

SKRIPSI

**COMPARATIVE ANALYSIS OF THE LEGAL SYSTEM
TOWARDS MIGRANT WORKERS REGULATIONS
IN INDONESIA AND MALAYSIA**



Written and submitted by:

TONDI EDWARD SAMUEL DAMANIK

NIM. B011191225

INTERNATIONAL LAW DEPARTMENT

FACULTY OF LAW

HASANUDDIN UNIVERSITY

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PENGESAHAN SKRIPSI

**COMPARATIVE ANALYSIS OF THE LEGAL SYSTEM TOWARDS
MIGRANT WORKERS PROTECTION IN INDONESIA AND MALAYSIA**

Disusun dan diajukan oleh :

TONDI EDWARD SAMUEL DAMANIK

B011191225

Telah dipertahankan di hadapan Panitia Ujian yang dibentuk dalam
rangka Penyelesaian Studi Program Sarjana Departemen Hukum
Internasional Program Studi Ilmu Hukum Fakultas Hukum Universitas
Hasanuddin

Pada hari Rabu, tanggal 22 November 2023

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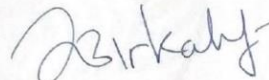
Ketua

Sekretaris



Prof. Dr. Iin Karita Sakharina, S.H., M.A.

NIP. 197701202001122001

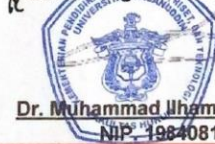


Dr. Birkah Latif, S.H., M.H., LL.M.

NIP. 198009082005011001

A.n. Dekan

Ketua Program Studi Sarjana Ilmu Hukum



Dr. Muhammad Iham Arisaputra S.H., M.Kn

NIP. 198408182010121005

TITLE PAGE

**COMPARATIVE ANALYSIS OF THE LEGAL SYSTEM
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As a Final Thesis in the Context of Completion of
Undergraduate Studies of the Department of International Law,
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Written and submitted by

TONDI EDWARD SAMUEL DAMANIK

B 011 19 1225

**INTERNATIONAL LAW DEPARTMENT
FACULTY OF LAW
HASANUDDIN UNIVERSITY
MAKASSAR**

2023

SUPERVISOR APPROVAL

Hereby declare that the thesis of:

Name : Tondi Edward Samuel Damanik
Student Number : B011 19 1225
Major : Law Science
Department : International Law
Thesis Title : COMPARATIVE ANALYSIS OF THE LEGAL
SYSTEM TOWARDS MIGRANT WORKERS
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MALAYSIA

Has been checked and approved for the thesis proposal exam.

Makassar, October 23rd 2023

Supervisor



Prof. Dr. Iin Karita Sakharina, S.H., M.A

NIP : 197701202001122001

Co - Supervisor



Dr. Birkah Latif, S.H., M.H., LL.M.

NIP : 198009082005011001



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RISET, DAN TEKNOLOGI

UNIVERSITAS HASANUDDIN
FAKULTAS HUKUM

Jln. Perintis Kemerdekaan KM.10 Kota Makassar 90245, Propinsi Sulawesi Selatan
Telp : (0411) 587219, 546686. Website: <https://lawfaculty.unhas.ac.id>

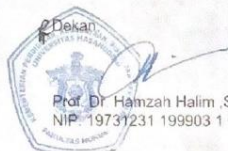
PERSETUJUAN MENEMPUH UJIAN SKRIPSI

Diterangkan bahwa skripsi mahasiswa :

Nama : Tondi Edward Samuel Damanik
N I M : B011191225
Program Studi : Ilmu Hukum
Departemen : Hukum Internasional
Judul Skripsi : Comparative Analysis of the Legal System Foreign Worker
Regulations in Indonesia and Malaysia

Memenuhi syarat untuk diajukan dalam ujian skripsi sebagai ujian akhir program studi.

Makassar, November 2023



STATEMENT OF ORIGINALITY

SURAT PERNYATAAN

saya yang bertanda tangan di bawah ini :

Nama : Tondi Edward Samuel Damanik
Nomor Pokok : B011191225
Program Studi : S1 - ILMU HUKUM
Judul Naskah Tugas Akhir : Comparative Analysis of the Legal System Foreign Worker Regulations in Indonesia and Malaysia

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Tondi Edward Samuel Damanik

ABSTRACT

TONDI EDWARD SAMUEL DAMANIK (B011191225), thesis titled **“COMPARATIVE ANALYSIS OF THE LEGAL SYSTEM TOWARDS MIGRANT WORKERS REGULATIONS IN INDONESIA AND MALAYSIA”** (Under the supervision from Iin Karita Sakharina, as main supervisor and Birkah Latif as co-supervisor)

This study aims to determine the provisions in international law regarding the protection of the rights of migrant workers abroad, specifically migrant workers from Indonesia and Malaysia. Seeing that the rights of migrant workers are sometimes not fulfilled, they are often exploited and mistreated, it is important to look at the implementation of international law and regulations from each country.

This study uses normative research using statute approach and comparative approach. The types and sources of legal materials that used in this study are primary and secondary legal materials. The method used to collect those legal materials is by using literature research method then analysed by using descriptive method.

The results of this study are 1) International law regulates the protection of migrant workers and has issued several regulations related to it. 2) Indonesia and Malaysia have made bilateral agreements related to migrant workers.

Keywords: Legal System Comparison, Migrant Workers, Employment Law

FOREWORD

All praise and gratitude are due to Lord Jesus Christ for all His blessings, love and grace so that the author can compile and complete the thesis entitled "**Comparative Analysis of the Legal System Towards Migrant Workers Regulations in Indonesia and Malaysia**" which is a requirement to complete the study period and obtain a Bachelor of Law Study Program, Department of International Law, Faculty of Law, Hasanuddin University.

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The author realizes that this thesis has many shortcomings and is far from perfect. For this reason, the author hopes for input in the form of constructive criticism and suggestions so that this paper will be much better in the future, as well as useful for readers and able to contribute to the development of science, especially in the field of law.

Makassar, 23rd October 2023

Tondi Edward Samuel Damanik

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CHAPTER I

INTRODUCTION

A. Problem Introduction

The migration process aims to improving the standard of living of migrants and their families, so that they generally look for job opportunities that can provide income and provide a higher social status at their destination. Migration between nations is the process of moving people from one country to another. ¹

Based on doctrinal investigations, generally, a person emigrates abroad to obtain better economic welfare for himself and his family. This information tooks by using content analysis methods collected through state power agencies, deeds, cases, literature review through theses, journal articles and newspapers to obtain current issues and data online such as websites. ²

The pattern of migration also happens in the neighboring countries such as, Malaysia and Indonesia. Both countries have entered into an agreement related to the provision of workers with the aim of strengthening the close relationship that exists between the two countries. The findings of this study found that both countries desire to further

¹ Pahroji, Dedi, and Holyness N. Singadimeja, 2012, "Legal System Comparison Ketenagakerjaan Negara Malaysia dan Negara Indonesia dalam Perlindungan Hukum dan Penegakan Hak Asasi Manusia, Majalah Ilmiah SOLUSI 11, p. 1.

² *Ibid*

strengthen existing relations and help each other in increasing economic cooperation and protection in the allocation of labor. ³

Despite the increasing number of worker immigration from Indonesia, the policy framework that comprehensive and effective institutions to manage Indonesian migrant workers are not achievable. On The Law No. 39 of 2004 concerning the Placement and Protection of Workers Indonesian Migrants Abroad (hereinafter referred to as the Placement and Protection Law) which has been approved by the House of Representative, have tried to regulate in such a way regarding Indonesian workers and foreign workers.

4

The act contains several provisions that admirable, such as guarantees that the placement of workers will be carried out on the basis of “equal rights, democracy, social justice, gender equality and gender justice, anti-discrimination, and anti-trafficking”, but the fact is that the law has a conceptual weakness and substance. ⁵ For example, conceptually the law has been criticized for focusing on placement migrant workers rather than the protection of these migrant workers.⁶

Judging from its substance, this law is less clear in some cases, such as the assignment of responsibilities to enforce rights migrant workers. However, the weakest aspect of this law is that its enforcement

³ *Ibid*

⁴ *Ibid*

⁵ Republic of Indonesia, The Law No.39 of 2004, Article 2

⁶ Muslan Abdurrahman, 2006, *Ketidakpatuhan Tenaga Kerja Indonesia, Sebuah Efek Diskriminasi Hukum*, UMM Press, Malang, p. 1.

so far has been very difficult less or none at all. ⁷

An example of a case that proves the weakness of law enforcement on the protection of Indonesian workers abroad is the torture of those working as domestic servants in Malaysia. The worker, MH, 26 years old, became a victim of her employer's torture. Based on information from the BWI-Malaysian Liaison Council (BWI-MLC), the authorities found the victim in a terrible condition with wounds all over the body.⁸

The Indonesian Migrant Workers Protection Agency (BP2MI) reported that in January 2022 the most complaints of Indonesian migrant workers came from Malaysia, namely 64 complaints⁹. On those cases, the supervision of Indonesian migrant workers abroad, including the responsibility of migrant worker placement companies, or in Indonesia it is named as *Perusahaan Penempatan Pekerja Migran* (P3MI) which is a business entity incorporated as a limited liability company that has obtained a written permit from the Central Government to organize placement services for Indonesian Migrant Workers. P3MI must continuously monitor the workers they send abroad.

As a result of weak laws and enforcement in terms of migrant workers, cases of abuse and exploitation of Indonesian migrant workers are numerous happens in the hands of labor service agents, trainers,

⁷ Adrian Sutedi, 2009, *Hukum Perburuhan*, Sinar Grafika, Jakarta, p. 1.

⁸ Davies Surya, "TKI di Malaysia disiksa, 'luka sayat dan bakar di sekujur tubuh' - mengapa kekerasan terus berulang?", <https://www.bbc.com/indonesia/indonesia-55172153>. Accessed date February 13th, 2023, on 22.30 PM

⁹ Dzulfiqar Fatur Rahman, "Awal 2022, Aduan Pekerja Migran Paling Banyak dari Malaysia" <https://databoks.katadata.co.id/datapublish/2022/04/05/awal-2022-aduan-pekerja-migran-paling-banyak-dari-malaysia>, Accessed date August 22nd, on 22.24 PM

employers, human traffickers (traffickers) and inhumane government officials. These cases occur at every stage of the labor migration process: pre-departure, during work abroad and upon return. ¹⁰

From the number of cases that occurs Indonesian workers and the fact that the handling has not been completed law on cases involving multiple parties, especially cases that directly intersects with the law, then it is appropriate to raise basic questions about the extent of the role and concern of the Indonesian government towards its citizens, so that can be used as a reflection to see the protection carried out by the state (in this case the government) against citizens for all forms of torture of their human rights. ¹¹

This is important to analyze because the government has issued various regulations related to the existence of Indonesian Migrant Workers., such as: Decree of the Minister of Manpower and Transmigration No. 104 A of 2002, Law No 13 of 2003 concerning Manpower, as well as Law No. 39 of 2004 concerning Placement and Protection of Indonesian Migrant Workers Abroad, and Memorandum of Understanding (MOU) between Malaysia and Indonesia which has been renewed after the revocation moratorium for Indonesian informal migrant workers to Malaysia, which until now is still lacking reveal policies that touch the protection of Indonesian migrant workers. ¹²

¹⁰ Pahroji, Dedi, and Holyness N. Singadimeja, Op. cit, p.1

¹¹ Pahroji, Dedi, and Holyness N. Singadimeja, Op. cit, p.2

¹² Soemaryo Suryokusumo, 2003, Pembuatan dan Berlakunya Perjanjian, UGM, Yogyakarta, p. 2.

Indonesian workers are sent to various countries around the world for employment opportunities. Some of the popular destinations for Indonesian workers include Malaysia, Saudi Arabia, United Arab Emirates, Taiwan, and Hong Kong. These workers are often employed in a range of sectors, including domestic work, construction, manufacturing, and agriculture.

It's worth noting that Indonesian workers who are employed overseas are protected under Indonesian law, including the Manpower Law No. 13 of 2003, which establishes minimum standards for working conditions, wages, and social security benefits. The Indonesian government has also established various initiatives and programs to support and protect its overseas workers, including the National Agency for Placement and Protection of Indonesian Overseas Workers (BNP2TKI), which provides assistance to Indonesian workers who face problems such as exploitation, abuse, or non-payment of wages while working abroad.¹³

In general, a number of parties view Malaysian law as being far more advanced than that Indonesian law. This view is quite reasonable for the progress made by Malaysia in various fields. In the field of law, the last 10 years have shown significant progress quite rapidly both in terms of the quality of the products of the legislation and from the level of supremacy

¹³ International Labour Organization. (2020). 'Global Estimates of Migrant Workers 2019: A Review of the International Labour Migration Statistics.' https://www.ilo.org/global/topics/labour-migration/publications/WCMS_652001/lang-en/index.htm , Accessed on March 8th, 2023 at 18.34 PM

law and public trust in the judiciary and law enforcement institutions.¹⁴

Malaysia sends workers to other countries, particularly in the Middle East, Asia, and some parts of Europe. These workers are typically employed in various industries, including construction, manufacturing, agriculture, and domestic work. The Malaysian government has established policies and programs to ensure the welfare and protection of its citizens working abroad, and many of these workers choose to work abroad for better job opportunities and higher salaries.¹⁵

1.1 Table of The Allocation Towards Indonesian and Malaysian Workers (Indonesian Migrant Workers: Key Facts and Figures." International Labour Organization (ILO) 2019)

Location	Indonesian Workers	Malaysian Workers
United Kingdom	Moderate	Moderate
Netherlands	Moderate	Low
Germany	Low	Low
France	Low	Low
Italy	Low	Low
Spain	Low	Low

¹⁴ Nasaruddin Umar, 2013, Studi Hukum Perbandingan Sistem Ketatanegaraan Malaysia Dan Indonesia, Jurnal IAIN Ambon: Tahkim, p.113

¹⁵ Haziman bin Muhamad, HendunAbd Rahman Shah, Kamal Halili Hassan, 2021, Analisa Perundangan Buruh Paksa Dalam Konteks Piawaian Perburuhan Antarabangsa Dan Undang-Undang Malaysia, Malaysian Journal of Syariah and Law, p.126

Location	Indonesian Workers	Malaysian Workers
Switzerland	Low	Low
United Arab Emirates	High	High
Saudi Arabia	High	High
Qatar	High	High
Kuwait	High	High
Bahrain	High	High
Oman	High	High
Japan	Low	Low
South Korea	Low	Moderate
Singapore	High	High
Australia	Low	Low
United States	Low	Low

However, according to the International Trade Union Confederation (ITUC) Global Rights Index 2020, which ranks countries based on their respect for workers' rights, several of the countries on the table have received relatively positive scores. For example, the Netherlands, Switzerland, and the United Kingdom have been ranked as countries with "regular violations of rights." Meanwhile, other countries in the MiddleEast, such as Saudi Arabia and Qatar, have been ranked as countries with

"systematic violations of rights."

It's important to note that the ITUC Global Rights Index measures violations of workers' rights in general, not specifically violations of the rights of migrant workers. Additionally, the index has limitations and has been criticized for its methodology and data sources. Therefore, it's important to consider other sources of information and conduct further research to assess the situation for migrant workers in each country. ¹⁶

The regulation of sending workers from Malaysia to other countries is governed by the Malaysian Ministry of Human Resources. The government has put in place a comprehensive system to regulate and monitor the employment of Malaysian workers overseas. This includes a pre-employment screening process, which involves verifying the job offer and the employer, as well as ensuring that the worker has the necessary skills and qualifications for the job. ¹⁷

Once the worker has been approved to work abroad, the government requires that the worker enter into a formal employment contract with the employer, which outlines the terms and conditions of the job, including the salary, benefits, and working hours. The government also requires the employer to provide adequate housing, insurance, and medical care for the worker. ¹⁸

To take an example of regulations outside Indonesia and Malaysia

¹⁶ International Trade Union Confederation. (2020). Global Rights Index 2020: The World's Worst Countries for Workers. <https://www.ituc-csi.org/IMG/pdf/2020-06-11-global-rights-index-2020-en.pdf>, Accessed on March 8th, 2023, at 18.58 PM

¹⁷ Haziman bin Muhamad, HendunAbd Rahman Shah, Kamal Halili Hassan, Op.cit, p.126

¹⁸ Haziman bin Muhamad, HendunAbd Rahman Shah, Kamal Halili Hassan, Op.cit, p.127

related to the regulation of foreign workers can be seen at European Union has implemented various measures to protect the rights of migrant workers, including those from Indonesia and Malaysia, and prevent their exploitation. These measures include the EU Blue Card system, which provides a path for highly skilled workers to work and live in the EU, and the EU Agency for Fundamental Rights, which provides research and analysis on the protection of fundamental rights in the EU.

In addition, each EU country has its own labor laws and policies that regulate the treatment of migrant workers. Some EU countries have been recognized for their efforts to protect migrant workers, such as the Netherlands, which has implemented various measures to prevent exploitation and human trafficking of migrant workers. However, it's important to note that exploitation and abuse of migrant workers still occur in some EU countries, like discrimination and lack of access to the healthcare, and more work needs to be done to ensure their protection.¹⁹

More detailed information on the measures taken by each EU country to protect the rights of migrant workers referring to the country reports on the implementation of the EU's Employers Sanctions Directive, which aim to combat the exploitation of migrant workers. These reports provide an overview of each country's legislative framework and practical

¹⁹ European Union. (2009). Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Official Journal of the European Union, L 168/24. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF>, Accessed on March 8th, 2023, at 19.19 PM

measures to prevent exploitation and protect migrant workers.²⁰

The Employers Sanctions Directive is the EU law that aims to combat the exploitation of migrant workers. The full name of the law is "Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals." The directive establishes common minimum rules on the sanctions and measures to be applied by EU member states against employers who illegally employ third-country nationals. It also aims to prevent the exploitation of third-country nationals who are working without proper authorization or who are victims of human trafficking.²¹

The directive requires EU member states to establish effective and dissuasive penalties for employers who exploit undocumented workers, such as fines and, in some cases, criminal sanctions. It also provides for measures to protect the rights of workers who are in an irregular situation, such as access to legal assistance and compensation for unpaid wages. Each EU member state is responsible for implementing the Employers Sanctions Directive into its national law and for ensuring its effective enforcement.²²

²⁰ European Union Agency for Fundamental Rights. (2019). Migrant workers in the EU: Summary report. Publications Office of the European Union. https://fa.europa.eu/sites/default/files/fra_uploads/fra-2019-migrant-workers-in-the-eu-summary-report_en.pdf, Accessed on March 8th, 2023, at 19.20 PM

²¹ European Commission. (n.d.). Employers' sanctions. Migration and Home Affairs. https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/employers-sanctions_en, Accessed on March 8th, 2023, at 19.21 PM

²² European Union Agency for Fundamental Rights. (2018). Handbook on European law

The Malaysian government also has an overseas mission in each country where Malaysian workers are employed, and these missions aim to monitor the welfare of the workers and address any issues or concerns that may arise. In case of any abuse or exploitation, workers can report the issue to the mission for assistance. In summary, the Malaysian government has a well-established regulatory framework to ensure the rights and welfare of its citizens working abroad are protected.²³

The laws and regulations governing the employment of Malaysian workers abroad are primarily governed by the Employment Act 1955 and the Foreign Workers Act 1990. These laws establish the framework for the employment of Malaysian workers overseas, including the rights and responsibilities of both the workers and the employers.²⁴

The Employment Act 1955 sets out the minimum standards for the terms and conditions of employment, including working hours, rest days, overtime pay, and other benefits. The Foreign Workers Act 1990, on the other hand, specifically deals with the employment of foreign workers in Malaysia and provides for the regulation and control of the employment of foreign workers. This act requires employers to obtain a valid work permit for foreign workers, as well as to provide certain benefits and protections, such as accommodation and medical insurance. Both the Employment Act 1955 and the Foreign Workers Act 1990 are regularly reviewed and

relating to the rights of the child. Publications Office of the European Union.
<https://fra.europa.eu/en/publication/2018/handbook-european-law-relating-rights-child>.

Accessed on March 8th, 2023, at 19.22 PM

²³ Haziman bin Muhamad, HendunAbd Rahman Shah, Kamal Halili Hassan, Op.cit, p.128

²⁴ Haziman bin Muhamad, HendunAbd Rahman Shah, Kamal Halili Hassan, Op.cit, p.129

updated by the Malaysian government to ensure that they continue to meet the needs of workers and employers in the changing global employment landscape.

As a former British colony, Malaysia still maintains its customary law traditions English common law system. This tradition stands at the center of the Islamic legal system (which implemented by the Shariacourts) and the customary law of various indigenous groups. Malaysia is a multi-ethnic, multicultural and multi-religious country. The national legal system reflects heterogeneous society that has been influenced and shaped by external and indigenous cultures.

Meanwhile, Indonesia as a former Dutch colony adheres to the Civil Law System tradition. Also maintains the Dutch legal tradition, especially in the criminal law system in Indonesia between the traditions of Islamic law and customary law. Like Malaysia, Indonesia has a system plural law, namely a national legal system in which two or more coexistence tradition.

The Malaysian legal system is an integration of Common Law, Sharia law and customary law tradition. Therefore, comparing the Indonesian legal system with Malaysian law is an in engaging study to examine the weaknesses and strengths of the legal systems of the two countries especially in the constitutional system of the two countries including the judicial system, so that an overview is obtained in order to improve the national legal system in the future which will come. Based on the problem introduction described above, therefore the author would like

to do the research in the form of legal writing with the title: “COMPARATIVE ANALYSIS OF THE LEGAL SYSTEM TOWARDS FOREIGN WORKERS REGULATIONS IN INDONESIA AND MALAYSIA”

B. Research Question

Based on the problem background that has been explained, so the writer decides that the research question are:

1. How the scope of the regulations regarding migrant workers permits in Indonesia and Malaysia?
2. Do the regulations related to migrant workers in Indonesia and Malaysia guarantee the protection of the workers?

C. Research Purpose

Based on the research question that has been described, the purpose of this research are:

1. To find out the regulations regarding foreign worker permits in Indonesia and Malaysia
2. To find out if the regulations related to foreign workers in Indonesia and Malaysia guarantee the protection of workers

D. Research Usage

Based on the formulation of the problem and the objectives of this study, the uses of this research include:

1. Academically

Academically, this scientific paper is expected to contribute to providing theoretical input for the development of science and

international law, especially in the field of comparative legal systems between countries.

2. Practically

Practically, it is hoped that the results of this legal research can provide legal knowledge for parties working in the field of employment and the public who want to research about employment in Indonesia and Malaysia.

E. Research Originality

This thesis, entitled Comparative Analysis of the Legal System Towards Foreign Workers in Indonesia and Malaysia This research is an initial research conducted by the author in looking at legal issues regarding how Indonesia and Malaysia protect foreign workers in their countries, by comparing legal systems, and looking from an international perspective. Based on the author's analysis to provide a comparative picture, the following authors attach previous research as comparative material for this paper:

1. Journal of the Faculty of Law, University of Muhammadiyah Malang, entitled "*Studi Komparatif Perlindungan Hukum Tenaga Kerja Asing Dalam Kepesertaan Program Jaminan Sosial Di Malaysia Dan Indonesia*" or in english "A Comparative Study of the Legal Protection of Foreign Workers in Participation in Social Security Programs in Malaysia and Indonesia" This journal only focuses on social security for workers. In contrast to the author's

thesis, which focuses more on regulation, permission, and protection.

2. Journal published by the Faculty of Sharia and Islamic Economics, Ambon State Islamic Institute or IAIN Ambon, with the title "*Studi Hukum Perbandingan Sistem Ketatanegaraan Malaysia Dan Indonesia*" or in English "Comparative Legal Studies of Malaysian and Indonesian Constitutional Systems". Apart from the different formats of scientific papers, namely journals and theses, the substance presented in these journals also has significant differences with the author's thesis. The substance raised in the journal is focusing on the constitutional system between Indonesia and Malaysia. For example, the journal focuses more on the power-sharing system in the two countries and its impact on employment.
3. Thesis written by Olivia Andi Bella Ayu Ajeng Riyanto, a student of the National Development University "Veteran" East Java (*Universitas Pembangunan Nasional "Veteran" Jawa Timur*) in 2020, entitled "*Upaya Indonesia Melindungi Tenaga Kerja Indonesia di Malaysia Pada Tahun 2006-2011*" or in English "Indonesia's Efforts to Protect Indonesian Workers in 2006-2011". This thesis focuses on Indonesia's efforts to protect Indonesian workers in Malaysia in the span of 2006-2011, which distinguishes the author's thesis is that the author refers to what is happening

now which is much different from Indonesia's efforts in 2006-2011. On the other hand, the difference is that the thesis does not compare Indonesian law and Malaysian law related to the protection of labor from each country.

F. Research Method

The research method that used by the author is the normative legal research method. Normative legal research is research that examines document studies. Normative legal research is also a process to find legal rules, legal principles, and legal doctrines to answer the legal issues at hand. legal principles, as well as legal doctrines in order to answer the legal issues at hand.²⁵ The author of this study employs both the comparative approach and the legislative approach. The statute approach is applied by reading statutory laws and norms that are pertinent to the current legal disputes. The statute approach is a method of conducting research that emphasizes the importance of using laws and regulations as the primary source of information.²⁶

This approach is a research method that focuses on legal materials which are statutory regulations such as laws, conventions, statutes, and others used by the two countries, namely Indonesia and Malaysia as the basic reference material in conducting research.²⁷ The legal material that will be the source used by the author in this study is:

²⁵ Peter Mahmud Marzuki, 2007, *Penelitian Hukum*. Kencana Prenada Group: Jakarta, p. 35.

²⁶ Kadaruddin, 2021, *Penelitian Di Bidang Ilmu Hukum (Sebuah Pemahaman Awal)*, Formaci, Semarang, p.104

²⁷ Bachtiar, 2018, *Metode Penelitian Hukum*, UNPAM PRESS. Tangerang Selatan. p. 81.

- a. International Conventions and other relevant legal instruments;
- b. Laws of the Republic Indonesia;
- c. Laws of the Federal State of Malaysia;
- d. Law books
- e. Scientific journals as well as literature and other sources of information both in hard copy and soft copy obtained either directly or through internet search results that are relevant to the topic being researched.

After collecting the sources, the technique of collecting legal materials carried out by the author is literature research. The author collected data carried out by studying and analyzing reading materials. The legal material analysis technique that the author use is the descriptive method on the primary and secondary legal material obtained which is expected to fulfill the identification of legal facts which can be in the form of a situation, event or action, examining legal material related to legal facts, and application of the law.²⁸

²⁸ Muhaimin, 2020, *Metode Penelitian Hukum*, Mataram University Press, Mataram, p. 70-71

CHAPTER II
LITERATURE REVIEW AND ANALYSIS OF THE FIRST PROBLEM
FORMULATION

A. Legal System Comparison

1. The Meaning of Legal System Comparison

Before further in-depth explanation, the concept of system comparison law actually has many terms. Several among others are:²⁹

- a. Comparative Law.
- b. Law Comparison (Law Compared or *Droit Compare*).
- c. Comparative Legal System.
- d. Comparative Legal Tradition.
- e. Comparative Legal Science.

Legal regulations or institutions from multiple countries are compared when the legal system is being compared, rather than just discussing laws or institutions from one country. Comparing legal systems may therefore be seen as an intellectual activity in which law serves as an object and comparison serves as the method. The comparison of legal systems can be said to cover a wide range of topics. The laws of the various nations are the subject of the comparison of legal systems. The law being compared here could refer to any number of institutions or legal frameworks that have a role in policing a community's use of public relations.³⁰

²⁹ Munir Fuady, 2007, *Perbandingan Ilmu Hukum*, PT. Refika Aditama, Bandung, p. 1.

³⁰ *Ibid*, p. 2.

When viewed based on the structure, legal system comparison can be divided into two approaches, namely: ³¹

- a. Comparison of legal systems as a method.
- b. Comparison of the legal system as a branch of knowledge.

As a method, comparison of legal systems considered as one way that can be used for compare and examine the rules, systems, institutions, other legal history of two or more countries. This method also works used to compare two or more legal systems. Comparison of legal systems can be said as a method because the “comparative method” is not exhaustive only in the realm of law, but comparison method can be implemented in the fields of economics, medicine, and etc. ³²

As a science, comparison of systems law falls into the category of reality science, side by side with legal psychology, legal sociology, and many more. Legal system comparison categorized as a science of reality because it is not characteristic dogmatic, such as the science of rules and the science of understanding in science law.

The law science of rules and understanding (*sollenwissenschaft* or *normwissenschaft*) is a set of norms whose focus is lies in the construction, systematization and interpretation of which strongly influenced by the doctrine held by a country, for examples are the criminal law and civil law. Legal system comparison as science can

³¹ Munir Fuady, Op. cit, p. 2.

³² Wahyono Darmabrata, 2000, “Perbandingan Hukum dan Pendidikan Hukum”, Jurnal Hukum dan Pembangunan, Fakultas Hukum UI, Vol. 30 No. 4, p. 319.

then play a role in developing the science of rules and the knowledge of that understanding. In its history, there are several figures who argue that comparison of legal systems is only a method and cannot be said to be a science.

Two of the characters these are Gutteridge and Sunarjati Hartono. Gutteridge argues that legal comparisons are simply a method. The method in question can then be used in all branches of law (state constitutional law, criminal law).³³ According to Sunarjati Hartono, there is no comparative legal system can be said as a branch of science like what said by many. Comparison of legal systems themselves can only be said as a method or approach.³⁴

2. The Development of Legal System Comparison

In fact, since Roman times, a comparative history of legal systems has been discovered. *Collatio Legum Mosaicarum et Romanarum* is a work in the form of a book that was produced by jurors in Rome during the classical period of Roman history, specifically in the 200s to 300s AD. The book includes comparisons between Christian law, Jewish law, and Roman law. From the book, it may be inferred that Roman law is highly similar to Christian law yet very dissimilar to Jewish law. The creation of the Twelve Tables, which dates back much further, shows how Roman law was influenced by

³³ *Ibid*, p. 320.

³⁴ Nurul Qamar, 2010, *Perbandingan Sistem Hukum dan Peradilan*, Pustaka Refleksi Books, Makassar, p. 8-9.

ancient Greek law. Additionally supporting this are Cicero and Gaius' writings, which claim that the legislature dispatched a committee.³⁵

The term comparative legal systems in the modern era began gained momentum at the International Congress of Law First Comparative in Paris in 1900. This Congress was intentional held in conjunction with the Paris World Exposition for more attracting audiences coming from different countries. As for goals the main objectives to be achieved at this congress are: ³⁶

- a. Define a methodology for analyzing diverse legislation.
- b. Determine the role of the comparison method in law teaching.
- c. Highlighting the link between comparative legal analysis and national legislation, legal interpretation, and international agreement.
- d. Discuss the mechanism for foreign law can be more easily accessed.

3. The Function of Legal System Comparison

According to Munir Fuady, there are at least 5 benefits why we study Comparative Legal Systems, namely: ³⁷

³⁵ Peter de Cruz, 1999, Comparative Law in a Changing Worlds, Cavendish Publishing Limited, London, p. 11.

³⁶ Anita Frohlich, Paris International Congress of Comparative Law – Culmination and End of the First Phase of Comparative Law Research, <https://comparelex.org/2015/05/19/parisinternational-congress-of-comparative-law-culmination-and-end-of-the-first-phase-ofcomparative-law-research/>. Accessed date, December 19, 2022.

³⁷ Munir Fuady, Op. cit, p. 19-21

- i. Benefits for the cultural field. Studying law in various countries can broaden horizons so can increase the critical power of the law in his country.
- ii. Benefits for the professional field. Understand the law of different countries can help a professional in carrying out his work. For example, a professionals can assist legislators in formulating or change laws and regulations with provisions the knowledge he has gained from studying law in other countries.
- iii. Benefits for the scientific field. Study comparisons legal systems can lead to the discovery of general principles that exist in the laws of countries. This matter can be used to compile a legal unification which are then useful to implement together, like by the countries of the European Union. In scale nationally, legal system comparison also has benefits for the scientific field by developing the science of law so that it happens legal harmonization.
- iv. Benefits for the international field. Studying

legal system comparison can assist in the preparation of agreements or treaties international. It is also useful for giving ideas in establishment of international institutions or organizations.

- v. Benefits for the transnational field. Advantages are felt when one party must apply the other party's law in certain circumstances. For example, international civil law or international criminal law

In short, the function or purpose of legal comparison as a science is to know the difference exist within an area of law and ultimately contribute knowledge of this area of law. Method comparison is the role of presenting the detailed differences that exist in the object being compared.³⁸

B. Comparison of the Legal Systems in Indonesia and Malaysia

1. Legal Systems in Indonesia

The Indonesian legal system is a legal system that comes from mainland Europe, namely Continental Europe which is also called as Civil Law. Indonesia adheres to the Civil Law legal system. This matter was motivated by the hegemony of Dutch power in Indonesia, so that

³⁸ Geoffrey Samuel, 2014, *An Introduction to Comparative Law Theory and Method*, Hart Publishing, Oxford, p. 45.

Indonesia adheres to a system that is Dutch heritage.³⁹ The Civil Law system originates from the codification of laws that apply in Indonesia the Roman empire during the reign of Emperor Justinian in IV century BC. In the Civil Law system, laws that having binding power is written law (regulations). legislation), so that the judge's decision in a case only binds the litigants (Dokrins Res Adjudicata) ⁴⁰

The Indonesian nation uses a legal system from the Dutch heritage, this happened because of Dutch colonialism in Indonesia for more than three hundred years. Civil law that arrived in Indonesia today is still using Civil Code inherited from the Netherlands which in its country of origin is no longer used or has been replaced. Influence from the Netherlands, which has a common law legal system, is the reason Indonesia divides it between public law and private Law but still under one roof of Justice.⁴¹

In contrast to the republican government, the colonial government realized that it could not effectively reach the villages. During the colonial period, the Dutch divided the population into European, Indigenous and Foreign Eastern groups. For indigenous people, problems were resolved through customary courts and village

³⁹ Budiman Ginting, 2013, Legal System Comparison Sebagai Alternatif Metode Pembaharuan Hukum Indonesia, <http://repository.usu.ac.id/bitstream/123456789/15226/1/equ-feb2005-6.pdf>, Accessed date December 19, 2022.

⁴⁰ R.Abdoel Djamali, 2007, Pengantar Hukum Indonesia, Jakarta, PT Raja Grafindo Persada, p. 68-69.

⁴¹ Somadiyono, S, 2020, Perbandingan Sistem Hukum Antara Indonesia dan Malaysia. *Wajah Hukum*, 4(2), p. 416

courts, except in certain cases so that they were tried in colonial courts (lanraad, raad van justitie to the Hoogerechtshof). At that time, religious courts were recognized, which still exist today. Therefore, to ensure that order was maintained, local institutions were recognized. The legislation of the Dutch East Indies Government passed down five types of courts, namely the Gubenemen Court, the Indigenous Court (Customary Court), the Swapraja Court, the Religious Court and the Village Court: ⁴²

1. Gouvernment's Court (*Gouvernements-rechtspraak*)

This was a court conducted by Government Judges on behalf of the King/Queen of the Netherlands under the European legal system for the entire area of the Dutch East Indies.

2. Indigenous or Customary Courts (*Inheemsche rechtspraak*)

This were courts administered by European and Indonesian Judges, not on behalf of the King/Queen and not under the European legal system, but under the customary legal system determined by the Resident with the approval of the Director of Justice in Batavia. The regions where Indigenous Courts were implemented were: Aceh, Tapanuli, West Sumatra, Jambi, Palembang, Bengkulu, Riau, Kalimantan, Sulawesi, Manado, Lombok and Maluku. The

⁴² Yance Arizona, 2013, "Kedudukan Peradilan Adat dalam Sistem Hukum Nasional", Bahan Ajar Ilmu Hukum – President University, p. 3-4

jurisdiction of this court is over indigenous people who reside in the judicial area, who are made Defendants or Suspects. The plaintiff may be a non-indigenous person including, for example, a European who feels aggrieved. This court used its own special procedural law in the form of court regulations from the Resident, for example: Aceh Besar and Singkel Musapat Regulation (1934), Riw Court Regulation (1933), Palembang Meeting Regulation (1933), South and East Kalimantan Density Regulation (1934), Gantarang, Matinggi and Laikan Regulation (South Sulawesi 1933) and so on.

3. The Swapraja Court (*Zelfbestuurrechtspraak*)

This was court conducted by Swapraja Judges. In Java Madura, the authority of this court was limited to trying the King's relatives by blood or consanguinity up to the fourth cousin and high-ranking swapraja officials in the position of Defendants in both civil and minor criminal cases. Outside Java-Madura, the authority of this court was limited to trying its own subjects. Swapraja judges carried out their duties based on swapraja regulations, the content of which was modeled on indigenous judicial regulations.

4. Religious Courts (*Godsdienstige Rechtspraak*)

This was a court conducted by Religious Judges or Indigenous Judges or Gubernemen Judges to resolve cases

concerning Islamic Law.

5. Village Courts (*Dorpjustitie*)

This was a court conducted by Village Judges either within the government courts, indigenous courts/ customary courts or self-governing courts outside Java-Madura. This court has the authority to adjudicate small cases that are customary or village affairs, such as land disputes, irrigation, marriages, dowries, divorces, customary positions and other matters arising in the indigenous community concerned. Village judges could not impose penalties as stipulated in the Criminal Code and if the parties to a dispute were not satisfied with the decision of the village judge, they could submit the case to a gubernatorial judge. The organization of village courts is not regulated by legislation, but is left to local customary law.

But now, after the colonial period and the improvement of the court system in Indonesia, then there are four (4) courts in Indonesia based on Article 24 paragraph (2) of the 1945 Constitution, including the following:⁴³

- a. General Court: includes civil law disputes and criminal law;
- b. Religious Courts: which oversees the law for Muslim individuals

⁴³ Somadiyono, S, Op.Cit, p. 417

in the field of waqf and family law and other issues in the field of muamalah.

- c. Administrative Court: includes disputes between individuals who are citizens and state administrative officer.
- d. Military Court: includes only crimes or offenses committed by the military.

The aforementioned court is structurally a court of first instance and may be appealed for law to the next level court and in the end it all boils down to the Supreme Court, each follows an explanation: ⁴⁴

- a. The General Court.

Laws and regulations governing public courts are also called District Courts is Law Number 13 of 1965 concerning Courts within the General Judiciary and Supreme Court. At the District Court which is the court of first instance, has the authority to decide criminal and civil cases in jurisdictions at the district or city level, this court include the juvenile court which concerning crimes committed by children.

- b. Religious Court

The law governing the Religious Courts is Law no. 7 of 1989 concerning the Religious Courts, duties and authorities to examine, decide and resolve the actions of judges at the first level in among people who are Muslim in the fields of marriage,

⁴⁴ *Ibid*, p. 416

inheritance, wills, grants, waqf and shadaqoh, in where all fields are based on Islamic law. The Religious Court is a special court for citizens countries that are Muslim on matters related to muamalah relations.

c. State Administrative Court

The State Administrative Court is regulated by Law no. 5 of 1986 as amended by Law No. 9 of 2004 concerning the State Administrative Court. State Administrative Court or *Tata Usaha Negara* authorized to resolve disputes between citizens and State Administration Officials. Object the case is that the decision of the State Administrative Officer regarding administrative matters was issued by state administrative officer. And in the State Administrative Court, there are 2 (two) types of remedies, namely, Attempts Administration, which consists of administrative appeals and objections, as well as lawsuits.

d. Military Court

Military Courts are regulated in Law no. 31 of 1997 concerning Military Courts. this court authorized to try crimes or offenses committed by members of the military.

e. The Special Courts in Indonesia, the Special Courts in Indonesia each have their rights themselves, as further explained below, among others, which is:

1) The Commercial Court

It was created and established by Presidential Decree No. 97 of 1999. Authority of the Court Niaga, among others, is to hear Bankruptcy cases, Intellectual Property Rights, and disputes other commercial stipulated by law.

2) The Human Rights Court

It was established and constituted by Law no. 26 of 2000. Court Human Rights is to prosecute gross violations of human rights, as occurred in cases of gross human rights violations in East Timor and Tanjung Priok in 1984. Human Section in the midst of human rights violations issued Presidential Decree No. 53 of 2001 concerning establishment of the current Ad Hoc Human Rights Court at the Central Jakarta District Court amended by Presidential Decree No. 96 of 2001.

3) The Tax Court,

It was established and constituted by Law Number 14 of 2002, has jurisdiction to resolve disputes in the field of taxation. The tax dispute itself is a dispute that arises in field of taxation between the taxpayer or tax insider and the competent authorities as a result of issuance of a decision that can be appealed or appealed to the Tax Court based on law taxation, including lawsuits over implementation of billing under the Billing Act tax.

4) The Fisheries Court,

It was established and constituted by Law 31 of 2004.

This court has the authority to examine, try and decide on criminal acts in the field of fisheries, and operates within a public court and has jurisdiction according to the local laws of the court the district concerned.

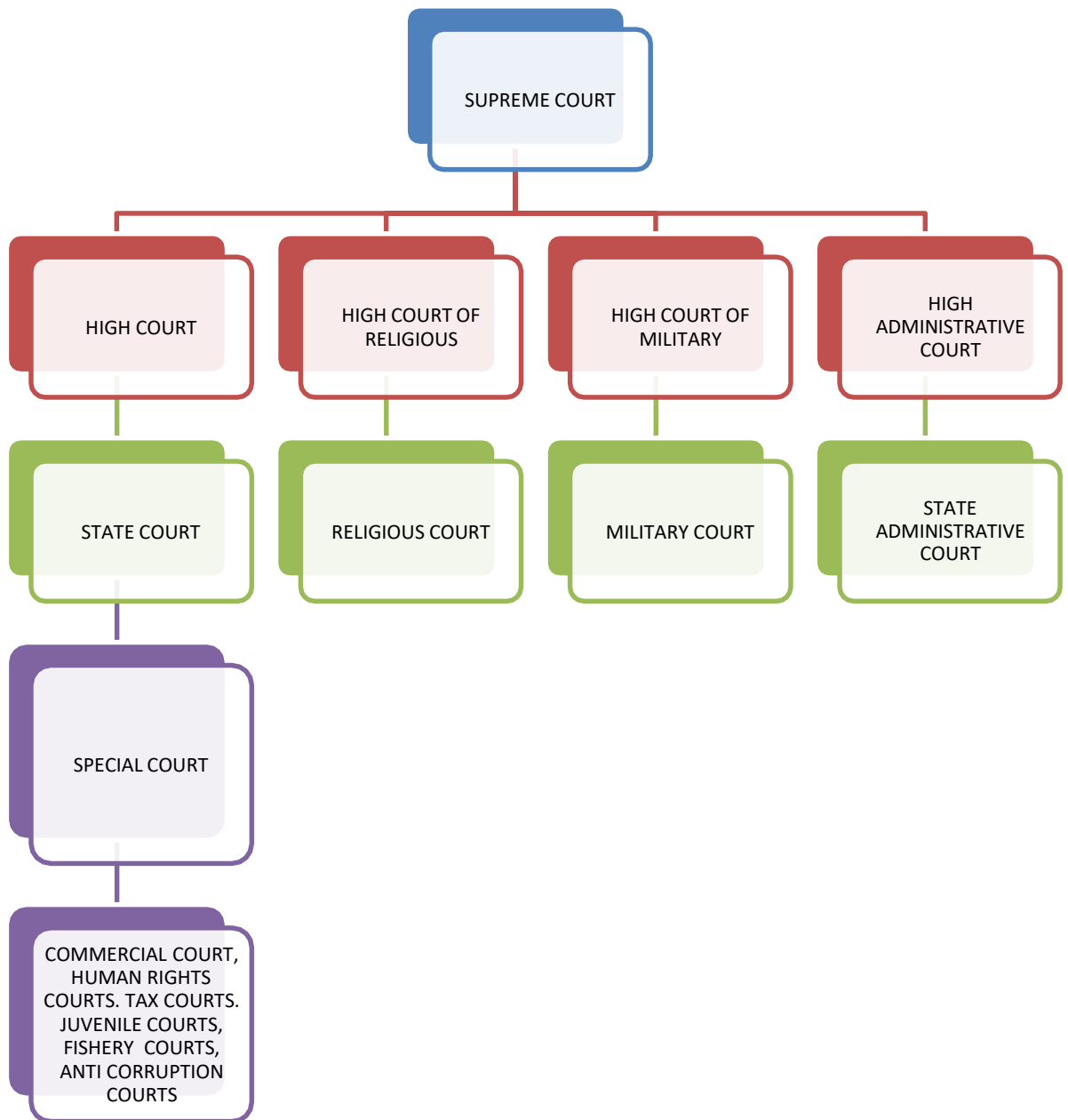
5) The Anti-Corruption Court

Tipikor refers to *Tindak Pidana Korupsi* or Corruption Criminal Act formed and established under the mandate of Article 53 of Law no. 30 of 2002 concerning the corruption act.

45

⁴⁵ *Ibid*, p. 4-5

2.1 Hierarchy Chart of Court Structure in Indonesia



2. Legal System In Malaysia

One of the interesting legal systems in Malaysia is the plurality of legal systems and state constitutional guarantees against Islamic law and other religious laws and the existence of dualism justice for

cases of violation of Islamic norms and cases of violation of civil norms, as emphasized in article 3 paragraph (1) of the Institutionalization of the Malaysia Fellowship that "Islam is religion for the Communion; but other religions may be practiced safely and peacefully everywhere in the Federal Division."⁴⁶

As a former British colony, Malaysia still retains the customary legal traditions of the English common law system. This tradition stands at the center of the Islamic legal system (enforced by Sharia courts) and the customary laws of the various indigenous groups. Malaysia is a multi-ethnic, multicultural and inter-faith country.

The national legal system reflects heterogeneous society that has been influenced and shaped by external as well as indigenous cultures. Like Indonesia, Malaysia has a system Plural law, namely the national legal system in which two or more coexist tradition. Malaysia's legal system is an integration of Common Law, Sharia law and customary law tradition.

Malaysia is a country that adheres to the legal system Anglo Saxon or also known as Common Law.⁴⁷ Common Law began to develop in England since the XI century and often too referred to as the "Unwritten Law" system or unwritten law. However, the Common Law system is not complete unwritten law, because where in the Common

⁴⁶ Perlembagaan Persekutuan Malaysia, Article 3, Paragraph (1)

⁴⁷ Embassy of Malaysia at Washington D.C, <http://www.eria.co.uk/freedata/HRCodes/MALAYSIA.htm>, Accessed date, December 19, 2022.

Law system too known written law (statutes).⁴⁸ The source in the Common Law system is court decisions and it is through court decisions that legal principles are formed and become a binding rule in general. Apart from the verdict courts, in the Common Law system also known as custom, written laws and regulations state Administration.

Sources of customary law, statutory regulations and state administrative regulations in the Common Law system do not systematically arranged in a hierarchy as in Civil law. In the Common Law system, judges have broad powers to interpret applicable laws and make decisions by creating new legal principles that become guidelines for other judges to hear cases that are kind.⁴⁹

2.1 Table of Comparisan Between Civil Law System and Common Law System

CIVIL LAW	COMMON LAW
Derived from the Roman law tradition and are mostly found in continental Europe, Latin America, and some parts of Asia	Derived from the English legal tradition and are mostly found in the United States, the United Kingdom, and other former British colonies
The systems rely heavily on written codes, statutes, and legislation as the	The systems rely heavily on case law, which is the body of legal precedent

⁴⁸ R.Abdoel Djamali, Op.cit, p. 70.

⁴⁹ *Ibid*, p. 71.

primary source of law	established by courts through their decisions in individual cases
Judges typically have a more limited role in interpreting the law and are expected to apply the law as it is written	Judges have a more active role in interpreting the law and are expected to make law through their decisions
Tend to be more codified, formal, and focused on the written law	Tend to be more flexible, adaptable, and focused on judicial precedent

On the mainland of Southeast Asia, the majority of the population in Malaysia are 53% Muslim, 19.2% Buddhist, 9.1% Christian, 6.3% Hindu and Religion Traditional Chinese 2.6%. The rest are considered to follow other religions, for example Animism, Folk religion, Sikhs.⁵⁰

Malaysia consists of 13 states; three of which are federal territory. Nine states are said to be native Malays namely Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor and Terengganu and Sarawak. While the rest is a federal territory consists of three parts, the so-called federal territories, namely the island of Labuan, the capital city of Kuala Lumpur, and the new city of Putrajaya.⁵¹

⁵⁰ Cyril Glasse, 1999, *The Concise Encyclopedia of Islam*, Jakarta, PT. Raja Grafindo Persada, p. 77.

⁵¹ Zaiful Muzani, 1993, *Penelitian Sosial dan Kebangkitan Islam di Malaysia*, Jakarta, LP3ES, p. 289

Malaysia's legal system can be traced from its historical perspective, namely in 1511 AD, Malacca was ruled by the Portuguese for 130 years, in 1641 AD. it was the turn of the Dutch to rule until 1824 AD Then power passed to the British according to the Anglo-Dutch agreement of 1824 AD. This incident expanded British influence in the area British control of the area that is now Malaysia was then paved the way for the entry into force of British customary law in Malaysia. So as a former British colony, Malaysia still maintains its British customary law tradition (Common Law System).

As a reaction against the British audacity in controlling and administering the State and the law, the Malaysian government strengthened the institutions that were still under their authority, including those related to Islam and Malay custom. The sultans began to strengthen institutions such as religious councils, muftis and religious courts.⁵²

The influence of the British colony was not only on the legal system adopted by the Malaysian state, but on a more detailed side as well thereby. Call it the rule of law principle practiced in Malaysia, which generally follow English administrative law as developed in Malaysian courts. Decisions made by administrators and courts must be within the scope of discretion or granted jurisdiction. They must

⁵² Nabilah Naili, 2013, Hukum Keluarga Islam Asia Tenggara Kontemporer : Sejarah, Pembentukan, dan Dinamikanya di Malaysia, Executive Summary, Surabaya, Lembaga Penelitian Masyarakat IAIN Sunan Ampel, p. 8

follow the principle of 'natural justice' (natural justice).⁵³

Comprehensively, regarding the entire provisions of Malaysian law, the court system is federal. Both federal state laws state or state, the trial shall be conducted in federal court. Only Sharia courts (shariah code) exist in the state by using the Islamic law system.⁵⁴ As a federated state, jurisdiction and authority should be divided between the federal and state states. Although Islam is declared as a federated religion, but the affairs of the Islamic religion were left to the state part. federal states govern almost all laws, both civil and criminal. Family law for non-Muslims is included in the jurisdiction federal government under civil courts. As for family law Muslims are a matter for the State government under the jurisdiction of sharia courts. Criminal law, compensation, contract, agrarian and others become the authority of the federal government that applies to Muslims and non-Muslims.

The various types of courts in Malaysia can be mapped as following: ⁵⁵

- 1) High Court

There are two high courts in Malaysia; High Court in Peninsular Malaysia, known as the High Court in Malaya; and in East Malaysia, known as the High Court in Sabah and Sarawak.

With the exception of all matters in jurisdiction of the Shari'ah

⁵³ *Ibid*, p. 10

⁵⁴ Ardian Nugraha, 2016, "Malaysia: Sistem Pemerintahan, Politik, Hingga Pemilu, www.ardiannugraha.com; Accessed date, December 21, 2022

⁵⁵ Somadiyono, S Op. Cit, p. 418

court, this court has jurisdiction pure is not limited to its territory.

2) Court of Appeal

There are two courts of appeal in Malaysia; Court of Appeal Malaysia (Court of Seduction) and Federal Court (Court Partnership).⁵⁶ The Court of Appeal is composed of a president of the court and 10 judges. His job is to examine court appeals higher and have other jurisdiction as regulated in law federal.

3) Federal Court

The Federal Court has jurisdiction in determining the validity of a law, with consideration this matter relates to matters outside the jurisdiction of parliament and state legislation in making laws. Federal courts also have jurisdiction to decide disputes between states or within federations and other states. the law is in litigation in that court otherwise, the Federal Court has jurisdiction to determine questions and dismiss cases in other courts accordingly Federal Court provisions.

4) Sessions Courts

Session Courts have criminal jurisdiction to try all crimes that are not subject to the death penalty.⁵⁷ These courts also have jurisdiction in civil matters relating to vehicle accidents, cases between landlords and tenants, and another case with an amount of compensation of about 250,000 Ringgit, and also

⁵⁶ Zulkifli Hasan, "Mahkamah di Malaysia"

⁵⁷ *Ibid*

may examine cases with higher demands upon agreement with the parties concerned. However, civil disputes are relating to a request for something such as a recession of a contract, an injunction, a declarative decision, or the exercise of a trusteeship outside the jurisdiction of Sessions Courts.

5) Magistrates' Courts,

Magistrates' Courts of the first class hear criminal cases with a penalty limited to 10 years in prison or a fine. Magistrates Courts may also examine appeals by Principal's Court. Magistrates' Courts of the second class hear cases civil case with a claim of 30,000 Ringgit and a criminal case and criminal cases with a prison sentence of 12 months or a fine. Court this can carry a prison sentence of up to 6 months, a fine of 1,000 Ringgit or a combination of the two penalties.

6) Juvenile Court (Children's Court)

Crimes committed by juveniles (between the ages of 10 up to 18 years) are tried in juvenile courts, unless the crimes committed are serious. This court consists of 2 advisors (one of them, if possible, female). The magistrate decides a case, and the advisers only give advice to punishment. Imprisonment is a last resort compared to sending to a designated special school

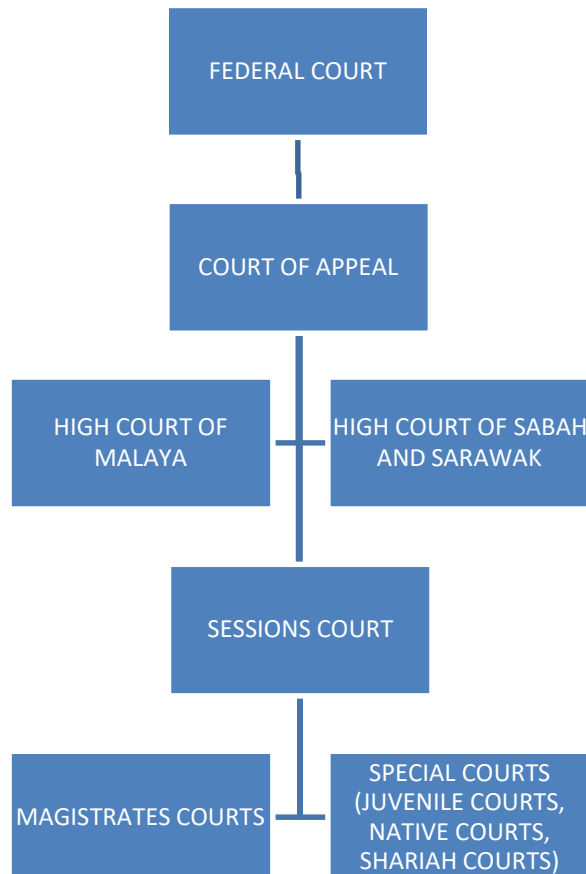
7) Sharia Court (Syariah Code)

Sharia courts are state courts that are separate from

federal state courts, which are not restricted by any jurisdiction in the Shari'ah courts. this court have jurisdiction over Muslims in matters of personal and family law such as engagement, marriage, divorce, guardianship, adoption, legitimacy, succession, along with alms and endowments.

8) Native Court

In Sabah and Sarawak, customary law is used in courts indigenous. Applicable jurisdiction differs between courts in Sabah and courts in Sarawak, but broadly extends to the situation where both parties are indigenous groups; cases examined include matters of religion, sexuality, or marriage where one of the parties is an indigenous person; and other matters in which jurisdiction regulated by written law.



2.2 Hierarchy Chart of Court Structure in Malaysia

There are four main sources of law in Malaysia, namely written law, customary law, Islamic law and customary law.⁵⁸ Written law consists of federal and state constitutions, statutes federal parliament and state legislation, and additional legislation (statutes and ordinances). Customary law consists of British customary laws and regulations equal rights that have been developed by Malaysian courts, which are in it contains the possibility of conflicts with written law as well as adjustments to local conditions and qualifications deemed appropriate.⁵⁹ There are several codifying laws most of the customary law, for example the contract law of the year 1950, the sale of goods

⁵⁸ Sudirman Tebba, 1993, *Perkembangan Hukum Islam di Asia Tenggara*, Bandung, Mizan, p. 102

⁵⁹ Dedi Supriadi, 2009, *Perbandingan Hukum Perkawinan di Dunia Islam*, Bandung, Pustaka al-Fikriis, p. 128

act and the special relief act. Malaysian courts follow the principle of stare decisis, namely courts follow previous court decisions.

High court decisions are binding on lower court levels. Court decision appeals are binding on the high court as well as the court level at under it and decisions of federal courts are binding on the courts appeals and courts under it. Islamic law is sourced from the Holy Qur'an, hadith, law agreed upon by jurists in ancient times, the explanation/statement of ancient and modern scholars, and in custom.

In context Malaysia which has a diversity of races, Islamic law only applies to Muslims as individual law, such as marriage, divorce, guardianship, and inheritance. West Malaysian customary law is derived from ancient Malay customary law, Hindu law, and Islamic law.⁶⁰ In East Malaysia, adat law consists of Malay customary law applicable to non-Malay natives, and Hindu and Chinese customary laws codified in statutes, these laws are administered by the Indigenous Courts.

C. Employment Law System in Indonesia and Malaysia

1. Employment Law in Indonesia

In Indonesia, the Ministry of Manpower and Transmigration is the main government agency for the regulation of migrant workers in Indonesia. Recruitment and placement of manpower is carried out by private agencies, licensed by the Ministry of Manpower and

⁶⁰ Sudirman Tebba, Op, cit. p. 103

Transmigration, the Ministry also oversees skills training, mandatory pre-deployment debriefing and provides a small number of labor attaches at Indonesian embassies abroad. Other government departments are also involved, along with their various mandates. For example, the Ministry of Foreign Affairs handles consular matters, the Directorate General of Immigration (within the structure of the Ministry of Law and Human Rights) issues passports, and the Ministry of Health is responsible for pre-departure health checks.

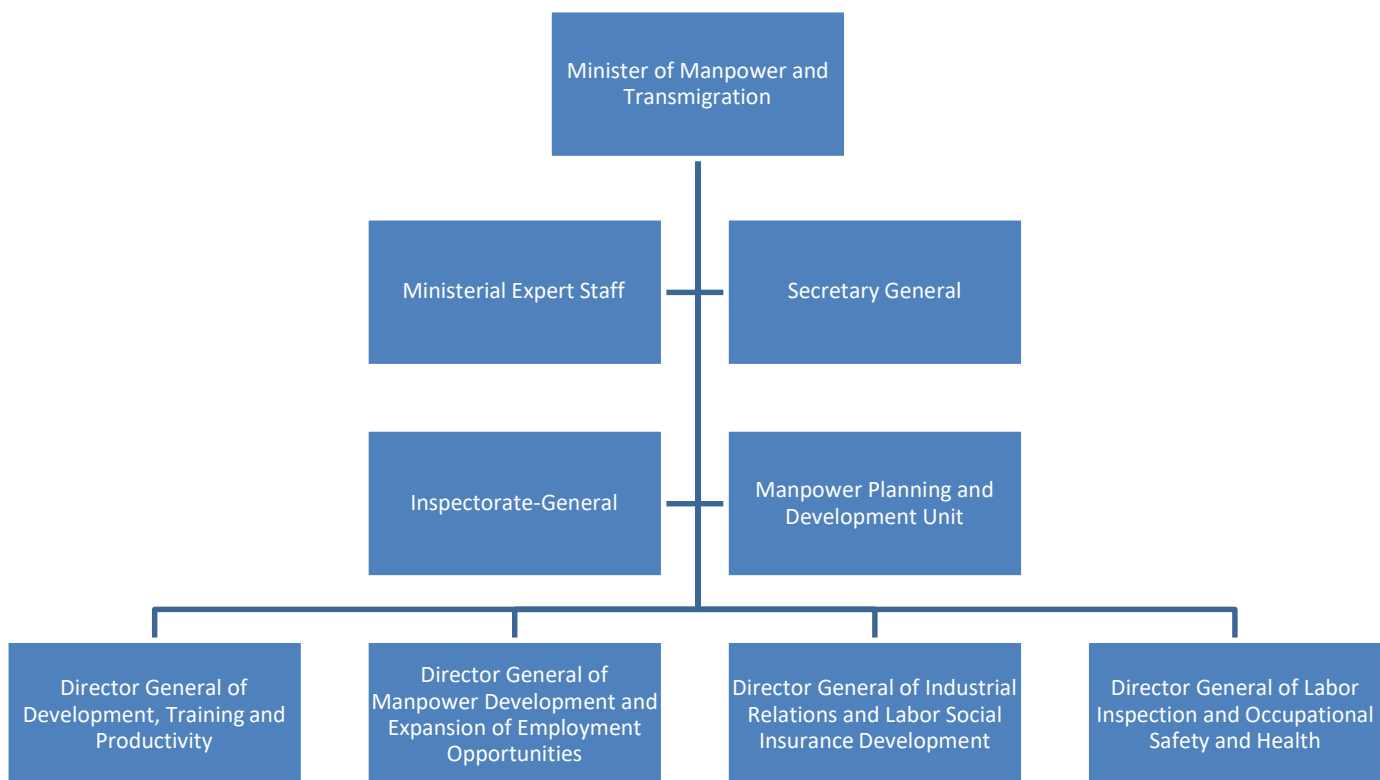
The Law No. 18 of 2017 regarding The Migrant Worker Placement and Protection Law (*UU No. 18 Tahun 2017 Tentang Penempatan Pekerja Migran Indonesia*) requires the establishment of a National Agency for the Placement and Protection of Overseas Migrant Workers. This agency has yet to be formed, although the Minister of Manpower has recently assured the public that it will start operating in October 2016. The National Agency for the Placement and Protection of Overseas Migrant Workers will consist of relevant government departments, and will report directly to the president. This agency will have the responsibility to “implement policies in the field of placement and protection of Indonesian Migrant Workers abroad in a coordinated and integrated manner”.⁶¹ This will include, recruitment, medical examination, training, departure and in-country protection.

Oversight of recruiters' licensing and training appears to be

⁶¹ Republic of Indonesia, Law No. 39 of 2004, Article 95

shared informally by different levels of government; the relationship between the Central Government, the Provincial Government and the Municipal/District Government is not clear. Other important issues are also not covered in this law. The fact that regional autonomy is now in force in Indonesia makes it important for the law to clearly define the roles and responsibilities of each level of government in managing the migration process.

2.3 Hierarchy Chart of Ministry of Manpower and Transmigration in Indonesia



The breakdown of the job descriptions of some of the key positions in the Ministry of Manpower in Indonesia:

1. Minister of Manpower: The Minister of Manpower is responsible

for overseeing the development and implementation of policies related to labor, employment, and social security in Indonesia. This includes coordinating with other government agencies, engaging with labor unions and employers, and developing programs and initiatives to support workers and promote job creation.

2. Director General of Industrial Relations and Social Security: This position is responsible for overseeing the development and implementation of policies related to industrial relations, social security, and occupational health and safety. This includes managing programs and initiatives to promote safe and healthy working conditions, mediating labor disputes, and administering social security programs for workers.
3. Director General of Labor Inspection: The Director General of Labor Inspection is responsible for enforcing labor laws and regulations in Indonesia, including those related to minimum wage, working hours, and working conditions. This includes conducting inspections of workplaces, investigating complaints of labor violations, and taking legal action against employers who violate labor laws.
4. Director General of Development, Training, and Productivity: This position is responsible for developing and implementing programs to improve the skills and productivity of the Indonesian

workforce. This includes providing vocational training, supporting apprenticeships and internships, and promoting lifelong learning and skills development.

5. Director General of Manpower Development and Expansion of Employment Opportunities: The Director General of Employment Placement is responsible for connecting job seekers with employment opportunities, and assisting employers in recruiting and hiring qualified workers. This includes managing job placement centers, developing job training programs, and providing career counseling and guidance.
6. Director General of Industrial Relations and Labor Social Insurance Development: This position is responsible for administering social security programs for workers in Indonesia, including health insurance, pension plans, and workers' compensation. This includes managing the collection of social security contributions, providing benefits to eligible workers and their families, and ensuring the integrity of the social security system.

The final division of authority must seek to balance the need to deliver services to the local level on the one hand with the human resources that are more widely available in the central government on the other. In Indonesia, the recruitment and placement of citizens to work abroad is carried out by private companies known as Indonesian

Migrant Service Companies. The government's role under the current regulatory framework is to supervise these agents through a licensing scheme known as the Permit to Implement Placement of Indonesian Migrant Workers. Currently there are around 400 Indonesian Labor Service Company with operating permits in Indonesia and 90% of them are members of Association Indonesian Labor Service Company. Apart from Indonesian Labor Service Company who have official licenses, it is estimated that there are at least 800 companies providing illegal labor services in Indonesia. Most of these illegal companies are actually contracted by legal recruitment agencies to conduct their initial recruitment campaign.

2. Employment Law in Malaysia

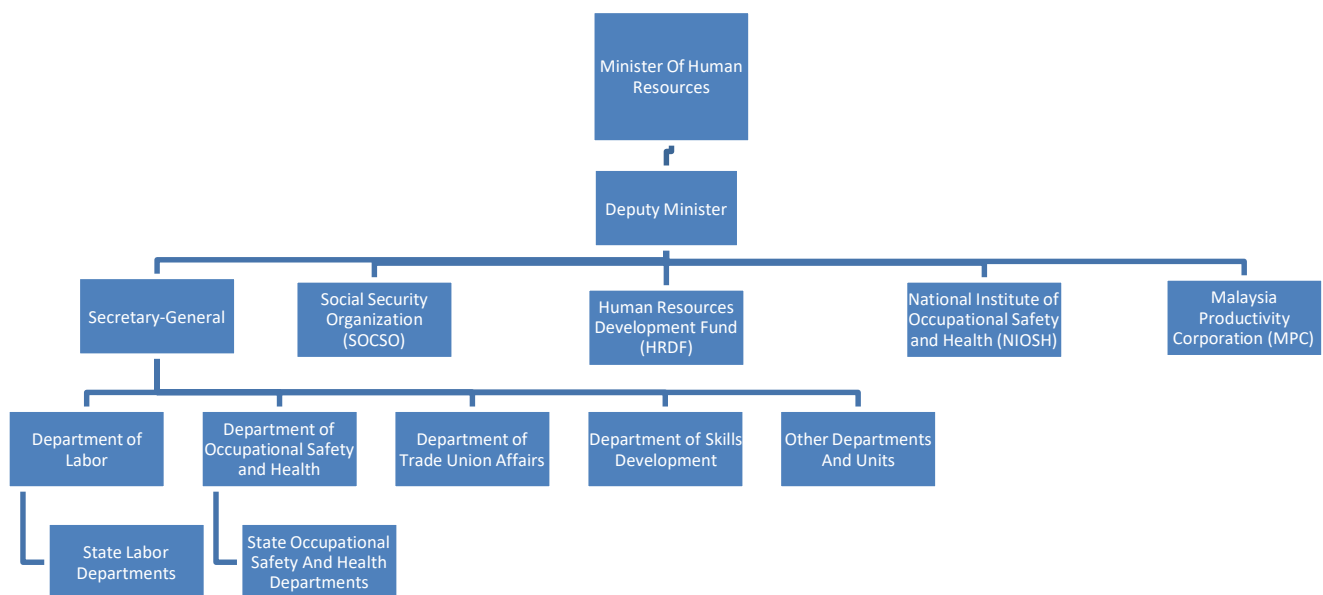
Malaysia is a federal state with a rigid written constitution.

Parliament

derives its powers from the constitution and is divided among the federal states and the states. Some of the powers of the Federal Government are foreign affairs, defenses, national security, police, civil and criminal law as well as procedures and administration of justice, citizenship, finance, commerce, commerce and industry, shipping, navigation and fishing, communication and transportation, performance and power. federal, education, health, employment, and social security. The court system is fundamentally federal. Both federal and state laws are enforced in federal courts. Only the Shari's courts exist only in the states, which use the

Islamic Law system, along with the indigenous courts in Sabah and Sarawak, which deal with customary law. Furthermore, there are Sessions Courts and Magistrates' Courts.⁶²

The high court and subordinate courts have jurisdiction and powers governed by federal law. They also do not have jurisdiction in all matters relating to the jurisdiction of Shari'ah courts. Some of the powers of the state include matters related to the practice of Islam in the state, land ownership rights, obligations to take land, mining permits, agriculture and forest exploitation, city government, and public work in the interests of the state.



2.4 Hierarchy Chart of Ministry of Human Resources in Malaysia

When federal law and state law conflict, federal law is deemed

⁶² Pahroji, Dedi, and Holyness N. Singadimeja, Op. cit, p.4

to apply. The minister in charge of industrial relations law can refer disputes between employers and trade unions to industrial courts, and the director general of labor can be summoned to resolve disputes over employee salaries.

Many statutes provide for arbitration, furthermore the 1952 arbitration act provides rules for domestic arbitration. There is also a Regional Center for Arbitration in Kuala Lumpur which provides facilities for the arbitration of international commercial transactions.

Principles covering the relationship between employers and workers in Malaysia are obtained from 3 main sources:

- a. Common law
- b. Written laws in Malaysia
- c. Decisions of the Company Court and the Civil Statute Court (written law) of Malaysian labor imitating the British and Indian Statutes.

However, the labor laws in Malaysia are not really similar (in pari material) to the labor laws of the two countries. In Malaysia's statutes, there are several designations specific to Malaysia. Labor statutes in Malaysia (written laws regarding Employment) consist of Employment Deed, Company Relations Deed, Work Unity Deed, Worker Social Safety Act, and so on. According to provisions 3 and 5 of the Civil Law Acts, if there is a written law in Malaysia, Common Law is not used, but if there is a void in the written law the common law principle is still used

to fill the void.

Courts in Malaysia adopts many common law rules to carry out aspects of labor law in Malaysia, for example to determine the test to determine whether or not a "service contract" (mutual agreement) is made, obligations between employers and workers, and so on. Statutes of employment in Malaysia are as follows:

- a. Employment Act 1955, amended 1989 (*Akta Kerja 1955, diamendemen tahun 1989*)
- b. Work Unit Act 1959, amended 1989 (*Akta Kesatuan Kerja 1989*)
- c. Company Relations Act 1957, amended 1980, 1989 (*Akta Perhubungan Perusahaan 1957*)
- d. Workers Social Safety Act 1969 (*Akta Keselamatan Pekerja Sosial 1969*)
- e. Workers Act of Children and Young People 1966 (*Akta Pekerja Anak-Anak dan Pemuda 1966*)

As is the case with labor laws in other countries in general, Malaysia's labor law regulates general provisions relating to protection for workers and employers/companies such as work agreements, rights and obligations of workers/workers and employers/employers, hours of work, wages, maternity leave, provisions regarding overtime, social security, the right to worship, termination of work / layoffs, as well as severance pay and its provisions and others. Employment in Malaysia is under the Ministry of Human Resources under the Prime Minister, parallel to other

ministries, such as Immigration.

As a receiving country for Indonesian migrant workers, Malaysia does not specifically regulate legislation relating to Foreign Workers, in Malaysia all workers both domestic and from outside the country who work in Malaysia through a valid employment contract between workers and Malaysia are bound by the provisions in the Employment Deed (law employment), except for informal workers, the same as Indonesia, Indonesian informant workers are bound by the provisions of Malaysian immigration rules as foreign nationals who are in Malaysia for a certain time limit.⁶³

Agreements between workers and employers through agents relating to length of service, wages, and rights and obligations of workers and employers, the Indonesian state in making an agreement with Malaysia in the form of a G to G (government to government) agreement in the form of an MoU. So far, the provisions have been more in favor of the employer. The MoU between the government is the legalization of Indonesian Workers to be able to work in Malaysia as a basis for protecting the rights and obligations of Indonesian Workers.

2.2 Table of The Comparison Between Employment Law in Indonesia

⁶³ Pahroji, Dedi, and Holyness N. Singadimeja, Op. cit, p.5

and Malaysia

Comparison	Indonesia	Malaysia
Law	<p>1) Law No. 21 of 2000 Concerning Labor Union</p> <p>2) Law No. 3 of 2003 Concerning Manpower</p> <p>3) Law No.2 of 2004 Concerning Settlement of Industrial Relations Disputes</p> <p>4) Law No. 39 of 2004 Concerning Placement and Protection of Indonesian</p>	<p>1) Employment Act 1955</p> <p>2) Company Relations Act 1957</p> <p>3) Work Unit Act 1959</p> <p>4) Workers Act of Children and Young People 1966</p> <p>5) Workers Social Safety Act 1969</p>

		Workers Abroad 5) Law No. 40 of 2004 Concerning Social Insurance System	
Agreement Government Government	to	Memorandum of Understanding on Placement and Protection of Indonesian Migrant Workers in the Domestic Sector in Malaysia.	

Referring to the table regarding the agreement from government to government between Indonesia and Malaysia regarding the system of sending workers was made and signed about One Channel System. This new system between Indonesia and Malaysia focused on the preparation of the workers who will be sent to another country. This new system is a renewal system rather than the old system before which is system maid online.

Table 2.3 Comparison Between System Maid Online and One Channel System

System Maid Online	One Channel System
Placement of migrant workers directly (direct hiring) without going through an agency.	Managed by a representative from Indonesia in Malaysia, with an online system managed by the Malaysian immigration department
Unable to grant permission for illegal workers	Can give permission for illegal workers to become legal
it is considered to provide a loophole for people who seek profit to bring migrant workers directly from their home countries using tourist visas. Migrant workers will be taken without going through legal procedures and are not registered with the Ministry of Manpower	This use is carried out by an online system that provides data related to job demand, employers, labor, availability in the domestic sector

D. Analysis I

In principle, the placement of Indonesian Workers Abroad as stipulated in Law Number 39 of 2004 must be based on the following: ⁶⁴

- a) Individuals are prohibited from placing Indonesian citizens abroad (Article 4)
- b) The Government is responsible for improving efforts to protect Workers abroad (Article 6).
- c) Placement of Indonesian Workers abroad is carried out to the destination country (Article 27): Who has made a written agreement with the Government of the Republic of Indonesia; or Destination countries that already have laws and regulations that regulate and protect foreign workers.
- d) Prohibition on placing prospective Indonesian Workers in positions and places of work that are contrary to human values and norms of decency and laws and regulations, both in Indonesia and in the destination country or in the destination country that has been declared closed as referred to in Article 27 paragraph (2).
- e) Every prospective Indonesian Worker is entitled to protection in accordance with laws and regulations starting from pre-placement, placement period, to post-placement.

⁶⁴ Abdul Hakim, 2009, Hukum Ketenagakerjaan Indonesia, PT Citra Aditya Bakti, Bandung, p. 34.

The placement of migrant workers to be able to work abroad is a tangible form of effort to provide and realize equal rights and opportunities for workers to get their jobs. The main issue with regard to migrant workers abroad is the high number of migrants without valid documents (illegal), which causes various problems related to labour protection. Several portraits of cases of violence against migrant workers can be seen clearly since December 2016, when the mass media intensively reported about the abuse experienced by Suyanti, a domestic worker working in Malaysia.

She suffered torture from his employer in the form of blows all over the body and bruised both eyes. In addition to Suyanti, violence was also experienced by Siti Romlah in 2017. During her five years of work, Siti admitted that she often received rough treatment, such as being splashed with hot water and being hit with objects in her employer's house.⁶⁵

Regarding crimes experienced by Indonesian Workers in Malaysia, the Indonesian Workers should get legal protection, in accordance with the provisions contained in Article 80 paragraph (1) of Law No. 39 of 2004. While the protection provided during the post-placement period, namely when Indonesian Workers return to Indonesia is an adequate service, both in terms of information such as installing a monitoring system at the arrival terminal of Indonesian Workers to inform about the rights of Indonesian

⁶⁵ Ardi Prayitno. Kompas. 2018, "Penyiksaan TKI Di Malaysia, Kisah Suram Yang Seolah Tiada Akhir, https://internasional.kompas.com/read/2018/02/13/1958_1311/penyiksaan-tki-di-malaysia-kisah-suram-yangseolah-tiada-akhir?page=all, Accessed date September 7th, 2023, on 14.34 WITA

Workers who need health care upon arrival of Indonesian Workers who suffer physical violence and sexual harassment that needs to be immediately get treatment.

Legal protection is not only given to legal Indonesian Workers, but legal protection should also be given to illegal Indonesian Workers, because basically Indonesian Workers are human beings who have the human right to get legal protection if they experience a crime, as well as for Indonesian Workers who are in Malaysia. If any of the workers experienced a criminal act, such as rape, molestation, sexual harassment and fraud, the illegal Indonesian Worker should get legal protection. Not only the government needs to be highlighted, migrant workers must also be made aware of their obligations, rights, and applicable laws so that they can protect themselves.

Many applicable legal regulations cannot work because: ⁶⁶

- a) The law is not familiar with social reality, not in accordance with the ideals of justice of the people because the language of law is very convoluted and difficult to understand so that it is multi-interpretation;
- b) Legal regulations must be accompanied by implementing regulations of legal regulations (laws).

Many legal regulations cannot be implemented, because they are not accompanied by implementing regulations, even if there are

⁶⁶ Kaligis, Griselda Athalia. "Perlindungan Hukum Bagi Tenaga Kerja Indonesia Di Malaysia Menurut Undang-Undang No 39 Tahun 2004 Tentang Penempatan Dan Perlindungan Tki Di Luar Negeri." *LEX PRIVATUM* 8.2 (2020).

implementing regulations, they cannot work, because there is no synergy between the legal regulations made and the implementing regulations as an operational reference. That's why legal communication is needed. It means the mechanism that connects human beings, developing all the symbols of the mind together with their accompanying meanings and through the freedom that provides them in time. ⁶⁷

Communication is also the conveyance of understanding between individuals. Our country's foreign exchange heroes, migrant workers wherever they are, still have the same protection of their rights as those who work in the country without exception. The existence of Law Number 39 of 2004 concerning the Placement and Protection of Indonesian Workers Abroad needs to be supported by: ⁶⁸

- a) Adequate language skills; One of the factors that causes the persecution and torture of migrant workers in other countries is the issue of language. Most of the migrant workers who departed were in a condition of minimal language understanding. This will obviously be an inhibiting factor in communication between an employee and the employer. Therefore, the important thing that must be fulfilled by a migrant worker who will be dispatched is the issue of language, language must be mastered because it is the main key in communication.

⁶⁷ *Ibid*, p.189

⁶⁸ *Ibid*, p.190

b) The ability to know the culture of the country to be addressed; The ability to read and understand the culture of an area is an important capital for someone to live in the area.

Migrant workers abroad who are often subjected to torture and physical abuse, the majority come from non-educated workers. Usually, it comes from among domestic workers, most of whom are women. The perspective of developed countries views Indonesia as a large country that is still poor and beset by domestic problems that never stop. ⁶⁹