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THE AWAKENING OF THE DINOSAURIAN MALAYSIAN LABOUR LAWS

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INTRODUCTION

The laws relating to employment are enacted to protect the rights of workers against exploitation by their employers. Although there are many laws regulating the relationship between an employee and employer in Malaysia, the focus of this article will be on the following two sources, the Employment Act 1955 ('the EA 1955')[1] and the Industrial Relations Act 1967 ('the IR 1967').[2] There are many reasons as to why employment law is very important and should be taken seriously. One of the many reasons are to prevent employees from being forced to overwork by employers. The EA 1955 provides inter alia, that employees should not exceed eight hours of work a day and should only work 48 hours in a week unless overtime wages are paid. Further, employees have to be given their fair amount of holidays and leaves as stated by the law. Without the EA 1955, employees may be forced to overwork which may cause many complications such as effects therefrom on their health. Furthermore, with the Children and Young Persons (Employment) Act 1966,[3] the abuse of child labour can be prevented in this country. In this Act, a person aged below 14 years is categorised as child while a person above 14 and below 16, a young person.[4] Children and young persons are only allowed to be employed in the family businesses that involve light work and do not require the use of machines. In the absence of these restrictions, there is high possibility that they may be exposed to exploitation which may lead to corruption.

Aside from the above, the Occupational Safety and Health Act 1994[5] is another act that protect workers' health and safety at the workplace. In this Act, employers are to make sure employees have a safe work environment. Employers has to keep up with the maintenance of the machines and systems used in the workplace from time to time to reduce the risk of their employees from getting injured. Employers are also responsible to send all employees for training to ensure they learn and understand all machines and systems well before working with it. We can conclude that this Act is very important and all the policies in this Act must be taken into account in all

companies.

It is undeniable that an organisation's most prized possession would most definitely be their employees. Employees make up a huge part of an organisations productivity and efficiency. It is without a doubt that organisations should treat their employees with utmost respect and make it a priority to instil equality within the workplace. In spite of this concept being as simple as it is, employees till to date face many issues regarding the unfair pressures of being treated poorly, being overworked and lacking democratic working environments.[6] Even though these issues have been clearly covered by the EA 1955, many organisations fail to give these disputes the attention they deserve and lack the practice of implementation to reduce the rate of organisational concerns. In order to avoid such circumstances, it is crucial for employees to be fully aware of their rights as members of an organisation. What are the common issues that arise from employees not knowing their rights? These issues range from workplace bullying all the way to downright discrimination of all sorts.

Workplace bullying occurs when employers instil any form of fear into their employees. Employees at this state will often give in or surrender to the authority of their employer or supervisor. A situation as such will eventually reduce job motivation, job satisfaction and may cause mental trauma to employees in the long haul. This is where employee awareness to their rights come into place. Knowing when to take a stand as an employee within the organisation is key when being pushed around unnecessarily. Another example of workplace bullying would include denying and dismissing employee for their trade union involvement. This act was clearly called out upon by the Malaysian Trade Union Congress ('MTUC') when Sabah forest industries denied their employees from forming a trade union for over decades. This act should be considered lawfully wrong as employees should be given the liberty to fight for their rights and it all begins simply by making it a priority to educate employees on their rights. The following content of this article will further explain the issues that have been frequently faced by employees due to the lack of awareness to their rights.[7]

MALAYSIAN EMPLOYMENT LAWS

As noted earlier, employment law is an important area as it provides guideline and protection for employee and employer to ensure a healthy and fair working employment in their organisation. It also helps to provide equality to everyone as well as stability for companies. The areas covered under Malaysian employment law are as follows:[8] (i) EA 1955; (ii) IR 1967; (iii) Trade Unions Act 1959 ('the TUA');[9] (iv) the Employment (Termination and Layoff) Benefits Regulations 1980;[10] (v) Children and Young Persons (Employment) Act 1966; (vi) Minimum Retirement Age Act 2012;[11] (vii) Minimum Wage Order 2016;[12] (viii) Employment (Part-time Employees) Regulations 2010;[13] and (ix) Employment (Limitation of Overtime Work) Regulations 1980.[14] This article however will only discuss some of the abovementioned labour statutes.

(i) Employment Act 1955: The EA 1955 is the principal legislation that governed the employment practice and employer-employee relationship in Malaysia. However, the EA is only applicable in West Malaysia as Sabah and Sarawak have their own labour statues namely, the Sabah Labour Ordinance and the Sarawak Labour Ordinance although it is admitted that the contents of the labour statues of the West Malaysia and that of the East Malaysia are identical. The EA 1955 provides guideline and protection to a certain category of workers as well as established certain rights for both employer and employee.[15] The content of the Act covered are contract of service, payment of wages, employment of women, maternity protection, complaints, termination and lay-off benefits, and other employee benefits such as, working hours, overtime, rest day, annual leave, public holidays and sick leave, among others.

Although the EA 1955 covers many provisions however, it is not adequate enough in matters related sexual

harassment and discrimination. For example, the amendments made to this Act in 2012 exempted employers from investigating sexual harassment cases if they think that complaint was 'frivolous, vexatious or is not made in good faith'.[16] In fact, the implementation regarding sexual harassment under the Act is not effective enough to prevent and eradicate sexual harassment in the workplace. Therefore, laws and regulations related to sexual harassment should be highlighted and amplified for the benefit of everyone, regardless of gender.

Other than that, the current laws in Malaysia is still not able to fully address issues related to discrimination as there are no any specific law prohibiting discrimination. Undoubted, workplace discrimination is a bitter experience that demoralises workers who normally feel their services to the organisation is not appreciated and this inevitably affects their work performance. In fact, there are many international instruments that promotes equal right to both men and women and the prohibition of workplace discrimination such as the United Nations Universal Declaration of Human Rights and the United Nations Convention on the Elimination of All Forms of Discrimination against Women. The International Labour Organisation ('ILO') has designated two conventions to address on the workplace discrimination. Refusing to employ a person by reasons of his race, religion or religious attires, discriminating against a prospective employee on the terms and conditions in the offer of employment, and a woman granted maternity leave being excluded when it comes to promotion among others ought to be prohibited expressly in a workplace discrimination law.

It is surprising to note that the Malaysian authorities stated that there is no need to enact any Anti-Discrimination Act in this country as the unity is still under control.[17] The reason behind this decision is that the government stated that unity should be fostered at a young age through education and not by law enforcement. As a saying goes, 'prevention is better than cure'. It may be added that while the basic concept of equality before the law and equal protection of the law is enshrined in the Federal Constitution art 8(1), this provision according to the Federal Court in *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor*,[18] only addresses the contravention of an individual's rights by a public authority. But when the rights of a private individual are infringed by another private individual, the above constitutional provision will take no recognisance of it. Many countries have enacted anti-discrimination law including at the workplace and those involving a jobseeker, for example the Australian Human Rights Commission Act 1986 prohibits *inter alia,* discrimination in employment because of a person's religion, political opinion, national extraction, nationality, social origin, medical record, criminal record or trade union activity. Likewise, the New Zealand Human Rights Act 1993 prohibits discrimination on a wide variety of grounds in areas of public life including employment. Be that as it may, it is the responsibility of every employer to make sure that their employees and people who apply for job with them are treated fairly and are not subjected to discrimination. In fact, it is high time for this country to roll out a workplace discrimination law that prohibits workplace discrimination including those involving the job seekers. The government should take initiative in solving discrimination issues before it worsened.

(ii) Children and Young Persons (Employment) Act 1966: The Children and Young persons (Employment) Act 1966 is the principal Act regulating the employment of children and young persons to give them rights and provides them protection from mistreatment in their employment. The Act defines children as those who are below the age of 14, while young person is those who has not yet reach the age of 16. This Act also provides the type of work that they can perform while protecting them from unfavourable, dangerous, and exploitative employment.

In June 2018, an estimated 200,000 children aged from 5–18 were found to be working in various sectors in Sabah. In addition, 60,000 children and young person were discovered to be involved in the plantation sector and with most of them being Indonesian. However, the explanation for this situation is that they are only helping their parents, therefore, it cannot be viewed as child labourers.[19] In Malaysia, it is common to spot children or young persons' working, especially in family-oriented business. They can be seen helping their parents by doing lightweight job such as, managing the cash register, serving customers or washing up plates and bowls. This is considered as a

norm, especially in a Chinese family.[20] Therefore, child labour law in Malaysia is not effective enough in terms of implementation as child labour is considered a norm in Malaysia despite the heavy punishment that could be imposed if found doing so.

It may be noted that 'child labour' is defined as work carried out by children in the formal and informal sectors. The formal settings include a variety of industries such as in agriculture, manufacturing, fishing, construction and domestic services. While for the informal sector examples include scavenging, shining shoes or family enterprises. In some extreme cases, child labour involves children being enslaved, separated from their families, expose to serious hazards and illnesses. The term 'child labour' according to the ILO deprives children of their childhood, their potential and dignity, and is harmful to their physical and mental development. In 2015, the ILO celebrated their annual event on the 'World Day Against Child Labour 2015' with the theme 'NO to child labour -YES to quality education!' In conjunction with the said event, the ILO promoted free, compulsory and quality education for all children and to take more concerted efforts to ensure that national policies on child labour, and education are consistent and effective.

The first legally binding international instrument to incorporate a complete range of human rights for children, including civil, cultural, economic, political and social rights is the United Nation's Convention on the Rights of the Child. The Convention defines child as a person below the age of 18 years. It promoted inter alia, basic human rights of children such as the right to protection from economic exploitation and the right to education. Apart from the above, the ILO also promoted the protection of child labour *vide* its two Conventions namely, Convention on Minimum Age for Admission to Employment (Convention No. 138) and Convention on the Worst Forms of Child Labour ('Convention No 182'). The ILO's Convention No. 182 has been ratified by more than 90% of ILO's 186 member States since its adoption in 1999.[21] In light of the above international instruments, a vast majority of countries around the globe have also adopted legislative measures with a view of placing restrictions on the employment and work of children. Hence, the enactment of the Malaysian Children and Young Persons (Employment) Act 1996. It may be added that the exploitation of children and young persons in the workplace is a global phenomenon. Vigorous enforcement of the Act is necessary and must be made a priority so as to ensure that young workers are not exposed to any form of exploitation or danger that may interfere with their education, health, moral or social development. Continuous commitment and support from all sections of the society shall play a great role in realising the aim of combating child labour.

REFORMING LABOUR LAWS — PRIORITY THAT IS NOT A PRIORITY?

The Human Resources Ministry announced that it is aiming to amend three acts that are considered outdated;[22] EA 1955, Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990[23] and the Occupational Safety and Health Act 1994. The Minister provided that, the amendments will also be streamlined with the Labour Ordinance of Sabah and Sarawak. It is undeniable that many of our labour laws are outdated due to the changing employment situation around the world. The proposed amendments not only will benefit the employers and employees, but also foreign investors. The Ministry of Human Resources released the list of proposed amendments on 4 October 2018 with the public welcomed to provide feedback on the proposals.[24]

The main changes to the Act will be further discussed below.

Application of the Act

Currently, the EA 1955 only covered employees who earns not more than RM2,000 and or those who works in manual labour. Thus, making the Act applicable to all employees regardless of their monthly earning and job position is included in the proposal. Nevertheless, those who earn more than RM5,000 per month would not be covered in certain provisions such as, hours of work, retrenchment benefits, and payment for working on a public

holiday.

The differences between an employee and independent contractor are also included in the proposal. A person will be presumed as an employee in certain conditions, such as:

(a) the manner of work is subject to the control or direction of the other person;

(b) the hours of work are subject to the control or direction of the other person;

(c) the person's work constitutes integral part of the other person's business;

(d) the work is performed solely or mainly for the benefit of the other person; and

(e) the person is provided with tools, raw materials or work equipment by the other person.

Anti-discrimination

The proposal also include provision to prohibit employers from discriminating job seekers based on their gender, religion, race, disability, language, marital status and pregnancy. This is new as currently there are no similar anti-discrimination provisions under the current Act.

Job Carnivals

Issue related to job carnivals or job fairs does not exist in the current Act. The proposal provides that approval from the Director General is needed to organise a job fair. As such, this will affect entities such as service providers and recruitment agencies. However, employers do not need to obtain such approval if he wants to organise a job fair with the purpose to fill up vacancies in his company.

Rights of Pregnant Employees

Under the proposed amendment, maternity leave is being raised from the current 60 days to 98 days. This is good news for employees, however, employers will need to face the additional salary burden which increases business expenses. Other than that, pregnant employees will also be protected from being terminated during maternity leave on the ground of pregnancy.

Flexible Working Hour

A new section is introduced on flexible work arrangement. This means, employees can make a request for flexible working arrangement, and employer would need to respond to the said request within a month and notify the employee via writing. However, employers can choose to refuse the request made on several reasons as below:

(a) inability to reorganise work among employees;

(b) inability to recruit additional employee;

(c) detrimental impact on quality;

(d) detrimental impact on performance; and

(e) burden of additional cost.

Sexual Harassment

Finally, employers will no longer have the right to reject any complaint related to sexual harassment. The current Act allow employers to refuse to inquire into complaints of sexual harassment. Furthermore, employers will also be required to write a code of prevention of sexual harassment and placed it in a conspicuous area in the workplace.

Lifting Limitation Involving Female Employees

In Malaysia, women are not allowed to work late or odd hours. The proposed amendments seeks to remove this limitation and allowing them to work late. However, employers would need to provide a reasonable level of safety and security to them. This helps to widen the work choices for women and provide them with equal opportunities that men have.

Domestic Employees

The phrase ‘domestic servants’ is being proposed to change to ‘domestic employees’ as the word ‘servants’ seem to be outdated and demeaning which could give rise to negative stereotyping. As Haines puts it in the following term; ‘labourer and worker are words that carry a menial flavour’. He further noted that, ‘employee’ is higher in the social scale of values than a worker or labourer while the term ‘servant’ has always implied subservience and actually means ‘slave’.[25] Fridman also expressed a similar view when he stated that terms such as ‘employment’, ‘employer’ and ‘employee’ seemed to be much more in keeping with modern life and conditions, and with modern views on the relationship between those who pay for and those who provide labour.[26] Thus, the change in the terms reflected a new concept of legal equality between parties to a contract.[27]

ISSUES FACED BY EMPLOYEES Gender Discrimination

Discrimination in the workforce happens anywhere and everywhere. Discrimination implies an unfair treatment of two or more persons or subjects on grounds such as race, gender, disability, age and religious belief, among others. Gender discrimination exists when women for example, are treated less favourably or suffer detrimental treatment at the workplace as a result of unreasonable differential treatment between men and women.

The ILO considers discrimination as a differential and less favourable treatment of certain individuals because of any characteristics such as sex, race and religion, regardless of their ability to fulfil the requirements of the job. The United Nations Universal Declaration of Human Rights 1948 provides that all human beings are born free and equal in dignity and rights. Discrimination often arises within the employee-employer dynamic, but it may come to surprise when employees of equal rights part take in this. This illegal act may have various aspects on where it is implemented and practiced, be it consciously or unconsciously. These aspects include age, gender, race, national origin and several others. Discriminatory practices in the workplace in terms of promotion, job assignment and requirement, leave entitlement and termination, among others, are prohibited by the United Nations Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’). CEDAW which is based on the principles of equality and of non-discrimination, has been ratified by more than 180 countries. The ILO has also taken proactive steps in the elimination of employment discrimination at the workplace mainly to give effect to the principle that ‘poverty anywhere constitutes a danger to prosperity everywhere’, in the 1944 Declaration of Philadelphia. Two significant conventions of the ILO that addresses on discrimination in respect of employment and occupation is the Convention on Equal Remuneration (‘Convention No 100’) and Discrimination (Employment and Occupation) (‘Convention No 111’). Convention No 100 is confined to the subject of remuneration between men and women while the Convention No 111 is wide enough to cover almost any aspect of employment that would cause discrimination on various grounds.

In order to remove barriers faced by women in their effective participation in the workforce, many countries have

enacted sex discrimination legislations for example, the UK Sex Discrimination Act 1975, New Zealand's Human Rights Act 1993 and Australian Sex Discrimination Act 1984, among others. The Australian Sex Discrimination Act 1984, for example, makes it unlawful for an employer to discriminate against an employee on the ground of the employee's sex in the terms and conditions of employment, denying or limiting the employee's access to opportunities for promotion, transfer or training, or to any other benefits associated with employment, dismissing the employee or subjecting the employee to any other detriment.

In Malaysia, the basic concept of equality before the law and equal protection of the law is contained in art 8(1) of the Federal Constitution. The article generally prohibits discrimination against a person or class of persons unless there is a rational basis for such discrimination. The word 'gender' was inserted into art 8(2) in order to comply with Malaysia's obligation under the CEDAW, to reflect the view that women were not discriminated.

As persons can be classified in many aspects such as age, education, ability and occupation to name but a few, the varying needs of these persons often require separate treatment and hence, the doctrine of classification was held constitutional. In fact, art 8(2) begins with the exclusion clause of '[e]xcept as expressly authorised by this Constitution', which demonstrates that certain kinds of discrimination may be allowed under the express provisions of the Constitution.

The landmark gender discrimination case in the Malaysian context is the Federal Court's decision in *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor*[28] where the Federal Court held, inter alia, that the constitutional law as a branch of public law only addresses the contravention of an individual's rights by a public authority. However, when the rights of a private individual are infringed by another private individual, constitutional law will take no recognisance of it.

The more recent case on gender discrimination at the workplace in Malaysia is the case of *Airasia Berhad v Rafizah Shima bt Mohamed Aris*[29] where the Court of Appeal held that cl 5.1(4) of the training agreement entered into between the appellant and the respondent which provides inter alia, that the respondent must not get pregnant during the duration of the training period was a lawful contract between private parties and thus, the agreement did not violate article 8 of the Constitution.

In light of the superior court's decision on gender discrimination in the context of art 8, it is submitted that the Malaysian legislature should seriously consider enacting a gender or sex discrimination law based on the concept of gender discrimination as defined under the CEDAW. The law is required to ensure a workplace free from any forms of gender or sex discrimination.

It is worth noting that women especially have experienced their fair share of workplace discrimination by gender bias employers who explicitly undermine female rights and equality when being brought to the table against male employees. A thorough research has been conducted by the Department of Statistics Malaysia to conclude statistical evidence that a mere 22.2% management roles and senior positions were given to women. The former chairman of the Human Rights Commission of Malaysia (Suhakam) Tan Sri Razali Ismail has computed results stating, for every RM100 earned by a male employee, a female employee were to earn a slightly lower figure summing up to RM93.80.[30] The figure below shows the percentage of women employment and unemployment

and how it widely varies from the male employment and unemployment rates.[31]

Featured indicators

	2000	2017
Employment in agriculture, female (% of female employment) (modeled ILO estimate)	14.1	6.7
Employment in agriculture, male (% of male employment) (modeled ILO estimate)	20.7	14.0
Employment in industry, female (% of female employment) (modeled ILO estimate)	28.9	19.8
Employment in industry, male (% of male employment) (modeled ILO estimate)	34.0	32.0
Employment in services, female (% of female employment) (modeled ILO estimate)	57.0	73.5
Employment in services, male (% of male employment) (modeled ILO estimate)	45.3	54.0
Unemployment, female (% of female labor force) (modeled ILO estimate)	3.1	3.9
Unemployment, male (% of male labor force) (modeled ILO estimate)	3.0	3.1
Wage and salaried workers, female (% of female employment) (modeled ILO estimate)	76.4	73.7
Wage and salaried workers, male (% of male employment) (modeled ILO estimate)	73.0	75.1
Contributing family workers, female (% of female employment) (modeled ILO estimate)	11.1	7.5
Contributing family workers, male (% of male employment) (modeled ILO estimate)	2.7	2.3

Over the years, it has been clearly observed that female employment rates in various sectors have reduced at a higher percentage when measured against the male employment rates. The highlighted figures above further dives into the percentage of paid workers from the year 2000 to the year 2017. While the male wage and salaried workers have increased by 2.1%, the female wage and salaried workers have decreased by 2.7%. Female employees should be encourageding and not suppressed of their opportunities. In light of the above, the proposal to amend the EA 1955 to address all types of discrimination at the workplace is timely and it is suggested that the Act should be applicable to all workers irrespective of their wages or their categorisation into manual or non-manual.

Further, the protection under the Act should also be extended to domestic servant. The Act should also protect foreign workers against retrenchment. In particular, section 60N which favours local over migrant worker should be reviewed in the interest of promoting fairness to workers. The section provides that when the employer is required to reduce his workforce, 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. It is reiterated that United Nations Universal Declaration of Human Rights 1948 promotes all human beings as born free and equal in dignity and rights. Hence, discriminatory practices in the workplace in terms of promotion, job assignment, leave entitlement and termination should be abhorred as per the CEDAW and the ILO.

TRADE UNION FORMATION

When discussing employee rights the concept of a trade union often comes to light. Why is this so? What is a trade Union? And how effective is it in Malaysia? A trade union is an association formed by employees from similar job functions that work together to stand for certain organisational beliefs and similar interests of its members. Trade unions are huge supporters for employee equality. They strongly prioritise employee satisfaction and inclusion within the workplace. Moreover, trade unions form a concrete bridge connecting employees directly to management for effective communication about employee well-being and enabling the under dogs of the organisation to voice out

their problems and opinions regarding changes in the workforce.

In Malaysia, the Federal Constitution guarantees every Malaysian citizen the right to form associations. Freedom of association refers to the right to form a legal identity in order to act collectively. It is a prerequisite for sound collective bargaining and social dialogue. However, article 10(2)(c) of the Federal Constitution gives power to Parliament to impose legal restrictions on the right to form associations if it deems such restrictions is 'necessary or expedient in the interest of security of the Federation or any part thereof, public order or morality'. Further, the TUA and IRA 1967 governs the trade union activities in Malaysia. The TUA requires every trade union to seek registration in accordance with the procedure contained in the said Act. Further, the IRA 1967 requires that the union must be recognised by the employer before the union can represent employees, whether individually or collectively.

Trade unions may come off as the pillar of strength supporting employee pecuniary and no pecuniary benefits. The primary object of a trade union is to negotiate for better terms and conditions of employment on behalf of its members. The TUA provides that one of the objects of a trade union is 'the regulation of relations between workmen and employers, for the purpose of promoting good industrial relation between workmen and employers, improving the working condition of the workmen or enhancing their economic and social status'. In order to pressure the employer to agree on certain terms and conditions of employment, trade union would sometimes engage in industrial actions such as strike and picket.[32] Strike and picket are two different things altogether.[33] Picketing is the action by workers carried out peacefully at or near the workplace to persuade or induce other workers to abstain from working. This would most definitely ensure constant financial security for its members in the long run.

As stated above, trade unions possess many factors that are very beneficial for our fellow employees yet when enquired, trade unions in Malaysia are known to be very ineffective. According to the Malaysian Trade Union congress ('MTUC'), a study in the 2012 was done to investigate the percentage of workers that were unionised with the result being a mere 9%. The then vice president of MTUC, A. Balasubramaniam, further acknowledged a constant standstill in rates of unionised employees over the years.[34] Since the early 90's, the percentage of unionised employees stood at 9.35% and gradually decreased to 9.24% in 1995 and eventually to 7.87% coming into the year 2000. The density of trade union increased slightly by 0.63% going into the year 2002 reaching up to 8.50% of unionised employees in Malaysia. The tables below clarifies and interpret the fluctuating rates of employee unionisation in Malaysia.

Number of members	Number of Trade Unions						Total Membership					
	1982	1986	1990	1997	2002	2003	1982	1986	1990	1997	2002	2003
Under 100	46	69	99	127	157	162	2,660	3,153	4,601	11,355	6,419	8,698
100-200	39	54	72	76	94	99	5,988	7,727	10,237	17,489	12,714	12,993
201-500	50	82	85	113	128	136	16,150	27,748	27,715	38,957	40,781	49,771
501-1,000	42	65	76	82	84	88	28,856	46,509	52,325	65,132	54,828	64,282
1,001-2,000	39	47	50	67	50	55	53,917	65,131	72,622	95,727	67,565	81,374
2,000-5,000	30	37	35	36	45	41	92,260	117,149	109,045	125,180	126,754	132,838
5,001-10,000	20	16	19	11	18	16	136,693	112,889	130,437	82,472	103,139	135,376
Above 10,000	6	9	10	14	18	12	191,891	225,518	251,517	298,373	349,829	303,811
Total	272	379	446	526	594	609	529,046	606,494	659,120	734,685	745,334	789,163

Sources: Ministry of Labour, Annual Report, various years, in Jomo and Todd (1994: 37); Ministry of Human Resources, in Navamukundan (2002b: 181); Ministry of Human Resources, Annual Reports 2002 (p. 184) and 2003 (p. 193)

Indicator	Year						
	1995	2000	2001	2002	2003	2004	Jan-Sept 2005*
Trade Union							
Private	281	351	364	376	380	380	385
Government	135	127	131	130	127	130	130
Statutory Bodies/Local Authorities	88	85	83	79	88	87	88
Total	**504**	**563**	**578**	**585**	**595**	**597**	**603**
Trade Union Membership							
Private	396,663	422,299	432,867	448,781	420,821	418,381	425,638
Government	226,823	236,524	284,008	295,132	298,000	296,139	309,207
Statutory Bodies/Local Authorities	82,767	75,214	68,006	67,559	69,798	68,139	66,106
Total	**706,253**	**734,037**	**784,881**	**811,472**	**788,619**	**782,659**	**800,951**
Total Employment	7,645,000	9,321,700	9,535,000	9,542,600	9,840,000	9,986,600	10,043,700
Union Density	9.24	7.87	8.23	8.50	8.01	7.84	7.97

Sources:
Department of Trade Unions, Ministry of Human Resources (http://www.mohr.gov.my/mohr_key.php, accessed 30 June 2006).
Department of Statistics (2006) *The Malaysian Economy in Brief*, Malaysia, May;
Department of Statistics (2006) *Malaysia Economic Statistics-Time Series 2005*, Malaysia, February.
Note: * Figures are for January to September 2005.
Ministry of Human Resources (1999) Labour and Human Resources Statistics 1994-1998. [35]

The tables above demonstrate very irregular rates of trade union density. It is unfortunate that these fluctuations range within very low figures indicating a need of reformation within the labour laws ensuring concrete protection for employees and elevating their confidence to a point of not being fearful when attempting to form a union of their own. Employers may find it intimidating when acknowledging employee unions as they are afraid of being exploited and losing 'management power' as they may call it but in reality encouraging employee unionisation may be beneficial to their organisations reputation as it portrays the firm to be more liberal and less autocratic with their management style. This may increase the rates of the labour force within the organisation and reduce turnover rates in the long run. An up and running trade union will instil a sense of job security within fellow employees. Hence, the declining turnover rates due to workers feeling safe and equal in their workplace. In addition to the trade union stagnation, union busting seems to be another factor preventing employee unionisation. Union busting occurs when companies or employers commit legal or illegal obstacles that actively prevent and abolish trade union formation.

Union busting was becoming an uprising issue within certain companies alarming the MTUC deputy secretary general A. Balasubramaniam, to call out the Registrar of the Trade Union to level up on the enforcement practices. The case of *Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia v Renesas Semiconductor Kl Sdn Bhd* (2016), looks into the matter of employers threatening the president of a registered trade union to join the organisation's in house union. Wan Noorulazhar, the president of the pro term committee, union of the Kesatuan Elektronik Wilayah Barat Semananjung Malaysia, also happened to be an employee of Renesas Semiconductor KL Sdn. Bhd. The union was registered, and its claims were sent for recognition. Recognition of the union was denied and so began the union busting of the company. Union busting activities included, Noorulazhar being offered the position of president of the in house union if he were to abandon his union, Noorulazhar was demoted to cold storage a position way below his qualifications along with being micromanaged by the Human Resource department and the most degrading union busting activity conducted among them all was the victimisation of union members by reducing wages and incentives.[36] In order for a reduced rate of trade union victimisations, reformations to the labour laws need to be enforced for an increase of employee protection, safety and security.

OVERWORKED AND UNDERPAID EMPLOYEES

Research has shown that Malaysia rates the highest when it comes to employees not getting enough work life balance. A survey conducted by AIA Vitality Malaysia concluded that more than half of the labour force in Malaysia (56%) sleep less than seven hours every night. The survey also proved that Malaysian employees exceed their contracted working hours by up to 15 hours weekly. The EA 1955 clearly stated under section 60(1d), '[e]xcept as hereinafter provided, an employee shall not be required under his contract of service to work more than forty-eight hours in one week'. Adding additional hours to already revised and contracted hours is against the law. Employees may be unaware of this provision under the Act. Hence, they abide by the oppressed rules and regulations of their employers. These regulations may not directly go against contracted terms and conditions but it most certainly has exploited employees by imposing impossible deadlines forcing employees to exceed standard working hours.[37] The table below sets out the results of the survey conducted by AIA Vitality Malaysia.

Findings for Malaysia's Healthiest Workplace (2018)	Employee percentage (%)
Employees not getting enough exercise weekly (less 150 hours)	45.9
Employee Obesity	16.6
Employees with musculoskeletal	85
Employee without a balanced diet	91.7
Employees that sleep less than seven hours per night	54.4
Employees with one or more chronic diseases	32
Employees that feel their line managers care about their wellbeing	56[38]

Employees who work overtime have the tendency of developing chronic diseases by 32% as shown in the table above. These diseases include high blood pressure, heart diseases, stroke and many more. Risking employee health factors may affect organisational productivity and efficiency in the long run. It has been reported 12% of employees engage in high levels of depression due to stress inflicted by their employers. Employers should respect employee personal needs and understand how an employee's lifestyle does not solely revolve around their organisational environment.

In view of foreign workers, there have been many accusations of increased death rates due to being overworked. Foreign workers conducting manual labour should be given breaks often as they not only exert physical energy but have been placed in risky working environments. Top industries such as Top Glove have been put under investigations for overworking their foreign employees and exploiting their efforts.[39] The Federal Constitution article 6 provides that 'no person shall be held in slavery.' The term 'no person' explicitly used in the above article reflects that neither local nor foreign workers shall be held in slavery or any form of servitude. Likewise, all forms of forced labour is also prohibited. Slavery and forced or compulsory labour is also prohibited in the Penal Code[40] sections 370 and 374, respectively. Further, art 8(1) provides that 'all persons are equal before the law and entitled to the equal protection of the law.' The word 'all persons' would necessarily include the foreign workers. It should therefore be recognised and accepted that all workers, local or foreign, should be treated with fairness, dignity and equality.

To top it off, foreign workers who have been exploited for their efforts have also been underpaid. In May 2017, Human Connection HR (M) Sdn Bhd was fined RM14,400 for not abiding by the minimum wage law, which states that a minimum of RM1000 should be paid to all employees working in Peninsular Malaysia. Three Nepalese workers were underpaid for the first three months of their contract. It was mentioned that the company was going through financial constraints. The case was further argued that employees should not face repercussions as such.[41] These workers are entitled to their salaries and employers should respect such entitlements. When analysing employees being underpaid in Malaysia, a study released by Bank Negara Malaysia (BNM) provides that Malaysian employees are underpaid compared to employees in benchmark economies.[42] When comparing cases of overworked workers to the rate of underpaid workers the scale seems to be imbalanced as workers have not been paid to the extent they deserve. Amendments to the EA 1955 should aim to balance this scale and not allow employers to abuse employee dedication.

It must be emphasised that wages payable must be adequate to meet the basic needs of the worker and his or her family. In practice however the level of wages is generally set by market force (supply and demand) or by a collective agreement. In fact, many workers are paid substandard wages. Realising this, many countries have introduced minimum wage laws that prohibits the employer from engaging workers for less than a given hourly, daily or monthly minimum wage. The minimum wage law is aimed at increasing the standard of living of workers and reduces poverty, among others. The minimum wage however varies in countries on account of age, region, occupation, industry, and job tenure, among others. In Malaysia, the Minimum Wages Order 2016 makes it mandatory for employers to pay its employees basic wages that meet the minimum wages requirement stipulated in the Order.

Undeniably, the wages of an employee is a fundamental factor in a contract of employment. It must be paid within the period specified by the law or as agreed to by the parties. An employer cannot delay the payment of wages to the employees. The EA 1955 provides *inter alia*, that wages must be paid not later than the seventh day after the last day of any wage period the wages. Failure of the employer to pay the wages to its workers when it falls due may result in criminal prosecution and on conviction the employer can be subject to a fine of up to RM10,000. The non-payment of wages would also constitute a fundamental breach of the employment contract where the affected worker may resign from employment and have his resignation treated as a constructive dismissal because the employer had repudiated an essential term of the contract.

Further, no employer may deduct any portion of an employee's wages except when it is authorised by the law or where the employer has written authorisation from the employee for such deduction. Any unilateral deduction of an employee's wages would amount to a significant breach going to the root of the contract. The employee in the foresaid circumstances was placed in a position that he had no choice but to leave the company and thereafter allege constructive dismissal.

CURRENT LAWS IN THE EYES OF THE HUMAN RESOURCE PRACTITIONERS The Effectiveness of the Dictionary Definition of Labour Law

After interviewing a few human resource practitioners, it can be concluded that the dictionary definition of labour law is not very effective. Most interviewees' responses were that it is too broad and general to be of use. It is also believed to be insufficient and unspecified context that perhaps does not apply to all countries. This is as it is mostly only used as a base source by every company to act fairly towards employees especially when recruiting new employees. However, one of the interviewees found the dictionary definition of labour law to be very effective. In fact, one interviewee stated that the definition of labour law is explained in detail but it is hard for people to understand especially those who do not study the legal terms. There may be a need to have an easy version on the definition so that all level of employees is able to understand the definition and would not lead to confusion.

Moreover, the interviewees also stated that the concern in labour law is everything regarding to the employment.

Perception on Independent Contractors

Collectively, respondents of the interview perceived independent contractors as self-made employees who are not obligated by the labour laws of the country. One respondent found independent contractors to be useful in the hospitality industry such as laundry and housekeeping services. Respondents were aware of how independent contractors were not covered by the EA 1955. There were a couple of respondents who were unaware of such contractors. These respondents had no input and may have been confused as to what the roles conducted by an independent contractor. A better understanding was needed to make further comments.

Effectiveness of Employee Protection under the Labour Laws

Majority of respondents interviewed agreed upon employees having effective protection under the labour law especially in relation to salaries and wages. It was then said that employee's personal data are highly respected and are kept private and confidential. One of the respondents added that there were about at least 15 to 20 enactments that cover employee protection under the labour law. If there were to be any misconduct of personal data leakage, employees would be able to report to the Ministry of Human Resources. Further in relation to trade union the respondents believed that the trade union in Malaysia is not very effective in enhancing the relationship of employer and employees. The bargaining strength would be compatible only if the employees are represented by a trade union who would be able to bargain effectively terms that would beneficial to both employer and employees.

When asked, most issues faced by employees were directed towards the salaries and wages. It was concluded that employees were not very satisfied with the management of their salary/wages and allowances. Some respondents felt that the EA 1955 was very outdated and should be amended as soon as possible in order to correlate with current employment trends. As a result, employees find the Act to be far from satisfactory.

What to be Included in the New Laws?

Respondents had many variations of what they would like to reform in the EA 1955. Better working hours was suggested by an interviewee as he felt employees were overworked and amendments to further protect employee exploitation should be acted upon immediately. Another respondent added her opinions on upskilling and reskilling employees for improved efficiency and productivity of the Malaysian workforce. It was also mentioned that the protection of labour data is also not very effective in Malaysia as the data may leak due to improper use as a result of the weaknesses in the human resource department. Furthermore, it was suggested that the EA 1955 should cover all levels of employees or provide consultation to those not covered under the Act. Several respondents vouched for anti-discrimination laws to be added into the Act. Discrimination seems to be a huge subject that needs to be addressed and reformed as many workforce issues tend to escalate when discriminatory disputes are left unresolved. The existing law on anti-discrimination is not adequate enough to stop the people's behaviour in discriminate. A more comprehensive law should be enacted and the workforce should be educated on the law relating to anti-discrimination at the workplace. In other words, the enhancement for Malaysia's law should be stronger against the discrimination.

One respondent mentioned that many of the provisions present in the EA 1955 should be removed as it takes up unnecessary space. He additionally recommended the that the EA 1955 should investigate laws regarding paternity leaves and amend maternity leaves. Moreover, the Act should extend the protection for employee with salary more than RM 2000, ie, there should be no limit of salary in order to fall under the protection of the Act. Reform for the EA 1955 should be made to the definition of employee in section 2 and the first schedule as well as protection under sections 69 and 69B.

MUCH ADO WITH THE TRANSFORMATION OF CURRENT LABOUR LAWS

Shakepeare wrote about much ado about nothing. However in the current scenario, certainly there are wealth of transformation that needs to be looked into with 60 over years of archaic laws. The discussion below has been gleaned by the above respondents hence, the provocative treatments of stakeholders in this law is very much needed to be looked into.

Gender Discrimination

It is undeniable, gender discrimination is often a problem is almost all companies not only in Malaysia but all around the world. This discrimination has to stop with the power of the youth today. Reformations should be done and the thoughts of the younger generation should be taken into consideration as they are more in trend with the current lifestyle. The first step for the formation of gender discrimination is to recondition the recruiting process. Employers should analyse their recruitment process from time to time. This will help them keep count and balance out of the amount of male and female employees they have hired. However, employers have to make sure the number of male and female employees that are recruited are fairly placed at the same level being it junior or senior level. Only then, can gender discrimination be prevented. Hiring the exact amount of females in lower administrative roles and males in the higher administrative level does not help in the reformation process of gender discrimination.

Another way to overcome gender discrimination is by conducting regular pay audits. Results has said that for every RM100 earned by a male employee, a female employee were to earn a slightly lower figure summing up to RM93.80. Companies should list all employees and their roles with their salary to be able to have a clearer look on employees with the same responsibilities and work being done but are paid different amount of salary. This way, they'll be able to notice the pay gap between male and female employees even when they carry out the same responsibilities. Conducting this regular pay audits can help overcome gender discrimination effectively and efficiently.[43]

Overworked and Underpaid Employees.

Overworked and underpaid employees are one of the many reasons Malaysia's employees are in the top rank for having an imbalance work life. This imbalance work life they carry out on a daily basis can lead to many health complications in life. Therefore, it is very important for employees to have their stand when it comes to their extended work hours. As an employee, one of the many ways to overcome this issue of overworking and being an underpaid employee is by voicing out. Employees should be able to voice out when they have too much on their shoulders. On the other hand, the employer has to be understanding and willing to listen to their employees. A good and understanding relationship between employees and employer creates a happy work environment which can prevent employees from being overworked as well. Employers should take responsibility in looking out for the employees who have been working very hard and make sure they are getting paid enough for the amount of work that is being put in. This way, employees will not feel the stress of being overworked as they will be receiving the fair amount of pay for the amount of work they have put to charge.

Another way to overcome this issue is by making sure the management has accountability. Employers should analyse the work that is given to their employees before actually giving them the full responsibility. Employers should always make sure the work given is manageable by employees and not overloaded. Overloaded work should be taken into concern by employers to avoid frustration from the workers. Therefore, companies should carry out regular work audits as this will help them have an overall view employees. Employers should also make sure the work given to their employees is based on the position that they are at. Therefore, if all companies were to manage their employees responsibly, employees will not feel overworked and underpaid.

Abolishing trade union victimisation

As discussed under issues faced by employees in the workforce, trade union victimisation has occurred way too many times in Malaysia. When interviewed every respondent had the same response as to how ineffective trade unions are in Malaysia. The EA 1955 should raise the bar on its protection acts against the formation of trade unions. These acts must then be specified on how employers should be penalised for misconduct before and after formation of trade unions. When analysed, Sweden happens to be a country that strongly encourages trade unions among their employees.[44] Trade unions in Sweden are considered to be a part of employment procedure as most employees join and form trade unions. Sweden has one of the highest rates of trade union memberships coming in at 70% employee membership equating to 3.5 million trade unions across the nation. Trade unions or as they call it in Sweden, Union Confederations, deal with several aspects of the organisational structure looking into manual labourers, non-manual labourers and unemployed labourers. Such admirable enforcements should be cultivated and instilled in Malaysia. Further research explained the mutual respect exchanged between the federation and the unions formed. The EA 1955 should take notice of major reformations and amendments that need to be acted upon to achieve ultimate unity regarding matters of industrial disputes. Noteworthy is the The Industrial Relations (Amendment) Bill 2019 ('IR Bill') that proposed progressive changes in the dispute resolution process in regards to unfair dismissal claims and union disputes. This Bill was supposed to come into force in 2020[45].

Inclusion of the Third Gender

The third gender is best defined as a category of individuals that do not identify themselves as male or female. They may want to be identified as both genders and neither. The concept of the third gender focuses on removing gender labels among individuals of such categories. The EA 1955 comprises of much generalised laws protecting the many forms of discrimination that goes on within the workplace. The Act does not comprise of a section that is fully subjected to laws pertaining to anti-discrimination rights. The third gender out of all genders may be the most discriminated due to society being unaccepting to the concept of unlabelled beings. Employees of the third gender often go through discrimination of employment and workplace bullying. A study conducted by the ILO stated that, the third gender may suffer the highest degree of discrimination in employment. Employers may feel the need to reject applicants of the third gender as they would not want to be responsible for jeopardising the reputation of the organisation. Therefore, a reformation on the inclusion of the third gender should also be considered to prevent such circumstances. When researched, the Malaysian labour laws are known to be a little outdated compared to the labour laws of many other nations. For instance, Germany has recently amended their labour laws prohibiting gender discrimination in article 3.3 of the Constitutional Law.[46] The amendment was made to raise awareness of the many levels of diversity that is evolving in a much bigger scale. Germany is one of the many countries that have strived for the third gender anti-discrimination rights. Other countries aside from Germany that have enforced similar laws on third gender anti-discrimination rights includes Australia, New Zealand, Canada, Nepal and India. India, being a very religious country, has accepted the third gender as an acknowledgment of human rights. Justice K.S Radhakrishna Panicker, former judge of the Supreme Court of India, has quoted '[r]ecognition of transgenders as a third gender is not a social or medical issue but a human rights issue'.[47] Besides the discrimination factors, inclusion of the third gender may bring certain benefits to booming or blooming organisations as it expands and diversifies the employment talent pool. Inclusion of the third gender will also educate employers, supervisors and managers on upgrading diversity management strategies.

It is worthwhile to quote the observation by Liaquat Ali Khan:

> In 2009, the Pakistan Supreme Court delivered a seminal ruling, recognizing the dignity of transgenders and declaring them the third gender under the equal protection clause of the Pakistan constitution. Article 25 states that 'there shall be no discrimination on the basis of sex'.

The Supreme Court noted that transgender persons have been neglected 'on account of gender disorder in their bodies'. They have been denied the inheritance rights as they were neither sons nor daughters who inherit under Islamic law. Sometimes, families disinherit transgender children. To remedy discrimination against transgenders, the Court ordered provincial and federal governments to protect transgenders' gender identification, right to inherit property, right to vote, right to education, and right to employment. The *Qur'an* is clear on genetic determinations by pointing out that Allah is the 'One who shapes you in the wombs as He pleases'.[48] 'All shapes, that is, all physical traits including sexual characteristics and inclinations of a human being, come with the pleasure and permission of Allah. Every child — male, female, or transgender— has the equal blessings of God and there is no justification for parents, courts, or governments to engage in gender-based ill-treatment'.[49]

CONCLUSION — THE NEW THRESHOLD CHANGES

The year 2020 embarked on a positive change for the existing Employment Rules and Laws. New minimum wages came into force whereby it is dependent on the employee's place of work[50]. In addition the government has recommended a 90 days maternity leave that is to taken effect by 2021. These changes shows that The EA 1955 should be heavily reconstructed and reformed as its provisions are not up to date with current and trending social affairs. With this being said, many cases of discrimination have cropped up over the years. Most of them were published on the social platforms of the country. However, none of them were ever really solved as reoccurrence of similar cases often took place within the workforce. For this country to progress and be better, the nation has to be of high income. However, this can only be achieved if Malaysian employers and employees were of great caliber. That is where reskilling and upskilling takes place as mentioned before. In addition to upskilling and reskilling employee performance, firms should make it mandatory for employees and employers to go through the labour laws of Malaysia to reduce issues faced in the workplace. Better knowledge of the EA 1955 will increase work proficiency of a wider scale.

Hopefully with better knowledge comes better understanding of employee rights and increase employee unionisation. The lack of knowledge and importance towards trade unions has brought out many conflicts and unethical decisions that was made explicitly. The TUA should be given equal amount of attention to reduce current rates of disputes held within Industrial Courts. Revising details constraining the progression of the employment act will be of great use as we then can pinpoint areas of reconstruction to form a concrete employment act. By doing so, our nation will ascend to new heights and be viewed globally. Through this, the country may set a rising example to countries of benchmark economies. The country can then flourish in its glory for accomplishing a better future for generations to come.

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