PROTECTION FROM LONG WORKING HOURS AND NO REST DAYS FOR FOREIGN DOMESTIC WORKERS IN MALAYSIA

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Abstract

The increase of economic growth in Malaysia since the 1970s coupled with the reluctance of Malaysians to perform certain jobs categorized as '3D jobs' (ie dirty, difficult, and dangerous) created a demand for cheap labour. This ushered in a greater influx of migrant workers into the country including foreign domestic workers ('FDWs') who have become common-place in many households in Malaysia. Unfortunately, this phenomenon has coincided with a relaxed policy on labour laws to attract foreign investment leading to rampant abuse and exploitation of migrant workers including FDWs in Malaysia. FDWs in Malaysia are extremely vulnerable and are at greater risk to ill treatment by their employers and recruitment agencies due to many different factors such as poverty, limited career opportunities in their home countries, poor educational background, lack of access to legal expertise, and the very nature of their work which is generally conducted out of public view. Abuses against FDWs range from deception, excessive fees, non-payment of wages, illegal deductions, verbal abuse, physical or even sexual abuse. One particular form of abuse that has been understated is the excessive working hours and no rest days which FDWs around the globe, including in Malaysia, suffer from. This article seeks to highlight the problems faced by FDWs in Malaysia with regard to excessive working hours and no rest days, specifically the unfair discrimination which FDWs are subjected to due to their exclusion from labour protections under the Employment Act 1955. This paper will explore the constitutionality of the First Schedule to the Employment Act 1955 which specifically excludes FDWs from Part XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service). Next, this paper will explore other viable protections including international conventions or treaties that Malaysia has ratified which could be utilized to protect FDWs from long working hours and no rest days. Finally, this paper will examine the challenges to access to justice faced by FDWs in Malaysia.

Keywords: Foreign Domestic Workers, working hours, rest days, Employment Act 1955

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I INTRODUCTION

Foreign domestic workers ('FDWs') are the forgotten and unappreciated heroes and heroines in Malaysia and worldwide. They enable the smooth running of the economy where members of society are free to pursue their careers with the comfort of knowing that their homes and loved ones are taken care of. It is a common - yet little publicised - fact that most FDWs are the sole breadwinners in their own nuclear family who remain in their home countries, where, through sheer hard work, they finance the livelihood of their families, including their childrens' education. Although their wages are too low to sustain a decent living, they manage to get by against the odds. Unfortunately, in spite of their tremendous efforts, their work is often underappreciated and undervalued even though they play a critical part in a society's success and well-being.

Legislation and regulations in many countries globally, including in Malaysia, discriminate against FDWs. They are often the subject of abuse and exploitation; some to the extent that it can only be termed as 'modern-day slavery'.[1] FDWs worldwide are regularly subjected to excessive working hours with no rest days, their wages always below the minimum wage scale of countries, and given no overtime pay to boot.[2] Despite the desperate need for protection as long working hours puts the health and safety of FDWs at risk, they are often excluded by local legislation from basic labour protections such as maximum working hours and weekly rest days.[3]

In Malaysia, FDWs are made up almost exclusively of documented and undocumented foreign women[4] who may come from countries such as Indonesia, Philippines, Cambodia, Thailand, Sri Lanka, and India[5] where they face '*intersectional discrimination*'[6] as they are discriminated on multiple levels (ie gender, race and class). Specifically, the Employment Act 1955 ('Employment Act')[7] inexplicably excludes FDWs (in fact, all domestic workers) from basic labour protections that entitle other 'employees' to a maximum work hours

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1 Helen Schwenken, '"Domestic Slavery" Versus "Workers Rights": Political Mobilizations of Migrant Domestic Workers in the European Union', (2017) *The Center for Comparative Immigration Studies (CCIS), University of California, San Diego*. See also Bridget Anderson, 'Migrant Domestic Workers: Good Workers, Poor Slaves, New Connections', (2015) 22(4) *Social Politics: International Studies in Gender, State & Society* 636-652.

2 Malte Luebker, Yamila Simonovsky and Martin Oelz, 'Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection', (2013), (International Labour Organization (International Labour Office), 56-59.

3 Ibid.

4 See 'Case calls for Domestic Workers' Act', (20 May 2020), The Star: 'According to the Human Resources Ministry, there are 129,980 registered domestic workers in Malaysia. Statistics from the International Labour Organisation (ILO) estimate the number of both documented and undocumented migrant domestic workers in the country to be between 300,000 and 400,000'. Retrieved from <https://www.thestar.com.my/opinion/letters/2020/05/20/case-calls-for-domestic-workers-act>.

5 Foreign Domestic Helper (FDH), Immigration Department of Malaysia (Ministry of Home Affairs). Accessed on 4 April 2021.

6 '*Intersectional discrimination*' means 'discrimination on the basis of a combination of protected classes, ie where two or more bases for discrimination are alleged. For example, an entity that is not unlawfully discriminating on the basis of race or gender still may be discriminating against individuals who are, for example, Asian males'. This definition is obtained from the 'Intersectional Discrimination definition', Law Insider. Retrieved from: <https://www.lawinsider.com/dictionary/intersectional-discrimination>.

7 Act 265.

per week (and per day) as well as weekly rest days.[8] This discrimination violates the Malaysian Federal Constitution and the fundamental rights of these FDWs.

Notably, although Malaysia has ratified conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women 1979[9] ('CEDAW') and the International Labour Organisation ('ILO') Forced Labour Convention 1930 (No. 29)[10] which prohibit States to have legislation that discriminates against women and allow forced labour, Malaysia has by and large failed in its obligations towards FDWs. Malaysia has been able to insulate themselves from international obligations through a dualist regime that enables States to ignore international norms even after ratification.[11] Nevertheless, there remains some form of protection for FDWs provided in the Federal Constitution as well as other local legislation and mechanisms.

In this article, the writer will explore the viability of the protections afforded to FDWs in Malaysia in the Federal Constitution as well as other legislation. In particular, the writer will explore the constitutionality of the First Schedule of the Employment Act which specifically excludes FDWs from Part XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service). Finally, the writer will examine the challenges to access to justice faced by FDWs in Malaysia.

II FDWS IN MALAYSIA

A *Regulation of FDWs in Malaysia*

In Malaysia, FDWs are known as a 'domestic servants'[12] who are not citizens of Malaysia; referred to either as a 'foreign domestic servant'[13] (as defined in the Employment Act) or as a 'foreign domestic helper' (as stated by the Immigration Department of Malaysia)[14]. Although foreign domestic servants are recognized as 'employees'[15] under

8 Eleanor Taylor-Nicholson, Renuka Balasubramaniam and Natasha Mahendran, 'Migrant Workers' Access to Justice: Malaysia', (Research Report by Bar Council Malaysia, 2019) 90-91. Retrieved from: https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20(28Nov2019).pdf.

9 United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, which came into force on 3 September 1981.

10 International Labour Organization (ILO), Forced Labour Convention, C29, 28 June 1930, which came into force on 1 May 1932.

11 Jenna Holliday, 'Enhancing Standard Employment Contracts for Migrant Workers in the Plantation and Domestic Work Sectors in Malaysia', International Labour Organization Research Report 2 July 2020). Retreived from: <https://www.ilo.org/asia/publications/WCMS_749704/lang--en/index.htm>. See also: Jaclyn Ling-Chien Neo, 'Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination Under CEDAW', (2013) 35 *Hum. Rts. Q*. 910.

12 Section 2(1) Employment Act states that a 'domestic servant' is 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.

13 Section 2(1) of the Employment Act states that a 'foreign domestic servant' is a domestic servant who is not a citizen or a permanent resident.

14 Foreign Domestic Helper (FDH) (n 5).

15 Section 2(1) of the Employment Act defines an 'employee' as any person or class of persons—
(a) included in any category in the First Schedule to the extent specified therein; or

the Employment Act , they are not entitled to similar protection and benefits as other employees.

An 'employee' under the Employment Act is entitled to a maximum of 48 hours a week work limit, a maximum of eight hours a day with not more than five hours continuous work without a break (section 60A),[16] a weekly rest day in each week (section 60),[17] a minimum of eleven paid public holidays (section 60D),[18] between eight and 16 days of

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

[16] Section 60A(1) of the Employment Act (Hours of Work) provides that 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.

[17] Section 60(1) of the Employment Act (Work on Rest Day) provides that 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.

[18] Section 60D(1) of the Employment Act (Holidays) provides that every employee shall be entitled to a paid holiday at his ordinary rate of pay on the following days in any one calendar year: (a) on eleven of the gazetted public holidays, five of which shall be - (i) the National Day; (ii) the Birthday of the Yang di-Pertuan Agong; or (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; (iv) the Workers' Day; and (v) Malaysia Day; and (b) on any day appointed as a public holiday for that particular year 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; or

(i) any other public holiday referred to in paragraphs (a) and (b),
(ii) the working day following immediately the rest day or the other public holiday shall be a paid holiday in substitution of the first mentioned public holiday.

paid annual leave according to length of employment (section 60E),[19] as well as between 14 and 22 days of paid sick leave according to the length of employment (section 60F).[20]

However, notwithstanding that FDWs are 'employees' under the Employment Act, FDWs are wholly excluded from the above benefits as well as all of Part XII of the Employment Act (Rest Days, Hours of Work, Holidays and Other Conditions of Service).[21] To add fuel to the fire, FDWs do not benefit from minimum wage in Malaysia. They have been consistently excluded from minimum wage orders declared by the government, the most recent being the Minimum Wage Order 2020[22].

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[19] Section 60E of the Employment Act (Annual leave) provides as follows:

(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.

[20] Section 60F(1) of the Employment Act (Sick Leave) provides as follows:

(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 calendar 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.

[21] Jennifer Whelan et al, 'Abused and Alone: Legal Redress for Migrant Domestic Workers in Malaysia' (2016) 6 *Indon. L. Rev.* 1.

[22] Section 2 of the Minimum Wages Order 2020 (Non-application) provides that this order shall not apply to a domestic servant as defined under subsection 2(1) of the Employment Act 1955 [Act 265], subsection 2(1) of the Sabah Labour Ordinance [Cap. 67] and subsection 2(1) of the Sarawak Labour Ordinance [Cap. 76]. Most FDWs earn below the minimum wage in Malaysia and therefore would come under the definition of 'employee' under the Employment Act. It must be noted that notwithstanding that an employee or domestic

B *Why are FDWs Excluded from Specific Labour Protections under the Employment Act?*

The rationale put forward by the Government of Malaysia as to why FDWs were excluded from protection of a maximum work hour limit and weekly rest days are two-fold: (i) that their work is 'exceptional' and (ii) their working hours are too difficult to define, making it impossible to enact legislation for FDWs.[23] This rhetoric is not peculiar to Malaysia and has been used by many countries worldwide to deny basic labour protection to FDWs.[24]

To address this rationale, reference is made to global statistics which show that there have been many countries, primarily developed countries like Australia, France, Germany, Ireland, and the Republic of Korea which have successfully enacted legislation with regard to maximum work hour limit and weekly rest days to protect domestic workers from long working hours.[25] For instance, one research study that examined global and regional data estimated that 'a total of approximately 20.9 million domestic workers are entitled to the same limitation of their normal weekly hours as other workers' and with regard to legislation for weekly rest, 'almost half of all domestic workers (25.7 million, or 49.0 per cent of the total) are entitled to a weekly rest period of at least 24 consecutive hours'.[26] This shows that the rationale put forward against legislation for domestic work in Malaysia are somewhat baseless. Legislation for domestic work is entirely feasible.

C *Working Hours of FDWs in Malaysia*

FDWs have one of the longest and most unpredictable working schedules. Due to the nature of their work they are constantly required to be on the beck and call of their employers at any time of the day and night. Therefore, on any given day a domestic worker is subjected to 'on-call duty' of 24 hours a day.[27] Furthermore, due to the fact that most FDWs in Malaysia live with their employer, this intensifies their long working schedule even further.[28] For these live-in FDWs, there is no delineation between working hours and non-working hours or rest periods.

An ILO study in 2016 concluded that on average an FDW in Malaysia works 14 hours a day with many FDWs subjected to 'on-call duty' or being on 'stand-by' 24 hours per

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worker may earn more than the statutory limit of RM2,000.00 meaning they would not come under the definition of 'employee' as provided under Employment Act, section 7 of the Employment Act provides that the terms of employment must not be less favourable than the provisions of the Employment Act (which includes the provisions on working hours and rest days).

[23] See New Straits Times, June 23, 1987: 'We will have problems defining, for instance, their [domestic workers] hours of work and the value of their accommodation by employers if they were to be included in the Employment Act' (Minister of Labour). See also Christine BN Chin, 'Walls of Silence and Late Twentieth Century Representations of the Foreign Female Domestic Worker: The Case of Filipina and Indonesian Female Servants in Malaysia', (1997) 31(2) *International Migration Review* 353-385.

[24] Malte Luebker (n 2).

[25] Ibid 131-134.

[26] Ibid 62.

[27] Claire Hobden, Inclusive Labour Markets, Labour Relations and Working Conditions Branch (INWORK), 'Working Time of Live-in Domestic Workers', (2013) *International Labour Organisation*.

[28] Eleanor Taylor-Nicholson (n 8).

day.[29] Further, another study showed that FDWs in Malaysia worked an average of 65.9 hours a week in 2008 (the highest of all countries surveyed).[30] This may be considerably more in some cases where FDWs are required to work constantly even for different family members of the employer, and with only limited hours of sleep.[31]

D *Long Working Hours and Impacts on Health*

The World Health Organization ('WHO') has categorically stated that 'working for 55 hours or more per week is a serious health hazard'.[32] Even in Malaysia, the medical community has started to voice their concerns over the negative health impacts brought on by long working hours.[33]

There have been numerous studies and well documented research which concluded that long working hours negatively impacts the health of an individual. One such study is a recent global research which found that '745,000 people died from stroke and heart disease associated with long working hours in 2016'.[34] Long working hours in this study was considered to be 41 to 48 hours, 49 to 54 hours, and over 55 hours per week whereas normal working hours were listed as 35 to 40 hours per-week. From these figures, it is clear that FDWs in Malaysia work long hours and are in danger of health issues arising from long working hours.

Specifically with regard to FDWs, the common health impact that have been identified by research studies are fatigue, effects on psychological health, stress, effects on physical health, risk to safety and accidents.[35]

III UNCONSTITUTIONALITY OF THE EMPLOYMENT ACT

A *Protection under the Federal Constitution for FDWs*

In Malaysia, the Federal Constitution confers upon all citizens fundamental rights and liberties which are enshrined under Articles 5 to 13 of the Federal Constitution. Provisions which are also extended to all 'persons' (and not just citizens) include: (1) the right to life

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29 Holliday (n 11).

30 Malte Luebker (n 2).

31 Eleanor Taylor-Nicholson (n 8).

32 'Long Working Hours Increasing Deaths From Heart Disease and Stroke: WHO, ILO', (17 May 2021), *World Health Organization*. Retrieved from: <https://www.who.int/news/item/17-05-2021-long-working-hours-increasing-deaths-from-heart-disease-and-stroke-who-ilo>.

33 Imran Ariff, 'Avoid Overworking Employees to Safeguard Their Health, Bosses Told', (22 May 2021), Free Malaysia Today (FMT). Retrieved from: <https://www.msn.com/en-my/news/national/avoid-overworking-employees-to-safeguard-their-health-bosses-told/ar-AAKfyIp>.

34 Frank Pega et al, 'Global, Regional, and National Burdens of Ischemic Heart Disease and Stroke Attributable to Exposure to Long Working Hours for 194 Countries, 2000–2016: A Systematic Analysis from the WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury' (2021), *Environment International* 106595.

35 Amelita King Dejardin, 'Working Hours in Domestic Work', Domestic Work Policy Brief No 2, International Labour Organization, 19 May 2011. Retreived from: <https://www.ilo.org/travail/info/publications/WCMS_156070/lang--en/index.htm>

(Article 5) which has been given a 'prismatic' interpretation by some judges,[36] thereby conferring upon persons unenumerated rights which would encompass health and safety as well as the right to private life and family; (2) prohibition of slavery (Article 6) which prohibits forced labour and includes the right to choose one's employer;[37] (3) equality before the law (Article 8) which guarantees 'persons' from being unfairly discriminated against; and (4) freedom of religion (Article 11) which includes the right to practice his or her religion,[38]

FDWs, despite not being citizens, are not excluded from these provisions of the Malaysian Federal Constitution as the word 'persons' are used in Articles 5, 6, 8 and 11 of the Federal Constitution. This view was supported by the Industrial Court case of *Ali Salih Khalaf v. Taj Mahal Hotel*[39]. This expansive interpretation was similarly echoed in the Federal Court case of *Ahmad Zahri Mirza Abdul Hamid v. Aims Cyberjaya Sdn Bhd*[40] where the court held *inter alia* that 'all workers should be treated with fairness, dignity, and equality without distinction whether they were local or foreigners' which is in consonant with Article 8(1) of the Federal Constitution that all persons are to be treated equally before the law. Hence, FDWs are equally protected by the provisions of the Federal Constitution on fundamental liberties that includes Articles 5, 6, 8, and 11.

However, there are limitations to these protections as was pronounced by the Federal Court in the case *of Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor*[41] which opined that; (i) any contravention of the rights and liberties in the Federal Constitution does not extend to the infringement of an individual's legal rights

[36] See *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 MLJ 281 [15] where Gopal Sri Ram JCA (as he then was) stated, 'the fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit'. See also *Lee Kwan Woh v. PP* [2009] 5 MLJ 301 [10-11] where Gopal Sri Ram FCJ stated that, '...In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art 5(1)…'

[37] See *Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors* [2000] 4 MLJ 107 [12] where Gopal Sri Ram JCA (as he then was) stated, 'In accordance with settled principles of constitutional interpretation, Art 6 must be given a broad and liberal construction… By its spirit and intendment it vests in an employee the right to be employed by an employer of his choice…That is because compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour…'

[38] See *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors* [2006] 4 MLJ 605 [16] where Abdul Hamid Mohamad FCJ stated, '...Practice may not be an integral part of the teaching of a religion, in the Islamic sense, it may be a "sunat" eg, performing the "sunat" prayers…However, it is not right to prohibit practice of religion…'

[39] [2014] 2 MELR 194 [10]. In this case, the Industrial Court stated as follows: '…The court agrees with the sentiments that no persons, no human being should ever be illegal. Of the two categories of migrant workers in our country namely documented and undocumented, the latter category, that is those without work permits, passes or visas that is required by law before a migrant worker can work, is nevertheless equal before the law as art 8 of the Federal Constitution uses the word "persons" and not "citizen". Therefore rights guaranteed by it is equally extended to all persons including migrant workers of both categories…'

[40] [2020] 5 MLJ 58 [83].

[41] [2005] 3 MLJ 681 [18].

by another individual and is limited to contravention of rights by a public authority;[42] and (ii) Article 8(1) only applies to persons within the same class. Notwithstanding this decision, some jurists argue against the Federal Court's interpretation in holding only a 'vertical effect'[43] to Article 8 as too narrow. They argue that this narrow interpretation has caused significant hardship especially for women who are unable to seek protection from gender discrimination in private sectors.[44]

Having said that, it is submitted that the long working hours and no rest days that FDWs are subjected to have violated Articles 5, 6, 8 and 11 in the following ways:

(a) they are unfairly discriminated from basic labour protections under the Employment Act;
(b) FDWs are not able to have a private life distinct from working life affecting right to family;
(c) FDWs are unable to have the choice of their employer because documented workers who have entered Malaysia to work are required to work only for the employer who brought them into the country. The work permit is valid for only one year which can be renewed annually for up to three years but once the employer terminates their contract with the FDW, they are immediately subject to arrest and deportation as they are not allowed to secure a job with a different employer.[45] Work permits are also renewed by the employer or recruitment agency themselves.[46] Further, passports of the FDWs are often kept in the custody of the employer or recruitment agency resulting in a huge power imbalance where the FDWs have no other option but to comply with directions of their employer or risk arrest and even deportation if they were to change employers;[47]
(d) the health and safety of FDWs are put at grave risk; and
(e) they are unable to practice their religion due to prolonged working hours. In Malaysia and Singapore numerous instances have been reported by the Human Rights Watch where domestic workers were prevented from practicing their religion freely. For example, Christian FDWs were prevented from attending church services, and

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42 Ibid, [13] where it was held: 'We took time to examine this allegation carefully and we found that it is simply not possible to expand the scope of art 8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual' s legal right by another individual. Further, the reference to the 'law' in art 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.'

43 'Vertical effect*'* is when constitutional law provides remedies to an individual where their rights are contravened by a public authority and not by a private entity. See M Chee Din, H Rahmat and R Mashudi, 'Pregnancy and Discrimination: Effect of the Case *Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia and Others*', (2011), 19(2) *International Journal of the Computer, The Internet and Management* 29-33.

44 Ibid. See also Neo (n 11).

45 Philip S Robertson Jr, 'Migrant Workers in Malaysia - Issues, Concerns and Points for Action', (2009), *Fair Labor Association* 8-9.

46 Ibid.

47 Sri Wahyono, 'The Problems of Indonesian Migrant Workers' Rights Protection in Malaysia', (2007) 2(1) *Jurnal Kependudukan Indonesia* 27-44.

Muslim FDWs were not allowed to fast and conduct their daily prayers.[48] Further, it is also common for recruitment agents to require that the FDWs stop praying, and confiscate holy books as well as other prayer items.[49]

For the purposes of this article, the writer will only elaborate on the infringement under Articles 5(1), 11 and 8 (1) of the Federal Constitution. The focus of this article however will be primarily on the infringement under Article 8(1) of the Federal Constitution where FDWs are unfairly discriminated against by the exclusion from basic labour protections under the Employment Act which all other employees are entitled to. The writer submits that a legitimate case can be made that the exclusion of FDWs from basic labour protections under Part XII of the Employment Act is unconstitutional as it unfairly discriminates against FDWs who are subjected to 'intersectional discrimination'.

B *Infringement under Article 5(1) of the Federal Constitution*

Article 5(1) of the Federal Constitution provides that 'No person shall be deprived of his life or personal liberty save in accordance with law', otherwise known as the 'right to life'. Cases such as *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal*[50] have also held that this fundamental liberty must be read widely and interpreted liberally. Further, in the case of *Sivarasah Rasiah v. Badan Peguam Malaysia*[51], Gopal Sri Ram FCJ opined that Article 5(1) would encompass other rights as well such as right to privacy. Therefore, FDWs' right to private and family life are protected under the Federal Constitution.

However, these rights are regularly abused by employers as it is common place for FDWs to be under constant supervision and their movements severely limited. There have also been instances where employers use their children or neighbours to report on the activities of the FDWs.[52]

C *Infringement under Article 11 of the Federal Constitution*

As discussed in the paragraphs above, the FDWs' right to practice their religion has been curtailed and restricted even to the extent of confiscation of holy books and prayer materials of the FDWs.[53] Article 11 of the Federal Constitution enshrines the right to freedom of religion which includes practicing one's religion as held in the case of *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors*.[54] It has been reported that one of the most common complaints by Indonesian FDWs are that they have been prevented from

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48 Human Rights Watch, 'Swept Under the Rug : Abuses Against Domestic Workers Around the World', (27 July 2006), *Human Rights Watch*. Retrieved from: <https://www.hrw.org/report/2006/07/27/swept-under-rug/abuses-against-domestic-workers-around-world>.

49 Ibid.

50 [2000] 3 MLJ 281.

51 [2010] 2 MLJ 333.

52 Chin (n 23).

53 'Swept Under the Rug: Abuses against Domestic Workers Around the World' (n 46).

54 [2006] 4 MLJ 605.

conducting their five daily prayers and having to handle as well as to eat pork contrary to the tenets of their religion.[55]

D *Intersectional Discrimination against FDWs : Infringement under Article 8(1) of the Federal Constitution*

Firstly, parallels can be drawn from the landmark South African decision of *Mahlangu and another v. Minister of Labour and others*[56] with the experience of FDWs in Malaysia with regard to their exclusion from basic labour provisions. The court in this case held that domestic workers in South Africa faced 'intersectional discrimination'[57] and were unfairly excluded from the definition of 'employee' in the Compensation for Occupational Injuries and Diseases Act ('COIDA') which meant that domestic workers were unable to make a claim for compensation under the COIDA.

The significance of this case is that; (1) the Court recognised that domestic workers in South Africa suffered from 'intersectional discrimination' under section 9(3) of the Constitution (Equality of Law);[58] and (2) the exclusion of 'domestic workers' from the meaning of 'employee' in the COIDA was unconstitutional as it discriminated against domestic workers. Although the distinction in the COIDA could be argued to be a 'reasonable classification' scenario as it refers to a particular category of workers and would not on its face infringe the equality of law principle, the Court took into account the historical and contemporary marginalisation of domestic workers due to intersectional factors that contribute to the discrimination of domestic workers.[59]

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[55] Wahyono (n 47).

[56] (CCT306/19) [2020] ZACC 24. This is a South African case where a domestic worker, Ms Mahlangu who had been employed by the same family for 22 years drowned in her employer's pool whilst performing her duties as a domestic worker. Subsequently, her daughter with the assistance of the South African Domestic Service and Allied Workers Union (SADSAWU) made an application to the High Court of South Africa to, *inter alia*, declare section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act as unconstitutional as it purports to exclude domestic workers employed in private households from the definition of 'employee'.

[57] See Shreya Atrey, 'Beyond Discrimination: Mahlangu and the Use of Intersectionality as a General Theory of Constitutional Interpretation', (2021), *International Journal of Discrimination and the Law* 13582291211015637: 'Intersectionality is considered not just at the point of the discrimination inquiry to address intersectional discrimination based on multiple grounds under section 9(3) of the Constitution, but as a theory which guides the interpretation of all rights per se'.

[58] Section 9 (Equality of Law) of the Constitution of Republic of South Africa, 1996 provides as follows:
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) …
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[59] *Mahlangu* (n 54) [90], where the Court stated that, '...Domestic workers experience racism, sexism, gender inequality and class stratification. This is exacerbated when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes…'. Also see at [93] where Court further held '…In addition, as I will demonstrate below, these various grounds of discrimination intersect, thus rendering domestic workers amongst the most indigent and vulnerable members of our society. There is no doubt that although the distinction in COIDA could be said to refer to a category of worker which, on the face of it, would not trigger a section 9(3) enquiry, the same cannot be said of the historical and contemporary marginalisation of domestic workers, and the various listed grounds of discrimination that intersect where discrimination is made between domestic workers and other workers…'

Similarly, in the context of Malaysia, the experience faced by FDWs attract the same type of intersectional discrimination on the basis of gender, race, and class. The historical marginalisation of FDWs in Malaysia is quite apparent and it is glaringly represented by numerous laws like the Employment Act that specifically excludes FDWs from basic labour protection.

It is evident from the discussion above that long working hours, no rest days and being on 24-hour on-call duty infringes the fundamental rights and liberties of FDWs. Furthermore, as long working hours have been established by numerous studies to be a serious health hazard, FDWs' health and right to life are being drastically violated.

It is patently clear that the Government has discriminated against FDWs in Malaysia and that the First Schedule to the Employment Act which excludes FDWs from Part XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service) is inconsistent with the Federal Constitution and unconstitutional. Hence, judicial review can be sought to invalidate the contravening sections in the Employment Act.

IV PROTECTION UNDER INTERNATIONAL LAW

A *International Law in Malaysia*

Malaysia has ratified several international conventions and treaties including some which are relevant to migrant workers such as; (1) Universal Declaration of Human Rights (UDHR); (2) Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW); (3) ILO Forced Labour Convention, 1930 (No. 29); (4) Equality of Treatment Convention (Accident Compensation), 1925 (No. 19); and (5) Minimum Wage Fixing Convention, 1970 (No. 131).[60]

Unfortunately, several specific conventions catered to domestic workers' rights have not been ratified by Malaysia, the most notable being the Domestic Workers Convention, 2011 (No.189). [61]

Having said that, the ratification of CEDAW (regardless of reservations) is a silver lining. It has several notable provisions which are significant to the protection of FDWs in Malaysia and their right to equal protection from long working hours, *inter alia*: (i) State Parties to adopt legislation to prohibit discrimination against women which includes modifying or abolishing existing laws, regulations, customs and practices which constitute '*discrimination against women*'[62] (Article 2);[63] (ii) State Parties to ensure

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[60] Holliday (n 11).

[61] See, eg, (1) Migration for Employment Convention (Revised), 1949 (No. 97), which includes the ILO Migration for Employment Recommendation (Revised), 1949 (No. 86); (2) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); and (3) Domestic Workers Convention, 2011 (No.189). See also Holliday (n 11).

[62] Article 1 of CEDAW provides that for the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

[63] Article 2 of CEDAW provides that States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work (Article 11(d));[64] and (iii) State Parties to take all appropriate measures in the field of employment to ensure the right to protection of health and to safety in working conditions (Article 11(f)).[65]

Further, the CEDAW Committee has defined gender-based violence as a practice or abuse that disproportionately affects a woman's ability to enjoy their basic rights and this would constitute discrimination under CEDAW.[66] From this definition, it is evident that the exploitative conditions vis-à-vis long working hours with no rest days that FDWs face can be characterized as gender-based discrimination.[67] To date, Malaysia has failed in its CEDAW obligations to address these abuses levied upon FDWs by not modifying its legislation and regulations to protect FDWs from long working hours. Sadly, Malaysia like many dualistic States claim that they are not bound by these provisions.

B *Applicability of CEDAW in Malaysia*

The applicability of CEDAW in Malaysia was considered in the case of *Noorfadilla Bt Ahmad Saikin v. Chayed Bin Basirun & Ors*[68] where the High Court declared that CEDAW was binding on Malaysia and had the force of law. This meant that Malaysia was obliged to follow the provisions of CEDAW in interpretating Article 8(2) of the Federal Constitution.[69] This decision had the potential of revolutionising womens' rights in Malaysia as it had the effect of expanding the rights of women significantly. However,

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(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and

(g) To repeal all national penal provisions which constitute discrimination against women.

64 Article 11(1)(d) obligates all States Parties to ensure the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

65 Article 11(1)(f) obligates all States Parties to ensure the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

66 Alice Huling, 'Domestic Workers in Malaysia: Hidden Victims of Abuse and Forced Labor', (2011) 44 *NYUJ Int'l L. & Pol.* 629.

67 Ibid.

68 [2012] 1 MLJ 832

69 Ibid [25] where it was held that, 'CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in *Mohamad Ezam's* case (supra), it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW as evidenced in the letter

subsequently in the case of *Airasia Berhad v. Rafizah Shima Bt Mohamed Aris*[70], the Court of Appeal unequivocally reiterated the 'four-walls' approach by declining to consider international obligations and stated that CEDAW is not binding on Malaysia because it has not been transformed into local legislation.[71]

Notwithstanding the decision in *Airasia Berhad,* it is submitted that this case does not expressly overrule the decision in *Noorfadila* as the nature of these two cases are different. Article 8(2) was applicable in *Noorfadila* because a public authority was involved whereas in *AirAsia Berhad*, the parties were private. Therefore, in interpreting Article 8(1) with Article 8(2) of the Federal Constitution (which was amended after the ratification of CEDAW to include the word 'gender'); there is jurisprudence in favour of using CEDAW's provisions in expanding the interpretation of Article 8 which could ultimately support the argument that the exclusion of FDWs from basic labour protections under the Employment Act has violated Article 8(1) read together with Article 8(2) of the Federal Constitution.[72]

V OTHER PROTECTION FOR FDWS

A *Protection under Contract Law*

The fact that legislation sets no limits on working hours or provide weekly rest days for FDWs does not *ipso facto* mean that FDWs are prevented from negotiating terms for maximum work hours or weekly rest days into their agreements or employment contracts. FDWs are at liberty to insert terms to protect them from long-working hours and no rest days but face a number of significant obstacles in this regard.

Firstly, most FDWs are unaware of the existence of their employment contract let alone the terms stated in their employment contract.[73] This is due largely to the methods of recruitment of FDWs and the recruitment mechanisms that are in place where the contracts of employment are used primarily as an immigration mechanism.[74] Other factors include the lack of education or access to legal expertise possessed by these FDWs.[75]

Secondly, even if the FDWs were able to contract terms that provide maximum working hours and rest days into their contract, they face an uphill task in enforcing these contractual terms as the legal and enforcement process are time-consuming and burdensome.[76] If the FDWs initiate a claim, the FDWs' contract could be terminated

from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010'.

70 [2014] MLJU 606.

71 Ibid [37] and [41] where the Court of Appeal held that, 'In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation' and 'The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the Executive possesses the treaty-making capacity while the power to give effect domestically rests with Parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by Parliament'.

72 Neo (n 11). See also Chee Din, Rahmat and Mashudi (n 43).

73 Eleanor Taylor-Nicholson (n 8).

74 Holliday (n 11).

75 Eleanor Taylor-Nicholson (n 8).

76 Ibid.

by the employer that would leave them in a state of 'limbo'. They would be unable to pursue employment with a different employer and will be forced to await the outcome of the claim. If their permit is revoked they could be subjected to arrests and deportation.[77] Further, if the FDWs initiate a claim, the FDWs will need to apply for a 'Special Pass'[78] and would have to somehow finance the claim whilst paying for their daily living expenses without having a job. This will often prove to be overwhelming and insurmountable for FDWs.[79] This likely outcome indubitably deters many FDWs from pursuing claims such as this.

B *Bilateral Memoranda of Understanding*

Bilateral Memoranda of Understanding ('MOUs') can potentially provide some protection for FDWs with regard to having a maximum work hour limit and weekly rest days. There have been several countries such as Nepal, Sri Lanka, Bangladesh, Pakistan, India, Vietnam , Indonesia, Philippines and Cambodia that have negotiated MOUs with Malaysia in relation to FDWs.[80] However, only the Philippines have actually included provisions to protect FDWs from long working hours ie maximum daily hours, at least eight hours of daily rest, 15 days of annual leave, and public holidays.[81]

The utilization of MOUs has not been successful and studies show that it does not result in any fundamental change for FDWs as not much weight is placed on MOUs in labour practices.[82] It has been stated that MOUs are mostly used as an immigration mechanism rather than a viable solution for labour grievances.[83]

Nevertheless, the writer submits that if there are contractual terms within the employment contract that protects FDWs from long working hours, this remains a significant protection that can be pursued by FDWs. However, the writer acknowledges the obstacles of access to justice faced by FDWs in this regard.

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77 See Robertson Jr (n 45) 8-9: 'Documented migrant workers who have entered Malaysia to work are required to work only for the employer who brought them into the country. Work permits are good for one year, and can be renewed annually for up to three years'.

78 Ibid, 7. A 'Special Pass' is a process that allows a terminated migrant worker to temporarily remain in the country while the worker's case is being considered, but this process is relatively difficult to access and expensive. This Special Pass is issued by the Immigration Department using the authority under Regulation 14 of the Immigration Regulations of 1963 which grants the discretion to the Immigration Department to allow an additional stay of one month for migrants for special reasons, and provides that the pass can be extended in one month increments issued at the discretion of the Immigration Department. There have been numerous cases when the denial of an application for the Special Pass effectively short circuits a worker's complaint under the Industrial Relations Department or Industrial Court to the relevant authorities.

79 Ibid.

80 Holliday (n 11).

81 Ibid.

82 Ibid.

83 Ibid.

C *Protection under the Occupational Safety and Health Act 1994*[84] *('OSHA 1994')*

Section 4 of the OSHA 1994 states that one of the objects of the Act is *inter alia* to protect the safety, health and welfare of persons at work against risks to safety or health arising out of the work including promoting a healthy environment for persons at work which is adapted to their physiological and psychological needs.[85]

Further, Section 15(1) of the OSHA 1994 provides that it is the duty of the employer to ensure the health and safety of all his employees.[86] As we have discussed earlier, long working hours have been established by numerous studies to be hazardous to the health and safety of FDWs. Hence, if the employer does not provide adequate rest for the FDWs, it will be an offence under the OSHA 1994, specifically section 19 of the OSHA 1994.[87]

One challenge that may hinder FDWs in utilizing this protection is that there is no specific reference to FDWs under the OSHA 1994. Domestic workers are also not expressly stated in Schedule 1 of the OSHA 1994 to be covered under the Act which leaves their protection under the Act subject to interpretation by the courts and authorities.

VI CHALLENGES TO ACCESS TO JUSTICE

A *Legal Mechanism for Grievances*

FDWs in Malaysia have essentially two legal avenues to file their grievances: (1) to lodge a complaint with the Labour Department; or (2) for cases of wrongful dismissal, to lodge a complaint with the Industrial Relations Department.[88] However, statistics show that there is a disparity with the number of violations and cases pursued. Arguably, this is caused by several systemic factors such as lack of enforcement, the isolation of foreign domestic workers, and largely ineffective labour laws.[89]

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[84] Occupational Safety and Health Act 1994 ('OSHA') (Act 514).

[85] Section 4 of the OSHA 1994 states that the objects of this Act are—

(a) to secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work;

(b) to protect persons at a place of work other than persons at work against risks to safety or health arising out of the activities of persons at work;

(c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs; and

(d) to provide the means whereby the associated occupational safety and health legislations may be progressively replaced by a system of regulations and approved industry codes of practice operating in combination with the provisions of this Act designed to maintain or improve the standards of safety and health.

[86] Section 15(1) of the OSHA 1994 (General duties of employers and self-employed persons to their employees) states that it shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees.

[87] Section 19 (Penalty for an offence under section 15, 16, 17 or 18) provides that a person who contravenes the provisions of sections 15, 16, 17 or 18 shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

[88] Holliday (n 11).

[89] Ibid. See also Eleanor Taylor-Nicholson (n 8).

To further exacerbate matters, if these FDWs do file complaints, they are often faced with difficulties in identifying who their employer is (as they are never given the actual employment contracts and deal exclusively with recruitment agents who do not divulge this information), producing evidence to substantiate their claim, and, are unable to maintain such claims due its long process to reach a resolution of final judgment.[90] It must also be noted that many abuses of FDWs are committed out of the view of the public which makes these claims difficult to prove.

B *Other Obstacles faced by FDWs*

FDWs face a myriad of challenges in obtaining a just and fair outcome to abuses against them. Firstly, the immigration system is skewed against FDWs as it is focused on breaches and sanctions against FDWs themselves rather than the employers.[91] Secondly, FDWs are in a vulnerable position because if they decide to make a complaint, their contract of employment could be terminated by their employer leaving them in an extremely vulnerable position as they are unable to secure another job with a different employer and places their migration status in serious jeopardy.[92]

Next, the labour laws in Malaysia are heavily discriminatory against domestic workers and the legal mechanisms in place are ineffectual for FDWs. Due to the lack of legal expertise and legal knowledge, FDWs face an insurmountable task in proving their claims in a tribunal or court of law.[93] All this and the fact that they are unable to unionize leaves FDWs without any legitimate chance to be successful in a complaint or claim.

VII CONCLUSION

As stated earlier, there have been numerous countries (mostly developed countries) that have enacted legislation vis-à-vis maximum work hour limit and weekly rest days. There have also been Latin-American countries such as Argentina, Chile and Paraguay that have enacted national legislation to protect FDWs.[94] FDWs unions within these countries have played an instrumental part in advancing the ratification of the ILO Domestic Workers Convention[95] in their respective countries.[96] Once ratified, these States are obliged to ensure that FDWsare provided with necessary labour protection, in particular, Article 10[97] which requires that FDWs have weekly rest of 24 hours consecutively and that they

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[90] Holliday (n 11). See also Eleanor Taylor-Nicholson (n 8).

[91] Ibid.

[92] Robertson Jr (n 45). See also Eleanor Taylor-Nicholson (n 8).

[93] Eleanor Taylor-Nicholson (n 8).

[94] Lorena Poblete, 'The ILO Domestic Workers Convention and Regulatory Reforms in Argentina, Chile and Paraguay- A Comparative Study of Working Time and Remuneration Regulations', (2018) 157(3) *International Labour Review* 435-459.

[95] ILO Domestic Workers Convention, 2011 (No. 189). Convention concerning decent work for domestic workers (05 September 2013Adopted16 June 2011) ('Domestic Workers Convention').

[96] Poblete (n 94).

[97] Domestic Workers Convention (n 93) Article 10 provides as follows:

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

are entitled to normal working hours comparable with other workers. In Malaysia, FDWs cannot form a union and there are no major organisations in Malaysia that are specifically catered to FDWs. It is no surprise that there has been no tangible effort made by Malaysia to ratify the ILO Domestic Workers Convention.

FDWs in Malaysia face various forms of abuse and discrimination not only from the public but also legally through discriminatory legislation. The fact that authorities and laws discriminate against FDWs and deny FDWs basic labour protections such as a maximum-working-hours, weekly rest days, paid annual leave, and sick leave are abhorrent and denigrates FDWs to a lesser class of people. This perception is not lost on the general public who are in a way given the green-light by those in power to exploit FDWs and use them as their property rather than employees. It is conceivable that this lack of protection from the law may precipitate other forms of abuses towards FDWs such as violence and sexual abuse due to the fact that FDWs have been legally de-humanized.

The purpose and design of the Employment Act is to protect the rights of all employees from abuse, yet, it has failed on all accounts to protect the basic labour rights of FDWs, specifically with regard to long working hours and no rest days. Although there is no legitimate objective that has been advanced by the exclusion of FDWs from Part XII of the Employment Act, it has been perpetuated without due regard to the fundamental rights of FDWs that are enshrined within the Federal Constitution. Even the health and safety of FDWs have been totally disregarded. There is no basis or reasonable explanation why FDWs are excluded from Part XII of Employment Act and it is high time that the Employment Act is overhauled to be aligned with principles of the Federal Constitution and to international standards of employment of FDWs.

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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.

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