

MATERNITY PROTECTION OF WOMEN WORKERS: A COMPARATIVE STUDY OF INDONESIAN AND MALAYSIAN LABOR LAWS

Badratun Nafis, Sanusi Bintang

Faculty of Law, University Syiah Kuala, Indonesia
Jalan Inoeng Bale, Rukoh, Darussalam
E-mail: cekpis96@gmail.com

ABSTRACT

This study analyses the similarities and differences of maternity protection under Indonesia and Malaysia's Labor Law. The method used in this research is a normative and comparative approach. This study shows several differences in maternity protection from both laws, such as the duration of maternity leave and the provision of breastfeeding entitlement. However, few similarities are also found, such as both laws provide social and health protection under the labor law. Malaysian lawmakers should revise the Employment Act 1955, which covers work protection and breastfeeding, and both countries should ratify the Maternity Protection Convention of 2000 to better protect women workers in the workplace.

Keywords: Maternity protection, Women worker, International convention, Indonesia and Malaysia labor law.

INTRODUCTION

Maternity protection is a special right obtained by women because of their innate nature as a woman after marriage and then getting pregnant and giving birth. Maternity protection means health protection for women during pregnancy, giving birth until the breastfeeding period in terms of maternity leave, maternity allowance, breastfeeding opportunity, work protection, and non-discrimination. Even international organizations are concerned about the right of women workers. Several conventions are regulated regarding this matter, such as the Universal Declaration of Human Rights, The Convention on Elimination of All Forms of Discrimination against Women, and in ILO Convention on Maternity Protection 2000, which specifically discuss the entitlement and protection for women workers on the maternity issue (ILO, 2012).

The International Labor Organization is an international organization under the United Nations' organs whose task is to expand the opportunities and the occasion for men and women to obtain decent work independently. In this regard, the ILO has published a convention that takes opinion and guidance from several international conventions such as the Universal Declaration of Human Rights (1948), the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979), and the United Nations Convention on the Rights of the Child (1989). This convention consists of 21 articles that describe maternity protection for women workers

The involvement of women can no longer be ruled out; unfortunately, almost all of the jobs put female workers in competition with even males. Governments as heads of state should take note of the need for protection against working women today to ensure a more developed country and produce more productive women of the nation. In some cases, employers have neglected their responsibility to protect female workers under maternity protection as regulated in several national and international conventions. Employers must comply with many types of protection for female workers and pregnant workers.

The Convention on Maternity Protection gives the option for the local Government to recreate the regulation on the protection of women worker who is pregnant. This convention describes the application's scope, health protection, maternity leave, allowance for women workers if they leave with permission, work protection, and non-discrimination. This convention also covers the protection issues of breastfeeding mothers while they work.

Indonesia and Malaysia are two countries with different legal systems. Indonesia applies the European legal system or Civil Law based on the hegemony of the Netherland state, while Malaysia adheres to the Common Law system that comes from British rule. Thus, the differences above reveal differences in the two countries' entire legal systems, including their regulation of the labor law structure.

In Indonesia, the maternity entitlement is protected by the national law under Indonesia labor law No. 13 of 2003 on Employment, while Malaysia has Employment Act 1955. Maternity protection is divided into maternal safety, child health, opportunities, and equal treatment without discrimination. Women are also entitled to job opportunities, promotion in the workplace, and carrying out their maternal roles.

Indonesian Employment Law No. 13 of 2003 states that every person has equal opportunity to get a job according to their interests and capabilities and decent living without differentiating type, gender, ethnicity, religion, and race. Article 1 point 2 of Law No. 13 of 2003 states that the worker is anyone who works to produce goods and/or services both to fulfill their own needs and social interest. Indonesian Employment Law also stipulates that the employer is prohibited from firing the women workers if they were pregnant, giving birth, conceiving, or breastfeeding. This regulation is specified in Article 153 paragraph e, which mentions the employer's inhibition to act freely to dismiss workers on the grounds of pregnancy.

In the Malaysian constitution, the employment matters are managed under the Minister of Human Resource, in which the prime minister is the head of management. The primary purpose of

the ministry is to create a competitive workforce environment and harmonious industry and social justice.

Malaysia Employment Act of 1955 interprets "employee/worker" as any person who enters into a contract of service with an employer and receives a salary that does not exceed RM 2000 per month. The Employment Act 1955 is the primary legislation regulating labor statutes and recently enforceable only in peninsular Malaysia. Maternity protection, held under sections 37 and 44, starts from the duration of maternity leave, maternity allowance, health protection, and the prohibition of the worker in maternity leave. Maternity protection is regulated in Part IX of the 1955 Malaysia Employment Act. The section focuses on maternity leave, maternity allowance, the eligibility criteria, the notice requirement, protection from dismissal, and other related provisions. Under Section 37, Malaysian law provides fulfilling requirement duration for the right to maternity allowance.

One of Malaysia's NGOs, the Women Aid Organization (WAO), surveyed women workers in Malaysia who face discrimination when applying for a job, where they were asked inappropriate questions and conditions to be accepted in the workplace. During an interview, women were asked about their family planning and willingness to postpone having a child when they got the job. In *Najah Binti Ahmad v. Consist College Sdn. Bhd* case, the women worker, claimed that the employer committed constructive dismissal just after she confirmed her pregnancy. Constructive dismissal is when the worker faces difficulty and pressure at work, which the employer aims to force them to leave the job. Nevertheless, Article 8 (2) of the Federal Constitution of Malaysia states prohibits any gender trafficking and discrimination against women, which is enforced for public sector employees.

Sometimes, a woman worker gets pressured to quit work due to pregnancy. For instance, they will be given many warning notices for something trivial and then make them choose resignation. Unfortunately, employers are concerned that pregnant women workers may interfere with their productivity. After all, pregnant women are more vulnerable to workplace risks. Under International Labor Organization (hereafter called ILO), dismissal for women workers is prohibited for pregnancy, childbirth, and breastfeeding. However, the employer bears the burden of establishing that the reason for the dismissal was not related to maternity leave.

RESEARCH METHOD

The research used a normative and a comparative approach. To achieve the objective of this research, Law No. 13 of 2003 concerning Manpower for Indonesia and Employment Act 1955 for Malaysia material is analyzed. The research was conducted on both countries' labor regulations, precisely maternity matters. The data used in this study were gathered through library

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research. Qualitative analysis and interpretation derived from data collected through library research or a documentary data approach will address the research questions. The data analysis is expected to deliver conclusions that answer the research problem.

FINDING AND ANALYSIS

1) Similarities of Maternity Protection under Indonesian and Malaysian Labor Laws

There are several similarities between Law No. 13 of 2003 concerning Manpower and Employment Act 1955 regarding maternity protection. Both countries do not ratify Convention on Maternity Protection 2000, which the International Labor Organization designed. Secondly, health protection for women worker in Indonesia and Malaysia are provided in the states' social program, namely Employees Social Security System (BPJS) for Indonesia and Social Security Organization (SOSCO) for Malaysia. The Indonesia government creates BPJS as social insurance for all workers in Indonesia. The first social insurances for Indonesian workers were about work accidents in 1947, designed to protect workers' rights, and it is still used until now with its programs.

One of those four insurances is working insurance or JKK (*Jaminan Kecelakaan Kerja*), which aims to ensure the worker access to proper health care and receives cash compensation if they suffer from illness or encounter an accident while working. This insurance includes pregnant women workers to guarantee the safety of their pregnancy.

Like Indonesia, the Malaysian Government also provides social protection known as PERKESO (Social Safety Organization), which recently became SOSCO (Social Security Organization). PERKESO was established in 1971 under the Minister of Human Resources to provide social protection for every local worker and migrant worker. This program is executed and enforced under the Social Security Worker Act 1969. Every worker must be registered and paid the program's fee by their employer at their workplace.

2) Differences of Maternity Protection under Indonesian and Malaysian Labor Laws

Relating to maternity protection for women workers, Indonesia and Malaysia regulate it differently. Those differences include:

a. Maternity Leave

Indonesia set 3 months or 90 days maternity leave for women workers, divided into 1,5 months before and 1,5 months after giving birth. In addition, employment law in Indonesia also provided a rest duration of 1.5 months for women workers who experience miscarriage.

Unlike Indonesia, the Malaysian Employment Act 1955 stipulates that the appropriate time

for maternity leave is not less than 60 days. Malaysia employment act creates complete and strict rules about the duration that should be taken for maternity leave. The maternity leave for Malaysian workers cannot be taken earlier than 30 days before giving birth or passed from the next day after the day of confinement. Additionally, workers who experience miscarried before 22 weeks of pregnancy have a right to take the same leave as women workers who give birth. Normal giving birth or sick for miscarried receive the same opportunity to rest because recovery of soul and mind is also taken into consideration by the Malaysian Government.

Receiving enough rest is very important for mothers to manage their newborns before starting work. Everyone should fulfill and respect the right of women workers to have time to recover and take care of their health and their baby after giving birth. The employer should not make any excuse to terminate the worker who will take maternity leave.

b. Cash Benefit / Medical Benefit

Indonesian law has stated that women workers on maternity leave are entitled to full wages, and the employer must provide such wages in full without any reason. However, the company does not pay employees' salaries fully on the pretext of cutting their wages to replacement employees during their leave.

In Malaysia, Employment Act 1955 mentions that the maternity allowance is received in advance per the amount of salary they should receive during the leave. However, the worker should fulfill several requirements before receiving the maternity allowance arranged under Employment Act 1955. The first condition is that workers who apply for maternity allowance must have worked for not less than 90 days in the nine months before taking maternity leave. The second requirement is that she has worked in the four months before becoming pregnant. The third is that maternity allowance is not available for all children born to a worker; only five children or more, if calculated from the child still alive when she gave birth, is included. The overtime leaves through thirty days before the worker gives birth cannot be considered maternity leave, and the worker is not eligible to get maternity benefit.

Compared to Indonesia, Malaysian labor law provided more additional maternity benefits requirements. Indonesia employment law comes with a simple condition to ensure that the worker does not face difficulty during maternity leave. Malaysia's Government needs to upgrade its law to make it easier for workers to claim maternity allowance.

c. Health Protection

Article 76 paragraph (2) of Indonesia Employment law mentions the prohibition for employers to employ pregnant women to work overtime or in midnight shift after the doctor describes the danger to the health and safety of the worker pregnancy and themselves. Meanwhile, in Malaysia, the employment act only defines the prohibition of women workers to work at night, starting at ten o'clock in the night until five o'clock in the morning. There is no other provision mentioned prohibiting pregnant workers from working at night.

Maternity protection in Indonesian Employment Act only covers maternity leave, maternity allowance, and protection from dismissal. Other points should also be included under this Act, such as the limitation of time for pregnant work and the safe environment for pregnant women to work.

d. Breastfeeding

Indonesia Employment Act expresses concern about the breastfeeding issue in the workplace. Article 83 states that the right to breastfeed for mothers worker must be allowed even during work. Meanwhile, in Malaysia, the employment act does not mention the right for workers to breastfeed during working. It is contrary to the nature of breastfeeding mothers, which is essential to breastfeed their child. Breastfeeding is only stated under Indonesian Employment Law, not in Malaysia Employment Act.

e. Work protection and non-discrimination

Indonesia prohibits termination of work based on maternity, such as pregnancy, giving birth, miscarriage, or breastfeeding. The termination made according to this article is null and void; the employer is required to rehire the employee in her previous position. In some cases, to terminate the women worker, some employers create a problematic environment for the worker to work in, aiming to make the worker resign, and this situation happens when the employer needs a reasonable excuse to fire the worker. This situation usually happens after the worker finishes their maternity leave. The employer will transfer the workers to a far away workplace or pressure the worker so that the worker cannot work anymore and ask for resignation. When this happens, the employer should be able to prove that the termination occurs is not because of maternity. The worker also has the right to receive equal treatment without discrimination from the employer, either in a job application or the workplace position. Female workers often face poor and injustice treatment from their employers simply because of the pregnancy. Most of the time, the pregnant worker will be

transferred to a new division or city urgently without prior consideration.

Section 37 paragraph (4) of the Malaysian Employment Act stated that terminating women workers during maternity leave is an offense. However, the termination caused by the closure of the employer's business will not be considered an unfair termination intended under this section.

The differences between these two laws on the women worker termination prohibition are that Indonesia Employment Law mentions strict and precise types of termination prohibition, such as maternity leave, giving birth, miscarriage, and breastfeeding. Meanwhile, Malaysia Employment Act only mentions maternity leave, which means this Act only protects the worker's job during maternity leave. Other than that, there is no guarantee from the Act to be protected.

Unfortunately, one of the critical issues for maternity protection which is the non-discrimination of the pregnant worker, is not stipulated in The Malaysia Employment Act 1955. As a result, many private-sector employees, if being discriminated against based on pregnancy, can only rely on unfair dismissal principles. The women workers can use the prohibition of constructive dismissal if they are subject to unfair treatment based on pregnancy.

The violation of Article 82 of Malaysia Employment Law on the maternity leave will be punished with a minimum penalty of 1-year imprisonment and a maximum of 4 years and/or a fine of at least Rp 100,000,000.00 (one hundred million rupiahs) and at most Rp 400,000,000.00 (four hundred million rupiahs). In addition, if the employer does not give the worker maternity leave, it will be considered a criminal Act under this law. The punishment for the employer who does not provide the cash benefit to the worker is minimum imprisonment of one month and a maximum of 4 years and/or fine of at least Rp 10,000,000.00 (ten million rupiahs) and a maximum of Rp 400,000,000.00 (four hundred million rupiahs).

The list of offenses in the maternity part refers to Section 94 of the Employment Act. The employer is considered violating this rule if workers fail to receive maternity leave, maternity allowance during leave, are unsuccessful in obtaining the maternity allowance as in regular wages, and restriction of dismissal after maternity leave due to illness for 90 days. The employer who fails to pay maternity allowance for the worker having maternity leave will be fined, and the court should order the amount. The termination of employment due to maternity reasons is considered an offense under Section 37, paragraph 4 of The Malaysian Employment Act.

Employment Act 1955 provides the general penalty to those offenses without any liability. It is under Section 99A, which states the penalty is RM10,000 must be paid if the employer is found guilty. The effect of this deficiency is that the employer can quickly terminate the women worker because this

offense is under the Employment Act 1955 and only subject to the payment of a fine not exceeding Rm10,000 as a penalty.

CONCLUSION

Indonesia and Malaysia are two countries with different legal systems. Thus, the differences above reveal differences in the two countries' entire legal systems, including labor regulation. This study shows the similarities of maternity protection between Indonesia and Malaysia Labor law which both countries provided the maternity entitlement in part of their labor regulations and did not ratify the Convention on Maternity Protection 2000 provided by ILO. The differences in both labor laws are the duration for maternity leave, breastfeeding arrangement, the cash allowance in Malaysia is followed with several requirements, and the work protection in Indonesia is tighter than the Malaysia employment act.

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