that the person operating, or intending to operate, the employment agency-

(i) is an undischarged bankrupt;

(ii) has, within the preceding 5 years, been convicted of an offence against the person of a child, young person or woman or of an offence involving membership of a triad society, fraud, dishonesty or extortion;

(iii) has knowingly furnished to the Commissioner any false or misleading information in connection with his application for the issue or renewal of the licence;

(iv) has contravened any provision of this Part or any regulation made under section 62; or

(v) is not, for any other reason, a fit and proper person to operate an employment agency.

(2) The Commissioner shall, if he refuses to issue or renew a licence or revokes a licence, within 14 days after such refusal or revocation, notify the applicant or licensee in writing of the grounds for such refusal or revocation.

(3) Any person aggrieved by a decision of the Commissioner taken in respect of him under subsection (1) may, within 28 days after he is notified under subsection (2), appeal to the Administrative Appeals Board. (Replaced 6 of 1994 s. 35)

(4) (Repealed 6 of 1994 s. 35)

(5) The licensee shall, if the Commissioner refuses to renew or revokes his licence under subsection (1),-

(a) within 28 days after he is notified under subsection (2); or

(b) if he has appealed under subsection (3), within 14 days after he withdraws or abandons the appeal or he is notified of the Administrative Appeals Board's dismissal of the appeal,

deliver the licence, and every copy thereof, to the Commissioner. (Replaced 6 of 1994 s. 35)

Section:	54	Commissioner's power of exemption		30/06/1997

(1) Subject to subsection (2), the Commissioner may, upon application in such manner as may be prescribed, exempt an employment agency from obtaining a licence under section 52, subject to such conditions as he may specify, if he is satisfied that the employment agency is non-profit making and should, in the public interest, be so exempted.

(2) (Repealed 28 of 1992 s. 4)

(3) The Commissioner shall issue to any person exempted under subsection (1) a certificate of exemption.

(4) A certificate of exemption issued under subsection (3) shall-

(a) be in a form determined by the Commissioner; (Replaced 28 of 1992 s. 4)

(b) specify the place of business of the employment agency in respect of which it is issued; and

(c) specify any conditions subject to which it is issued.

Section:	55	Withdrawal of exemption		30/06/1997

(1) The Commissioner may, at any time, withdraw an exemption granted under section 54 if he is satisfied that the employment agency has ceased to be non-profit making or should not be so exempted in the public interest.

(2) Without prejudice to the generality of subsection (1), the grounds on which the Commissioner may withdraw an exemption shall include mutatis mutandis the grounds contained in section 53(1) on which he may refuse to issue or renew a licence or revoke a licence.

(3) Where the Commissioner withdraws his exemption from any person under subsection (1) he shall notify such person in writing of the grounds for such withdrawal.

(4) The holder of a certificate of exemption shall, within 14 days after he is notified under subsection (3) of the withdrawal of the Commissioner's exemption, deliver the certificate of exemption, and every copy thereof, to the Commissioner.

(5) No appeal shall lie under this Part against the decision of the Commissioner to withdraw an exemption granted to an employment agency.

Section:	56	Maintenance and delivery to the Commissioner of prescribed registers, records and returns		30/06/1997

(1) A licensee shall-

(a) maintain a record of-

(i) all job applicants registered with his employment agency; and

(ii) job applicants who, at the time of registration, were not residents of Hong Kong and who were placed in employment in Hong Kong by his employment agency,

containing the person's name, address, Hong Kong Identity Card number or, in the case of a non-resident, passport number and citizenship, fee and commission received, date of employment and name and address of employer; and (Replaced 28 of 1992 s. 5)

(b) keep such records available for inspection at the place of business of the employment agency by the Commissioner, or by any public officer authorized by him in that behalf, at all reasonable times. (Amended 28 of 1992 s. 5)

(2) A licensee shall, within such time as may be prescribed, deliver to the Commissioner such returns in respect of the employment agency as may be prescribed.

(3) The records referred to in subsection (1) shall be retained by the licensee for a period of not less than 12 months after the expiration of each accounting year of the employment agency concerned. (Amended 28 of 1992 s. 5)

Section:	57	Prohibited acts in respect of employment agencies		30/06/1997

A licensee shall not, directly or indirectly-

(a) receive from any person on account of having obtained, or in connection with obtaining or seeking to obtain, employment for that person-

(i) any reward of any kind; or

(ii) any payment or other advantage in respect of expenses or otherwise, except the prescribed commission; (Replaced 87 of 1975 s. 2. Amended 28 of 1992 s. 6)

(b) share with any person, other than another licensee or a bona fide partner or shareholder in his employment agency, the prescribed commission which he is permitted to charge and receive; or (Amended 87 of 1975 s. 2; 28 of 1992 s. 6)

(c) enter, except with the written permission of the Commissioner, into an agreement, express or implied, with any employer whereby-

(i) the employer undertakes to employ only persons who seek employment through the licensee's employment agency; and

(ii) the licensee agrees to pay or give to the employer some form of material benefit.

Section:	58	Inspection of places of business of licensed or exempted employment agencies		30/06/1997

The Commissioner, and any public officer authorized by him in that behalf may-

(a) enter and inspect without a warrant at any reasonable time the place of business of an employment agency;

(b) require the production of, inspect, examine or take copies of any record or other document relating to an employment agency; (Amended 28 of 1992 s. 7)

(c) require any person who operates, manages or assists in the management of an employment agency to furnish such information or particulars relating to the employment agency as he may specify; and

(d) make such other inquiries from any other person connected or associated with the employment agency as he thinks fit.

Section:	59	Investigation of suspected offences		30/06/1997

(1) If the Commissioner, any public officer authorized by him in that behalf or any police officer not below the rank of inspector suspects on reasonable grounds that there is in any premises or place evidence of an offence under this Part he may-

(a) enter and search without a warrant any such premises (other than domestic premises) at any reasonable time; and

(b) require the production of, seize, detain and remove any article, record or other document which may be evidence of an offence under this Part. (Amended 28 of 1992 s. 7)

(2) A magistrate may, if he is satisfied by information on oath that there may be found in any domestic premises any evidence of an offence under this Part, issue a warrant authorizing the Commissioner, any public officer authorized in that behalf by the Commissioner or any police officer not below the rank of inspector to enter and search the domestic premises at any reasonable time.

(3) (Repealed 24 of 1988 s. 2)

Section:	60	Offences		30/06/1997

(1) Any person who contravenes section 51(2) shall be guilty of an offence and shall be liable on conviction to a fine at level 3. (Amended 24 of 1988 s. 2; 28 of 1992 s. 8)

(2) Any person who contravenes section 53(5) or 55(4) shall be guilty of an offence and shall be liable on conviction to a fine at level 3. (Amended 24 of 1988 s. 2)

(3) Any licensee who contravenes section 52(2A), (2B) or (2C) or 56(1), (2) or (3) shall be guilty of an offence and shall be liable on conviction to a fine at level 3. (Amended 24 of 1988 s. 2; 28 of 1992 s. 8)

(4) (Repealed 24 of 1988 s. 2)

(5) Any person who-

(a) in connection with any application to the Commissioner under section 52(1) or 54(1) furnishes any information which he knows or reasonably ought to know to be false or misleading in any material particular; or

(b) in connection with any inquiry or inspection under section 58-

(i) fails without reasonable excuse to produce any record or other document relating to the employment agency when required to do so by the Commissioner or any public officer authorized in that behalf by the Commissioner; or (Amended 28 of 1992 s. 7)

(ii) furnishes to the Commissioner or any such public officer any information which he knows or reasonably ought to know to be false or misleading in any material particular,

shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2)

(6) Any person who contravenes section 51(1) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Added 24 of 1988 s. 2)

(7) Any licensee who contravenes any provision of section 57 shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Added 24 of 1988 s. 2.)

(Amended 103 of 1995 s. 18)

Section:	61	Application of sections 52(2A), (2B) and (2C), 56, 57, 58 and 59 to holders of certificates of exemption and exempted employment agencies		30/06/1997

(1) Sections 52(2A), (2B) and (2C), 56, 57, 58 and 59 shall apply to holders of certificates of exemption in the same manner as they apply to licensees.

(2) Every reference to an employment agency in sections 52(2A), (2B) and (2C), 56, 57, 58 and 59 shall, except where the context otherwise requires, be construed as a reference to both an employment agency licensed under section 52 and an employment agency exempted under section 54.

(Amended 28 of 1992 s. 9)

Section:	62	Power to make regulations	56 of 2000	01/07/1997

Remarks:
Adaptation amendments retroactively made - see 56 of 2000 s. 3

The Chief Executive in Council may make regulations for all or any of the following purposes- (Amended 56 of 2000 s. 3)

(a) prescribing the procedure for the issue of licences and certificates of exemption;

(b) fixing the fees to be paid for the issue and renewal of a licence or certificate of exemption and the method of payment of such fees;

(c) prescribing the procedure to be followed when a licensee or holder of a certificate of exemption-

(i) ceases to operate his employment agency; or

(ii) changes the place of business of his employment agency;

(d) prescribing the procedure to be followed when-

(i) a company is issued with a licence or certificate of exemption; and

(ii) there is a change in the management of the company;

(e) requiring a licensee and the holder of a certificate of exemption to display his licence or certificate of exemption conspicuously at the place of business of the employment agency;

(f) providing for the publication in the Gazette of particulars of all licences and certificates of exemption;

(g) prescribing the nature of services in respect of which an employment agency may charge and receive any fee, commission or expenses;

(h) prescribing the maximum fees and charges which may be charged and received by an employment

agency;

(i) prescribing any thing which is to be or may be prescribed under this Part; and

(j) generally for the better carrying out of the provisions and purposes of this Part.

Part:	XIII	OFFENCES AND PENALTIES		30/06/1997

Section:	63	Offences and penalty		30/06/1997

(1) Any employer who wilfully and without reasonable excuse contravenes any of the provisions of section 11E or 11F(3) or (4) shall be guilty of an offence. (Amended 71 of 1970 s. 4; 48 of 1984 s. 26; 24 of 1988 s. 2)

(2) Any employer who-

(a) without reasonable excuse, fails-

(i) to grant to any employee any rest day which he is required to grant under Part IV; or

(ii) (Repealed 103 of 1995 s. 19)

(b) contravenes section 19,

shall be guilty of an offence. (Added 23 of 1970 s. 4)

(3) Any person who wilfully contravenes section 67(2) shall be guilty of an offence. (Added 71 of 1970 s. 4)

(4) Any employer who without reasonable excuse fails-

(a) to grant to any employee any holiday which he is required to grant under section 39; or

(b) to pay to any employee-

(i) any sickness allowance which he is required to pay under section 33; or

(ii) any holiday pay which he is required to pay under section 40 or 40A(2); or (Amended 48 of 1984 s. 26)

(c) to give to any employee any leave which he is required to grant or allow by section 41AA or 41F(3); or (Replaced 53 of 1990 s. 5)

(d) to grant to any employee any rest day or holiday which he is required to grant under section 41AA(6); or (Amended 53 of 1990 s. 5)

(e) to pay to an employee-

(i) pay as regards leave which he is required to grant or allow under section 41AA or 41F(3); or

(ii) a sum or compensation which he is required to pay under section 41D, (Replaced 53 of 1990 s. 5)

shall be guilty of an offence. (Added 39 of 1973 s. 6. Amended 53 of 1977 s. 7)

(5) Any person who contravenes section 40A(1) or 41B shall be guilty of an offence. (Replaced 103 of 1995 s. 19)

(5A) Any person who-

(a) fails to comply with a requirement made by any officer under any of the provisions of section 72 other than subsection (1)(a), (b) and (c) of that section; (Amended 31 of 1992 s. 2)

(b) wilfully or recklessly gives information which is false in a material particular or withholds information as to any of the matters in respect of which information is required to be given under any of the provisions of section 72 other than subsection (1)(b) and (c) of that section; or (Amended 31 of 1992 s. 2)

(c) (Repealed 24 of 1988 s. 2)

(d) fails to comply with any condition imposed on the granting of any exemption under section 73(2),

shall be guilty of an offence. (Added 55 of 1979 s. 2)

(5B) (a) Any person who makes a payment in contravention of section 41E(1) shall be guilty of an offence.

(b) In any proceedings for an offence under this subsection the onus shall be on the defendant to show that any payment to which the offence relates was made pursuant to an agreement duly made under section 41E(2). (Added 53 of 1990 s. 5)

(5C) Any employer who contravenes section 41EA shall be guilty of an offence. (Added 53 of 1990 s. 5)

(6) Any person who fails to comply with the requirements of a notice in writing or a notice published in the Gazette under section 48(1) shall be guilty of an offence.

(7) A person who is guilty of an offence under this section shall be liable on conviction to a fine at level 5. (Amended 24 of 1988 s. 2; 103 of 1995 s. 19)

Section:	63A	Offences relating to sections 31, 72A and 72B and penalty		30/06/1997

(1) Any employer who wilfully and without reasonable excuse contravenes any of the provisions of section 31 shall be guilty of an offence. (Amended 31 of 1992 s. 3)

(2) (Repealed 103 of 1995 s. 20)

(3) A person who is guilty of an offence under subsection (1) shall be liable on conviction to a fine at level 6. (Replaced 103 of 1995 s. 20)

(4) Any person who contravenes section 72A(3) shall be guilty of an offence and shall be liable on conviction to a fine at level 5. (Added 103 of 1995 s. 20)

(5) Any person who contravenes any of the provisions of section 72(B)(1)(a), (b), (c) or (d) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. (Added 103 of 1995 s. 20)

(Added 24 of 1988 s. 2)

Section:	63B	Offences relating to sections 32 and 72(1)(a), (b) and (c)		30/06/1997

(1) Any person who contravenes section 32 or fails to comply with a requirement made by an officer under section 72(1)(a), (b) or (c) commits an offence.

(2) Any person who wilfully or recklessly gives information which is false in a material particular or withholds information as to any of the matters in respect of which information is required to be given under section 72(1)(b) or (c) commits an offence.

(3) A person who commits an offence under this section is liable to a fine at level 6 and to imprisonment for 1 year. (Amended 103 of 1995 s. 21)

(Added 31 of 1992 s. 4)

Section:	63C	Offences relating to time and payment of wages	L.N. 17 of 2006	30/03/2006

Any employer who wilfully and without reasonable excuse contravenes section 23, 24 or 25 commits an offence and is liable to a fine of $350000 and to imprisonment for 3 years.

(Added 31 of 1992 s. 4. Amended 1 of 2006 s. 3)

Section:	63CA	Offences relating to interest on late payment of wages	L.N. 312 of 1998	11/09/1998

Any employer who wilfully and without reasonable excuse contravenes section 25A commits an offence and is liable to a fine at level 3.

(Added 74 of 1997 s. 16. Amended L.N. 312 of 1998)

Section:	63D	Minor offences		30/06/1997

(1) Any person who contravenes section 18(2), 26, 27, 28(2), 29, 30, 41AA(4) or (5), 41F(1), 41G, 44, 45, 47(1), 49A or 72A(1) or (2) shall be guilty of an offence.

(2) A person who is guilty of an offence under this section is liable on conviction to a fine at level 3.

(Added 103 of 1995 s. 22)

Section:	64	Prosecution of offences	L.N. 362 of 1997	01/07/1997

(1) No prosecution for an offence under section 31RA(6) or section 63(1) or (3) or 63A(1) or 63B or 63C shall be commenced without the consent in writing of the Commissioner. (Amended 71 of 1970 s. 4A; 24 of 1988 s. 2; 52 of 1988 s. 16; 31 of 1992 s. 5)

(2) Before the Commissioner gives his consent to prosecute under subsection (1) he shall hear the person against whom the allegation is made, or give him an opportunity of being heard.

(3) Subject to subsection (1), a prosecution for any offence under this Ordinance may be brought in the name of the Commissioner and may be commenced and conducted by any officer of the Labour Department authorized in that behalf in writing by the Commissioner. (Replaced 48 of 1984 s. 27)

(4) Nothing in this section shall derogate from the powers of the Secretary for Justice in respect of the

prosecution of criminal offences. (Amended L.N. 362 of 1997)

Section:	64A	Service of summons		30/06/1997

(1) Any summons relating to an offence alleged to have been committed under this Ordinance by an employer may be served by leaving a copy of the summons with some person for him at the place of employment mentioned in the summons.

(2) Any such summons may be addressed to "the employer" without specifying the name of the employer.

(3) Any summons relating to an offence alleged to have been committed under this Ordinance by an employee may be served by leaving a copy of the summons either with some person for him at his last or usual place of abode or with some person for him at his place of employment mentioned in the summons.

(4) Any summons relating to an offence alleged to have been committed under this Ordinance by a company may be served by leaving a copy of the summons at, or sending it by registered post to, the registered office of the company.

(Added 48 of 1984 s. 28)

Section:	64B	Liability of directors, partners, etc.		30/06/1997

(1) Where an offence under section 63B or 63C committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer shall be guilty of the like offence.

(2) Where an offence under section 63B or 63C committed by a partner in a firm is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner in the firm or any person concerned in the management of the firm, that partner or the person concerned in the management of the firm shall be guilty of the like offence.

(Added 31 of 1992 s. 6)

Section:	65	Liability for outstanding wages		30/06/1997

(1) An employer convicted of an offence under this Ordinance shall, in addition to any fine imposed under this Ordinance, if the court before which the conviction was obtained so orders, pay any wages or other sum outstanding at the time of the conviction and in respect of which the offence was committed.

(2) Where the employer is acquitted of an offence under this Ordinance on grounds that his default was not wilful or not without reasonable excuse, the court may, if it finds that any wages or other sums in respect of which the charge was brought are due, order the employer to pay such wages or other sums.

(Amended 31 of 1992 s. 7)

Part:	XIV	MISCELLANEOUS	56 of 2000	01/07/1997

Section:	66	Wages not to be attached	56 of 2000	01/07/1997

Remarks:
Adaptation amendments retroactively made - see 56 of 2000 s. 3

No order for the attachment of wages, or, in the case of an employee to whom Part IIA applies, any end of year payment or proportion thereof, of an employee shall be made by any court:

Provided that a civil debt due to the Government under any enactment may be recovered from the wages of an employee by attachment or otherwise.

(Amended 48 of 1984 s. 29; 56 of 2000 s. 3)

Section:	67	Application for apprehension of absconding employer		30/06/1997

(1) If an employer or former employer is about to leave Hong Kong with intent to evade payment of- (Amended 48 of 1984 s. 30)

(a) any wages earned by any of his employees and owed by the employer, whether or not the payment of such wages is yet due; or

(b) any other moneys owed by the employer under a contract of employment to any of his employees,

any of his employees may apply to a District Judge to issue a warrant in accordance with the Second Schedule, and in respect of any such application the Second Schedule shall apply.

(2) No person shall make an application under subsection (1) unless he has reasonable grounds for making such application.

(Added 71 of 1970 s. 5)

Section:	67A	Amendment of limitation imposed on severance payment and long service payment		30/06/1997

The Legislative Council may, by resolution published in the Gazette, amend the references to $22500 in sections 31G and 31V and in this section by substituting a different amount specified in the resolution.

(Replaced 41 of 1990 s. 22. Amended L.N. 264 of 1995)

Section:	68	Amendment of forms	56 of 2000	01/07/1997

Remarks:
Adaptation amendments retroactively made - see 56 of 2000 s. 3

The Chief Executive may, by order published in the Gazette, amend Part II of the Second Schedule.

(Added 44 of 1971 s. 5. Amended 56 of 2000 s. 3)

Section:	69	Saving as to existing contracts of service		30/06/1997

Save as is otherwise provided in this section, any agreement or contract of employment entered into between an employer and an employee, which is valid and in force at the commencement of this Ordinance, shall continue to be in force and, subject to any express conditions contained in any such agreement or contract, the parties thereto shall be subject to and entitled to the benefit of the provisions of this Ordinance:

Provided that where any express condition in the agreement or contract is contrary to the provisions of this Ordinance, the express condition shall be void.

Section:	70	Contracting out		30/06/1997

Any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void.

(Added 5 of 1970 s. 8)

Section:	71	Saving as to schemes of medical treatment under repealed Industrial Employment (Holidays with Pay and Sickness Allowance) Ordinance		30/06/1997

Any scheme of medical treatment which is operated by an employer and is recognized by the Director under section 8 of the repealed Industrial Employment (Holidays with Pay and Sickness Allowance) Ordinance* shall continue in force and have effect as if it were operated and approved under the corresponding provision in this Ordinance.

(Added 39 of 1973 s. 7)

Note:

*** See Cap 333, 1964 Ed.**

Section:	72	Powers of officers	L.N. 147 of 2010	01/05/2011

(1) The Commissioner, or any public officer authorized by the Commissioner in writing for the purpose and on production of that authority, may-

(a) subject to subsection (2), enter, inspect and examine at all reasonable times, by day and night, any premises or place, in which he knows or has reasonable cause to believe that persons are employed;

(b) require the production of any register, record, form or other document required to be kept under this Ordinance (and, in the case of a record which includes particulars required to be included under section 49A(3)(ea), require that the particulars under section 49A(3)(a), (d), (e), (ea) and (f) are produced in a single document) and inspect, examine and copy the same; (Amended 15 of 2010 s. 21)

(c) make such examination and inquiry as may be necessary to ascertain whether the requirements of this Ordinance are complied with, and seize anything which may appear to be evidence of an offence against this Ordinance;

(d) examine, either alone or in the presence of any other person, as he thinks fit, respecting matters under this Ordinance, any person whom he finds in any industrial undertaking within the meaning of the Factories and Industrial Undertakings Ordinance (Cap 59), or whom he has reasonable cause to believe has been within the preceding 2 months employed in any industrial undertaking within the meaning of the Factories and Industrial Undertakings Ordinance (Cap 59), or require any such person to be so examined and to sign a declaration of the truth of the matters respecting which he has been so examined; (Added 10 of 1980 s. 6)

(e) require any person who employs or has employed any young person or child in an industrial undertaking within the meaning of the Factories and Industrial Undertakings Ordinance (Cap 59) or any agent or servant of any such employer to give to him all information in the possession of such person, agent or servant with reference to such young person or child and to the labour conditions and treatment of every young person or child employed by such employer; (Added 10 of 1980 s. 6. Amended 7 of 2001 s. 10)

(f) require the posting up, in such place and manner and for such period as he may direct, of any notice or form in connection with the provisions of this Ordinance or of any Ordinance specified in the Fourth Schedule; (Added 10 of 1980 s. 6. Amended 48 of 1984 s. 31)

(g) exercise any other powers which may be conferred on him by any regulations made under this Ordinance. (Added 10 of 1980 s. 6)

(2) No premises or part of a premises which is used for dwelling purposes shall be entered under subsection (1) except by virtue of a warrant issued by a magistrate, where such magistrate is satisfied by information on oath that there is reasonable ground for suspecting that an offence against this Ordinance has been, is being or is about to be committed in such premises or part or that there is in such premises or part anything likely to be or contain evidence of such offence.

(3) An officer exercising any power conferred on him by subsection (1) in relation to any industrial undertaking within the meaning of the Factories and Industrial Undertakings Ordinance (Cap 59) may take with him any person whom he may reasonably need to assist him in carrying out his duties under this Ordinance and in particular may, for his assistance, take persons who have been engaged by the Commissioner, on account of their special expertise, to advise the Labour Department on any matters necessary for carrying out the purposes of this Ordinance. (Added 10 of 1980 s. 6)

(4) A person who accompanies an officer pursuant to subsection (3)-

(a) may give to the officer such assistance in the exercise of any power conferred on him by subsection (1) as the officer may reasonably require;

(b) shall be deemed to be a public officer for the purposes of sections 72A and 72B. (Added 10 of 1980 s. 6)

(Added 55 of 1979 s. 2)

Section:	72A	Duty of public officers not to disclose source of complaint, etc.		30/06/1997

(1) Save with the consent of the person who has made the complaint or as provided in subsection (4), no public officer shall disclose to any person, other than another public officer in the course of official duty, the name or identity

of any person who has made a complaint alleging a contravention of this Ordinance or as a result of which a contravention of this Ordinance has come to his notice or to the notice of any other public officer.

(2) No public officer shall disclose to an employer or his agent or servant that a visit to the place of employment maintained by that employer was made in consequence of the receipt of any such complaint as is referred to in subsection (1).

(3) Save as provided in subsection (4), where, arising out of, or in connection with, the enforcement of this Ordinance, any manufacturing or commercial secret or any working process comes to the knowledge of a public officer, such officer shall not at any time, and notwithstanding that he is no longer a public officer, disclose such secret or process to any person.

(4) Where in any proceedings a court or a magistrate considers that justice so requires, the court may order the disclosure of the name or identity of any person who has made any such complaint as is referred to in subsection (1) or the disclosure of any such secret or process as is referred to in subsection (3).

(Added 10 of 1980 s. 7)

Section:	72B	Employment not to be terminated, etc. by reason of fact that employee has given evidence in proceedings under Ordinance, etc.		30/06/1997

(1) No employer shall terminate, or threaten to terminate, the employment of, or in any way discriminate against, any of his employees by reason of the fact that the employee has- (Amended 61 of 1993 s. 9)

(a) given evidence, or agreed to give evidence, in any proceeding for the enforcement of this Ordinance; (Amended 29 of 1992 s. 3)

(b) given information to a public officer in any inquiry made by such officer for the purposes of or in connection with the enforcement of this Ordinance;

(c) given evidence, or agreed to give evidence, in any proceeding relating to an accident to an employee arising out of and in the course of his employment or for the breach of a statutory duty in relation to the safety of persons at work; or (Added 29 of 1992 s. 3)

(d) given information to a public officer in any inquiry made by such officer for the purposes of or in connection with an accident to an employee arising out of and in the course of his employment or for the breach of a statutory duty in relation to the safety of persons at work. (Added 29 of 1992 s. 3)

(2) Where an employer is convicted of an offence under section 63A(5) in respect of an action prohibited by this section, the court or magistrate before which the conviction is obtained may, in addition to any fine that may be imposed, order the employer to pay as compensation to the employee who was the victim of the offence, such amount as the court or magistrate considers appropriate having regard to the circumstances of the case. (Added 61 of 1993 s. 9. Amended 103 of 1995 s. 23)

(Added 10 of 1980 s. 7)

Section:	72C	Presumptions	7 of 2001	12/04/2001

In any prosecution under this Ordinance-

(a) where the age of any person at any time is material for the purposes of any provision of this Ordinance, his age at the material time shall be deemed to be or have been that which appears to the court or magistrate, after considering any available evidence, to be or to have been his age at that time;

(b) if the charge alleges the contravention of any of the provisions of this Ordinance prohibiting or controlling the employment of young persons or children and the defendant in such prosecution is the employer at the place of employment in or in respect of which the offence is alleged to have been committed, it shall, until the contrary is proved, be presumed that any young person or child to whom the charge relates and who was employed in the place of employment on the day on which the offence is alleged to have been committed was employed therein on that day by such employer. (Amended 7 of 2001 s. 11)

(Added 10 of 1980 s. 7)

Section:	73	Regulations	7 of 2001	12/04/2001

(1) The Chief Executive in Council may make regulations for all or any of the following purposes- (Amended

56 of 2000 s. 3)

(a) prohibiting or controlling the employment of persons or any class of persons in any industry, occupation or trade;

(b) requiring records to be kept and forms to be maintained in respect of employees or any class of employees employed in any industry, occupation or trade;

(c) imposing obligations for securing compliance with the provisions of this Ordinance upon employers, their agents or servants, and upon employees;

(d) imposing duties and liabilities on employers and employees;

(e) defining the functions, duties and powers of public officers appointed or authorized for the purposes of this Ordinance;

(f) exempting any industry, occupation or trade, or any class or part of any industry, occupation or trade, from the operation of this Ordinance or any provision thereof;

(g) providing that this Ordinance or any provision thereof shall not apply, or may be modified, in relation to any class of persons;

(h) (Repealed 56 of 2000 s. 3)

(ha) providing that, where the Commissioner is satisfied that work in any industrial undertaking within the meaning of the Factories and Industrial Undertakings Ordinance (Cap 59), or class or description thereof, is subject to seasonal or other special pressure, he may by order published in the Gazette as respects any such industrial undertaking, or class or description thereof, increase for any employee during any period of such pressure the hours of work or period of employment specified in relation to that employee in regulations made under this Ordinance for a period in any year not exceeding that specified in the order; (Added 10 of 1980 s. 8. Amended 7 of 2001 s. 12)

(hb) providing that-

(i) any document purporting to be a copy of any document or notice and purporting to be signed by a person or his duly authorized agent shall be admitted in evidence in proceedings before any court or magistrate on its production by a public officer without further proof; and

(ii) until the contrary is proved, the court or magistrate before which such document is produced shall presume that the document is a true copy and that it is signed by that person or his duly authorized agent; and

(iii) the document shall be conclusive evidence of the facts stated therein; (Added 10 of 1980 s. 8)

(hc) providing that any person who works in any place of employment at any kind of work whatsoever incidental to or connected with the process, trade or business for which the place of employment is used shall, save as may be provided otherwise in the regulations, be deemed to be employed therein for the purposes of any regulations made under this Ordinance or of any proceedings thereunder; (Added 10 of 1980 s. 8)

(i) generally, carrying into effect the provisions of this Ordinance.

(2) The Commissioner may in writing, in such cases as he thinks fit and for such period and subject to such conditions as he may specify, exempt any person or class of persons from any regulations made under this section.

(3) (Repealed 24 of 1988 s. 2)

(Added 55 of 1979 s. 2. Amended 10 of 1988 s. 8)

Section:	74	Penalty for contravention of regulations		30/06/1997

Regulations under this Ordinance may provide that a contravention thereof shall be an offence and may provide penalties therefor not exceeding a fine at level 6.

(Added 24 of 1988 s. 2. Amended 103 of 1995 s. 24)

Section:	75	Transitionals for Certification for Employee Benefits (Chinese Medicine) (Miscellaneous Amendments) Ordinance 2006	L.N. 203 of 2006	01/12/2006

(1) A reference in this Ordinance to a certificate or medical certificate issued by a registered Chinese medicine practitioner—

(a) does not include a certificate or medical certificate so issued before the commencement of the 2006 Ordinance; and

(b) does not include a certificate or medical certificate so issued on or after the commencement of the

2006 Ordinance to the extent—

(i) that it relates to any period of days or hours which ends before that commencement; or

(ii) if it relates to any period of days or hours which occurs partly before that commencement, that it relates to such part of the period occurring before that commencement.

(2) For the purposes of this section—

(a) "2006 Ordinance" (《2006年條例》) means Part 2 of the Certification for Employee Benefits (Chinese Medicine) (Miscellaneous Amendments) Ordinance 2006 (16 of 2006);

(b) a certificate or medical certificate relates to a period of days or hours if the certificate or medical certificate is produced for the purposes of—

(i) an employee taking that period of days as maternity leave under Part III or sickness days under Part VII; or

(ii) having that period of hours counted as hours in which an employee has worked by virtue of paragraph 3(2)(a) of the First Schedule.

(Added 16 of 2006 s. 9)

Section:	76	Application of this Ordinance as amended by the Employment (Amendment) Ordinance 2007	L.N. 94 of 2007	13/07/2007

(1) This Ordinance as amended by the Employment (Amendment) Ordinance 2007 (7 of 2007) ("amending Ordinance") applies to contracts of employment entered into on or after the date of commencement of the amending Ordinance ("commencement date").

(2) Where an employee's contract of employment was entered into before the commencement date and the date of termination of the contract falls on or after the commencement date, this Ordinance as amended by the amending Ordinance applies to the calculation of the following payments—

(a) any payment in lieu of notice or sum payable by or to the employee under Part II;

(b) any sum payable to the employee under section 15(2);

(c) any sum payable to the employee under section 33(4BA) or (4C);

(d) any sum payable to the employee under section 40A(2);

(e) any sum payable to the employee under section 41D.

(3) Where an employee's contract of employment was entered into before the commencement date and any end of year payment or proportion thereof payable to the employee under Part IIA becomes due on or after the commencement date, this Ordinance as amended by the amending Ordinance applies to the calculation of the end of year payment or proportion thereof.

(4) Where an employee's contract of employment was entered into before the commencement date and any maternity leave pay, sickness allowance, holiday pay or annual leave pay is payable by the employer to the employee in respect of a wage period the last day of which falls on or after the commencement date, this Ordinance as amended by the amending Ordinance applies to the calculation of the maternity leave pay, sickness allowance, holiday pay or annual leave pay.

(Added 7 of 2007 s. 17)

Schedule:	1	CONTINUOUS EMPLOYMENT	L.N. 203 of 2006	01/12/2006

[sections. 3 & 75]
(Amended 16 of 2006 s. 10)

1. (a) The provisions of this Schedule are to ascertain whether or not any contract of employment is a "continuous contract" for the purposes of this Ordinance.

(b) In the case of a contract of employment existing at the commencement of this Ordinance, such period of employment next preceding the date of commencement of the Ordinance as may be necessary shall be taken into account in order to ascertain whether or not the contract of employment is a continuous contract.

2. Subject to the following provisions, where at any time an employee has been employed under a contract of

employment during the period of 4 or more weeks next preceding such time he shall be deemed to have been in continuous employment during that period.

3. (1) For the purposes of paragraph 2, no week shall count unless the employee has worked for 18 hours or more in that week, and in determining whether he has worked in any hour the provisions of sub-paragraph (2) shall apply.

(2) If in any hour the employee is, for the whole or part of the hour-

(a) incapable of work in consequence of sickness or injury; provided that any such incapability in excess of 48 hours is supported by a certificate issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist; or (Amended 5 of 1995 s. 11; 16 of 2006 s. 10)

(b) absent from work in circumstances such that, by law, mutual arrangement or the custom of the trade, business or undertaking, he is regarded as continuing in the employment of his employer for any purpose,

then, save as provided in paragraph 4, that hour shall count as an hour in which he has worked.

4. Where an employee is absent from work for the whole or part of any hour-

(a) because of a strike (which is not illegal) in which he takes part; or

(b) because of a lock-out by his employer, that hour shall not count as an hour in which he has worked, but the continuity of his period of employment shall not be treated as broken by any such absence.

5. If a trade, business or undertaking is transferred from one person to another, the period of employment of an employee in the trade, business or undertaking at the time of the transfer shall count as a period of employment with the transferee, and the transfer shall not break the continuity of the period employment.

6. For the purposes of this Schedule, any reference to hours in which an employee has worked shall mean hours in which he has worked for his employer whether or not the hours were worked under the same or another contract of employment with that employer and whether or not they were consecutive hours. (Replaced 41 of 1990 s. 23)

7. In this Schedule, unless the context otherwise requires-

"lock-out" (閉廠) and "strike" (罷工), respectively, have the meanings assigned to them in the Trade Unions Ordinance (Cap 332);

"week" (星期) means a week ending with Saturday.

(Amended 5 of 1970 s. 9; 71 of 1970 s. 6; 41 of 1990 s. 23)

Schedule:	2	PROCEDURE FOR APPREHENSION OF ABSCONDING EMPLOYER	32 of 2000	09/06/2000

Remarks:
Adaptation amendments retroactively made - see 56 of 2000 s. 3

[section 67]

PART I

1. In this Part, the wages and moneys described in section 67(1)(a) and (b) are referred to as "the debt". (Amended 32 of 2000 s. 48)

2. An application under section 67 shall be as in Form 1 in Part II.

3. If a District Judge, after making such investigation as he considers necessary in respect of an application made under section 67, is satisfied that there is probable cause for believing that the employer is about to leave Hong Kong with intent to evade payment of the debt, he may issue a warrant as in Form 2 in Part II ordering that the employer be apprehended and brought before a District Judge to show cause why the employer should not be required to give security in accordance with paragraph 5. (Amended 48 of 1984 s. 32)

4. If an employer who is brought before a District Judge in accordance with a warrant issued under paragraph 3 shows cause why he should not be required to give security in accordance with paragraph 5, the warrant shall be discharged and the employer shall be released.

5. (1) If an employer who is brought before a District Judge in accordance with a warrant issued under paragraph 3 does not show cause why he should not be required to give security in accordance with this paragraph, the District Judge may make an order requiring the employer to enter a bond, in accordance with sub-paragraph (3), for his appearance before a District Judge whenever called upon until he has paid to the employee the full amount of the debt.

(2) If the employer offers, in lieu of entering a bond under sub-paragraph (1), to secure the payment to the employee of the full amount of the debt by any other arrangement, the District Judge may accept such other arrangement as security for the payment to the employee of the full amount of the debt in lieu of the bond.

(3) A bond entered under sub-paragraph (1)-

(a) shall be in favour of the employee;

(b) shall be as in Form 3 in Part II;

(c) shall be for such sum, not exceeding the amount of the debt, as the District Judge may order; and

(d) shall be a bond with such number of sureties, approved by the District Judge, as the District Judge may order.

6. If an employer complies with an order made under paragraph 5(1), or secures the payment to the employee of the full amount of debt by any other arrangement under paragraph 5(2), the warrant issued under paragraph 3 shall be discharged and the employer shall be released.

7. If an employer fails to comply with an order made under paragraph 5(1), a District Judge may commit him to prison until the order is complied with or until the expiration of 3 months from the date of committal, whichever event occurs first.

8. (1) On the application of the employer, or of any surety for a bond entered under paragraph 5, a District Judge, if he is satisfied that any of the conditions specified in sub-paragraph (2) have been fulfilled, shall order as may be appropriate-

(a) that any warrant issued under paragraph 3 be discharged;

(b) that the employer, if apprehended or brought before a District Judge under paragraph 3, or committed to prison under paragraph 7, be released;

(c) that any bond entered under paragraph 5 shall be void (notwithstanding the conditions thereof); and

(d) that the employer be released from any arrangement made under paragraph 5(2).

(2) The conditions referred to in sub-paragraph (1) are-

(a) that the debt has been satisfied in full or has been abandoned;

(b) that no proceedings have been brought within 14 days after the application under section 67 to recover any part of the debt from the employer;

(c) that no proceedings brought to recover the debt or any part of the debt from the employer have been prosecuted diligently;

(d) that all proceedings brought to recover the debt or any part of the debt from the employer have been finally struck out or dismissed.

9. (1) Any surety for a bond entered under paragraph 5 may at any time apply to a District Judge to be discharged from his obligation under the bond.

(2) On receipt of an application under sub-paragraph (1), the District Judge shall call upon the employer to appear before a District Judge.

(3) On the appearance of the employer before the District Judge, the District Judge shall order the surety by whom the application under sub-paragraph (1) is made to be discharged from his obligation under the bond, and shall order the employer to provide another surety or sureties, approved by the District Judge, for the bond.

(4) If an employer is ordered under sub-paragraph (3) to provide an approved surety or sureties for a bond, the provisions of paragraphs 6 and 7 shall apply as if the order were an order made under paragraph 5(1).

10. No fees shall be payable to the District Court in respect of or in connection with an application made under section 67 or under paragraph 8 or 9.

PART II

FORM 1 [Employment Ordinance, Second Schedule, Part I, paragraph 2]

APPLICATION FOR WARRANT FOR APPREHENSION OF ABSCONDING EMPLOYER

Title

IN THE DISTRICT COURT OF HONG KONG
Held at .....
No. ..... of 19 .....

IN THE MATTER of an application under section 67 of the Employment Ordinance, for a warrant for the apprehension of.....
....., an employer.

EX PARTE....., an employee.

I, ... , of .....
(name of applicant) (address of applicant)

apply for the issue of a warrant in accordance with paragraph 3 of Part I of the Second Schedule to the Employment Ordinance in respect of .....
(name of employer)

of .....
(address of employer)

.....
(occupation of employer)

2. The grounds for my application are-

(a) that I am an employee/former employee [(1)] of .....;
(name of employer)

(b) that ..... is the employer/former
(name of employer)
employer [(1)] of each person specified in the First Column of the Schedule;

(c) that the employer owes to such employees the wages and/or[(1)] other moneys specified in the Second Column of the Schedule opposite their names, by reason of the facts specified in the Third Column of the Schedule; and

(d) that I believe for the following reasons that the employer is about to leave Hong Kong with intent to evade payment of the wages and/or[(1)] other moneys specified in the Second Column of the Schedule-
.....
.....

SCHEDULE

FIRST COLUMN	SECOND COLUMN	THIRD COLUMN
Name and address of employee	Amount of wages and/ or[(1)] other moneys owing to employee	Reason for which moneys owing

Total amount owing to employees		

Dated this day of 19 .

.....

Applicant.

AFFIDAVIT IN SUPPORT OF APPLICATION

I, ... make oath/do solemnly, sincerely and truly declare and affirm(1) and say that the facts stated in paragraph 2 of the above application are correct to the best of my knowledge and belief.

Sworn/affirmed(1) at

Hong Kong, the day of 19 .

Before me,

A Commissioner, &c.

Note: (1) Delete whichever is inapplicable.

(Amended L.N. 48 of 1972; L.N. 177 of 1981)

FORM 2

[Employment Ordinance, Second Schedule, Part I, paragraph 3]

WARRANT FOR APPREHENSION OF ABSCONDING EMPLOYER

[Title as in Form 1]

To each and all the police officers and bailiffs of Hong Kong.

Whereas I am satisfied, on application made on the day of 19 by [name of applicant that the applicant [and the other persons referred to in the application](2) is/are/was/were(1) the employee/employees(1) of [name of employer], and that there is probable cause for believing that the said [name of employer] is about to leave Hong Kong with intent to evade payment of the sum of [amount of debt] being moneys earned by and owed to such employee/employees(1):

This is therefore to command you forthwith to apprehend the said [name of employer] and to bring him before a District Judge to show cause why he the said [name of employer] should not be required to give security in accordance with paragraph 5 of Part I of the Second Schedule to the Employment Ordinance, and to be further dealt with according to law.

Dated this day of 19 .

.....
District Judge.

[L.S.]

Notes: (1) Delete whichever is inapplicable.
(2) Delete if inapplicable.

(Amended L.N. 177 of 1981; 56 of 2000 s. 3)

FORM 3

[Employment Ordinance, Second Schedule, Part I, paragraph 5]

BOND TO SECURE PAYMENT OF WAGES DUE TO EMPLOYEES BY EMPLOYER

I/We[(1)] [name of employer] of [address], [name of surety] of [address], and [name of surety] of [[address], is/are[(1)] bound to [name of employee [and the other employees of (name of employer) specified in the application of (name of applicant) made on the day of 19 to District Judge , under section 67 of the Employment Ordinance][(2)] in the sum of $, to be paid to [name of employee] [and the said other employees][(2)] or his/their respective[(1)] executors, administrators or assignees; for which payment to be made I/we jointly and severally[(1)] bind myself/ourselves[(1)], and my/our respective[(1)] heirs, executors and administrators.

In witness whereof I/we[(1)] have hereto set my hand and seal/our hands and seals[(1)] this day of 19 .

The condition of this obligation is that if [name of employer] appears before a District Judge whenever called upon until he has paid [name of employee] [and the said other employees][(2)] the full amount of $ specified in the application, then this obligation shall be void but this obligation shall otherwise remain in full force.

Signed, sealed and delivered in the presence of } [Employer] (L.S.)
[Surety] (L.S.)
[Surety] (L.S.)

Notes: (1) Delete whichever is inapplicable.
(2) Delete if inapplicable.

(Second Schedule added 71 of 1970 s. 7)

Schedule:	3	DEATH OF EMPLOYER OR OF EMPLOYEE		30/06/1997

[section. 31M]

PART I

DEATH OF EMPLOYER

1. This Part shall have effect in relation to an employee where his employer (in this Part referred to as "the deceased employer") dies.

2. Section 31J shall not apply to any change whereby the ownership of the business, for the purposes of which the

employee was employed by the deceased employer, passes to a personal representative of the deceased employer.

3. Where, by virtue of section 31L(1), the death of the deceased employer is to be treated for the purposes of Part VA of this Ordinance as a termination by him of the contract of employment, the employee shall nevertheless not be treated for these purposes as having been dismissed by the deceased employer if-

(a) his contract of employment is renewed by a personal representative of the deceased employer, or he is re-engaged under a new contract of employment by such a personal representative; and

(b) the renewal or re-engagement takes effect not later than 4 weeks after the death of the deceased employer.

4. Where, by reason of the death of the deceased employer, the employee is treated for the purposes of Part VA of this Ordinance as having been dismissed by him, he shall not be entitled to a severance payment in respect of that dismissal if a personal representative of the deceased employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the renewal or re-engagement would take effect not later than 4 weeks after the death of the deceased employer and either-

(a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the contract as in force immediately before the death; or

(b) if, in accordance with the particulars specified in the offer, those provisions would differ (wholly or in part) from the corresponding provisions of the contract as in force immediately before the death, the offer constitutes an offer of suitable employment in relation to that employee,

and (in either case) the employee has unreasonably refused that offer.

5. For the purposes of paragraph 4-

(a) an offer shall not be treated as one whereby the provisions of the contract as renewed, or of the new contract, as the case may be, would differ from the corresponding provisions of the contract as in force immediately before the death of the deceased employer by reason only that the personal representative would be substituted as the employer for the deceased employer; and

(b) no account shall be taken of that substitution in determining whether the refusal of the offer was unreasonable.

6. Whereby virtue of section 31L(1) the death of the deceased employer is to be treated as a termination by him of the contract of employment, any reference in subsection (2) of that section to section 31D(2) shall be construed as including a reference to paragraph 3.

7. Where by virtue of paragraph 3 the employee is treated as not having been dismissed by reason of a renewal or re-engagement taking effect after the death of the deceased employer, then-

(a) in determining, for the purposes of section 31B(1), whether he has been employed under a continuous contract for the requisite period, the interval between the death and the date on which the renewal or re-engagement takes effect shall count as a period of employment with the personal representative of the deceased employer, if apart from this paragraph it would not count for that purpose as such a period of employment; and

(b) in computing the period specified in section 31B(1), the continuity of the employee's period of employment shall be treated as not being broken by any week which falls within that interval.

8. For the purposes of the application, in accordance with section 31B(3), of Part VA of this Ordinance in relation to an employee who was employed as a domestic servant in, or in connection with, a private household, any reference to a personal representative in this Part of this Schedule shall be construed as including a reference to any person to whom, otherwise than in pursuance of a sale or other disposition for valuable consideration, the management of the household has passed in consequence of the death of the deceased employer.

9. Subject to this Part of this Schedule, in relation to an employer who has died-

(a) any reference in Part VA of this Ordinance to the doing of anything by, or in relation to, an employer

shall be construed as including a reference to the doing of that thing by, or in relation to, any personal representative of the deceased employer; and

(b) any reference in Part VA of this Ordinance to a thing required or authorized to be done by, or in relation to, an employer shall be construed as including a reference to anything which, in accordance with any provision of Part VA of this Ordinance as modified by this Part of this Schedule (including sub-paragraph (a)), is required or authorized to be done by, or in relation to, any personal representative of his.

10. Where by virtue of Part VA of this Ordinance, as modified by this Part of this Schedule, a personal representative of the deceased employer is liable to pay a severance payment, or part of a severance payment, and that liability had not accrued before the death of the deceased employer, it shall be treated for all purposes as if it were a liability of the deceased employer which had accrued immediately before his death.

PART II

DEATH OF EMPLOYEE

11. Where an employer has given notice to an employee to terminate his contract of employment, and before that notice expires the employee dies, Part VA of this Ordinance shall apply as if the contract had been duly terminated by the employer by notice expiring on the date of the employee's death.

12. Where an employer has given notice to an employee to terminate his contract of employment, and has offered to renew his contract of employment, or to re-engage him under a new contract, and-

(a) the employee dies without having either accepted or refused the offer; and

(b) the offer has not been withdrawn before his death,

subsection (2) or (as the case may be) subsection (3) of section 31C shall apply as if, for the words "the employee has unreasonably refused", there were substituted the words "it would have been unreasonable on the part of the employee to refuse".

13. In relation to the making of a claim by a personal representative of a deceased employee who dies before the end of the period of 1 month beginning with the relevant date, section 31N shall apply with the substitution, for the words "3 months", of the words "6 months". (Amended 76 of 1985 s. 9)

14. Subject to this Part of this Schedule, in relation to an employee who has died, any reference in Part VA of this Ordinance to-

(a) the doing of anything by, or in relation to, an employee shall be construed as including a reference to the doing of that thing by, or in relation to, any personal representative of the deceased employee; and

(b) a thing required or authorized to be done by, or in relation to, an employee shall be construed as including a reference to anything which, in accordance with Part VA of this Ordinance as modified by this Part of this Schedule (including sub-paragraph (a)), is required or authorized to be done by, or in relation to, any personal representative of his.

15. Any right of a personal representative of a deceased employee to a severance payment, where that right had not accrued before the employee's death, shall devolve as if it had accrued before his death.

(Third Schedule added 67 of 1974 s. 6)

Schedule:	4	SPECIFIED ORDINANCES	6 of 2008	18/04/2008

[section 72(1)]

Item	Title
1.	Labour Tribunal Ordinance (Cap 25).
2.	Apprenticeship Ordinance (Cap 47).
3.	Labour Relations Ordinance (Cap 55).
4.	Contracts for Employment Outside Hong Kong Ordinance (Cap 78).

5. Employees' Compensation Ordinance (Cap 282).
6. Trade Unions Ordinance (Cap 332).
7. Pneumoconiosis and Mesothelioma (Compensation) Ordinance (Cap 360). (Amended 6 of 2008 s. 37)
8. Minor Employment Claims Adjudication Board Ordinance (Cap 453). (Added 61 of 1994 s. 55)

(Fourth Schedule added 48 of 1984 s. 33)

Schedule:	5	(Repealed 74 of 1997 s. 18)	74 of 1997	27/06/1998

Schedule:	6	DEATH OF EMPLOYER-LONG SERVICE PAYMENTS		30/06/1997

[section 31ZC]

1. This Schedule shall have effect in relation to an employee where his employer (in this Schedule referred to as "the deceased employer") dies.

2. Section 31Z shall not apply to any change whereby the ownership of the business, for the purposes of which the employee was employed by the deceased employer, passes to a personal representative of the deceased employer.

3. Where, by virtue of section 31ZB, the death of the deceased employer is to be treated for the purposes of Part VB of this Ordinance as a termination by him of the contract of employment, the employee shall nevertheless not be treated for these purposes as having been dismissed by the deceased employer if-

(a) his contract of employment is renewed by a personal representative of the deceased employer, or he is re-engaged under a new contract of employment by such a personal representative; and

(b) the renewal or re-engagement takes effect not later than 4 weeks after the death of the deceased employer.

4. Where by virtue of paragraph 3 the employee is treated as not having been dismissed by reason of a renewal or re-engagement taking effect after the death of the deceased employer, then-

(a) in determining, for the purposes of section 31R or 31RA, whether he has been employed under a continuous contract for the requisite number of years of service, the interval between the death and the date on which the renewal or re-engagement takes effect shall count as a period of employment with the personal representative of the deceased employer, if apart from this paragraph it would not count for that purpose as such a period of employment; and

(b) in computing the number of years of service specified in section 31R or 31RA, the continuity of the employee's period of employment shall be treated as not being broken by any week which falls within that interval.

5. For the purposes of the application, in accordance with section 31RB, of Part VB of this Ordinance in relation to an employee who was employed as a domestic servant in, or in connection with, a private household, any reference to a personal representative in this Schedule shall be construed as including a reference to any person to whom, otherwise than in pursuance of a sale or other disposition for valuable consideration, the management of the household has passed in consequence of the death of the deceased employer.

6. Subject to this Schedule, in relation to an employer who has died-

(a) any reference in Part VB of this Ordinance to the doing of anything by, or in relation to, an employer shall be construed as including a reference to the doing of that thing by, or in relation to, any personal representative of the deceased employer; and

(b) any reference in Part VB of this Ordinance to a thing required or authorized to be done by, or in relation to, an employer shall be construed as including a reference to anything which, in accordance with any provision of Part VB of this Ordinance as modified by this Schedule (including sub-paragraph (a)), is required or authorized to be done by, or in relation to, any personal representative of his.

7. Where by virtue of Part VB of this Ordinance, as modified by this Schedule, a personal representative of the

deceased employer is liable to pay a long service payment, or part of a long service payment, and that liability had not accrued before the death of the deceased employer, it shall be treated for all purposes as if it were a liability of the deceased employer which had accrued immediately before his death.

(Sixth Schedule added 76 of 1985 s. 10. Amended 52 of 1988 s. 17; 41 of 1990 s. 24)

Schedule:	7			30/06/1997

[sections 31G & 31V]

TABLE A

Column 1	Column 2
Relevant date	Maximum amount
Before the date of commencement of the Employment (Amendment) Ordinance 1995(5 of 1995)	The total amount of wages earned by the employee during the period of 12 months immediately preceding the relevant date, or $180000, whichever is less
On or after the date of commencement of the Employment (Amendment) Ordinance 1995 (5 of 1995), but before 1 October 1995	$210000
1 October 1995 to 30 September 1996	$230000
1 October 1996 to 30 September 1997	$250000
1 October 1997 to 30 September 1998	$270000
1 October 1998 to 30 September 1999	$290000
1 October 1999 to 30 September 2000	$310000
1 October 2000 to 30 September 2001	$330000
1 October 2001 to 30 September 2002	$350000
1 October 2002 to 30 September 2003	$370000
On or after 1 October 2003	$390000

TABLE B

Column 1	Column 2
Relevant date	Fully reckonable years of service
On or after the date of commencement of the Employment (Amendment) Ordinance 1995 (5 of 1995), but before 1 October 1995	25 years
1 October 1995 to 30 September 1996	27 years
1 October 1996 to 30 September 1997	29 years
1 October 1997 to 30 September 1998	31 years
1 October 1998 to 30 September 1999	33 years
1 October 1999 to 30 September 2000	35 years
1 October 2000 to 30 September 2001	37 years
1 October 2001 to 30 September 2002	39 years

1 October 2002 to 30 September 2003	41 years
1 October 2003 to 30 September 2004	43 years

(Seventh Schedule added 5 of 1995 s. 12)

Schedule:	8	EMPLOYMENT PROTECTION		30/06/1997

[section 32G]

DEATH OF EMPLOYER OR OF EMPLOYEE

PART I

DEATH OF EMPLOYER

1. If an employer dies after his employee's right of action has arisen under Part VIA of this Ordinance on employment protection but before the adjudication of the claim, the claim shall be actionable by the employee against the personal representative of the deceased employer.

2. In relation to the death of an employer, a reference to renewal or re-engagement by the employer in section 32B or 32C shall be construed as including a reference to renewal or re-engagement by any personal representative of the deceased employer, and a reference to an offer made by the employer shall be construed as including a reference to an offer made by any personal representative of the deceased employer.

PART II

DEATH OF EMPLOYEE

3. If an employee dies after his right of action has arisen under Part VIA of this Ordinance on employment protection but before the adjudication of the claim, the claim shall be actionable by a personal representative of the deceased employee.

4. Where an employer has given notice to an employee to terminate his contract of employment and before that notice expires the employee dies, Part VIA of this Ordinance on employment protection shall apply as if the contract had been terminated by the employer by notice expiring on the date of the employee's death.

5. Where an employer has given notice to an employee to terminate his contract of employment and has offered to renew his contract of employment or to re-engage him under a new contract and-

(a) the employee dies without having either accepted or refused that offer; and

(b) the offer has not been withdrawn by the employer before the death of the employee,

section 32C(1) or (2), as the case may be, shall apply as if, for the words "the employee has unreasonably refused", there were substituted the words "it would have been unreasonable on the part of the employee to refuse".

(Eighth Schedule added 75 of 1997 s. 5)

Schedule:	9	MONETARY CAP ON KEEPING RECORDS OF HOURS WORKED	L.N. 147 of 2010; L.N. 148 of 2010	01/05/2011

[section 49A]

$11500 per month

(Ninth Schedule added 15 of 2010 s. 22. Amended L.N. 148 of 2010)

International Covenant on Economic, Social and Cultural Rights

**Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)
of 16 December 1966**

entry into force 3 January 1976, in accordance with article 27

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

(a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

Equal Remuneration Convention, 1951 (No. 100)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-fourth Session on 6 June 1951, and

Having decided upon the adoption of certain proposals with regard to the principle of equal remuneration for men and women workers for work of equal value, which is the seventh item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this twenty-ninth day of June of the year one thousand nine hundred and fifty-one the following Convention, which may be cited as the Equal Remuneration Convention, 1951:

Article 1

For the purpose of this Convention--

(a) the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

(b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. This principle may be applied by means of--

(a) national laws or regulations;

(b) legally established or recognised machinery for wage determination;

(c) collective agreements between employers and workers; or

(d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

Convention No. 100

2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the partíes thereto.

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each Member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

Article 5

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 6

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 7

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate --

a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;
b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 9, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 8

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 9, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 12

At such times as may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides--
   a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;
   b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14

The English and French versions of the text of this Convention are equally authoritative.

C189 Domestic Workers Convention, 2011

Convention concerning decent work for domestic workers (Note: Date of coming into force:)
Convention:C189
Place:Geneva
Date of adoption:16:06:2011
Session of the Conference:100
Subject: **Specific Categories of Workers**
See the ratifications for this Convention

Display the document in: French Spanish
Status: Up-to-date instrument This Convention was adopted after 1985 and is considered up to date.

The General Conference of the International Labour Organization, Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 100th Session on 1 June 2011, and

Mindful of the commitment of the International Labour Organization to promote decent work for all through the achievement of the goals of the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization, and

Recognizing the significant contribution of domestic workers to the global economy, which includes increasing paid job opportunities for women and men workers with family responsibilities, greater scope for caring for ageing populations, children and persons with a disability, and substantial income transfers within and between countries, and

Considering that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights, and

Considering also that in developing countries with historically scarce opportunities for formal employment, domestic workers constitute a significant proportion of the national workforce and remain among the most marginalized, and

Recalling that international labour Conventions and Recommendations apply to all workers, including domestic workers, unless otherwise provided, and

Noting the particular relevance for domestic workers of the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), the Workers with Family Responsibilities Convention, 1981 (No. 156), the Private Employment Agencies Convention, 1997 (No. 181), and the Employment Relationship Recommendation, 2006 (No. 198), as well as of the ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration (2006), and

Recognizing the special conditions under which domestic work is carried out that make it desirable to supplement the general standards with standards specific to domestic workers so as to enable them to enjoy their rights fully, and

Recalling other relevant international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Convention against Transnational Organized Crime, and in particular its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and

Having decided upon the adoption of certain proposals concerning decent work for domestic workers, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this sixteenth day of June of the year two thousand and eleven the following Convention, which may be cited as the Domestic Workers Convention, 2011.

Article 1

For the purpose of this Convention:

(a) the term ***domestic work*** means work performed in or for a household or households;

(b) the term ***domestic worker*** means any person engaged in domestic work within an employment relationship;

(c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

Article 2

1. The Convention applies to all domestic workers.

2. A Member which ratifies this Convention may, after consulting with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers, exclude wholly or partly from its scope:

(a) categories of workers who are otherwise provided with at least equivalent protection;

(b) limited categories of workers in respect of which special problems of a substantial nature arise.

3. Each Member which avails itself of the possibility afforded in the preceding paragraph shall, in its first report on the application of the Convention under article 22 of the Constitution of the International Labour Organisation, indicate any particular category of workers thus excluded and the reasons for such exclusion and, in subsequent reports, specify any measures that may have been taken with a view to extending the application of the Convention to the workers concerned.

Article 3

1. Each Member shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in this Convention.

2. Each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation. 3. In taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.

Article 4

1. Each Member shall set a minimum age for domestic workers consistent with the provisions of the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), and not lower than that established by national laws and regulations for workers generally.

2. Each Member shall take measures to ensure that work performed by domestic workers who are under the age of 18 and above the minimum age of employment does not deprive them of compulsory education, or interfere with opportunities to participate in further education or vocational training.

Article 5

Each Member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence.

Article 6

Each Member shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as

well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy.

Article 7

Each Member shall take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements, in particular:

(a) the name and address of the employer and of the worker;

(b) the address of the usual workplace or workplaces;

(c) the starting date and, where the contract is for a specified period of time, its duration;

(d) the type of work to be performed;

(e) the remuneration, method of calculation and periodicity of payments;

(f) the normal hours of work;

(g) paid annual leave, and daily and weekly rest periods;

(h) the provision of food and accommodation, if applicable;

(i) the period of probation or trial period, if applicable;

(j) the terms of repatriation, if applicable; and

(k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.

Article 8

1. National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is

to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies.

2. The preceding paragraph shall not apply to workers who enjoy freedom of movement for the purpose of employment under bilateral, regional or multilateral agreements, or within the framework of regional economic integration areas.

3. Members shall take measures to cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers.

4. Each Member shall specify, by means of laws, regulations or other measures, the conditions under which migrant domestic workers are entitled to repatriation on the expiry or termination of the employment contract for which they were recruited.

Article 9

Each Member shall take measures to ensure that domestic workers:

(a) are free to reach agreement with their employer or potential employer on whether to reside in the household;

(b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and

(c) are entitled to keep in their possession their travel and identity documents.

Article 10

1. Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work.

2. Weekly rest shall be at least 24 consecutive hours.

3. Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice.

Article 11

Each Member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex.

Article 12

1. Domestic workers shall be paid directly in cash at regular intervals at least once a month. Unless provided for by national laws, regulations or collective agreements, payment may be made by bank transfer, bank cheque, postal cheque, money order or other lawful means of monetary payment, with the consent of the worker concerned.

2. National laws, regulations, collective agreements or arbitration awards may provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind that are not less favourable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable.

Article 13

1. Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers.

2. The measures referred to in the preceding paragraph may be applied progressively, in consultation with the most representative organizations of employers and workers and, where they exist,

with organizations representative of domestic workers and those representative of employers of domestic workers.

Article 14

1. Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity.

2. The measures referred to in the preceding paragraph may be applied progressively, in consultation with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.

Article 15

1. To effectively protect domestic workers, including migrant domestic workers, recruited or placed by private employment agencies, against abusive practices, each Member shall:

(a) determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice;

(b) ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers;

(c) adopt all necessary and appropriate measures, within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of domestic workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that specify the respective obligations of the private employment agency and the household towards the domestic worker and provide for penalties, including prohibition of those private employment agencies that engage in fraudulent practices and abuses;

(d) consider, where domestic workers are recruited in one country for work in another, concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment; and

(e) take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers.

2. In giving effect to each of the provisions of this Article, each Member shall consult with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.

Article 16

Each Member shall take measures to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.

Article 17

1. Each Member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers.

2. Each Member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.

3. In so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due respect for privacy.

Article 18

Each Member shall implement the provisions of this Convention, in consultation with the most representative employers and

workers organizations, through laws and regulations, as well as through collective agreements or additional measures consistent with national practice, by extending or adapting existing measures to cover domestic workers or by developing specific measures for them, as appropriate.

Article 19

This Convention does not affect more favourable provisions applicable to domestic workers under other international labour Conventions.

Article 20

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 21

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director- General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification is registered.

Article 22

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of

ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention within the first year of each new period of ten years under the terms provided for in this Article.

Article 23

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and denunciations that have been communicated by the Members of the Organization.

2. When notifying the Members of the Organization of the registration of the second ratification that has been communicated, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention will come into force.

Article 24

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and denunciations that have been registered.

Article 25

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 26

1. Should the Conference adopt a new Convention revising this Convention, then, unless the new Convention otherwise provides:

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 22, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 27

The English and French versions of the text of this Convention are equally authoritative.

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

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WE, the Heads of State/Government of the Member Countries of the Association of Southeast Asian Nations (hereinafter referred to as ASEAN), attending the 12th ASEAN Summit on 13 January 2007 in Cebu, Philippines;

RECALLING the Declaration of ASEAN Concord II adopted at the 9th ASEAN Summit in Bali, Indonesia, which stipulated the establishment of an ASEAN Community resting on three pillars: an ASEAN Security Community, an ASEAN Economic Community and an ASEAN Socio-Cultural Community;

RECALLING also the Universal Declaration on Human Rights adopted and proclaimed by General Assembly Resolution 217(A)(III) of 10 December 1948, as well as other appropriate international instruments which all the ASEAN Member Countries have acceded to, in order to safeguard the human rights and fundamental freedoms of individuals such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child;

RECALLING further the Vientiane Action Programme adopted at the 10th ASEAN Summit in Vientiane, Lao PDR, which provides for, inter alia, the promotion of human rights and obligations to realise an open, dynamic and resilient ASEAN Community;

CONFIRMING our shared responsibility to realise a common vision for a secure and prosperous ASEAN Community by improving the quality of life of its people and strengthening its cultural identity towards a people-centered ASEAN through, among others, measures on the protection and promotion of the rights of migrant workers;

RECOGNISING the contributions of migrant workers to the society and economy of both receiving states and sending states of ASEAN;

RECOGNISING further the sovereignty of states in determining

their own migration policy relating to migrant workers, including determining entry into their territory and under which conditions migrant workers may remain;

ACKNOWLEDGING the legitimate concerns of the receiving and sending states over migrant workers, as well as the need to adopt appropriate and comprehensive migration policies on migrant workers;

ACKNOWLEDGING also the need to address cases of abuse and violence against migrant workers whenever such cases occur;

REITERATING that ASEAN should make further progress as a cohesive and caring society committed to enhancing the quality of life and well being of its people, especially those in the vulnerable and disadvantaged sectors;

HEREBY DECLARE AS FOLLOWS:

GENERAL PRINCIPLES

1. Both the receiving states and sending states shall strengthen the political, economic and social pillars of the ASEAN Community by promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN Member Countries;
2. The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented;
3. The receiving states and the sending states shall take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies; and
4. Nothing in the present Declaration shall be interpreted as implying the regularisation of the situation of migrant workers who are undocumented.

OBLIGATIONS OF RECEIVING STATES

Pursuant to the prevailing laws, regulations and policies of the

respective receiving states, the receiving states will:

5. Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers;
6. Work towards the achievement of harmony and tolerance between receiving states and migrant workers;
7. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfill the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties;
8. Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
9. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and
10. Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations.

OBLIGATIONS OF SENDING STATES

Pursuant to the prevailing laws, regulations and policies of the respective sending states, the sending states will:

11. Enhance measures related to the promotion and protection of the rights of migrant workers;
12. Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;
13. Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers

when abroad as well as repatriation and reintegration to the countries of origin; and

14. Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

COMMITMENTS BY ASEAN

For purposes of protecting and promoting the rights of migrant workers, ASEAN Member Countries in accordance with national laws, regulations and policies, will:

15. Promote decent, humane, productive, dignified and remunerative employment for migrant workers;
16. Establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin;
17. Take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities;
18. Facilitate data-sharing on matters related to migrant workers, for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states;
19. Promote capacity building by sharing of information, best practices as well as opportunities and challenges encountered by ASEAN Member Countries in relation to protection and promotion of migrant workers' rights and welfare;
20. Extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the Embassies and Consular Offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements;
21. Encourage international organisations, ASEAN dialogue partners and other countries to respect the principles and extend support and assistance to the implementation of the measures contained in this Declaration; and
22. Task the relevant ASEAN bodies to follow up on the

Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.

DONE at Cebu, Philippines, this Thirteenth Day of January in the Year Two Thousand and Seven, in a single original copy in the English Language.

For Brunei Darussalam:

HAJI HASSANAL BOLKIAH
Sultan of Brunei Darussalam

For the Kingdom of Cambodia:

SAMDECH HUN SEN
Prime Minister

For the Republic of Indonesia:

DR. SUSILO BAMBANG YUDHOYONO
President

For the Lao People's Democratic Republic:

BOUASONE BOUPHAVANH
Prime Minister

For Malaysia:

DATO' SERI ABDULLAH AHMAD BADAWI
Prime Minister

For the Union of Myanmar:

GENERAL SOE WIN
Prime Minister

For the Republic of the Philippines:

GLORIA MACAPAGAL-ARROYO
President

For the Republic of Singapore:

LEE HSIEN LOONG
Prime Minister

For the Kingdom of Thailand:

GENERAL SURAYUD CHULANONT (RET.)
Prime Minister

For the Socialist Republic of Viet Nam:

NGUYEN TAN DUNG
Prime Minister

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

Adopted by General Assembly resolution 45/158 of 18 December 1990

Preamble

The States Parties to the present Convention,

Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,

Taking into account also the principles and standards set forth in the relevant instruments elaborated within the framework of the International Labour Organisation, especially the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No.151), the Convention concerning Forced or Compulsory Labour (No. 29) and the Convention concerning Abolition of Forced Labour (No. 105), Reaffirming the importance of the principles contained in the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization,

Recalling the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration of the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Code of Conduct for Law Enforcement Officials, and the Slavery Conventions,

Recalling that one of the objectives of the International Labour Organisation, as stated in its Constitution, is the protection of the interests of workers when employed in countries other than their own, and bearing in mind the expertise and experience of that organization in matters related to migrant workers and members of their families,

Recognizing the importance of the work done in connection with migrant workers and members of their families in various organs of the United Nations, in particular in the Commission on Human Rights and the Commission for Social Development, and in the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, as well as in other international organizations,

Recognizing also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families, as well as the importance and usefulness of bilateral and multilateral agreements in this field,

Realizing the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community,

Aware of the impact of the flows of migrant workers on States and people concerned, and desiring to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families,

Considering the situation of vulnerability in which migrant workers and members of their families frequently-find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment,

Convinced that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection,

Taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family,

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned,

Convinced, therefore, of the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally,

Have agreed as follows:

Part I: Scope and Definitions

Article 1

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

Article 2

For the purposes of the present Convention:

1. The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

2.

(a) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;

(b) The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;

(c) The term "seafarer", which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national;

(d) The term "worker on an offshore installation" refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;

(e) The term "itinerant worker'' refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;

(f) The term "project-tied worker" refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;

(g) The term "specified-employment worker" refers to a migrant worker:

(i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or

(ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or

(iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;

(h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Article 3

The present Convention shall not apply to: (a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;

(b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;

(c) Persons taking up residence in a State different from their State of origin as investors;

(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

(e) Students and trainees;

(f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Article 4

For the purposes of the present Convention the term ''members of the family" refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

Article 5

For the purposes of the present Convention, migrant workers and members of their families:

(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

Article 6

For the purposes of the present Convention:

(a) The term "State of origin" means the State of which the person concerned is a national;

(b) The term "State of employment" means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be;

(c) The term "State of transit,' means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

Part II: Non-discrimination with Respect to Rights

Article 7

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Part III: Human Rights of All Migrant Workers and Members of their Families

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.

2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 9

The right to life of migrant workers and members of their families shall be protected by law.

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 11

1. No migrant worker or member of his or her family shall be held in slavery or servitude.

2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.

3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.

4. For the purpose of the present article the term "forced or compulsory labour" shall not include:

(a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;

(b) Any service exacted in cases of emergency or clamity threatening the life or well-being of the community;

(c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.

Article 12

1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.

2. Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4. States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13

1. Migrant workers and members of their families shall have the right to hold opinions without interference.

2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.

3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others;

(b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;

(c) For the purpose of preventing any propaganda for war;

(d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 14

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

Article 15

No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

Article 16

1. Migrant workers and members of their families shall have the right to liberty and security of person.

2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

3. Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.

4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived o their liberty except on such grounds and in accordance with such procedures as are established by law.

5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.

6. Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.

7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:

(a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;

(b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

8. Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

9. Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

Article 18

1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. Migrant workers and members of their families who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

(a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them;

(b) To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;

(c) To be tried without undue delay;

(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;

(e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

(f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court;

(g) Not to be compelled to testify against themselves or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Migrant workers and members of their families convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.

6. When a migrant worker or a member of his or her family has, by a final decision, been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person.

7. No migrant worker or member of his or her family shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of the State concerned.

Article 19

1. No migrant worker or member of his or her family shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of

the offence, provision is made by law for the imposition of a lighter penalty, he or she shall benefit thereby.

2. Humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right of residence or work, should be taken into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family.

Article 20

1. No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.

2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.

Article 21

It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 23

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.

Article 24

Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.

Article 25

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

(b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Article 26

1. States Parties recognize the right of migrant workers and members of their families:

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;

(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

Article 27

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Article 29

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

Article 30

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

Article 31

1. States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.

Article 32

Upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings.

Article 33

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:

(a) Their rights arising out of the present Convention;

(b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State. 2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall co-operate with other States concerned.

3. Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

Article 34

Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI of the present Convention.

Part IV: Other Rights of Migrant Workers and Members of their Families who are Documented or ina Regular Situation

Article 36

Migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in the present part of the Convention in addition to those set forth in part III.

Article 37

Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

Article 38

1. States of employment shall make every effort to authorize migrant workers and members of the families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.

2. Migrant workers and members of their families shall have the right to be fully informed of the terms on which such temporary absences are authorized.

Article 39

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.

2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 40

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.

2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

Article 41

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Article 42

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.

3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

Article 43

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:

(a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and placement services;

(c) Access to vocational training and retraining facilities and institutions;

(d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;

(e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;

(f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;

(g) Access to and participation in cultural life.

2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

Article 44

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

Article 45

1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:

(a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met;

(c) Access to social and health services, provided that requirements for participation in the respective schemes are met;

(d) Access to and participation in cultural life.

2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.

3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate.

4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

Article 46

Migrant workers and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreements and the obligations of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and household effects as well as the equipment necessary to engage in the remunerated activity for which they were admitted to the State of employment:

(a) Upon departure from the State of origin or State of habitual residence;

(b) Upon initial admission to the State of employment;

(c) Upon final departure from the State of employment;

(d) Upon final return to the State of origin or State of habitual residence.

Article 47

1. Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements.

2. States concerned shall take appropriate measures to facilitate such transfers.

Article 48

1. Without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment:

(a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;

(b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families. 2. States Parties shall endeavour to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.

Article 49

1. Where separate authorizations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity.

2. Migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.

3. In order to allow migrant workers referred to in paragraph 2 of the present article sufficient time to find alternative remunerated activities, the authorization of residence shall not be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits.

Article 50

1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State.

2. Members of the family to whom such authorization is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment.

3. The provisions of paragraphs I and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State.

Article 51

Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.

Article 52

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.

2. For any migrant worker a State of employment may:

(a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;

(b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:

(a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;

(b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 53

1. Members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker in accordance with article 52 of the present Convention.

2. With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States Parties shall consider favourably granting them priority in obtaining

permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements.

Article 54

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

(a) Protection against dismissal;

(b) Unemployment benefits;

(c) Access to public work schemes intended to combat unemployment;

(d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.

Article 55

Migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity.

Article 56

1. Migrant workers and members of their families referred to in the present part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III.

2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit.

3. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

Part V: Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families

Article 57

The particular categories of migrant workers and members of their families specified in the present part of the Convention who are documented or in a regular situation shall enjoy the rights set forth in part m and, except as modified below, the rights set forth in part IV.

Article 58

1. Frontier workers, as defined in article 2, paragraph 2 (a), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.

2. States of employment shall consider favourably granting frontier workers the right freely to choose their remunerated activity after a specified period of time. The granting of that right shall not affect their status as frontier workers.

Article 59

1. Seasonal workers, as defined in article 2, paragraph 2 (b), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year.

2. The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

Article 60

Itinerant workers, as defined in article 2, paragraph 2 (A), of the present Convention, shall be entitled to the rights provided for in part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State.

Article 61

1. Project-tied workers, as defined in article 2, paragraph 2 (of the present Convention, and members of their families shall be entitled to the rights provided for in part IV except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 45, paragraph I (b), and articles 52 to 55.

2. If a project-tied worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18, paragraph 1, of the present Convention.

3. Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.

4. Without prejudice to the provisions of article 47 of the present Convention and to relevant bilateral or multilateral agreements, States Parties concerned shall permit payment of the earnings of project-tied workers in their State of origin or habitual residence.

Article 62

1. Specified-employment workers as defined in article 2, paragraph 2 (g), of the present Convention, shall be entitled to the rights provided for in part IV, except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 52, and article 54, paragraph 1 (d).

2. Members of the families of specified-employment workers shall be entitled to the rights relating to family members of migrant workers provided for in part IV of the present Convention, except the provisions of article 53.

Article 63

1. Self-employed workers, as defined in article 2, paragraph 2 (h), of the pre sent Convention , shall be entitled to the rights provided for in part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.

2. Without prejudice to articles 52 and 79 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Article 64

1. Without prejudice to article 79 of the present Convention, the States Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families.

2. In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

Article 65

1. States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, inter alia :

(a) The formulation and implementation of policies regarding such migration;

(b) An exchange of information. consultation and co-operation with the competent authorities of other States Parties involved in such migration;

(c) The provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment, on agreements concluded with other States concerning migration and on other relevant matters;

(d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

2. States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

Article 66

1. Subject to paragraph 2 of the present article, the right to undertake operations with a view to the recruitment of workers for employment in another State shall be restricted to:

(a) Public services or bodies of the State in which such operations take place;

(b) Public services or bodies of the State of employment on the basis of agreement between the States concerned;

(c) A body established by virtue of a bilateral or multilateral agreement.

2. Subject to any authorization, approval and supervision by the public authorities of the States Parties concerned as may be established pursuant to the legislation and practice of those States, agencies, prospective employers or persons acting on their behalf may also be permitted to undertake the said operations.

Article 67

1. States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation.

2. Concerning migrant workers and members of their families in a regular situation, States Parties concerned shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

Article 69

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

Part VII: Application of the Convention

Article 72

1.

(a) For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as "the Committee");

(b) The Committee shall consist, at the time of entry into force of the present Convention, of ten and, after the entry into force of the Convention for the forty-first State Party, of fourteen experts of high moral standing, impartiality and recognized competence in the field covered by the Convention.

2.

(a) Members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal systems. Each State Party may nominate one person from among its own nationals;

(b) Members shall be elected and shall serve in their personal capacity.

3. The initial election shall be held no later than six months after the date of the entry into force of the present Convention and subsequent elections every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to all States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties that have nominated them, and shall submit it to the States Parties not later than one month before the date of the corresponding election, together with the curricula vitae of the persons thus nominated.

4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the States Parties present and voting.

5.

(a) The members of the Committee shall serve for a term of four years. However, the terms of five of the members elected in the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting of States Parties;

(b) The election of the four additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of the present article, following the entry into force of the Convention for the forty-first State Party. The term of two of the additional members elected on this occasion shall expire at the end of two years; the names of these members shall be chosen by lot by the Chairman of the meeting of States Parties;

(c) The members of the Committee shall be eligible for re-election if renominated.

6. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party that nominated the expert shall appoint another expert from among its own nationals for the remaining part of the term. The new appointment is subject to the approval of the Committee.

7. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee.

8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 73

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention:

(a) Within one year after the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years and whenever the Committee so requests.

2. Reports prepared under the present article shall also indicate factors and difficulties, if any, affecting the implementation of the Convention and shall include information on the characteristics of migration flows in which the State Party concerned is involved.

3. The Committee shall decide any further guidelines applicable to the content of the reports.

4. States Parties shall make their reports widely available to the public in their own countries.

Article 74

1. The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports.

2. The Secretary-General of the United Nations shall, in due time before the opening of each regular session of the Committee, transmit to the Director-General of the International Labour Office copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports, in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the present Convention that fall within the sphere of competence of the International Labour Organisation. The Committee shall consider in its deliberations such comments and materials as the Office may provide.

3. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence.

4. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies to submit, for consideration by the Committee, written information on such matters dealt with in the present Convention as fall within the scope of their activities.

5. The International Labour Office shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.

6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered.

7. The Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations, based, in particular, on the examination of the reports and any observations presented by States Parties.

8. The Secretary-General of the United Nations shall transmit the annual reports of the Committee to the States Parties to the present Convention, the Economic and Social Council, the Commission on Human Rights of the United Nations, the Director-General of the International Labour Office and other relevant organizations.

Article 75

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The Committee shall normally meet annually.

4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 76

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of the present paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

(i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of the present article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 77

1. A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration.

2. The Committee shall consider inadmissible any communication under the present article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. The Committee shall not consider any communication from an individual under the present article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual.

4. Subject to the provisions of paragraph 2 of the present article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

5. The Committee shall consider communications received under the present article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

6. The Committee shall hold closed meetings when examining communications under the present article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of the present article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by or on behalf of an individual shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 78

The provisions of article 76 of the present Convention shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

Part VIII: General provisions

Article 79

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

Article 80

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention.

Article 81

1. Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:

(a) The law or practice of a State Party; or

(b) Any bilateral or multilateral treaty in force for the State Party concerned.

2. Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act that would impair any of the rights and freedoms as set forth in the present Convention.

Article 82

The rights of migrant workers and members of their families provided for in the present Convention may not be renounced. It shall not be permissible to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights. It shall not be possible to derogate by contract from rights recognized in the present Convention. States Parties shall take appropriate measures to ensure that these principles are respected.

Article 83

Each State Party to the present Convention undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 84

Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.

Part IX: Final provisions

Article 85

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 86

1. The present Convention shall be open for signature by all States. It is subject to ratification.

2. The present Convention shall be open to accession by any State.

3. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 87

1. The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the present Convention after its entry into force, the Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of its own instrument of ratification or accession.

Article 88

A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application.

Article 89

1. Any State Party may denounce the present Convention, not earlier than five years after the Convention has entered into force for the State concerned, by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of the receipt of the notification by the Secretary-General of the United Nations.

3. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

4. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 90

1. After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting shall be submitted to the General Assembly for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Convention and any earlier amendment that they have accepted.

Article 91

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 92

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 93

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

In witness whereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Contract Of Employment

Perjanjian Kerja

This Contract is made on this _____ day of _____ in the year _____ between _____ I/C No. _____ of _____ _____(hereinafter referred to as the Employer) of the one part and _____ Holder of Indonesian Passport No. _____ of _____ _____ (hereinafter referred to as the Domestic Worker) of the other part.

Perjanjian Kerja ini dibuat pada hari _____ tanggal _____ antara _____ I/C No. _____ dari _____ (selanjutnya disebut pengguna) sebagai pihak pertama dan _____ Pemegang Paspor Indonesia No. _____ Berasal dari _____ (selanjutnya disebut pekerja) sebagai pihak kedua.

It is hereby agreed as follows:

Kedua belah pihak menyetujui *hal-hal sebagai berikut:*

1. Duration of the Contract

Masa Perjanjian

(a) The Employer shall employ the Domestic Worker in accordance with the terms and conditions of this Contract and subject to the provisions of the relevant laws, regulations, rules, policies and directives of Malaysia.

Pengguna akan mempekerjakan Pekerja sesuai dengan ketentuan dan kondisi yang berlaku dalam perjanjian kerja ini dengan mengacu kepada hukum, peraturan dan ketentuan yang berlaku di Malaysia.

(b) This Contract shall commence from the date of the arrival of the Domestic Worker at the Employer's home.

Perjanjian Kerja ini mulai berlaku sejak kedatangan pekerja di rumah pengguna.

(c) The Domestic Worker shall continue in the employment under the terms and conditions of this Contract for a period of _____ (_____) years

or until such time the Contract is terminated in accordance with the terms and conditions of this Contract.

Pekerja harus bekerja dibawah kondisi Perjanjian Kerja ini untuk jangka waktu _____ (____) tahun atau sampai Perjanjian Kerja ini dibatalkan sesuai dengan ketentuan dan kondisi Perjanjian Kerja ini.

2. Place of work / residence of Domestic Worker

Tempat Kerja/Tinggal Pekerja

The Domestic Worker shall work and reside only at _____ _____ during the duration of the Contract.

Pekerja hanya diperbolehkan bekerja dan tinggal di _____ _____ *selama berlakunya Perjanjian Kerja ini.*

3. Duties and Responsibilities of the Domestic Worker

Tugas dan Tanggung Jawab Pekerja

(a) The Domestic Worker shall work only with the Employer and shall not seek employment or be employed elsewhere.

Pekerja hanya diperbolehkan bekerja pada pengguna dan dilarang mencari pekerjaan lain atau dipekerjakan di tempat lain.

(b) The Domestic Worker shall comply with reasonable instructions of the Employer in the performance of the assigned household duties.

Pekerja harus mematuhi arahan dari pengguna dalam mengerjakan pekerjaan rumah tangga sehari-hari.

(c) The Domestic Worker shall perform diligently, faithfully and sincerely all household duties assigned by the Employer which shall not include commercial activities.

Pekerja harus menunjukkan mutu kerja yang baik, rajin, setia dan berbudi bahasa dalam melaksanakan tugas yang diberikan oleh Pengguna yang tidak menyangkut kegiatan komersial.

(d) The Domestic Worker shall not use or take advantage of the Employer's possessions without Employer's permission.

Pekerja dilarang menggunakan atau mengambil kesempatan menggunakan barang-barang milik pengguna tanpa ijin.

(e) The Domestic Worker is expected at all times to observe proper attire and shall be courteous, polite and respectful to the Employer and family members of the Employer.

Pekerja diharapkan selalu berpakaian rapi, sopan, berbudi bahasa dan hormat kepada pengguna dan anggota keluarga pengguna.

(f) The Domestic Worker shall abide by the laws, rules, regulations, national policies and directives of Malaysia and respect the customs and traditions of Malaysia.

Pekerja harus patuh pada hukum dan peraturan Kerajaan Malaysia dan menghormati kebudayaaan dan adat istiadat Malaysia.

(g) In the event that the Domestic Worker marries In Malaysia during the period of employment, the Government of Malaysia reserves the right to revoke the Work Pass.

Apabila pekerja menikah di Malaysia dalam waktu perjanjian kerja masih berlangsung, Kerajaan Malaysia berhak membatalkan Permit Kerja Pekerja.

(h) No member of family or any other person shall be allowed to stay with the Domestic Workers in the place of employment without the consent of the Employer.

Tidak ada anggota keluarga atau orang lain diperbolehkan untuk tinggal dengan pekerja di tempat bekerja tanpa ijin dari pengguna.

4. Duties and responsibilities of the Employer

Tugas dan Tanggung Jawab Pengguna

(a) The Employer shall provide the Domestic Worker with reasonable accommodation and basic amenities.

Pengguna harus memberi tempat tinggal yang layak dan menyediakan keperluan sehari-hari.

(b) The Employer shall provide the Domestic Worker reasonable and sufficient daily meals.

Pengguna diwajibkan menyediakan makan yang cukup dan memadai.

(c) The Employer shall not require the Domestic Worker to work or to be engaged in any activities other than that related to household duties.

Pengguna tidak dibenarkan memberi kegiatan atau pekerjaan lain diluar tugas-tugas yang berhubungan dengan kegiatan rumah tangga.

(d) The Employer shall insure the Domestic Worker with the Foreign Worker Compensation Scheme in respect of any medical expenses the Domestic Worker may incur in the event of an injury where such injury arises out of and in the course of employment.

Pengguna wajib mengasuransikan pekerja dengan Skim Pampasan Pekerja Asing untuk mengantisipasi biaya pengobatan sekiranya pekerja mengalami kecederaan semasa bekerja.

(e) The Employer shall at all times respect and pay due regard to the sensitivity of religious beliefs of the Domestic Worker, including the right to perform prayers and to refuse to handle and consume non-Halal food.

Pengguna pada setiap saat harus menghormati kepekaan kepercayaan keagamaan pekerja termasuk memberi kesempatan pekerja untuk melakukan ibadah dan melarang pekerja memegang/mengolah dan makan makanan yang tidak halal.

(f) The employer shall allow the Domestic Worker to keep their passport, documents and possesions in case the Domestic Worker will

Pengguna wajib mengizinkan pekerja menyimpan sendiri paspor, dokumen-dokumen, serta barang-barang miliknya dalam hal pekerja menghendakinya.

(g) The employer must provide the freedom for Domestic Worker to communicate and/or interact with their family, colleagues and the Representative of Indonesia in terms of necesary and unnecessary and does not interfere with implementation of the jobs.

Pengguna wajib menyediakan keleluasaan bagi pekerja untuk berkomunikasi dan/atau berinteraksi dengan keluarga, rekan, serta Perwakilan RI dalam hal diperlukan dan tidak diperlukan dan tidak mengganggu pelaksanaan pekerjaan.

5. Payment of Wages

Pembayaran Gaji

(a) The Employer shall pay the Domestic Worker a monthly wages of RM _____(_____**RINGGIT MALAYSIA**) and the payment shall be in accordance with the account of the workers.

Pengguna diwajibkan membayar gaji bulanan sebanyak RM._____ (_____.Ringgit Malaysia) yang pembayarannya harus dilakukan melalui rekening/akum bank atas nama pekerja.

(b) The salary payments given no later than the last day of the month.

Pembayaran gaji selambat-lambatnya dilakukan pada hari terakhir bulan yang sama.

(b) No deduction of the monthly wages of the Domestic Worker shall be done save in accordance with the law.

Tidak ada pemotongan gaji bulanan pekerja dapat dibuat sesuai dengan undang-undang yang berlaku.

6. Rest Period/*Waktu Istirahat*

(a) The Domestic Worker shall be allowed adequate rest, at least 8 hours a day.
Pekerja harus diberi waktu istirahat yang cukup, sekurang-kurangnya 8 (delapan) jam berterusan dalam sehari

(b) The Domestic Worker granted leave 1 (one) day each week which the time based on the agreement between the employer and Domestic Worker.
Pekerja diberikan cuti 1 (satu) hari dalam setiap minggu yang waktunya ditetapkan atas kesepakatan pengguna dan pekerja

(c) The employer and Domestic Worker agreement, in weekly leave domestic worker may request to work, the employer paid the wage as the provisions:

$$The\ wage\ 1(one) day\ leave\ = \frac{\text{monthly wage}}{26}$$

Atas kesepakatan pengguna dan pekerja, pada hari cuti mingguan pekerja dapat meminta bekerja, dengan kewajiban pengguna membayar upah pekerja sesuai dengan ketentuan:

$$Upah\ Kerja\ 1\ Hari\ Cuti = \frac{\text{Upah 1 bulan}}{26}$$

7. Termination of Contract by the Employer

Pembatalan Perjanjian Kerja oleh Pengguna

The Employer may terminate the service of the Domestic Worker without notice if the Domestic Worker commits any act of misconduct inconsistent with the fulfillment of the Domestic Worker's duties or if the Domestic Worker breaches any of the terms and conditions of this Contract.

Pengguna dapat membatalkan Perjanjian Kerja tanpa pemberitahuan, apabila pekerja melakukan pelanggaran dalam melaksanakan tugas sehari-hari atau pekerja melanggar ketentuan dan kondisi Perjanjian Kerja ini.

For the purposes of this clause, misconduct includes the following:

Pelanggaran yang dimaksud dalam klausul ini adalah sebagai berikut:

(i) working with another Employer.
Bekerja dengan pengguna lain.

(ii) Disobeying lawful and reasonable order of the Employer.
Tidak mematuhi arahan yang diberikan oleh pengguna..

(iii) Neglecting the household duties and habitually late for work.
Mengabaikan pekerjaan rumah tangga dan sering terlambat melakukan pekerjaannya.

(Iv) is found guilty of fraud and dishonesty.
Didapati bersalah karena menipu dan tidak jujur.

(v) Is involved in illegal and lawful activities.
Mengikuti kegiatan yang dilarang atau bertentangan dengan undang-undang.

(vi) permitting outsiders to enter the employer's premises or to use the Employer's possessions without Employer's permission.
Membenarkan orang luar memasuki kediaman atau menggunakan barang milik pengguna tanpa sepengetahuan/ijin pengguna.

(vii) using the Employer's possessions without the Employer's permission.
Mempergunakan barang milik pengguna tanpa ijin dari pengguna.

Provided always that the Employer terminating the Contract under this clause shall provided proof of existence of such situation upon request of the Domestic Worker
Pengguna berhak membatalkan Perjanjian Kerja dibawah pasal ini dengan menunjukkan bukti yang cukup apabila diminta oleh pekerja.

8. Termination of Contract by the Domestic Worker

Pembatalan Perjanjian Kerja oleh Pekerja

The Domestic Worker may terminate this Contract without notice if :
Pekerja dapat membatalkan Perjanjian Kerja tanpa pemberitahuan apabila:

(i) The Domestic worker has reasonable grounds to fear for his or her life or is threatened by violence or disease.
Pekerja mempunyai alasan yang wajar bahwa jiwanya terancam atau hidupnya diancam penderaan atau penyakit.

(ii) the Domestic Worker is subjected to abuse or ill-treatment by the Employer. or
Pekerja didera atau mendapat perlakuan tidak layak oleh Pengguna. atau

(iii) The employer has failed to fulfil his obligation under paragraph 5.
Pengguna tidak dapat memenuhi kewajibannya seperti tertera dalam klausul 5.

Provided always that the Domestic Worker terminating the Contract under this clause shall provided proof of existence of such situation upon request of the employer.
Pekerja berhak membatalkan Perjanjian Kerja dibawah pasal ini dengan menunjukkan bukti yang cukup apabila diminta oleh pengguna.

9. General Provisions

Ketentuan umum

(a) Transportation cost from the Domestic Workers's original exit point in Indonesia to the place of employment shall be born by the employer.
Biaya perjalanan pekerja dari tempat asal pekerja sampai ketempat pengguna ditanggung sepenuhnya oleh pengguna.

(b) In the event that the Contract is terminated by the employer on the ground that the Domestic Worker has committed misconduct, the Domestic Worker shall bear the cost of his/her repatriation.

Dalam hal Perjanjian Kerja ini dibatalkan oleh pengguna atas dasar kesalahan pekerja, biaya perjalanan ditanggung sepenuhnya oleh pekerja.

(c) The repatriation cost of the Domestic Worker from the place of employment to the original exit point in Indonesia shall be born by the Employer in following circumstances.

Biaya pemulangan pekerja dari tempat pengguna sampai ke tempat asalnya di Indonesia ditanggung oleh pengguna dalam kondisi :

(1) at the completion of Contract of Employment.
Perjanjian Kerja berakhir.

(2) termination of the Contract of Employment by the Employer. or
Pembatalan Perjanjian Kerja oleh pengguna. Atau

(3) termination due to non compliance of the terms and conditions of the Contract of Employment by the Employer
Pembatalan oleh pengguna disebabkan ketidak patuhan terhadap tugas dan tanggung jawab yang tertera dalam perjanjian ini

(d) Any dispute arising between the Employer and the Domestic Worker concerning the ground for termination of the Contract of Employment pursuant to Paragraph 7 or 8 of this Contract shall be dealt with in accordance with the applicable laws in Malaysia

Perdebatan yang timbul antara pengguna dan pekerja dalam hal pembatalan perjanjian kerja seperti tercantum dalam paragraph 7 atau 8 dalam perjanjian ini agar diselesaikan sesuai hukum yang berlaku di Malaysia.

(e) For the purpose of this Contract, the terms "original exit point" shall mean _____ in Indonesia

Yang dimaksud dalam Perjanjian ini, sebagai "tempat asal" adalah _____ di Indonesia.

10. Extension of the Contract

Perpanjangan Perjanjian

Notwithstanding the expiry of the duration of the Contract, the Employer and the Domestic Worker may agree that this Contract may be extended based on similar terms and conditions therein.

Masa berlaku Perjanjian Kerja ini dapat diperpanjang dengan persetujuan dari kedua belah pihak dengan dasar dan kondisi yang sama.

11. Time is Essence/*Waktu adalah Pokok*

Time whenever mentioned shall be essence of this Contract in relation to all provisions of this Contract.

Waktu yang disebutkan adalah pokok dari ketentuan-ketentuan yang berlaku pada perjanjian ini.

12. Governing Law/*Hukum yang berlaku*

This Contract is governed by, and shall be constructed in accordance with the laws of Malaysia.

Perjanjian ini dibuat sesuai dengan hukum yang berlaku di Malaysia.

IN WITNESS WHEREOF, the parties to this Contract have hereunto affixed their signature this _____ day of _____ 20__

DISAKSIKAN OLEH *pihak-pihak yang menurunkan tanda tangan pada hari _____ tanggal _____20__*

Employer/*Pengguna*	Domestic Worker/*Pekerja,*
_____	_____
Name/*Nama :*	Name/*Nama :*
Date/*Tanggal*	Date/*Tanggal :*
Witnessed by/*Disaksikan oleh,*	Witnessed by/*Disaksikan oleh,*
_____	_____
MRA *:*	IRA *:*
Date/*Tanggal :*	Date/*Tanggal :*
Approved by/*Disahkan oleh,*	Approved by/*Disahkan oleh,*
_____	_____
Embassy Malaysia	Embassy Indonesia
Date/*Tanggal :*	Date/*Tanggal :*

Diregister di BP3TKI .....
No :
Tanggal :

Stamp BP3TKI

BNP2TKI03

PEMBAYARAN/PENGANGSURAN BIAYA PENEMPATAN TKI

BLN	GAJI	UPAH CUTI	ANGSURAN/POTONGAN	SISA/DITERIMA
1	600	X	300	300 + X
2	600	X	300	300 + X
3	600	X	300	300 + X
4	600	X	300	300 + X
5	600	X	300	300 + X
6	600	X	300	300 + X
7	600	X		600 + X
8	600	X		600 + X
9	600	X		600 + X
10	600	X		600 + X
11	600	X		600 + X
12	600	X		600 + X
13	600	X		600 + X
14	600	X		600 + X
15	600	X		600 + X
16	600	X		600 + X
17	600	X		600 + X
18	600	X		600 + X
19	600	X		600 + X
20	600	X		600 + X
21	600	X		600 + X
22	600	X		600 + X
23	600	X		600 + X
24	600	X		600 + X
	14.400	**24 X**	**1.800**	**12.600 + 24 X**

Employer/*Pengguna*

Name/*Nama* :
Date/*Tanggal* :

Witnessed by/*Disaksikan oleh,*

MRA :
Date/*Tanggal*

Approved by/*Disahkan oleh,*

Embassy Malaysia
Date/*Tanggal* :

Domestic Worker/*Pekerja,*

Name/*Nama* :
Date/*Tanggal* :

Witnessed by/*Disaksikan oleh,*

IRA :
Date/*Tanggal* :

Approved by/*Disahkan oleh,*

Embassy Indonesia
Date/*Tanggal* :

Diregister di BP3TKI ...
No :
Tanggal :

Stamp
BP3TKI

BNP2TKI03

D. H. Contract No. H 193782

EMPLOYMENT CONTRACT

(For A Domestic Helper recruited from abroad)

This contract is made between CHAN ROSITA ("the Employer", holder of Hong Kong Identity Card/Passport No.* P020770(9)) and SULISTYANA ("the Helper") on 2010/09/10 and has the following terms:

1. The Helper's place of origin for the purpose of this contract is DSN KENSO II (RT V RW V) DC KENSOHANJO GENENG MGAWI JAWA TIMUR INDONESIA

2. (A)† The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Helper arrives in Hong Kong.

(B)† The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on ....., which is the date following the expiry of D.H. Contract No. ..... for employment with the same employer.

(C)† The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Director of Immigration grants the Helper permission to remain in Hong Kong to begin employment under this contract.

3. The Helper shall work and reside in the Employer's residence at FLAT F, 4/F, YEE QUN MANSION, LEI KING WAN, 37 TAI HONG ST., HK

4. (*a*) The Helper shall only perform domestic duties as per the attached Schedule of Accommodation and Domestic Duties for the Employer.

(*b*) The Helper shall not take up, and shall not be required by the Employer to take up, any other employment with any other person.

(*c*) The Employer and the Helper hereby acknowledge that Clause 4 (*a*) and (*b*) will form part of the conditions of stay to be imposed on the Helper by the Immigration Department upon the Helper's admission to work in Hong Kong under this contract. A breach of one or both of the said conditions of stay will render the Helper and/or any aider and abettor liable to criminal prosecution.

5. (*a*) The Employer shall pay the Helper wages of HK$ 3,580.00 per month. The amount of wages shall not be less than the minimum allowable wage announced by the Government of the Hong Kong Special Administrative Region and prevailing at the date of this contract. An employer who fails to pay the wages due under this employment contract shall be liable to criminal prosecution.

(*b*) The Employer shall provide the Helper with suitable and furnished accommodation as per the attached Schedule of Accommodation and Domestic Duties and food free of charge. If no food is provided, a food allowance of HK$ 750.00 a month shall be paid to the Helper.

(*c*) The Employer shall provide a receipt for payment of wages and food allowance and the Helper shall acknowledge receipt of the amount under his/her* signature.

6. The Helper shall be entitled to all rest days, statutory holidays, and paid annual leave as specified in the Employment Ordinance, Chapter 57.

7. (*a*) The Employer shall provide the Helper with free passage from his/her* place of origin to Hong Kong and on termination or expiry of this contract, free return passage to his/her* place of origin.

(*b*) A daily food and travelling allowance of HK$100 per day shall be paid to the Helper from the date of his/her* departure from his/her* place of origin until the date of his/her* arrival at Hong Kong if the travelling is by the most direct route. The same payment shall be made when the Helper returns to his/her* place of origin upon expiry or termination of this contract.

8. The Employer shall be responsible for the following fees and expenses (if any) for the departure of the Helper from his/her place of origin and entry into Hong Kong:—

(i) medical examination fees;
(ii) authentication fees by the relevant Consulate;
(iii) visa fee;
(iv) insurance fee;
(v) administration fee or fee such as the Philippines Overseas Employment Administration fee, or other fees of similar nature imposed by the relevant government authorities; and
(vi) others: .....

In the event that the Helper has paid the above costs or fees, the Employer shall fully reimburse the Helper forthwith the amount so paid by the Helper upon demand and production of the corresponding receipts or documentary evidence of payment.

* Delete where inappropriate.
† Use either Clause 2A, 2B or 2C which is appropriate.

9. (*a*) In the event that the Helper is ill or suffers personal injury during the period of employment specified in Clause 2, except for the period during which the Helper leaves Hong Kong of his/her* own volition and for his/her* own personal purposes, the Employer shall provide free medical treatment to the Helper. Free medical treatment includes medical consultation, maintenance in hospital and emergency dental treatment. The Helper shall accept medical treatment provided by any registered medical practitioner.

(*b*) If the Helper suffers injury by accident or occupational disease arising out of and in the course of employment, the Employer shall make payment of compensation in accordance with the Employees' Compensation Ordinance, Chapter 282.

(*c*) In the event of a medical practitioner certifying that the Helper is unfit for further service, the Employer may subject to the statutory provisions of the relevant Ordinances terminate the employment and shall immediately take steps to repatriate the Helper to his/her* place of origin in accordance with Clause 7.

10. Either party may terminate this contract by giving one month's notice in writing or one month's wages in lieu of notice.

11. Notwithstanding Clause 10, either party may in writing terminate this contract without notice or payment in lieu in the circumstances permitted by the Employment Ordinance, Chapter 57.

12. In the event of termination of this contract, both the Employer and the Helper shall give the Director of Immigration notice in writing within seven days of the date of termination. A copy of the other party's written acknowledgement of the termination shall also be forwarded to the Director of Immigration.

13. Should both parties agree to enter into new contract upon expiry of the existing contract, the Helper shall, before any such further period commences and at the expense of the Employer, return to his/her* place of origin for a paid/unpaid* vacation of not less than seven days, unless prior approval for extension of stay in Hong Kong is given by the Director of Immigration.

14. In the event of the death of the Helper, the Employer shall pay the cost of transporting the Helper's remains and personal property from Hong Kong to his/her* place of origin.

15. Save for the following variations, any variation or addition to the terms of this contract (including the annexed Schedule of Accommodation and Domestic Duties) during its duration shall be void unless made with the prior consent of the Commissioner for Labour in Hong Kong:

(*a*) a variation of the period of employment stated in Clause 2 through an extension of the said period of not more than one month by mutual agreement and with prior approval obtained from the Director of Immigration;

(*b*) a variation of the Employer's residential address stated in Clause 3 upon notification in writing being given to the Director of Immigration, provided that the Helper shall continue to work and reside in the Employer's new residential address;

(*c*) a variation in the Schedule of Accommodation and Domestic Duties made in such manner as prescibed under item 6 of the Schedule of Accommodation and Domestic Duties; and

(*d*) a variation of item 4 of the Schedule of Accommodation and Domestic Duties in respect of driving of a motor vehicle, whether or not the vehicle belongs to the Employer, by the helper by mutual agreement in the form of an Addendum to the Schedule and with permission in writing given by the Director of Immigration for the Helper to perform the driving duties.

16. The above terms do not preclude the Helper from other entitlements under the Employment Ordinance, Chapter 57, the Employees' Compensation Ordinance, Chapter 282 and any other relevant Ordinances.

17. The Parties hereby declare that the Helper has been medically examined as to his/her fitness for employment as a domestic helper and his/her medical certificate has been produced for inspection by the Employer.

Signed by the Employer _____ (Signature of Employer)

OVERSEAS EMPLOYMENT CENTRE LTD. 海外 有限公司 (合約專用) CENTRE

in the presence of ANG YENNY (Name of Witness) _____ (Signature of Witness)

Signed by the Helper _____ (Signature of Helper)

in the presence of KHIKMAH (Name of Witness) _____ (Signature of Witness)

PT. MAJU PUTRA DEWANGGA

* Delete where inappropriate.

SCHEDULE OF ACCOMMODATION AND DOMESTIC DUTIES

1. Both the Employer and the Helper should sign to acknowledge that they have read and agreed to the contents of this Schedule, and to confirm their consent for the Immigration Department and other relevant government authorities to collect and use the information contained in this Schedule in accordance with the provisions of the Personal Data (Privacy) Ordinance.

2. Employer's residence and number of persons to be served

   A. Approximate size of flat/house 582 square feet/square metres*

   B. State below the number of persons in the household to be served on a regular basis:

   2 adult ... minors (aged between 5 to 18) ... minors (aged below 5) 1 expecting babies.

   ... persons in the household requiring constant care or attention (excluding infants).

   (Note: Number of Helpers currently employed by the Employer to serve the household ...)

3. Accommodation and facilities to be provided to the Helper

   A. Accommodation to the Helper

   While the average flat size in Hong Kong is relatively small and the availability of separate servant room is not common, the Employer should provide the Helper suitable accommodation and with reasonable privacy. Examples of unsuitable accommodation are: The Helper having to sleep on made-do beds in the corridor with little privacy and sharing a room with an adult/teenager of the opposite sex.

   ☐ Yes. Estimated size of the servant room ..... square feet/square metres*

   ☒ No. Sleeping arrangement for the Helper:

   ☒ Share a room with 1 child/children aged NEW BORN

   ☐ Separate partitioned area of ..... square feet/square metres*

   ☐ Others. Please describe .....

   .....

   .....

   B. Facilities to be provided to the Helper:

   (Note: Application for entry visa will normally not be approved if the essential facilities from item (*a*) to (*f*) are not provided free.)

(*a*) Light and water supply	☒	Yes	☐	No
(*b*) Toilet and bathing facilities	☒	Yes	☐	No
(*c*) Bed	☒	Yes	☐	No
(*d*) Blankets or quilt	☒	Yes	☐	No
(*e*) Pillows	☒	Yes	☐	No
(*f*) Wardrobe	☒	Yes	☐	No
(*g*) Refrigerator	☐	Yes	☒	No
(*h*) Desk	☐	Yes	☒	No

(*i*) Other facilities (Please specify) _____

_____

_____

4. The Helper should only perform domestic duties at the Employer's residence. Domestic duties to be performed by the Helper under this contract exclude driving of a motor vehicle of any description for whatever purposes, whether or not the vehicle belongs to the Employer.

5. Domestic duties include the duties listed below.

Major portion of domestic duties:—

(1.) Household chores
(2.) Cooking
3. Looking after aged persons in the household (constant care or attention is required/not required*)
(4.) Baby-sitting
(5.) Child-minding
6. Others (please specify)

.....
.....
.....
.....

6. The Employer shall inform the Helper and the Director of Immigration of any substantial changes in item 2, 3 and 5 by serving a copy of the Revised Schedule of Accommodation and Domestic Duties (ID 407G) signed by both the Employer and the Helper to the Director of Immigration for record.

Employer's name and signature	Date	Helper's name and signature	Date
CHAN ROSITA	2010/09/10	SULISTYANA	2010/09/10

OVERSEAS EMPLOYMENT CENTRE LTD. 海外傭工中心有限公司 (合約專用) CENTRE

* delete where inappropriate

☐ tick as appropriate

070071

No. D/IV.....
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Bambang Susanto
Konsul

CONSULATE GENERAL OF THE REPUBLIC OF INDONESIA * HONG KONG 02

Fieldnote Atase Ketenagakerjaan – Pak Agus

1. Di Malaysia ada 1, 089.230 TKI legal dan ada 1,3jt TKI illegal yang terbagi dalam 6 sektor (5 formal+1 informal). Informal itu PRT dg gaji 600 RM. Mengenai gaji itu ada yang digaji 500-800 RM. Sementara kalau yang formal, KBRI menyusun matrix remuneration for TKI (didasarkan atas hukum perburuhan Malaysia), termasuk di dalamnya gaji pokok dan tunjangan di dalamnya.
2. Menurut UU 39/2004 terdapat 3 bagian: pra penempatan (Indonesia) – penempatan (KBRI) – pascapenempatan
3. KBRI tidak bisa menyusun gaji sendiri tetapi harus mengikutu UU yang ada di Malaysia
4. Gaji PRT flat
5. Malaysia dan Hk berbeda karena di HK hanya 1 sektor, sementara di Malaysia 6 sektor
6. Gaji PRT itu bersih karena tempat tinggal + makan bersama dengan majikan
7. Kalau PRT legall ada asuransi yang wajib ditanggung oleh asuransi Malaysia didasarkan atas workmen compantation act
8. Di dalam MoU 2011 hanya mengatakan **one day** off per week jadi bebas hari apapun
9. SDM KBRI sangat terbatas sementara TKI yang berada di Malaysia sangat banyak
10. KBRI tidak mengetahui TKI yang bermasalah di luar sana apabila tidak ada informasi mengenai TKI yang bermasalah
11. Apabila ada yang bermasalah, KBRI menjemput (rescue) dengan koordinasi dengan kepolisian Malaysia
12. Malaysia adalah negara yang berdaulat sehingga tidak bisa semena-mena untuk menerobos hukum
13. Yang menempatkan TKI adalah agency Malaysia dan KBRI hanya mendapatkan laporan. Apabila tidak melapor ya KBRI tidak mengetahui
14. PPTKIS harus memberitahui KBRI sebelum mengirim TKI ke negara tujuan (berdasarkan UU 39/2004)
15. KBRI mendesak agency Malaysia untuk memberikan laporan TKI yang ditempatkan olehnya
16. Program "Welcoming Programme" KBRI menempatkan perwakilan di LCCT. Tetapi sifatnya voluntary bukan mandatory yaitu membuat loket tersendiri dan menyuruh TKI melapor sendiri
17. KBRI mengunci di PK untuk PRT bekerja di 4 bagian: helping cook, washing, housekepping, ironing
18. Mengenai keberlakuan PK di lapangan, KBRi tidak mempunyai wewenang dan SDM KBRI sangat terbatas (10 orang)
19. Setelah melakukan rescue, KBRI menempatkan PRT di shelter (sekarang ada 72 orang) di KBRI KL ada 59 orang
20. Kasus TKI ada 2: labour cases dan non labour cases. Kalau yang labour cases wewenang dari depnaker Malaysia. Kalau non labour cases itu wewenang kepolosian. KBRI menyewa lawyer untuk membantu TKI
21. Dalam perlindungan terdapat 2 mekanisme: perlindungan administrative/regulasi dan fisik
22. Mekanisme perlindungan hukum menggunakan mediasi bipartite, apabila tidak bisa dibawa ke labour court. Tidak selesai juga dibawa ke mahkamah – mahkamah tinggi – rayuan (cek slides)
23. PRT yang sudah masuk ke dalam shelter harus pulang karena PRT tersebut bermasalah, baik fisik, mental, maupun hukum
24. KBRI setiap 1 minggu melakukan reach out – melakukan pemantauan langsung ke ladang2
25. KBRI juga melakukan pelatihan TKI formal – di bebrapa titik, kalau di KL terdapat 2 titik

26. Apa yang dilakukan oleh KBRI itu free of charge, pelatihannya pun free
27. Peserta pelatihan biasanya 40 orang-an
28. TKI seharusnya paham terkait praturan Malaysia karena PPTKIS seharusnya memberitahukan pada saat pelatihan sebelum diberangkatkan
29. Alasan TKI memilih Malaysia: tidak mendapatkan akses untuk bekerja di Indonesia dan tertipu oleh ajakan sponsor/agen
30. Di Indonesia banyak pelung kerja untuk menjadi PRT tetapi tidak ada publikasi terkait dengan lapangan pekerjaan tersebut. Agen mengirimkan ke PT untuk disalurkan ke luar negeri bisa mendapatkan jutaan, sementara untuk di dalam negeri hanya ratusan ribu
31. KBRI mendapatkan muntahan dari apa yang terjadi di Indonesia (pra penemptan)
32. Illegal tidak memiliki PK, kalau ada dapat di jamin hak hukumnya
33. Komposisi penduduk Malaysia: Melayu 65%, Cina 15%, India 5%. Pengguna TKI adalah kebanyakan ras Melayu
34. Melayu lebih dominan tidak membayar gaji dan eksploitasi
35. CIna lebih dominan eksploitasi dan abuse
36. India lebih dominan sexual abuse
37. Untuk menjadi majikan cukup dengan gaji 3000 RM, baru dinaikkan menjadi minimum 5000 RM. KBRI mengadvokasikan minimum 7000 RM
38. Masukkan untuk pemerintah: LAW ENFORCEMENT (khususnya terkait dengan hal-hal yang menyangkut pra penempatan-pelatihan)
39. PRT di Malaysia mayoritas pendidikannya adalah SD karena UU Indonesia tidak mengatur terkait dengan batas pendidikan untuk menjadi TKI
40. Permasalahan utama PRT adalah misunderstanding bahasa
41. KBRI menolak disamakan dengan dinas sosial (hanya menginformasikan apa yang belum diinformasikan di Indonesia)
42. Malaysia negara penerima dengan jumlah sektor terbanyak
43. Indonesia lebih dipilih oleh majikan karena mudah diatur dan bahasanya sama
44. Moratorium
45. Gaji tidak dibayarkan karena pada umumnya TKI dibohongi oleh majikan: dijanjikan gaji akan dibayar diakhir tahun ataupun ditransfer setelah di indonesia tetapi tidak pernah dibayarkan
46. KBRI melakukan penelitian terkait dengan kinerja TKI di Malaysia dan hasilnya TKi tidak ada yang pernah menonjol dalam hal kinerja, manner, kerajinan, dll
47. Tipe-tipe TKI: awalnya legal tetap legal, awalnya legal menjadi tidak illegal karena pindah majikan, awalnya illegal menjadi tidak illegal karena kabur dari mejikan, awalnya illegal tetap illegal, legal karena mlancong lalu bekerja sehingga menjadi legal dan bisa juga illegal tetapi menjadi sumber pemerasan
48. TKI illegal akan tetap dilindungi sebagai warga negara Indonesia tetapi secara pekerja tidak aman karena tidak memiliki pelindung, yakni PK
49. TKI dijadikan komoditi ekonomi (pemerasan), apabila ada masalah baru dijadikan ekonomi politik

<u>Hasil shelter</u>

TKI bernama Nurjanah yang overtime dan tidak kuat untuk bekerja 2-3 rumah sehari dari jam 06.00-23.00. Sudah 11 hari di shelter. Baru bekerja 4 bulan dengan gaji 600 RM.

Fieldnote Dompet Dhuafa – Mba Zizi

1. Kalo di HK gaji yang diperjanjikan kurang dari yang seharusnya maka keduanya akan dihukum (majikan dan PRT)
2. PRT tidak boleh memiliki 2 pekerjaan, kalau mengurus nenek ya nenek aja
3. Kalau majikan tidak mau membayar, maka tinggal melapor ke agency tetapi agency suka bekerjasama dengan majikan (membayar ke agency, agency diam2)
4. Peraturan di HK tidak memperbolehkan potongan lebih dari 7 bulan, TKI harus melaoprkan kalau tidak maka TKi juga ditangkap
5. Yang dpat menghukum agent adalah KBRI bukan pemerintah KJRI, dan disinilah yang menjadi masalah karena suka main belakang
6. KJRI memberikan hukuman dengan memberikan peringatan secara diam2
7. Permasalahan terkait dengan perpanjangan kontrak mandiri tidak diperbolehkan. Hal ini dikarenakan kalau tidak terdata maka tak terpantau, kena human trafficking dan dicatatkan PKnya. Tetapi permasalahan dari perpanjangan ini adalah lama bekerja akan dibatasi
8. BNP2TKI dan KJRI tidak akur di HK. BNP2TKI hanya 18 orang harus melayani 450.000 sehingga fungsi pelayanan dan pemonitoran tidak berjalan
9. Calo membeli TKI 15juta, agent di HK membeli TKi dr calo 21juta dengan potongan 3000 dollar HK. Dan ini merupakan alur human trafficking
10. Pemerintah mengejar target untuk mendapatkan devisa yang banyak. Ada target dari pemerintah
11. Gaji 3750 dollar HK itu adalah gaji bersih, diluar makan, tempat tinggal, asuransi, dan kesehatan
12. Di HK gaji harus ditransfer lewat bank
13. PRT dianggap sebagai formal worker di HK
14. Majikan tidak membayarkan gaji TKI selain karena kucingan2an dengan agent , yakni karena bangkrut karena bayarnya ditunda2 jadi semakin berat
15. Apabila ada yang tidak dibayar, bisa dibawa ke pengadilanuntuk ditetapkan bankruptcy tetapi berat. Karena lama dan rumit karena PRT banyak yang tidak mengerti sistem hukum disana
16. Kalau majikan sudah ditetapkan bankruptcy maka pengadilan yang akan membayar PRTnya
17. Pengguna PRT Indonesia: pengen diurus nenek/kakek, mengurus anak kecil
18. Yang membutuhkan PRT adalah yang sudah tua, settle dan sibuk (menengah ke atas)
19. Terkait dengan manner tidak diatur di dalam UU tetapi potongan maksimal 300 dollar per bulan. Jadi dipotong gajinya oleh majikan dan kewenangan majikan
20. Kalau dipecat atas dasar2 tidak kuat maka biasa dibawa ke court khusus
21. Hamil dan sakit tidak bisa bekerja di HK
22. Mengenai sakit saat bekerja jug diatur di dalam uu
23. Polisi HK menangani permasalahan setiap orang (baik warga negara maupun bukan) dengan baik
24. Kalau ada kasus hukum, PRTnya menunggu terselesaikan dulu baru dapat majikan baru
25. Pada ingin kerja di HK karena permasalahan gaji dan pride keluar negeri
26. KJRI juga kekurangan SDM dan gajinya PNS, maka mudahlah agent menyogok mereka. Tingikanlah gaji mereka dan pengawasan disini kurang. Maka diawasilah
27. Pengacara2 di KJRI sangat kurang
28. Esensi dari advokasi KJRI adalah memulangkan bukan menyelesaikan. Saat sudah dipulangkan, hak2 tidak dipenuhi
29. PRT ada gaji pensiunnya

30. Kalau ingin menjadi majikan ada tes wawancara di department men power
31. Permasalahan di HK: mengenai transfer rekening, transfer awal2 ke agent bukan ke PRT
32. Apabila menarik illegal worker (bekerja tidak sesuai dng prosedur yang ada), yang akan dihukum ya majikan dan PRT
33. Untuk menghindari pensiun, majikan mengganti nama2 yang bekerja padanya
34. PK tidak bisa di-approve harus memiliki visa kerja terlebih dahulu

Filednote TKI HK → Ibu Yana

1. Rata2 TKW yang bekerja di HK adalah mengurs anak-anak dan nenek
2. Pemerintah HK menyediakan fasilitas pelatihan untuk TKW, wifi
3. Besarnya gaji dapat digunakan untuk membeli laptop
4. Ibu Yana sempat mengikuti les-les saat waktu senggang dan melakukan advokasi terkait dengan buruh migran
5. TKI biasanya di penampungan ditakut-takuti tidak bisa beribadah dan gaji akan dipotong
6. Hamper kasus 90% dimenangkan oleh buruh migran, karena polisi dan jaksa tidak memihak
7. Ibu Yana berasal dari Ngawi, Jawa Timur
8. Ibu Yana sempat belajar bahasa kanton dan bahasa Inggris
9. Di dalam pengadilan, Ibu Yana sempat menjadi penerjemah untuk buruh migran karena bahasa yang digunakan pada saat pengadilan adalah bahasa kanton
10. Majikan ibu yana yang pertama mengajarkan computer, bahasa inggris (diberikan laptop, hp, dan computer)
11. TKW di HK dianggap sebagai asisten rumah tangga
12. Permasalahan utama TKW di HK adalah permasalahan bahasa
13. TKW Filipin di HK tidak terhalang oleh bahasa sama sekali, TKW Filipin diberikan gambaran visual terkait dengan social life (perkenalan fasilitas2)
14. TKI harus menggunakan PJTKI
15. Orang HK menganggap orang indonesia tidak memiliki etika
16. Kualitas orang Indonesia lebih bbaik dari pada Filipin karena tekun dan nurut, kalau Filipin strict to contract
17. Indonesia sudah menguasi pasar TKW di HK
18. HK memperbolehkan buruh migran untuk berserikat. Pada saat berserikat TKW mereka bertukar pikiran dan pengetahuan
19. Tidak semua LSM dapat membatu lewat jalur hukum karena terkait dengan permasalahan bahasa dan permasalahan pengetahuan hukum (Ilisance)
20. Ibu Yana sempat bekerja di Dompet Dhuafa
21. Permasalahan buruh migran di HK tidak terlalu banyak permasalahan serius karena pada dasarnya permasalahan didasarkan atas misunderstanding (komunikasi)
22. Pelatihan yang dilakukan oleh PPTKIS seharusnya dilakukan secara visual; baik social life dan hukum
23. Awal ingin ke HK untuk mendapatkan biaya sekolah untuk adik-adik dan belajar lebih banyak
24. Pada saat ibu Yana bekerja, majikan juga lebih flexible karena majikan juga sudah maju dan sangat menjunjung tinggi HAM
25. Permasalahn utama buruh migran di HK adalah underpayment (90%)
26. Alasan underpayment adalah permasalahan permainan
27. Apabila gaji 2000 HKD potongannya 5 bulan
28. Apabila gaji standar HK potongan 7 bulan (potongannya 3000 untuk fee agency HK, PJTKI, dan KJRI)
29. Apabila ada PK potongan yg diberlaklukan oleh pemerintah HK hanya 340 HKD saja, pemerintah HK tidak mau menerima PK apabila tidak dicap oleh KJRI. Dan cap dari KJRI inilah yang mengharuskan membayar 21.000 HKD

30. Apabila ada TKI yang meninggal saat bekerja, pemerintah HK membebankan kepada warga negaranya untuk seluruh biaya proses pemulangan
31. Untuk mendaptkan persetujuan kerja di HK, harus mendapatkan persetujuan keapada KJRI, sementara KJRI tidak mau menyetujui apabila tidak ada persetujuan PJTKI. Hal ini dikarenakan orang yang bertanggungjawab apabila TKI meninggal adalah PJKI. Alasan ini non sense karena alasan pada no. 30
32. Ada dana pensiun bagi buruh migran yang sudah bekerja minimum 6 tahun
33. Banyak sekali prostitusi terutama lesbi di sugar street
34. TKW yang bekerja disana lebih konsumtif
35. Banyak TKW yang kekurangan uang meminjam finance karena syaratnya mudah, hanya passport, KTP, dan PK. Proses hanya 2 hari. Apabila tidak mampu membayar maka akan diambil barang2 yang ada di kampungnya
36. TKW mempunya 5 PK - KJRI, agent, PJTKI, majikan dan untuk kita. Kita memegang yang aslinya bukan fotokopi. Kebanyak karena PJTKI nakal, TKW hanya dikasih copy-nya saja
37. Ibu Yana memilih HK karena gaji lebih besar dari negara lain dan adanya hak libur
38. Ibu Yana ttd di HK tetapi tidak diperbolehkan untuk membaca dan tetap tidak diberikan kemampuan untuk menentukan hukum yang beliau inginkan
39. Untuk PK potongan gaji 3000 perbulan dibayarkan selama 7 bulan sebesar 21.000. semntara itu untuk gaji 2000 dipotong selama 5 bulan hanya sebesar 10.000 – tidak mendapatkan libur selama 2 tahun
40. Majikan ibu Yana yang memperbolehkan libur meskipun agent tidak memperbolehkan
41. Yang sering ibu Yana bantu adalah TKW yang baru tahu hak-hak mereka, gaji dan hak libur
42. Modus underpayment: Majikan membayar 3000 lalu bank membeikan bukti tetapi bank memberikan kembali ke majikan. Tetapi ada juga yang PRT disuruh ttd tapi tidak diberikan uangnya
43. Bukti2 diperlukan untuk dibawa kepengadilan apabila terjadi underpayment adalah bukti bon2 dan rekaman dengan memancing majikan (contoh: terkait dengan hari libur nasional) pasalnya apabila PRT tidak diberikan libur maka majikan wajib membayar uang lembur
44. Standar tercepat di pengadilan 3 minggu. Uang dikembalikan dengan cash atau cek. Tetapi lewat cek sulit mencairkannya karena PRT harus membuat account number di bank tersebut dan ada minimum saldo (5000)
45. Setelah 2 minggu ke luar dari majikan PK dianggap putus dan visa kerja tidak berlaku
46. Kebijakan pemerintah HK setelah ada dispute: Apabila hanya mndapatkan kuranng dari 50%, maka harus exit HK. Apabila
47. Ibu Yana mendapatkan majikan (awalnya) cepat yakni 3 bulan di PJTKI
48. Jumlah majikan ibu Yana selama 6 tahun = 4 majikan
49. Majikan ibu Yana memberikan line khusus teklepon di rumah majikan pertama
50. Agen HK sering memberikan barang2 mewah dan tiket pesawat untuk orang2 KJRI, sehingga agen tersebut dilindungi oleh KJRI
51. TKI sangat takut dengan terminal 4 Soetta karena pemerasan terjadi dimana-mana. Terminal 4 disebut sebagai terminal laknat
52. Apply paspor untuk TKI hanya 24 lembar dan sangat murah harganya. Dan mahalnya saat harus membayar ke PJTKI

53. PJTKI untuk mendapatkan uang potongan dari PRT adalah dengan memindahkan PRT dari majikannya apabila tidak bisa bekerja sehingga PRT tersebut terkena potongan lagi dari majikan aoabila sudah berada di majikan baru
54. TKW yang bermasalah disana disebabkan karena memang di Indonesia bermasalah, di rumahnya punya masalah
55. Banyak juga TKW yang terjerumus kepada narkoba dan sex bebas hingga menjadi lesbian
56. TKW yang tidak ingin pulang ke rumah sangat banyak karena TKW diperas oleh keluarganya karena ada stigma apabila pulang kerja dari luar negeri mempunyai banyak uang
57. Ibu Yana pada awal masa kerja mengalami kendala bahasa
58. Majikan TKW Indonesia rata-rata adalah Chinese, bule adalah pasar TKW Filipin
59. Shelter KJRI di HK tidak laku karena permasalahan hukum TKW tidak diselesaikan tetapi malah dipulangkan
60. Asuransi adalah hal yang wajib bagi asuransi TKI yang dibelikan oleh majikan. Apabila majikan tidak membelikan asuransi, maka akan didenda 500juta. Padahal majikan hanya mengeluarkan 2juta untuk membeli asuransi
61. Pemerintah HK sangat terbuka dengan TKW
62. TKW Malaysia tidak bergantung kepada KJRI. KJRI tidak ada gunanya, malah hanya menambah beban
63. Dianatara TKW terdapat kecemburuan sosial apabila ada yang melihat TKW yang lebih dari pada yang lainnya
64. Majikan memiliki kewajiban untuk memberangkatkan hingga memulangkan TKW

i

Fieldnote BNP2TKI

Part 1 – bagian advokasi (Pak Aritonang)

1. Walaupun pemerintah Malaysia tidak mensyaratkan Upah Mininum, tapi di dalam perjanjian kerja disyaratkan besaran gaji minimal yang harus dibayarkan, dalam arti kita memberi batasan mengenai besaran minimal yang harus diperoleh.
2. TKI diingatkan sebelum menandatangani perjanjian kerja, harus tau dulu berapa besaran gaji yang akan diberikan oleh majikannya
3. Perlindungan dari BNP2TKI (Pemerintah) hanya mengontrol bahwa benar perjanjian kerja tersebut telah dilaksanakan sesuai standard. sebelum TKI berangkat, dipastikan apakah perjanjian kerja sudah sesuai persyaratan dan apakah TKI menyetujui besaran gajinya. Kalau tidak disetujui, ya sebaiknya tidak berangkat.
4. Fungsi BNP2TKI apabila terjadi penyimpangan saja, kalau alur tanya sama yang lain, misal di penempatan kemnakertrans.
5. Walau mekanisme gaji di Malaysia diserahkan kepada pasar, namun bisa intervensi, dalam arti kalau gaji yang ditawarkan tidak cocok, ditolak.
6. TKI lemah, meskipun sudah dibekali dengan perjanjian kerja, tapi kita tidak tahu bagaimana pelaksanaannya di sana. Karena TKI banyak sekali maka tidak dapat dikontrol satu per satu.
7. Persoalan baru diketahui kalau sudah ada Laporan dari TKI.
8. Saat ada masalah, yang pertama kali harus dihubungi adalah perwakilan, Konjen atau KBRI, namun seringkali tidak bisa karena tidak ada akses/komunikasi yang sangat terbatas. Apalagi kalau ingin melarikan diri secara legal tidak mungkin karena paspor biasanya ditahan.
9. Call Center sebenarnya bisa dipakai oleh TKI untuk pengaduan/melaporkan kalau ada masalah seperti majikan melakukan kekerasan. Tapi persoalannya TKI tersebut tidak diberi akses untuk komunikasi.
10. Kalau ada masalah, PPTKIS dipanggil, terus dia yang berurusan dengan agent yang ada di sana, itu kalau TKI masih di sana. Kalau sudah di Indonesia, PPTKIS nya diminta untuk tidak menempatkan lagi TKI nya di tempat di mana terjadi masalah tersebut.
11. Salahsatu usaha untuk mengontrol gaji dengan mewacanakan agar gaji langsung dibayarkan oleh majikan melalui rekening bank. Soalnya kalau tidak demikian kita tidak tau bagaimana, apakah belum dikirim atau bagaimana.
12. Kalo diliat di Perpres 81, kan dibilang kalau BNP2TKi itu adalah pelaksana kebijakan. Sementara yang mengeluarkan kebijakan-kebijakan itu adalah kemnakertrans. Yang melaksanakan dan mengontrol itu BNP2TKI.
13. BNP2TKI punya standar2, seperti standar gaji, standar2 lain yang harus ada di dalam kontrak.
14. Kalau untuk Malaysia standar gaji 350 RM.
15. Permasalahan/Persoalan dalam BNP2TKi, kita tidak pernah tau masalah apa yang akan terjadi

Part 2 – bagian Penempatan (Pak Anes)

1. Alur yang berlaku untuk TKI itu harus dilakkan karena setiap alur mengunci alur yang yang lain, berkesinambungan

2. Apabila mengukuti alur maka tidak mungkin menjadi illegal
3. Semua sistem data menggunakan web
4. Lihat alur bunga matahari BNP2TKI
5. Ketika PPTKIS mengajukan kerjasama penempatan dengan agen di luar negeri harus dibarengi dengan PK yang diketahui oleh KBRI. Khusus Malaysia harus diketahui oleh KBRI dan pemerintah Malaysia
6. Pmeriksaan psikologi sebelum keberangkatan akan diterapkan pada bulan Mei
7. Pelatihan TKI untuk Malaysia 200 jam, 21 hari. Apabila telah mengikuti pelatihan mendapatkan sertifikat
8. Terdapat 2 asuransi: asuransi pra (mulai dari mendaftar hingga terbang ke negara tujuan) = 50.000. asuransi penempatan = 300.000 dan asuransi purna penempatan = 50.000
9. Pembekalan akhir keberangkatan 4 hal yang diberikan: budaya negara tujuan, PK, mental kepribadian, dan HIV/AIDS/trafficking. Hanya 1 hari
10. KTKLN berisikan dokumen2 yang berikan terkait dengan data2 selama proses dan harus dimiliki oleh setiap TKI
11. PK ditandatangani sebelum training, tetapi pada tahap awal sudah memiliki PK
12. Pada tahap suarat menyurat sudah ada PK tetapi PK yang kolektif, bukan perorangan. Pk yang perorangan akan dikirim ulang
13. Agency Malaysia membuat kesepakatan dengan PPTKIS terkait dengan penempatan lalu keluarlah job order (banyaknya TKI yang dibutuhkan). Setelah ada job order keluarlah PK
14. PK harus dittd oleh kedua belah pihak (TKI dan majikan dengan diketahui oleh KBRI, perwakilan Malaysia di Indonesia, agency Malaysia, dan PPTKIS). Setelah itu barulah keluar visa kerja
15. Belum ada penempatan setelah moratorium karena permasalahan pelatihan yang harus melewati 200 jam
16. Terkait pemulangan menjadi tanggungjawab KBRI, BNP2TKI memiliki anggaran hanya menjemput dari bandara dan proses berikutnya
16. Illegal dan tidaknya, TKI kebanyakan tidak memahami, TKI hanya menjadi korban atas perlakuan agent
17. Kabanyakan proses yang berlaku formal tidak diketahui oleh TKI
18. Pengetahuan terkait proses harusnya diberitahukan ke kantung-kantung TKI agar mereka mengetahui cara formal menjadi TKI
19. PK seharusnya dipegang oleh TKI, syarat keberangkatan adalah PK dan di bandara dicek PKnya sebelum berangkat

Fieldnote Kemnakertrans - Ibu Endang

1. Sudah ada protocol perubahan MoU tahun 2006.
2. Saat ini kita sedang moratorium, karena Malaysia tidak memenuhi dan melaksanakan kesepaktan sebagaimana yang telah disepakati.
3. Kesepakatan ada 11 item. Apakah PPTKIS dan Agent di Malaysia sudah in dengan kesepakatan yang 11 item itu.
4. Sebagai regulator, memfasilitasi warganegara yang ada di sana. Atase 13 perwakilan, di 11 negara. Kalo Mou 12 di 10 Negara.
5. Ternyata ada kekurangan dari Malaysia, bahwa hanya Kuala Lumpur yang melaksanakan isi MoU. Sementara negara-negara bagian yang lain ga melaksanakan.
6. Malaysia setengah hati karena masalah jabatan. Agent di sana membuat AKUJANJI. Sementara PPTKIS membuat kontrak kinerja. Pemerintah kita meminta pekerja domestic kita itu harus jelas, terbatas dengan jabatannya. Jadi ga semuanya misal ngasuh anak, orang jompo itu harus dibagi satu-satu. Malaysia menerima modul pelatihan, tapi Malaysia curang. Kita maunya House Keeper. Tetapi di dalam persetujuan Malaysia dibilang kalo Housemaid.
7. Malaysia minta Joint Working Group lagi untuk menyelesaikan masalah Housekeeper sama Housemaid. Kita sudah mengirim surat tapi belum ada tanggapan/balasan.
8. Di Undang-Undang tidak dikenal Kontrak Mandiri. Yang ada TKI Mandiri, yang bekerja di sektor formal. Jadi Kontrak Mandiri itu plesetan, disalah artikan karena info stengah2.
9. Selesai kontrak kerja 2 tahun, Wajib kembali ke Indonesia. Kalau seandainya perpanjangan, seharusnya gaji naik dan ada perjanjian baru. Tapi TKI seringkali mengabaikan karena seringkali menganggap kalo majikan sudah baik, ya sudahlah. Padahal kalao kembali lagi buat perpanjangan harus ada beberapa syarat misalnya Majikan harus sama, gaji harus naik, PT yang menyalurkan juga harus sama.
10. Agent di Malaysia harus punya izin, job description, kemudian punya master kontrak kerja agar tidak menyalahi aturan. Setelah itu membawanya ke perwakilan RI di sana. Lalu diperiksa, apakah agency tersebut sudah memiliki mitra dengan PPTKIS di Indonesia. Harus ada kontrak dengan PPTKIS Indonesia. Apabila bekasnya sudah ada, maka di endorse oleh atase dan dibawa ke Indonesia. Berarti udah ada master. Nanti itu akan dikasi ke instansi tenaga kerja di provinsi, kemudian di sebar ke instansti tenaga kerja kabupaten/kota yang berpotensi. Setelah di dapat, di audisi, dilakukan tes kesehatan dan lain-lain. Kemudian calon TKI wajib diasuransikan.
11. Beda nakertrans sama BNP2TKI itu hanya sampai SIP (Surat Izin Pengerahan). SIP itu kewenangannya sebenarnya NAkertrans. Sementara BNP2TKI juga ngeluarin SIP. Yang berwenang mengeluarkan SIP ya Nakertrans.
12. Perjanjian kerja untuk ke Malaysia dibuat sedemikian padat sehingga TKI tinggal tanda tangan saja karena perjanjian tersebut sudah termasuk di dalam annex Protokol, kalau TKI tidak sepakat dengan isi perjanjian, ya berarti tidak jadi berangkat.
13. Kedutaan Malaysia dengan mudahnya mengeluarkan Visa kunjungan kerja. Jadi misalnya masuk Malaysia dulu untuk melancong, habis itu keluar sehari, habis itu masuk lagi, jadinya masuk ke Malaysia sebagai TKI undocumented. Makanya wajar aja di bilang Indon bodoh. Oleh karena itu, kita minta Malaysia tidak mengeluarkan visa itu lagi, Malaysia mensyaratkan moratorium dicabut.
14. JTF Indonesia dan JTF Malaysia sedang membicarakan bagaimana membayarkan gaji lewat Bank, akan tetapi Bank Mandiri, BNI dll belum terhubung dengan May Bank.

15. Kalo Kriteria yang diajukan soal House keeper dan Housemaid sudah disetujui, maka disana terkait juga soal paspor yang dipegang sendiri, bukan sama majikan.
16. Kalo Labor Case, misal masuk illegal, maka dipulangkan. Kalau kabur maka diproses. Kalau 2 tahun minta pulang. Klaim asuransi banyak ga dibayar karena ternyata banyak yang dibawah 3 bulan klaim. Padahal harusnya Cuma yg diatas 3 bulan kerja yang bisa klaim asuransi.
17. Kalo Non-Labor Case, diproses sesuai hukum. Masalah ini timbul karena TKI yang bekerja di sana tidak memiliki kualitas pendidikan yang mumpuni. Karena pasal dalam UU yang mensyaratkan pendidikan untuk pekerja harus SMA dicabut oleh MK.
18. Ratifikasi Convention on Migrant Workers tidak sepenuhnya menguntungkan, karena kita terikat untuk melindungi Pekerja Migrant yang kerja di Indonesia, tetapi kita tetap tidak bisa melindungi TKI2 yang bekerja di negara2 Timur Tengah yang hampir mustahil tidak akan pernah meratifikasi konvensi2 terkait TKI.
19. Roadmap ada di kemnakertrans.go.id

Fieldnotes pak Iqbal - UNIMIG

1. Sedang dibuat kontrak terbaru yang mana klausa salah satunya 700 RM, one day off, paspor pegang sendiri, pekerja hanya satu pekerjaan (di Malay)
2. Kalau di HK masih seperti itu sudah seperti itu karena care giver jd membantu pengurusan keluarga
3. Di malay seperti itu karena terjadi eksploitasi yang besar, gajinya sedikit, tidak ada standar kontrak dan pengawasan
4. Kalau filipin ketat sekali di malay
5. Pd tahun 2004 gajinya 350 RM 2010 500 RM sekarang 700 RM
6. Cost tructre without salary 5-6 months untuk PRT
7. Alasan PRT lebih kecil dr pada pekerja formal karena tinggal dengan majikan dan gaji 500 RM itu bersih untuk saving/nabung padahal PRT itu merupakan pekerjaan dengan resiko tinggi. Adapun resikonya yaitu: eksploitasi, pelecahan seksual, tidak ada hari libur
8. Di indonesia gaji 1,4 juta juga ada
9. Nilai lebih PRT lebih memilih Malaysia karena mudah → tidak susah belajar bahasa, tanpa pelatihan berat
10. Untuk perlindungan buruh migran di Malaysia, Malaysia masih menggunakan Akta Perburuhan tahun 1955. Hanya menyebutkan tp belum ada perlindungan → sekedar pengertian dan hak2, macam buruh dapat berserikat tapi tidak dapat menjadi pengurus (hanya anggota saja). Legal actnya blm ada
11. Kualitas tidak hanya untuk TKI tetapi juga majikan. Ini yang lagi ditingkatkan oleh KBRI
12. Di Malaysia sudah gt, di arab sudah diterapkan. Ada 10 tahap untuk menjadi majikan
13. Informal ada MoU tp blm ada substantif dan harusnya dibuat substantifnya – usaha Malaysia
14. Terdapat joint committee dr Malay dan Indo untuk
15. Kalau ada sengketa dengan pendekatan jalur KBRI – dengan kekeluargaan karena pada dasarnya buruh Indo takut masuk kemahkamah buruh karena lama waktunya
16. Illegal itu pekerja tanpa izin
17. Blm ada kontrak standard sehingga tidak ada pengawasan dan lebih dipengaruhi oleh agent bukan oleh si pekerja dan majikan
18. Kasus paling banyak yang terjadi bukan pelecehan tetapi unpaid, dengan adanya transfer lewat bank sehingga dapat memantau majikan-majikan yang belum membayar pekerjanya
19. Majikan suka bayar dimuka sehingga majikan merasa bahwa merka suka membayr mahal, bargain position mejikan dan pekerja yang berbeda, orang2 di Malay juga bukan orang kayak2 banget
20. Kebanyakan pekerja tidak dibayarkan karena majikan sering meninggak dan lama-kelamaan pada saat ingin membayar terasa berat dan banyak modus dari majikan untuk mengelak membayar (tuduhan pencurian, dll) untuk bebeas dari tuntutan gaji
21. Lebih dari 1000 kasus sejak tahun 2000-an dan mayoritas perempuan
22. Orang yang kerja di Malay tidak lulus ke HK, Arab, tidak lulus ke negara2 favorit dan kebanyakan orang2 yang tidak bisa baca tulis dan tidak kenal dengan majikannya oleh karena itu moratorium dilakukan
23. Saran: malay memformalkan PRT
24. Ada yang lewat agen dengan mandiri

25. PRT lewat agen: Rata2 tidak mengetahui bahwa mereka punya PK, mengetahui tetapi tidak tahui isinya
26. Tripartite tidak berlaku di Indonesia sehingga mayoritas tidak mengadukan permasalahannya kepada yang berwajib di Indo
27. Rata2 agent terdaftar tetapi yang melakukan perekrutan adalah calo dan apabila ada permasalahan calo tersebut tidak diakui sebagai pekerja dari agent dan cara tersebut yang digunakan untuk cuci tangan
28. Permasalahan TKI yang harus dibenerin: seleksi majikan (mulai dari kreterian, adanya minimum salary), TKI juga diseleksi, meningkatkan softskill, meningkatkan lifeskill – how to treat emotion
29. Menghapuskan stigma informal kalau permasalahkannya sekttor kerja yang jelas, kan TKI punya sektor kerja yang jelas
30. Dengan meratifikasi konvensi ILO yang baru bargain position Indo lebih kuat
31. Organisasi int macam ILO tidak berani mempush penegakan konvensi kepada negara maju tetapi negara berkembang di push

Filednote Migrant Care (Pak Nur dan Pak Wahyu Susilo)

1. Kata remunerasi mengangkat harkat buruh migrant
2. Dalam konteks migrasi internasional terdapat 2 hukum yang harus dilalui → hukum negara sendiri (terkait dengan penempatan) dan hukum negara tujuan
3. Dalam konteks penempatan TKI sejak tahun 98-99 di tingkat kepmen 104, 204 lalu pada tahun 2004 lahirlah uu 39/2004 dan inilah tatanan hukum yang digunakan untuk penempatan dan perlindungan TKI
4. Indo tidak bisa intervensi dengan hukum negara lain, karena negara lain juga memiliki yurisdiksi sendiri
5. Ada perbedaan terkait dengan hukum2 ini → budaya, sosial, politik. Ini yang menjadi faktor2 kompleksnya permasalahan TKI
6. Sejauh apa kewenangan KBRI terkkait dengan TKI: di dalam UU 39/200d terdapat mnadat untuk melindungi TKI dg menempatkan atase ketenagakerjaan u/ mengevaluasi agen, mengevaluasi TKI, maupun majikan. Dengan demikian KBRI wajib memberikan perlindungan dan pengayoman, sehingga tidak ada alasan apapun untuk tidak menjalankan tanggungjawabnya (baik documented maupun undocumented)
7. Pada dasarnya negara wajib memenuhi memenuhi hak perlindungan kepada warganegara baik di dalam negeri maupun luar negeri. Terkait dengan penyelesaian perselesihan antara ranah privat antara majikan dengan TKI diikat dengan PK dan di ttd oleh agency dan PPTKIS dan negara harus melakukan pengecekan, muali dari dokumen dan pemenuhan hak2 dan kewajiban2 dan mempunyai pos2 layanan yang mudah dan murah untuk diakses,membuat SOP terkait dengan pengaduan, pendataan juga harus berjalan terutama terrkait dengan PK yang habis (alasan u/ intervensi). Kalau ranah publik harus menggunakan hukum sana dengan membela hak2 TKI
8. Penelusuran akar dari setiap permasalahan yang terjadi oleh TKI untuk menyelesaikan permasalahan
9. PK yang ditandatangani di Indonesia menyalahi prosedur-bagaimana org Indo menjadi perwakilan majikan? Inilah yang menyyebabkan PK sayangat berbeda dengan kenyataan. Kalau PK dittd di Indonesia harus diverifikasi di KBRI terkait dengan majikan dan TKI serta hak dan kewajiban lalu dibuat database-nya
10. Tetapi bagaimana PK yang ditandatangani tidak face to face?
11. Ranah KBRi di luar negeri hanya pada ranah diplomasi dan kekonsuleran. Sehingga agak sulit kalau harus memg-enforce Malaysia untuk membentuk peraturan buruh migran secara khusus. Tetapi dengan adanya MoU tahun 2011 sudah ada standar baku pengupahan walaupun masih belum diterapkan. Di Malaysia juga belum membolehkan KBRI mengontrol pengupahan. KBRi bisa memantau pada saat perpanjangan PK dan memulai PK
12. Terkait dengan dispute di malay blm ada labour court, baru mahkamah saja.
13. Penyelesaian permasalahan didasarkan oleh access to justice harus diselesaikan hak2 normatifnya, tetapi terkadang paspor ditahan sehingga mereka takut untuk melapor TKInya. Pada saat ini KBRI lebih memilih untuk memulangkan TKI. Tidak apa2 TKI dipulangkan asalkan kasusnya diperoses dan hak2nya dipenuhi, baik access to justicenya maupun hak2 lainnya
14. Banyak kasus kekerasan terjadi karena overtime jam kerja, paspor ditahan oleh majikan, ada anggapan bahwa PRT adalah pekerjaann yang sepela bahkan ada konstruksi kalau mereka boleh diperlakukan semena2. PRT melawan dan mereka melarikan diri

15. Idealnya TKI yang direkrut adalah yang sudah sesuai deng job ordernya, mengikuti proses, mengikuti paltihan. Tetapi perekrutan saat ini banyak yang untuk memenuhi targer recruitment. Banyak permasalahan yang terjadi disebabkan oleh maladministrasi
16. PK untuk teman2 yang undocumented bisa secara bilateral baik lisan maupun tertulis. Teman2 yang undocumented mempunyai bargain juga karena dapat memilih majikan
17. Moratorium menyebabkan krisis PRT dan harga rekrutmen PRT makin tinggi sehingga konsumen di malay kelabakan. Ini dapat menjadi senjata untuk Indo memaksa Malay untuk memberikan perlindungan lebih kepada PRT
18. Dalam PK ada 2 tahap yakni: perjanjian penempatan (rekrutmen antara TKI dengan PJTKI) dan PK antara majikan dengan TKI. PK seharusnya dittd bida dilakukan di KBRI. PK yang ttd di Indonesia dittd oleh TKI dng PJTKI (mewakili majikan)
19. Rate gaji PRT Malaysia 400-500 RM
20. Alur penyelesaian apabila ada dispute ada di MoU
21. Tidak ada pilihan hukum bagi TKI untuk menentukan isi PK, di HK tergantung dari keratifitas masing2, sementara di malay masih di template-kan
22. Konvensi 1990 memberikan rasa percaya diri pemerintah Indo dlm mengadvokasi TKInya, dan wajib diselaraskan dh UU 39/2004 dg mengadopsi prinsip2 yang ada. yang paling penting itu komitmen dan political will dari pemerintah Indo
23. Permasalahan negara2 ASEAN yang pecah antara receiving dan sending countries. Tetapi untuk negara2 maju harusnya menimbang bahwa pembangunan mereka tidak lepas dari SDM PRT
24. Malaysia menggunakan dual standard → saat mereka membutuhkan tenaga kerja murah mereka tidak terlalu ketat (panenkelapa sawit dan proyek2 infrastruktur, saat pemilu diberikan ID untuk bs menyoblos) dan saat sudah mulai tidak diperlukan mereka sangat ketat dengan melakukan amnesty
25. Pemerintah tidak boleh membebani tenaga kerja dengan biaya yang berat, harus digratiskan, karena pd dasarnya itu merupakan hak untuk berpindah.
26. Permasalahan2 yang terkit dengan TKI yang harus segera dibenahi: diskriminatif disini kelompok dg upah yang rendah dibebeani dengan berbagai macam pembiayaan sementara ekspatriat tidak perlu mengeluarkan uang, keseriusan di dalam pengawasan terutama pemalsuan dokumen, penampungan2 pelatihan yang memadai.
27. Pengetahuan hukum wajib diberikan oleh pemerintah, tidak hanya hukum keimigrasian, tetapi juga hukum universal (HAM) dan juga hukum internasional.
28. Pemerintah melihat penempatan hanya melihat TKI sebagai komoditi/bisnis semata sehingga meng-excluded permasalahan2 TKI dalam perburuhan Indonesia. Harus ada mainstream terhadap migrant protection

Fieldnote Pak Irham - ILO

1. Dasar2 pembentukan konvensi 189: di dalam internasional blm ada legal binding untuk domestic worker, sbg payung hukum, dan menjaga hak2 pekerja dalam hubungan industrial
2. Untuk Indonesaia, konvensi ini akan sangat penting kedepannya, terutama untuk buruh migran
3. ILO sbg fasilitator, dan merupakan lembaga tripartite dan merupakan rumah bersama antara pengusaha, buruh, dan pemerintah. Isu yang diangkat oleh ILO itu perburuhan bukan buruh saja
4. Pada kwartal terakhir 2010 disebarkan kuisioner ke semua negara ILO (dr pemereintah, pengusaha, dan serikat buruh) yang isinya pertanyaan mengani hal2 apa saja yang sebaikanya diatur standar2 ketenagakerjaan di dalam perburuhan
5. Indonesia setuju untuk rekomendasi saja, tetapi tidak dengan konvensi. Indonesia lebih prefer untuk bilateral agreement
6. ILO melakukan serangkaian advokasi
7. Standing Malaysia: kekuatan civil tidak Nampak, mengambil benefit sebanyak mungkin sebagai user
8. Posisi ASEAN terbelah menjadi 2→ sending dan receiving
9. Apa saja yang ILO lakukan untuk mendapatkan pengakuan agar PRT berubah menjadi pekerja formal? ILo hanya memfasilitasi dan tidak ada kewenangan untuk membuat peraturan2. Adanya advokasi2, memperkuat isu
10. Isu domestic worker bukan isu yang seksi untuk serikat buruh, isu anak tiri. Isu yang seksi: kenaikan UMR, freedom of association. Alasannya: PRT merupakan budaya dan sudah sebagai keluarga sendiri
11. HK menetapkan standar perburuhan paling bagus di Asia, buruh bisa berasosiasi (tdk seperti di Malaysia), HK negara pertema yang menerapkan one day off, minimum wadges, maximum hour
12. Setalah moratorium, Malaysia sudah menerapkan minimum wedges dan one day off
13. Moratorium dicabut Maret dan April baru penempatan
14. Negara2 receiving countries menolak perwakilan ILO di negaranya karena takut mencampuri permasalahan terkait dengan perburuhan
15. ILO 189 harus ada 2 negara dahulu yang meratifikasi oleh negara anggota ILO agar dapat disahkan menjadi konvensi
16. Harapan Bapak dan hal2 yang perlu diperbaiki kedepannya: pemerintah harus meng-adress semua permasalahan2, memonitor dengan baik, dinegara penempatan menambah SDM ketenagakerjaan, membenahi permasalahan terkait dengan kemenakertrans dan BNP2TKI, memastikan semua negara penempatan memiliki bilateral agreement, mekanisme pengaduan diperjelas karena banyak sektor privat yang bermasalah, pada saat pemulangan banyak eksploitasi dan diskriminasi kedatangan (terminal), pasca pemulangan harus diperhatikan dengan menyediakan lapangan pekerjaan,
17. Gaji TKi digunakan untuk: bayar hutang, daily needs, reparasi rumah, sisanya untuk produksi.
18. 0% itu tidak mungkin karena itu kan kebesasan untuk berpimdah, kewajiban negara untuk memerikan proteksi, negara tidak bisa menyediakan lapangan pekerjaan di dalam negeri, negara blm mampu untuk meng-upgrading kemampuan mereka

Fieldnote Mba Nisa – Solidaritas Prempuan

1. Knp tenaga kerja banyak yang memilih bekerja di luar negeri: terkait dengan kondisi ekonomi (penggajian), akhir 1990-an pemerintah menganjurkan untuk keluar negeri untuk mendapatkan devisa → target pemerintah, itu juga terpengaruh dari investor yang menyerobot lahan, dan mereka kebanyakan tidak terdidik maka mereka berekerja dengan apa yang mereka bisa yakni PRT
2. Kalau dikomparasi dg Afrika yang kebanyakan laki2 yang bekerja ke luar negeri 9buruh bangunan/pabrik)
3. Dipengaruhi juga ada faktor budaya gengsi kalau plng dari luar negeri, benerin rumah dan itu menjadi daya tarik buat tetangganya, sehingga bekerja ke luar negeri itu untuk alasan konsumtif
4. Terkait dg perekrutan: PPTKIS menggunakan calo yang sampai pergi ke rumah2 untuk mencari anak perempuan yang terkadang melakukan pemalsuan data, melakukan pelatihan, dan disalurkan ke PJTKI
5. BNP2TKI hanya sebagai tempat pendaftaran, bukan TKI yang mendaftar tetapi PPTKIS yang mendaftarkan
6. Banyak data2 yang tidak masuk dan baru terlihat setelah ada permasalahan, tidak ada koordinasi antara BNP2TKI, KBRI, maupun kemenakertrans
7. Pelatijan 200 jam dilakukan di BNP2TKI, pelatihannya pun terkadang hanya asal memberikan sertifikasi kepada PRT dan kadang mengajarkan softskill, hukum, dan pengetahuan terkait dengan hak-hak
8. Mereka mendapatkan list no telfon, tetapi terkadang sampai di tempat majikan tidak diberikan akses untuk telfon
9. BNP2TKI mempunyai kewenangan untuk melatih, tetapi terkadang hanya pengawasan. Pengawasannya pun hanya sekedarnya saja, tidak mengecek secara langsung. Hal ini baru terlihat saat adanya poermasalahan
10. Jadwal pertemuan dr BNP2TKI dengan PPTKIS, TKI kadang tidak diberitahukan karena dalam mediasi yang terjadi hanya PPTKIS dan BNP2TKI saja, TKI tidak ada
11. Transparasi proses yang tidak ada
12. Jarang sekali TKI diberikan kesempatan untuk menawar atau menentukan isi kontrak kerja karena kalau tidak setuju akan diancam bahwa mereka tidak akan berangkat. Kasus yang terjadi banyak yang PK dirampas oleh majikan sehingga PK tidak terlalu menjadi hal yang penting
13. Permasalahan PK yaotu implementasi, dan pada saat permbuatan tidak ada pilihan hukum untuk si buruh migran
14. Penyelesaian terkait dengan PK P to P: biasanya kalau di dalam negeri menghubungi BNP2TKI, dan BNP2TKi yang akan memanggil PPTKIS yang menmberangkatkannya, kalau kejadiannya masih di luar negeri: nego dengan agen di negara tempat ia bekerja, tapi diusahakan untuk pulang terlebih dahulu
15. Agen bertanggung jawab sampai TKI pulang, sementara kalau sampai berangkat itu PPTKIS
16. Perspektif aparat di luar terkait dengan keberpihakkan terhadap warga negara dipertanyakan karena apabila ada permasalahan TKI disuruh pulang saja
17. TKI dilihat sebagai proyek, tetapi pada saat ada masalah pemerintah lepas tangan (perspektif u/ pemerintah)
18. Kenapa SDM tidak tidambah di KBRI? Sebelumnya sistem juga diperbaiki karena pengaduan2 tersebut dikarenakan kurangnya peklatihan, baik hukum, susbstansi maupun softskill

19. KBRI juga terkadang megawasi dg cara menelpon dengan random
20. Perbaiki awal untuk mengurangi pengaduan
21. Keberpihakan media di Malaysia sangat terlihat
22. 1 PRT = 1 pekerjaan untuk menjaga hak2 PRT karena PRT sendiri terkadang tidak mengetahui kalau mereka sedang dieksploitasi
23. Permasalahan utama dalam permasalahan penggajian: ratifikasi konvensi merupakan langkah awal dan pembuatan MoU hendaknya di dasarai oleh nilai2 yang ada di konvensi, pembuatan PK mengikutsertakan pekerja, pemerintah melakukan pelatihan di kantung2 daerah pengirim TKI
24. PK dittd tanpa diketahui oleh majikan dan TKIkarena diwakilkan, tetep berlaku karena sudah di ttd. Padahal PPTKIS yang mewakilkan TKI tidak sama derajatnya, bargainnya

Fieldnote majikan + TKI Malaysia → Mrs Lim dan Wati

1. Mrs Lim menginginkan pembatu dari Indonesia keran PRT dari indonesia dapat bekerja dengan baik dan baik dalam bersikap
2. PRT yang bekerja baru 1 tahun untuk mengurus nenek yang berumur 86 tahun
3. PRT yang bekerja di Mrs Lim baru 1 tahun
4. Mrs Lim sedang menemani PRTnya menguruh permit kerja
5. Mrs Lim tidak mengurus TKW yang bekerja padanya lewat PJTKI tetapi saudaranya yang mengurusnya karena Mrs Lim mengetahui bahwa apabila melewati PJTKI akan mengeluarkan banyak biaya

Mba wati

Sudah bekerja 7 tahun di Malaysia sejak 2005. Sudah mempunyai 2 majikan. Majikan pertama 2 tahun dan berhenti baik2, bilangnya mau pulang kampung tetapi malah keluar. Mba wati dipkerjakan dg gaji 400 RM untuk mengurus satu keluarga dan keponakan2 dari keluarga tersebut. Mba wati sekarang mendapkan gaji 800 RM hanya untuk mengurus nenek saja. Mba wati ternyata adalah PRT Mrs. Lim

Fieldnote Agency Malaysia – Pak Punky

1. PPTKIS tidak professional dan tidak mempunyai komitmen karena tidak mentraining dan tidak mengarahkan TKI lalu langsung disalurkan. Agency Malaysia membayar PPTKIS sebesar 6.000 RM dan baru akan diatur menjadi 4.600 RM. Jadi TKI itu biar cepat dapat uang.
2. Sponsor membawa orang dari kampung per orang dihargai 4jt oleh PPTKIS.
3. Pembantu yang tidak memiliki data2 administratif dirayu2 oleh sponsor dan baru membuat administrasi setelah ingin berangkat
4. Uang 4-6 juta untuk PPTKIS itu digunakan untuk pekerja juga, tetapi itu kebohongan, biasanya semuanya diambil oleh sponsor
5. Agency Malaysia dan indo ketemu dikedutaan dan membuat job order disana, lalu agency malay me-marketing-kan di Malaysia, agency Indonesia yang mencari TKI
6. Agency Malaysia terkadang tidak bisa masuk ke dalam ranah majikan dengan pembantu, tidak bisa menolong, masuk ke dalam rumah
7. Orang yang tinggal di Malaysia adalah TKI yang bermasalah, perekrutan harus menggunakan psikolog
8. Kadang keinginan untuk bekerja di Malaysia itu bukan hal yang utama, tetapi ada jalan2 dll
9. Pernah mengirim orang Lombok, bekerja 3 hari gamau kerja. Dikarenakan dia ke Malaysia untuk mencari suaminya, dan baru mau bekerja apabila sudah bertemu dengan suaminya
10. Om punky pernah bekerja sama dengan PPTKIS yang benar2 melatih dengan professional (pekerjaan rumah tangga)
11. Knp Filipina dan Indonesia TKInya berbeda jumlah gainya karena TKI dari Filipina dilatih dengan baik, baik bahasa inggris maupun kemampuan mengurus rumah dengan baik
12. Orang2 Malaysia terkadang melakukan tindakan fisik kartena banyak kesalahpahaman terkait dengan banyak hal terutama pekerjannya dan majikan merasa ditipu karena majikan telah membayar mahal tetapi malah mendapatkan TKI yang tidak bisa apa2. Dalam hal ini TKI menjadi korban dan yang bermasalah di sini adalah PPTKIS
13. KBRI kinerjanya semakin mambaik. Banyak TKI di Malaysia tetapi SDM yang mengurus sedikit sehingga banyak yang tidak ke-handle
14. Paspor+medical check up copy dikasih ke majikan. Majikan mengurus ke imigrasi untuk diminta calling visa, calling visa diurus dan melewati di kedutaan Malaysia di Indonesia dan TKI dapat berangkat ke Malaysia (tanpa agency)
15. PK didasarkan atas pembicaraan pemerintah Indo dengan Malaysia sehingga PK yang ada adalah sama untuk seluruh majikan dan TKI
16. Di Malaysia gahi untuk mengambil pembantu minimum 5.000 RM, istri tidak bekerja pada dasarnya tidak bisa mengambil PRT
17. Kebijakan 1 pembantu = 1 pekerjaan dikarenakan overtime di Malaysia
18. Besaran gaji untuk PRT yang benar diberikan → tergantung nasib, minimum 500 RM. Bisa ada 800 RM apabila kerjanya bagus
19. Karena bayar ke agency mahal maka majikan terkadang menganggap bahwa PRT itu harus bisa semuanya dan inilah awal exploitasi (bayarnya 8.500 RM)
20. Terkadang ada majikan yang complaint dan meminta refund kepada agency Malaysia dan agency Indonesia tidak mau bertanggungjawab, lepas tangan
21. Terkadang ada juga agency yang memiliki komitmen apabila ada keluhan terkait dengan TKI yang dikirimkan makan akan menggantinya dengan yang baru, dikirim ulang

22. Agency Malaysia harus mendaftarkan diri kepada KBRI tetapi ada pula yang tidak mendaftar diri, macam om punki, asal tetap menjjaga TKinya dengan baik maka tidak aka nada masalah
23. Agency Malaysia harus membuat perjanjian kerjasama terlebih dahulu dengan agency Indonesia dengan deposit 100.000 RM
24. Satu titik yang menjadi sumber masalah TKI di Malaysia yakni agency Malaysia tidak memberikan after sell service
25. Pasca penempatan yang bertanggungjawab untuk memulangkan adalah majikan
26. Dana KBRI untuk memulangkan TKI pun terbatas
27. Yang berhak menutup agency Malaysia adalah departemen men power dan apabila ingin membuat TKI harus memberikan deposit sekitar 1 M ke bagian departemen men power
28. Om punki pernah mengirim 15-20 orang, tetapi untuk pekerja sawit sudah 30.000 orang
29. Selama MoU sudah ada itu merupakan itikad baik tetapi standars recruitment Indonesia harus diperketat dan benar2 dilaksanakan

KBRI MALAYSIA

***SHELTER* DI KBRI MALAYSIA**

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