

FOREIGN WORKERS

The Law And Practice In Malaysia

*Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig
Muzaffar Syah Mallow
Mohammad Naqib Ishan Jan*



CLJ Publication

FOREIGN WORKERS

The Law And Practice In Malaysia

*Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig
Muzaffar Syah Mallow
Mohammad Naqib Ishan Jan*



CLJ Publication

Foreign workers : the law and practice in Malaysia /

Ashgar Ali Ali Mohamed ... [et al.]

Includes index

ISBN 978-967-0379-26-5

1. Labor laws and legislation--Malaysia.
2. Foreign workers--Legal status, law, etc.--Malaysia.

I. Ashgar Ali Ali Mohamed.

344.59501

Published by

The Malaysian Current Law Journal Sdn Bhd

E1-2, Jalan Selaman 1/2,

Dataran Palma, 68000 Ampang,

Selangor Darul Ehsan, Malaysia

[Co No 51143 M]

Tel: 603-42705400 Fax: 603-42705401

2013 © The Malaysian Current Law Journal Sdn Bhd ('MCLJ').

All rights reserved. No part of this publication may be reproduced or transmitted in any material form or by any means, including photocopying and recording, or storing in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Although every effort has been made to ensure accuracy of this publication, The Malaysian Current Law Journal accepts no responsibility for errors or omissions, if any.

Edited by Baizura Abd Razak

Printed by

Printmate Sdn Bhd

No. 14 & 16, Jalan Industri P.B.P. 7,

Taman Industri Pusat Bandar Puchong,

47100 Puchong, Selangor Darul Ehsan.

CONTENTS

| | | | |
|--|--------|---|----|
| Preface | i | 2.4 CONTRACT OF EMPLOYMENT: A COMMERCIAL OR PERSONAL CONTRACT | 33 |
| Acknowledgement | iii | 2.4.1 Employer-Employee Relationship: A Special or Personal Relationship | 33 |
| Foreword | v | 2.4.2 Relationship between Employer and Employee - Regulated by 'Status' not 'Contract' | 36 |
| Biographies of Contributors | vii | 2.4.2.1 <i>The Introduction of Statutory Protection and Erosion of Freedom to Contract</i> | 38 |
| List of Abbreviations | ix | 2.4.2.2 <i>Against Exploitation of Workers in Employment: Implying Terms</i> | 40 |
| Table of Cases | xi | 2.4.3 Implying Terms in the Contract of Employment | 41 |
| Table of Legislation | xxix | 2.4.3.1 <i>The Recognition of the Implied term of Trust and Confidence</i> | 44 |
| Table of Foreign Legislation | xxxvii | 2.4.3.2 <i>The Origin of the Implied Trust and Confidence Term</i> | 46 |
| | | 2.4.3.3 <i>The Employer's Conduct of Infringing the Implied Term of Confidence and Trust</i> | 49 |
| CHAPTER 1 | | 2.4.4 International Labour Organisation Slogan: 'Labour is not a Commodity' and the Performance of Service is not Akin to the Supply of Goods | 53 |
| MIGRANT WORKERS: AN INTRODUCTION | | 2.5 CONCLUSION | 55 |
| <i>by Farheen Baig Sandar Baig</i> | | | |
| 1.1 INTRODUCTION | 1 | | |
| 1.2 MIGRANT WORKER AND WORK PERMIT | 9 | | |
| 1.3 EMPLOYMENT OF MIGRANT WORKERS IN A FOREIGN LAND: THE REASONS | 11 | | |
| 1.4 EXPLOITATION OF MIGRANT WORKERS | 15 | | |
| 1.5 CHAPTERIZATION | 21 | | |
| 1.6 CONCLUSION | 24 | | |
| CHAPTER 2 | | | |
| CONTRACT OF EMPLOYMENT: A NON-COMMERCIAL CONTRACT | | | |
| <i>by Ashgar Ali Ali Mohamed</i> | | | |
| 2.1 INTRODUCTION | 25 | | |
| 2.2 CONTRACT LAW IN RELATION TO EMPLOYMENT | 28 | | |
| 2.3 FREEDOM OF CONTRACT: A REALITY IN CONTRACT OF EMPLOYMENT? | 29 | | |

| | |
|--|--|
| CHAPTER 3 | |
| MIGRATION OF FOREIGN LABOURERS INTO MALAYSIA | |
| <i>by Ashgar Ali Ali Mohamed</i> | |
| 3.1 | INTRODUCTION 57 |
| 3.2 | FOREIGN INVASION INTO THE MALAY PENINSULA 61 |
| 3.3 | MIGRATION OF FOREIGN LABOURERS 62 |
| 3.4 | CONDITIONS OF MIGRANT WORKERS 63 |
| 3.5 | LABOUR LEGISLATION PROTECTING MIGRANT WORKERS 66 |
| 3.7 | INFLUENCE OF THE DOCTRINE OF LAISSEZ-FAIRE 69 |
| 3.7 | INFLUX OF MIGRANT WORKERS SINCE 1957 70 |
| 3.8 | CONCLUSION 71 |
| CHAPTER 4 | |
| INTERNATIONAL STANDARDS ON TREATMENT OF MIGRANT WORKERS | |
| <i>by Farheen Baig Sardar Baig</i> | |
| 4.1 | INTRODUCTION 73 |
| 4.2 | INTERNATIONAL LABOUR ORGANISATION (ILO) 74 |
| 4.3 | ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION (MFLM) - NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH TO LABOUR MIGRATION 76 |
| 4.3.1 | MFLM - Principles and Basic Guidelines 77 |
| 4.3.2 | Review of ILO's MFLM 92 |
| 4.4 | ILO RELATED INSTRUMENTS ON MIGRANT WORKERS 93 |

| | |
|-----|---|
| 4.5 | UNITED NATIONS INSTRUMENT: INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES 97 |
| 4.6 | UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948 AND THE UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS 1981 99 |

| | |
|---|---|
| CHAPTER 5 | |
| RIGHTS OF WORKERS FROM THE ISLAMIC PERSPECTIVE | |
| <i>by Farheen Baig Sardar Baig</i> | |
| 5.1 | INTRODUCTION 103 |
| 5.2 | HISTORY OF FOREIGN WORKERS IN ISLAM 103 |
| 5.3 | TREATMENT TOWARDS SLAVES / FOREIGN WORKERS 105 |
| 5.3.1 | Equality 106 |
| 5.3.2 | Kindness, Maintenance as a Moral Duty 106 |
| 5.3.3 | Masters/Employers Should Not Have Harsh Attitude towards Servants/Workers 108 |
| 5.3.4 | Humility and Respect towards Slaves and Establishing Brotherhood between Master and Slave 110 |
| 5.3.5 | Human Dignity 113 |
| 5.4 | CONCLUSION 116 |

**CHAPTER 6
EMPLOYMENT STATUTES
AND THEIR APPLICATION
TOWARDS MIGRANT WORKERS**

by Ashgar Ali Ali Mohamed

| | | |
|--------|--|-----|
| 6.1 | INTRODUCTION | 117 |
| 6.2 | EMPLOYMENT ACT 1955 | 118 |
| 6.3 | EMPLOYMENT (TERMINATION AND LAY-OFF BENEFITS) REGULATIONS 1980 | 120 |
| 6.4 | EMPLOYEES PROVIDENT FUND ACT 1991 | 121 |
| 6.5 | EMPLOYEES' SOCIAL SECURITY ACT 1969 | 123 |
| 6.6 | WORKMEN'S COMPENSATION ACT 1952 | 126 |
| 6.7 | WORKMEN'S COMPENSATION (FOREIGN WORKER'S COMPENSATION SCHEME) (INSURANCE) ORDER 2005 | 127 |
| 6.8 | INDUSTRIAL RELATIONS ACT 1967 | 127 |
| 6.9 | TRADE UNIONS ACT 1959 | 130 |
| 6.10 | OCCUPATIONAL SAFETY AND HEALTH ACT 1994 | 130 |
| 6.11 | FACTORIES AND MACHINERY ACT 1967 | 131 |
| 6.12 | WORKERS' MINIMUM STANDARDS OF HOUSING AND AMENITIES ACT 1990 | 132 |
| 6.13 | SECTION 28A OF THE CIVIL LAW ACT 1956 | 132 |
| 6.14 | CONTRACT LAW | 137 |
| 6.15 | PROTECTION AT COMMON LAW | 140 |
| 6.15.1 | Implied Term of Trust and Confidence | 140 |

| | | |
|--------|---|-----|
| 6.15.2 | Employer's Duty of Care for the Health and Safety of Employee | 144 |
| 6.16 | JURISDICTION OF THE INDUSTRIAL COURT AND THE LABOUR COURT | 145 |
| 6.16.1 | Industrial Court | 145 |
| 6.16.2 | Labour Court | 146 |
| 6.17 | CONCLUSION | 147 |

**CHAPTER 7A
MIGRANT WORKERS: THE
IMMIGRATION LAW, RULES AND
PROCEDURES IN MALAYSIA**

by Muzaffar Syah Mallow

| | | |
|--------|---|-----|
| 7A.1 | INTRODUCTION | 149 |
| 7A.2 | THE GOVERNING BODY WHICH ENFORCES THE IMMIGRATION LAWS IN MALAYSIA | 149 |
| 7A.3 | IMMIGRATION ACT 1959/1963 (REVISED 1974) | 152 |
| 7A.3.1 | Admission and Departure | 153 |
| 7A.3.2 | Entry Permit | 166 |
| 7A.3.3 | Removal of Prohibited Immigrants from Malaysia | 174 |
| 7A.4 | CONCLUSION | 175 |

**CHAPTER 7B
HIRING MIGRANT WORKERS:
RESTRICTION WITH
REFERENCE TO EMPLOYMENT
(RESTRICTION) ACT 1968**

by Ashgar Ali Ali Mohamed

| | | |
|------|---|-----|
| 7B.1 | RESTRICTIONS UNDER THE EMPLOYMENT (RESTRICTION) ACT 1968 | 177 |
| 7B.2 | RESTRICTION UNDER THE EMPLOYMENT (RESTRICTION) (EMPLOYMENT PERMIT) REGULATIONS 1969 | 184 |

| | |
|---|-----|
| 7B.3 EMPLOYING MIGRANT WORKER WITHOUT A VALID EMPLOYMENT PERMIT: THE CRIMINAL OFFENCE | 188 |
| 7B.4 EMPLOYMENT OF MIGRANT WORKERS IN CONTRAVENTION OF THE 1968 ACT: ITS EFFECT ON CONTRACT OF EMPLOYMENT | 191 |
| 7B.5 REMEDY OF MIGRANT WORKERS WITH VALID WORK PERMITS WHOSE EMPLOYMENT CONTRACT WAS PREMATURELY TERMINATED | 193 |
| 7B.6 CONCLUSION | 196 |

**CHAPTER 8
EXPLOITATION OF MIGRANT WORKERS: ITS FORMS**

by Mohammad Naqib Ishaq Jan

| | |
|---|-----|
| 8.1 INTRODUCTION | 197 |
| 8.2 DEFINITION OF MIGRANT WORKERS | 198 |
| 8.3 PULL AND THE PUSH FACTORS DRIVING MIGRATION | 200 |
| 8.4 EXPLOITATION OF MIGRANT WORKERS | 200 |
| 8.4.1 Forms of Exploitation of Migrant Workers | 201 |
| 8.5 STATES' OBLIGATION TO PROTECT THE HUMAN RIGHTS OF MIGRANT WORKERS | 209 |
| 8.6 CONCLUSION | 218 |

**CHAPTER 9
EXPLOITATION OF MIGRANT WORKERS: THE LIKELY IDENTIFIABLE CAUSES**

by Muzaffar Syah Mallow

| | |
|---|-----|
| 9.1 INTRODUCTION | 219 |
| 9.2 THE ABUSE AND EXPLOITATION OF MIGRANT WORKERS IN MALAYSIA | 220 |
| 9.2.1 Inefficient and Inadequate Legal Protection towards Migrant Workers | 222 |
| 9.2.2 Social Misunderstanding toward Migrant Workers | 226 |
| 9.2.3 Lack of Religious or Moral Values of the Abuser or Exploiter | 226 |
| 9.3 CONCLUSION | 230 |

**CHAPTER 10
EXPLOITATION OF MIGRANT WORKERS: A CASE STUDY**

by Muzaffar Syah Mallow

| | |
|--|-----|
| 10.1 INTRODUCTION | 231 |
| 10.2 AN OVERVIEW OF REPORTED CASES INVOLVING THE EXPLOITATION OF MIGRANT WORKERS IN MALAYSIA | 232 |
| 10.3 ABUSE CASES INVOLVING MIGRANT WORKERS IN MALAYSIA: THE LEGAL IMPACT | 240 |
| 10.4 CONCLUSION | 241 |

**CHAPTER 11A
EXPLOITATION OF MIGRANT
WORKERS: CRIMINAL
SANCTIONS PROVIDED UNDER
THE MALAYSIAN PENAL CODE**

by Muzaffar Syah Mallowa

| | | |
|---------|---|-----|
| 11A.1 | INTRODUCTION | 243 |
| 11A.2 | AN OVERVIEW OF THE THEORY AND PRINCIPLES OF CRIMINAL LAW | 244 |
| 11A.3 | THE STANDARD COMMON LAW TEST OF CRIMINAL LIABILITY: <i>ACTUS NON FACIT REUM NISI MENS SIT REA</i> | 249 |
| 11A.3.1 | <i>Actus reus</i> | 250 |
| | <i>11A.3.1.1 Act</i> | 251 |
| | <i>11A.3.1.2 Omission</i> | 252 |
| 11A.3.2 | <i>Mens rea</i> | 256 |
| 11A.4 | EXPLOITATION OF MIGRANT WORKERS: CRIMINAL SANCTIONS PROVIDED UNDER THE MALAYSIAN PENAL CODE | 260 |
| 11A.4.1 | Possible Sanctions under the Malaysian Penal Code (Act 574) | 260 |
| 11A.4.2 | Case Study Involving Migrant Workers which Had Been Tried by the Courts under the Penal Code | 267 |
| 11A.4.3 | Criminal Sentencing Principle in Malaysia | 279 |
| 11A.6 | CONCLUSION | 280 |

**CHAPTER 11B
CRIMINAL OFFENCES AND CIVIL
WRONGS BY OR AGAINST
MIGRANT WORKERS**

by Ashgar Ali Ali Mohamed

| | | |
|-------|---|-----|
| 11B.1 | PHYSICAL ABUSE OR ILL-TREATMENT OF MIGRANT WORKERS: THE PUNISHMENT | 281 |
| 11B.2 | OFFENCES AGAINST MIGRANT WORKERS: ILLUSTRATION FROM DECIDED CASES | 284 |
| 11B.3 | A REVIEW OF SELECTED CASES | 289 |
| 11B.4 | CONCLUSION | 306 |

**CHAPTER 12
EXPLOITATION OF NATIONAL OR
LOCAL WORKERS AND THE
LIABILITY OF THE EMPLOYER**

by Ashgar Ali Ali Mohamed

| | | |
|--------|---|-----|
| 12.1 | INTRODUCTION | 307 |
| 12.2 | LABOUR IS NOT A COMMODITY | 310 |
| 12.3 | FORCED LABOUR PROHIBITED | 311 |
| 12.4 | RELATIONSHIP OF MUTUAL TRUST AND CONFIDENCE | 315 |
| 12.5 | EMPLOYEES' RIGHTS IN EMPLOYMENT AKIN TO 'PROPERTY RIGHTS' | 317 |
| 12.5.1 | Withholding of Salary or Failure of Salary Payment | 318 |
| 12.5.2 | Demotion or Reduction in Status and Rank | 320 |
| 12.5.3 | Transfer of Employee | 322 |
| 12.5.4 | Secondment Must Be <i>Bona Fide</i> | 326 |

| | | | | | |
|--|---|-----|---|--|-----|
| 12.5.5 | Retrenchment Justifiable on Genuine Commercial Reasons | 329 | 13.6 | CASES ON NON-RENEWAL OF FIXED-TERM CONTRACTS INVOLVING MIGRANT WORKERS | 360 |
| 12.5.6 | Outsourcing to Victimise Employee | 331 | 13.7 | CONCLUSION | 368 |
| 12.5.7 | Voluntary Separation Scheme Being Forced or Coerced on Employee | 332 | CHAPTER 14 | | |
| 12.5.8 | Other Circumstances | 334 | MIGRANT WORKERS: ADEQUACY AND SUFFICIENCY OF LAW | | |
| 12.6 | CONSTRUCTIVE DISMISSAL AND REMEDIES | 335 | <i>by Farheen Baig Sardar Baig</i> | | |
| 12.6.1 | Constructive Dismissal | 335 | 14.1 | INTRODUCTION | 369 |
| 12.6.2 | Remedies for Dismissal without Just Cause or Excuse | 340 | 14.2 | MIGRANT WORKERS' ACCESS TO JUSTICE | 370 |
| 12.7 | CONCLUSION | 342 | 14.3 | ADEQUACY AND SUFFICIENCY OF THE LAW | 374 |
| CHAPTER 13 | | | 14.4 | PROBLEMS FACED BY MIGRANT WORKERS | 378 |
| PREMATURE TERMINATION OF FIXED-TERM CONTRACT AND ITS REMEDIES | | | 14.4.1 | Discriminatory Wages | 378 |
| <i>by Ashgar Ali Ali Mohamed</i> | | | 14.4.2 | Inadequate Housing | 379 |
| 13.1 | INTRODUCTION | 343 | 14.4.3 | Insurance | 379 |
| 13.2 | FIXED-TERM ENGAGEMENT ON GENUINE GROUNDS | 347 | 14.4.4 | Medical Facilities | 379 |
| 13.3 | LEGITIMATE EXPECTATION OF RENEWAL OF FIXED-TERM ENGAGEMENT | 350 | 14.4.5 | Cancellation of Work Permits | 380 |
| 13.4 | COMPENSATION FOR PREMATURE TERMINATION OF FIXED-TERM CONTRACT | 356 | 14.4.6 | High Costs for Renewing Work Passes | 380 |
| 13.5 | HIRING MIGRANT WORKERS OR EXPATRIATES ON FIXED-TERM CONTRACT | 358 | 14.4.7 | Other Related Problems | 381 |
| | | | 14.5 | RECOMMENDATIONS | 382 |
| | | | 14.6 | ESTABLISHING MIGRANT WORKERS' RIGHTS: ITS IMPORTANCE | 385 |
| | | | 14.7 | CONCLUSION | 388 |

| | | | |
|---|---|-----|--|
| CHAPTER 15 | | | |
| ASYLUM SEEKERS AND THE RIGHT TO WORK | | | |
| <i>by Mohammad Naqib Ishan Jan</i> | | | |
| 15.1 | INTRODUCTION | 389 | |
| 15.2 | THE DEFINITIONS OF ASYLUM AND ASYLUM SEEKERS | 391 | |
| 15.2.1 | Definition of Asylum | 391 | |
| 15.2.2 | Definition of Asylum Seeker | 393 | |
| 15.3 | PROTECTION TO ASYLUM SEEKERS EASIER SAID THAN DONE | 394 | |
| 15.4 | CLASSIFICATION OF ASYLUM | 395 | |
| 15.4.1 | Territorial Asylum | 396 | |
| 15.4.2 | Extra-Territorial or Diplomatic Asylum | 399 | |
| 15.5 | THE RIGHT TO WORK: IS IT AVAILABLE UNDER INTERNATIONAL HUMAN RIGHTS LAW TO ASYLUM SEEKERS | 404 | |
| 15.6 | THE RIGHT TO WORK: IS IT AVAILABLE TO ASYLUM SEEKERS IN MALAYSIA? | 412 | |
| 15.7 | CONCLUSION | 414 | |
| CHAPTER 16 | | | |
| HUMAN TRAFFICKING AND SMUGGLING OF MIGRANTS: THE INTERNATIONAL INSTRUMENTS AND DOMESTIC LAWS OF MALAYSIA | | | |
| <i>by Ashgar Ali Ali Mohamed</i> | | | |
| 16.1 | INTRODUCTION | 415 | |
| 16.2 | HUMAN TRAFFICKING: THE INSTRUMENTS | 416 | |
| 16.2.1 | United Nations Convention Against Transnational Organized Crime | 416 | |
| 16.2.2 | Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) | 430 | |
| 16.3 | DECIDED CASES OF HUMAN TRAFFICKING: A REVIEW | 454 | |
| 16.4 | ISLAMIC APPROACH TO HUMAN TRAFFICKING | 475 | |
| 16.5 | CONCLUSION | 477 | |
| CHAPTER 17 | | | |
| DILIGENCE AND TRUSTWORTHINESS: THE QUALITIES OF A MUSLIM EMPLOYEE | | | |
| <i>by Ashgar Ali Ali Mohamed</i> | | | |
| 17.1 | INTRODUCTION | 489 | |
| 17.2 | EMPLOY HIM WHO IS STRONG AND TRUSTWORTHY | 493 | |
| 17.3 | CONCLUSION | 504 | |
| CHAPTER 18 | | | |
| IMMIGRATION LAW, RULES AND PROCEDURE FOR MIGRANT WORKERS: A COMPARATIVE STUDY FROM VARIOUS JURISDICTIONS | | | |
| <i>by Muzaffar Syah Mallow</i> | | | |
| 18.1 | INTRODUCTION | 507 | |
| 18.2 | IMMIGRATION LAW, RULES AND PROCEDURE FOR MIGRANT WORKERS UNDER VARIOUS JURISDICTIONS | 510 | |
| 18.2.1 | United States of America | 511 | |
| 18.2.2 | United Kingdom | 516 | |
| 18.2.3 | Australia | 519 | |
| 18.2.4 | Hong Kong | 520 | |
| 18.2.5 | Singapore | 525 | |
| 18.2.6 | Saudi Arabia | 527 | |

| | | | | | |
|---|--|-----|-------------------|---|-----|
| 18.3 | THE ISSUES ON THE EXPLOITATION OF MIGRANT WORKERS IN SINGAPORE, SAUDI ARABIA & HONG KONG | 528 | 19.7.6 | Protection of Informers or Whistleblowers | 556 |
| 18.4 | CONCLUSION | 532 | 19.7.7 | Implementation of Minimum Wages Order: The Guidelines | 557 |
| CHAPTER 19 | | | APPENDICES | | |
| THE LAW ON MINIMUM WAGES IN MALAYSIA | | | | | |
| <i>by Ashgar Ali Ali Mohamed</i> | | | | | |
| 19.1 | INTRODUCTION | 533 | Appendix A | | 579 |
| 19.2 | MINIMUM WAGE FIXING CONVENTION, 1970 (NO. 131) | 534 | Appendix B | | 582 |
| 19.3 | MINIMUM WAGE FIXING RECOMMENDATION, 1970 (NO. 135) | 536 | Appendix BA | | 599 |
| 19.4 | MINIMUM RATE OF WAGES FROM ISLAMIC PERSPECTIVE | 539 | Appendix C | | 619 |
| 19.5 | MINIMUM WAGE LAW IN SELECTED COUNTRIES | 541 | Appendix CA | | 628 |
| 19.6 | MINIMUM WAGES ORDER 2012 (MALAYSIA) | 545 | Appendix D | | 637 |
| 19.7 | APPLICATION OF MINIMUM WAGES ORDER: AN EMPLOYEE UNDER A CONTRACT OF SERVICE | 546 | Appendix E | | 676 |
| 19.7.1 | The Rates of Minimum Wages | 549 | Appendix F | | 682 |
| 19.7.2 | Council to Review Minimum Wages Order | 553 | INDEX | | 697 |
| 19.7.3 | Negotiation for Restructuring of Wages | 553 | | | |
| 19.7.4 | Enforcement of the Minimum Wages Order | 554 | | | |
| 19.7.5 | Compounding of Offences | 555 | | | |

2.1 | INTRODUCTION

Generally, most contracts are entered into for business affairs and have commercial inclinations. Together with the various types of contracts, the contract of employment has been viewed as an ordinary commercial contract. The application of contractual principles in employment relationship was enunciated by prominent English jurists of the early nineteenth century namely, Sir Henry Maine, an English comparative jurist and historian, through his theory of 'progressive society' and by Bentham, also an English philosopher and jurist, through his philosophy 'the utilitarian principles.' Since the creation of the contractual relationships, the concept of exchange of something for another, be it goods, services, labour and the likes, have all been treated as an ordinary commercial contract.¹

* This Chapter is contributed by Ashgar Ali Ali Mohamed.

1 A contract is an agreement between two or more persons by which legal rights and obligations are created. The formation of a contract of employment involves two elements: offer and acceptance. A contract of service is a bilateral contract which imposes mutual obligations. The servant owes the duty of obedience and due respect whereas the master must provide protection and good treatment. See *Limland v. Stephen* (1801) 3 Esp. 269, 270; 170 ER 611 and Norrie P., *Status and Contracts of Employment in the Field of Public Education in Saskatchewan* (1991) 35 Saskatchewan Law Review 365, 368. In *High v. British Railways Board* [1979] IRLR 52, at 54, Talbot J stated: 'A contract is the product of agreement between parties, providing for rights and obligations, and therefore one must look to the contract in question in order to determine this particular point.' Again, in *Mifsud v. MacMillan Bathurst Inc* (1989) 63 DLR (4th) 714, 719 (Ont. CA), McKinley JA observed: 'The relationship between the parties is contractual. Where there is no written contract it is necessary first to determine what terms are implied in the specific contract involved, and those terms are not those which the court considers reasonable, but rather what the parties would have agreed to when forming the contract, had they turned their mind to the type of situation which later transpired.'