

## CHAPTER II

### LITERATURE REVIEW

#### A. Conceptual Framework

##### 1. Comparative Law

###### a. Definition of Comparative Law

Comparative law is a study of the legal systems of various countries in order to find out about the differences and similarities between these legal systems. In particular, it is a comparative study of the legal systems of various laws in the world, such as common law, civil law, socialist law, Canon law, Jewish law, Islamic law, Hindu law, and Chinese law. The study also included a description and analysis of the foreign legal system, although no explicit comparison was made. In the era of economic globalization as it is today, the era of internationalism and democratization is also increasing<sup>7</sup>.

The existing legal system has its own characteristics, with Comparative Law studies we can find similarities and differences in the legal system making it possible to be classified, where Family Law is the basic level of classification. The main difference between the Family Law is found in the source (s) Law, the role of court precedents, the origin and development of the legal system. Montesquieu is generally considered as one of the initial founders of comparative law. His comparative legal approach is clearly found in his great work, *De l'esprit des lois*, 1748

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<sup>7</sup> Konrad Zweigert, Hein Kötz, and Tony Weir, *Introduction to Comparative Law*, n.d.

which was first translated by Thomas Nugent in 1750. Here's one excerpt from Chapter III of Book I of his great work, *De l'esprit des lois*<sup>8</sup>:

*“The political and civil laws of each nation... should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government: whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.”*

Also, in Chapter XI (entitled 'How to compare two different Systems of Laws') of Book XXIX, discussing the French and English systems for punishment of false witnesses, he advises that "to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety." Yet another place where Montesquieu's comparative approach is evident is the following, from Chapter XIII of Book XXIX<sup>9</sup>:

*“As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.”*

In conclusion Comparative Law is studies that analyze the differences and similarities between two different systems of law of different countries. With the aim to see which legal system that more applicable in society.

<sup>8</sup> Baron De Montesquieu, *The Spirit of the Laws* (New York: Hafner, 1949).

<sup>9</sup> Ibid

### **b. The Purpose of Comparative Law**

Comparative Law is a study that focuses on the analyzing of the legal system. Comparative laws discussed constitutive elements and analyze what makes them different and how the system is formed from the combination of these elements. From Comparative law appeared scientific disciplines have emerged as different entities that still related to the comparative law, such as legal official law, administration law, civil law (in the sense of lawsuits, agreement, property and duties), commercial law (in the sense of business act and organizations), and comparative criminal law<sup>10</sup>. Studies of this specific field can be seen as a comparative legal analysis of micro or macro, which is a detailed comparison of the two countries, or comprehensive study of several countries. Comparative study of civil law, for example, show how the law of personal relationships governed, interpreted and used in the system or a different country. The purpose of comparative law is<sup>11</sup>:

Theoretically, the purpose of comparative law is:

- 1) To have deeper understanding about the applicable legal system.
- 2) To improve the legal system.
- 3) With the hope to contribute to the unification of the legal system, on a smaller scale or greater
- 4) Liberating function from legal chauvinism.

<sup>10</sup> “Artikel Hukum: PERBANDINGAN HUKUM,” accessed July 24, 2019, <http://sudiknoartikel.blogspot.com/2012/04/perbandingan-hukum.html>.

<sup>11</sup> “Perbandingan Hukum - Bahan Kuliyah Fakultas Hukum,” accessed July 24, 2019, <http://bahankuliyahhukum.blogspot.com/2014/05/perbandingan-hukum.html>.

- 5) The inspirational function gets a better picture of the legal system itself, because by comparing we see certain problems to perfect certain solutions in the law itself.
- 6) Is a tool for other disciplines, especially for legal sociology, anthropology.
- 7) The development of general principles of law.
- 8) To enhance mutual understanding among nations.
- 9) Helping in the distribution of the legal system in groups contributions to the doctrine.

Practically the purpose of comparative law is<sup>12</sup>:

- 1) For the sake of law formation.
- 2) Assist in forming new laws.
- 3) Preparation in drafting uniform laws.
- 4) Preliminary research on receptors of foreign legislation.
- 5) For the benefit of the judiciary; influences on the judiciary in general.
- 6) Important in international agreements.
- 7) Important for juridical translation.

So, in conclusion Comparative Law aims to achieve a deeper knowledge about the legal system that applies. From that, we could see the better picture of the legal system and by comparing it, we could see how each legal system handling certain problem of their countries. Also, from the comparison we could see which legal system that better at handling the

<sup>12</sup> “Artikel Hukum: PERBANDINGAN HUKUM, *Op.cit*”

problem and what could be learned from them to perfect the legal system that exist.

## 2. Legal Protection

### a. Protection of Female Workers

#### 1) Women's Workforce Protection Policy

Legal protection efforts for female workers are based on national legislation as well as international labor standards that have been adopted into national legislation. The aim is to increase the protection of female workers the nature of the policy of protecting labor for women can be categorized into three things, namely<sup>13</sup>:

##### a) Protective

This protection policy is directed at protecting reproductive functions for female workers, such as giving menstrual breaks, maternity leave or miscarriages.

##### b) Corrective

This protection policy is directed at increasing the position of female workers prohibiting termination of employment for female workers due to marriage, pregnancy or childbirth. also, it guarantees women workers to be involved in the preparation of company regulations and collective labor agreements.

<sup>13</sup> Sulistyowati Irianto, *Perempuan Dan Hukum: Menuju Hukum Yang Berspektif Kesetaraan Dan Keadilan* (Jakarta: Yayasan Obor Indonesia, 2006).

c) Non-discriminatory

This protection policy is directed at the absence of discriminatory treatment of women in the workplace.

2) Operational Application

a) Protective Protection

Female labor is a group because "its nature" has certain characteristics that need attention. Therefore, in certain cases the female labor force applies special regulations, especially those concerning labor protection, including work restrictions at night, prohibitions on work that endanger ill health, maximizing overtime work, menstruation leave regulations, maternity leave rules, leave maternity or miscarriage<sup>14</sup>.

In Manpower Law, Article 76 which is regulated as follows:

- 1) *"It is prohibited to employ female workers aged less than 18 (eighteen) years of age between 11 p.m. until 7 a.m.*
- 2) *Entrepreneurs are prohibited from employing pregnant female workers who, according to a doctor's certificate, are at risk of damaging their health or harming their own safety and the safety of the baby that are in their wombs if they work between 11 p.m. until 7 a.m.*
- 3) *Entrepreneurs who employ female workers to work between 11 p.m. until 7 a.m. are under an obligation: a. To provide them with nutritious food and drinks; and b. To maintain decency or morality and security in the workplace.*
- 4) *Entrepreneurs are under an obligation to provide returned and roundtrip transport for female workers who work between 11 p.m. until 5 a.m.*

<sup>14</sup> Ibid

5) *Provisions as mentioned under subsection (3) and subsection shall be regulated with a Ministerial Decision.*"

Meanwhile to protect their reproductive function Article

81 stated that:

*"Female workers who feel pain during their menstruation period and notify the entrepreneur about this are not obliged to come to work on the first and second day of menstruation."*

In Article 82 stated that:

*"Female workers are entitled to a 1.5 (one-and-a-half) month period of rest before the time at which they are estimated by an obstetrician or a midwife to give birth to a baby and another 1.5 (one-and-a-half) month period of rest thereafter."*

b) Corrective Protection

The implementation of safeguards that are corrective to normative matters is carried out through labor inspection by labor inspectors in accordance with Manpower Law Article 176. Implementation of supervision consists of a series of activities, including<sup>15</sup>:

- a. Arrange work plan.
- b. Inspection at the company or workplace.
- c. Corrective action, both preventive and repressive.
- d. Reporting of inspection results

With the issuance of Law number 7 of 1984 concerning the ratification of the UN convention on the elimination of all forms of discrimination against women, the affirmation of the

<sup>15</sup> Ibid

protection of female workers from discriminatory treatment is getting stronger. The matters regulated in the convention are<sup>16</sup>:

- a. The right to get a job.
- b. The right to equal employment opportunities includes the application of the same selection criteria in recruitment of workers.
- c. The right to choose a profession or job.
- d. The right to promote his position at work.
- e. The right to obtain vocational training.
- f. The right to receive wages equal to male labor for work of equal value.
- g. The right to social security

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<sup>16</sup> Ibid

### 3. Manpower Law

#### a. Definition of Manpower Law

Formerly called labor law or in Dutch is called *Arbeidsrecht*, it is also the same as the definition of law itself, which varies according to the point of view of each legal expert. For comparison following, the opinions of some legal experts regarding Manpower Law<sup>17</sup>:

- 1) Soepomo stated that, labor law is a set of rules both written and unwritten, which pertain to events where someone works for another person by receiving a wage.
- 2) Soetikno stated that, labor law is the whole legal regulations concerning work relations which result in a person personally placed under the command/leadership of another person and concerning the conditions of livelihood which are directly related to the employment relationship.
- 3) N.E.H van Esveld stated that, Labor law does not only cover work relations where work is carried out under the leadership but also includes work carried out by workers who carry out work on their responsibilities and risks.

From statement of the legal expert, Manpower law has a few elements such as:

- 1) A series of written and unwritten rules.
- 2) Regulates the incidence of employment relations between workers and employers.

<sup>17</sup> Khakim, *Hukum Ketenagakerjaan Indonesia, Loc.cit*

- 3) The existence of people who work under other people by getting wages in return for services.
- 4) Regulating worker protection.

#### **b. Principles of Manpower Law**

Based on Article 2 of Manpower Law, stated that:

*“Manpower development shall have the Pancasila and the 1945 Constitution as its statutory basis.”*

Then, in the explanation of the Article it is stated that:

*“The National Development shall be carried out in the framework of the whole, undivided development of Indonesian as a human being. Therefore, manpower development shall be carried out with the aim to develop Indonesian and the Indonesian society as a whole into a prosperous, just, and well-off society in which material and spiritual benefits are evenly shared.”*

Furthermore, Article 3 of Manpower Law confirms that:

*“Manpower development shall be carried out based on the basic principle of integration through functional, cross sector, central, and provincial or municipal coordination.”*

The principle of labor development is basically under the principles of national development, especially the principles of democracy, the principles of justice and equality. This is done because the construction of labor concerns multi-dimensional and is related to various parties, including the government, employers, and workers/laborers. Therefore, employment development is carried out in an integrated manner in the form of mutual support. So, the principle of labor law is the principle of

integration through functional coordination across central and regional sectors<sup>18</sup>.

### c. Legal Purpose of Manpower Law

According to Manulang, the purpose of labor law is<sup>19</sup>:

- 1) To achieve or implement social justice in the field of employment.
- 2) To protect labor against unlimited power from employers.

Point a further indicates that labor law must maintain order, security, and justice for parties involved in the production process, in order to achieve work peace and business continuity. While point b is motivated by the experience so far that employers often abuse the workers/laborers. For that, a comprehensive and concrete legal protection is needed from the government.

In Article 4 of Manpower Law it stated that employment development aims:

- 1) *“Empowering and making efficient use of manpower optimally and humanely;*
- 2) *Creating equal opportunity and providing manpower (supply of manpower) that suits the need of national and provincial/municipal developments;*
- 3) *Providing protection to manpower for the realization of welfare; and*
- 4) *Improving the welfare of manpower and their family.”*

<sup>18</sup> Ibid

<sup>19</sup> Ibid

Empowerment and the use of labor are intended to be able to provide the widest possible work opportunities for Indonesian workers. Then Indonesian workers are expected to participate optimally in national development, but still uphold their human values. Thus, labor development aims to make Indonesian labor as the subject of development, not the opposite of being the object of development<sup>20</sup>.

#### **d. Workers**

In labor law, there are several different terms, such as laborers, workers, employees. The term laborer has been popular for a long time and is still often used as a term for groups of workers who are fighting for their organizational programs. The term worker in practice is often used to show the status of employment relations, such as contract workers, bulk workers, daily workers, temporary workers, permanent workers and so on<sup>21</sup>.

Another opinion also said that the term laborers had long been identified with manual labor, low education and low income. The word workers has a very broad understanding, that is, every person who does work, both in work relations and work. The term that is commensurate with workers is employees, namely people who work who are more identified in non-physical work, the nature of the work is smooth or not dirty like bank employees and so on. There is also manpower. What is meant by manpower is someone who has the ability to work with the

<sup>20</sup> *Loc.cit*

<sup>21</sup> *Ibid*

aim of producing goods or services that are useful for him or for others<sup>22</sup>.

Based on Manpower Law Article 1 paragraph (2), what is meant by Manpower is *“everyone who can do work to produce goods and/or services both to meet their own needs and for the community”*. Also in Article 1 paragraph 3 what is meant by worker are *“any person who works and receives wages or other forms of remuneration.”* Meanwhile based on Law Number 3 of 1992 concerning Workers' Social Security (which is commonly abbreviated as JAMSOSTEK) in Article 1 paragraph (2) there's also a definition of labor which is *“Everyone who is able to do work both inside and outside the work relationship, to produce services or goods to meet the needs of the community.”*

The difference is in the scope of employment. In the JAMSOSTEK the scope of work relations is broader, namely people who do work outside of employment relations are also included in the category of labor, whereby in the Manpower Act does not mean that. The difference is due to the Social Security Act made or promulgated before the existence of the Manpower Act, which refers to Law No. 14 Year 1969 concerning Basic Provisions Regarding Labor.

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<sup>22</sup> Ibid

#### 4. Indonesia and Malaysia Legal System

The word system is derived from the Greek word "systema" which means the whole consisting of various parts. According to prof.

Subekti, S.H the system is an order or order that is organized and consists of elements which are related to each other arranged in a plan such as patterns and results of writing to achieve a goal. In a system there is no contradiction between one and the other between parts and there should be no overlap between the parts. The legal system provides the unity of an arrangement consisting of parts or elements that are closely related between one another, so to achieve a goal cooperation must be needed between parts or elements according to certain plans and patterns<sup>23</sup>.

The legal system in the world is divided into four, namely the legal system of continental Europe or civil law, the common law or Anglo Saxon legal system, the customary legal system and the Islamic legal system. Civil law comes from a collection or codification of the law that was valid in the Roman Empire in the VI century BC Justianus emperor. The characteristics of the legal system of Civil Law are codification, judges based on laws that are the main source of law, and the judicial system is inquisitive, meaning that judges have a big role in deciding a case<sup>24</sup>.

In this system, the law obtains binding strength because it comes from a systematic regulation, namely the law that is prioritized is its

<sup>23</sup> "Sistem Hukum Indonesia | Sistem Pemerintahan Indonesia," accessed July 25, 2019, <https://sistempemerintahan-indonesia.blogspot.com/2013/05/sistem-hukum-indonesia.html>.

<sup>24</sup> Ibid

legal certainty. A judge's decision binds the litigant parties. The judge has the power to direct and decide on a case based on the interpretation of the rules following the decision of the previous judge, because the judge's guideline or guideline is the rules he has made himself<sup>25</sup>.

In its development, the civil law system is divided into two parts, namely public law and private law. Public law, namely legal regulations governing the power and authority of employers or the state and its relationship with society. Whereas private law is a law that regulates relations between individuals in fulfilling their needs. The positive side of the civil law system is that almost all aspects of people's lives are governed by written laws so that existing cases can be resolved easily by law enforcement, and ensuring legal certainty in ensuring legal certainty in the process of resolution. While the negative side is that there are problems that arise due to the progress of human civilization so that there is no law that regulates and cannot be resolved in court. From both sides, it can be seen that the judge is only a servant of the law who does not have much of his own interpretation other than under the law<sup>26</sup>.

Furthermore, the second legal system, Anglo Saxon or common law, is a system from England, which has spread to the United States and its former colonies. Since the 8th century, the name Anglo Saxon was used to refer to the great British people, who were Germania's and was from the Anglia tribes, Saks, Yut. This common law legal system is

<sup>25</sup> Ibid

<sup>26</sup> "Sistem Hukum Di Indonesia | Pidana - Perdata - Negara - ABI - Awam Bicara," accessed July 25, 2019, <https://www.awambicara.id/2018/02/sistem-hukum-di-indonesia.html>.

a legal system that is based on jurisprudence, namely the decision of the first judge who becomes the basis of the next judge's decision<sup>27</sup>.

This system prioritizes customary law and is in line with the dynamics of society. In this system, the role of the judge is very large, because the judge does not only function as the party who interprets the rules, but also plays a major role in shaping the order of people's lives. The judge can create a new law that has never been there to become the next judge's hand in the same case.

The common law system is also divided into two parts, namely private law and public law. Private law is a law about property rights, about people, laws regarding agreements and acts against the law, similar to civil law legal systems. Whereas public law is a law that regulates the relations of the authorities and between communities. The positive side of this common law system is that it is flexible and can adjust to the times, because this law is not written. Whereas the negative side of this common law system is the lack of good management of legal certainty because of the basis for deciding something based on custom or unwritten customary law<sup>28</sup>.

The third legal system is customary law. The customary legal system comes from unwritten regulations. This system grows and develops in people's lives. This customary law is traditional based on ancestral habits. This law can change according to the influence of community events and social conditions in the community so that they

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<sup>27</sup> Ibid

<sup>28</sup> "Perbandingan Hukum Pidana Malaysia | Junetboengsoe," accessed July 25, 2019, <https://junetbungsu.wordpress.com/2013/03/01/perbandingan-hukum-pidana-malaysia/>.

are not rigid and fixated and can adjust. In leading customary law are leaders or elders.

The fourth legal system is the Islamic legal system. This Islamic legal system comes from the Qur'an, the Sunnah of the Prophet (Hadith), Ijma ' and Qiyas. The Qur'an is a Muslim holy book revealed by Allah SWT to the Prophet Muhammad through the angel Jibril. Prophetic Sunnah is a way of life and story of the prophet Muhammad SAW. Ijma 'is the agreement of the scholars about how to live. The Islamic legal system in the law of Fiqh is divided into two parts, namely spiritual law (worship) and worldly law. Spiritual law (worship) which is to practice worship to serve Allah SWT. Whereas worldly law is divided into three, namely muamalat, munahakat and jinayat. Muamalat is a regulation related to human relations such as buying and selling, leasing other economic relationships. Munahakat is about the conditions, harmony and the basis of marriage. While jinayat is Islamic criminal law<sup>29</sup>. Further explanation regarding the state legal system is as follows:

a. Indonesia Legal System

The Indonesian legal system is a combination of several legal systems. The Indonesian legal system is a combination of religious law, customary law, and European state law, especially the Netherlands as a nation that once colonized Indonesia. The Netherlands was in Indonesia for about 3.5 centuries. So it is not

<sup>29</sup> Ibid

surprising that many of their civilizations are inherited including the legal system<sup>30</sup>.

The Indonesian nation was also a nation that had a very rich culture or custom. Legacy evidence or historical facts say that in Indonesia in the past there were many Hindu-Buddhist kingdoms such as Sriwijaya, Kutai, Majapahit, and others. The royal age left behind cultural heritage which until now still feels. One of them is customary rules that live and survive until now. The values of customary law are one source of law in Indonesia. Indonesia is a country with the largest Muslim population, so it is not surprising that the Indonesian people also use religious law, especially Islam as a guide in life and also become a source of Indonesian law<sup>31</sup>.

#### 1) Indonesia Criminal Law

Criminal law is the entire regulation that regulates behavior and actions that are categorized as an offense and actions that are categorized as a crime, as well as the rules regarding punishment that will be received by violators and perpetrators. According to Prof. Moeljatno, S.H. Criminal Law is part of the required law in a country, which provides the basics and rules for<sup>32</sup>:

<sup>30</sup> "PENGERTIAN HUKUM PIDANA | Kajian Magister Ilmu Hukum," accessed July 25, 2019, <https://customslawyer.wordpress.com/2014/09/10/pengertian-hukum-pidana/>.

<sup>31</sup> "Perbandingan Struktur Sistem Hukum Malaysia Dan Indonesia - Blog Sivitas Akademik Fakultas Syariah," accessed July 25, 2019, <http://syariah.uin-malang.ac.id/index.php/komunitas/blog-fakultas/entry/perbandingan-struktur-sistem-hukum-malaysia-dan-indonesia>.

<sup>32</sup> "Hukum Pidana - Wikipedia Bahasa Indonesia, Ensiklopedia Bebas," accessed July 25, 2019, [https://id.wikipedia.org/wiki/Hukum\\_pidana](https://id.wikipedia.org/wiki/Hukum_pidana).

- a) Determination of which actions are violations and which are crimes, accompanied by punishment in certain forms for those who violate the prohibition.
- b) Determining when and in what cases for violators to be charged or punished according to the regulations.
- c) Determine how the determination of the violation can be carried out if someone is suspected of violating the prohibition.

According to Sudarsono, Criminal Law is the governing law of crimes and violations of the public interest and the action was threatened with punishment which is the suffering of those who violate them. Thus criminal law does not hold its own legal norms, but already lies in other norms and criminal sanctions. Held to strengthen the adherence to other norms, for example religious norms and decency. Principles in criminal law is<sup>33</sup>:

- a) Principle of Legality, no act can be convicted except for the strength of the criminal rule in the Legislation that has existed before the act was carried out (Article 1 Paragraph (1) of the Criminal Code). If after the act is carried out there is a change in the Laws and Regulations, what is used is the lightest sanction for

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<sup>33</sup> Ibid

the defendant (Article 1 Paragraph (2) of the Criminal Code)

b) The Principle of No Crime Without Mistake (*Nullum*

*delictum noella poena sine praevia lege poenali*). To

impose a criminal offense on a person who has committed a crime, it must be done if there is an

element of error in that person.

c) Territorial principles, meaning the provisions of the

Indonesian criminal law apply to all criminal incidents that occur in the territories of the territory of the Unitary State of the Republic of Indonesia,

including Indonesian-flagged vessels, Indonesian aircraft, and Indonesian embassies and consuls in foreign countries (Article 2 of the Indonesian

Criminal Code).

d) The principle of active nationality, meaning that the

provisions of the Indonesian criminal law apply to all

Indonesian citizens who commit crimes wherever they are (Article 5 of the Criminal Code).

e) The principle of passive nationality, meaning that the

provisions of the Indonesian criminal law apply to all criminal acts that harm the interests of the state

(Article 4 of the Criminal Code).

## b. Malaysian Legal System

Malaysia is a former British colony so that it still maintains the English customary law namely common law. The legal sources in Malaysia are derived from written law, customs, Islamic law and customary law. Written law is federal and state law, federal parliamentary legislation and additional legislation made by people or entities that have the authority to carry out this task. Customary law which is derived from equality of rights that has been formally adopted in a civil law law consisting of English customary law and equality rules that have been developed in Malaysian courts. Islamic law comes from the teachings of Islam and the Sunnah of the Prophet that was agreed upon by experts. Whereas customary law comes from ancient Malay customs, Hindu law and also Islamic law<sup>34</sup>.

The Malaysian justice system is a dual justice system, namely secular law (criminal and civil) and sharia law embodied in Article 121 of the Malaysian constitution. Sharia law only applies to Muslims in Malaysia.

### 1) Malaysian criminal law

Malaysian criminal law is based on the Indian criminal code which was originally written in 1860 by the Indian Law Commission chaired by President Lord Macaulay. The criminal law is explained in The Penal Code which is a

<sup>34</sup> “Perbandingan Struktur Sistem Hukum Malaysia Dan Indonesia - Blog Sivitas Akademik Fakultas Syariah.”

codification of criminal acts and procedures in Malaysia. The reasoning code passed by the parliamentary council through deed 574 consists of 22 chapters<sup>35</sup>. Malaysian law based on its form is divided into written and unwritten law. Written law is like Malaysian reason code and Malaysian constitution. Whereas unwritten law comes from customary law and English law. The law is further divided into two, namely English trade law and English land law<sup>36</sup>.

#### **5. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a convention that protects women's rights. Because its contents protect the interests of women, this convention are often also referred to as international legal benchmarks in protecting women's rights. CEDAW convention was formalized by the United Nations in 1979 and is considered as one of the important conventions in human rights law. CEDAW convention regulates the related civil, political, economic and social rights of women whose articles are 30 articles. This convention strictly prohibits discrimination in any aspect

<sup>35</sup> “Perbandingan Hukum Pidana Malaysia | Junetboengsoe, Op.cit”

<sup>36</sup> “Perbandingan Struktur Sistem Hukum Malaysia Dan Indonesia - Blog Sivitas Akademik Fakultas Syariah, Op.cit”

such as education, politics, employment, health services, and the economy and fully recognizes the existence of gender equality.<sup>37</sup>

CEDAW recognizes women's rights such as women's right to choose and defend elected offices; get the same salary for the same job; to have a full control of property, gain loans, mortgages or other forms of loans without relying on your husband or relatives; marriage and divorce without interference from other parties and have the same rights in the care of the child. There are some things that are required to be done for countries that have ratified this convention. Among them are not to discriminate against opportunities in education, the provisions regarding maternity leave, providing access related to family planning, reducing the number of women trafficking and prostitution.<sup>38</sup>

The agreement consisting of 30 articles explains the definition and types of discrimination against women, as well as initiatives that can be taken by a country to stop these practices. Although the convention basically refers to the text of the treaty, its contents and substance come from various other sources. As with other laws, CEDAW is a living and dynamic document that enriches and develops its meaning from a variety of applications, uses and struggles that further deepen and broaden understanding of women's human rights. In addition to the text of the Convention there are also General Recommendations and Concluding Comments. Comments) which are part of the Convention

<sup>37</sup> Deen K. Chatterjee, "Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)," *Encyclopedia of Global Justice*, no. September (2011): 195–195, [https://doi.org/10.1007/978-1-4020-9160-5\\_9003](https://doi.org/10.1007/978-1-4020-9160-5_9003).

<sup>38</sup> Ibid

change the static provisions of the treaty codified in 1979 into flexible legislation, which actively absorbs and responds to new challenges that arise. General Recommendations and Final Comments together with the treaty article form the building of the Convention<sup>39</sup>

The contents of the Article in the CEDAW Convention are divided into six parts, namely<sup>40</sup>:

a. Part I, Articles 1-6

This part of the convention contains the principles adhered to by the Convention, and emphasizes the obligations of the state towards the implementation of the Convention.

b. Part II, Articles 7 - 9

Article 7 - 9 of the CEDAW Convention contains the civil and political rights of women. The International Covenant on Civil and Political Rights has included equal rights of men and women to enjoy civil and political rights, some of which are the right to life, the right to be free from slavery and trafficking, the right to be treated humanely in any situation, the right have the same position before the law, the right to freedom of thought and religious belief, the right to get equal opportunities in government, and the right to culture.

c. Part III, Articles 10-14

<sup>39</sup> Kalliopi Chainoglou, "International Covenant on Economic, Social and Cultural Rights (ICESCR)," *Culture and Human Rights: The Wroclaw Commentaries* 1945, no. 44 (2016): 1-18, <https://doi.org/10.1515/9783110432251-086>.

<sup>40</sup> Sali Susiana, "Protection of Women Work Rights in Feminism Perspective," 2017, 207-22.

Article 10-14 The CEDAW Convention contains the economic, social and cultural rights of women. In this Convention these rights are emphasized in the fields of education, employment, health, and special rights of women in rural areas.

d. Part IV, Articles 15-16

Article 15 of the CEDAW Convention includes equality between men before the law. These rights include the right to deal with legal entities, recognized legal skills, opportunities to carry out legal skills, among others in terms of making contracts, managing property, and equal treatment at every level of procedure before law enforcement. In addition there is also the right to connect with people, freedom of choice of residence and their domicile. Whereas Article 16 includes guarantees regarding women's rights in marriage. This right has previously been regulated in the UDHR, Covenant on Civil and Political Rights, and Covenant on Economic, Social and Cultural Rights

e. Part V, Articles 17-22

In this section, the CEDAW Convention contains the CEDAW Committee, reporting and monitoring mechanism.

f. Part VI, Articles 23-30

Article 23 contains an affirmation of the importance of upholding the principle of equality in state law. Specifically in the law of a state party or in any applicable conventions, treaties or international treaties

The provisions contained in this convention, are binding on the parties in this case the countries that have ratified them including Indonesia and Malaysia. Indonesia ratified CEDAW through Law No. 7 of 1984 concerning ratification of CEDAW while Malaysia ratified it since 1955<sup>41</sup>.

## **B. Legal Framework**

### **1. 1945 Constitution of Indonesia** Article 27 paragraph (2) stated that:

*"That every citizen has the right to work, and decent life for humans."*

### **2. Indonesian Law No. 13 of 2003 on Manpower (Manpower Law)**

#### **a. Article 5:**

*"Every worker has the right to receive equal treatment without discrimination from their employer."*

#### **b. Article 76:**

- 1) *"Female workers that under 18 years old prohibited from being employed between 23.00 to 07.00.*
- 2) *Employers are prohibited from employing pregnant women workers who, according to doctors, are dangerous for their health and the safety of their wombs also themselves if they work between 23:00 and 07:00.*
- 3) *Employers who employ female workers between 23:00 to 07:00 must:*
  - a) *Provide nutritious food and drinks; and*
  - b) *Maintain decency and security while at work.*
- 4) *Employers are required to provide shuttle transportation for female workers who depart and return to work between 23:00 to 05:00.*
- 5) *The clause referred to in paragraph (3) and paragraph (4) are regulated by a Ministerial Decree."*

<sup>41</sup> Chainoglou, "International Covenant on Economic, Social and Cultural Rights (ICESCR), Op.cit"

**c. Article 81:**

*“Female workers, who experience menstruation pain and notify employers, do not have to work on the first and second days of menstruation.”*

**d. Article 82:**

- 1) *“Female workers have the right to get a rest for 1.5 (one and a half) months before the time to give birth and 1.5 (one and a half) months after giving birth according to the obstetrician or midwife's calculations.*
- 2) *Female workers who had a miscarriage have the right to get a 1.5(one and a half) month break or in accordance with a certificate from the obstetrician or midwife.”*

**e. Article 83:**

*“Female workers whose children are still breastfeeding should be given the right opportunity to breastfeed their children if it has to be done during work time.”*

**f. Article 84:**

*“Every worker who uses the right to rest as referred to in Article 79 paragraph (2) letters b, c, and d, Article 80, and Article 82 has the right to receive full wages.”*

**g. Article 153:**

- 1) *“The entrepreneur is prohibited from terminating the employment of a worker because of the following reasons:
 
  - e. *The worker is pregnant, giving birth, having a miscarriage, or breastfeeding her baby**
- 2) *Any termination of employment that takes place for reasons mentioned under subsection 1 shall be declared null and void by law. The entrepreneur shall then be obliged to reemploy the affected worker”*

### **3. Indonesian Law No. 39 of 1999 on Human Rights (Human Rights Law)**

#### **a. Article 1 number 1**

*“Human Rights are a set of rights that are inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and Government, and every person for the honor and protection of human dignity.”*

#### **b. Article 49:**

- 1) *“Women have the right to choose, be elected, and appointed in work, position, and profession in accordance with the requirements and regulations.*
- 2) *Women have the right to get special protection in carrying out their work or profession on matters that can threaten their safety and or health with regard to their reproductive function.*
- 3) *Special rights inherent in women due to their reproductive functions, guaranteed and protected by law”*

### **4. Indonesian Law No. 2 of 2004 on Industrial Relations Dispute Settlement**

#### **a. Article 3**

- 1) *“Industrial relations disputes are required to be resolved first through bipartite bargaining in deliberation to reach consensus.*
- 2) *Settlement of disputes through bipartite mechanism as stipulated in subsection (1) must be settled at the latest within 30 (thirty) working days from the commencement of negotiations.*
- 3) *In the event that within a time frame of 30 (thirty) days as stipulated in subsection (2), one party refuses to continue negotiations or there had been bargaining which did not result in agreement, then the bipartite meetings will be considered to have failed”*

#### **b. Article 4**

- 1) *“In the event the bipartite bargaining failed as stipulated in Article 3 subsection (3), then one or both of the parties can file their dispute to the local authorized manpower offices, and attaching proof that efforts to resolve the dispute through bipartite bargaining have been conducted.*
- 2) *In the event the proofs as stipulated in subsection (1) were not attached, then the authorized manpower offices will return the dossier to be made complete at the latest within 7 (seven) working days from the date the dossier was returned.*
- 3) *After receiving a written report from one or both parties, the local authorized manpower offices is required to offer to both parties a Collective Agreement to select a settlement through conciliation or arbitration.*
- 4) *In the event the parties do not select settlement through conciliation or arbitration within 7 (seven) working days, then the authorized manpower offices will transfer settlement of the dispute to a mediator.*
- 5) *Settlement through conciliation is conducted for resolution of disputes over interests, disputes on termination of work relationships, or disputes among trade unions.*
- 6) *Settlement through arbitration is conducted for resolution of disputes over interest or disputes among trade unions.”*

#### **c. Article 5**

*“In cases where an attempt at settlement through conciliation or mediation does not result in agreement, then one of the parties can file a legal petition to the Industrial Relations Court.”*

#### **d. Article 90**

*“Both the plaintiff and the defendant may submit witnesses or expert witnesses”*

### **5. Malaysian Law, Federal Constitution**

#### **a. Article 8 paragraph 2 Equality**

*“Except as expressly authorized by this constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment”*

## 6. Malaysian Law, Employment Act, 1955

### a. Article 34 - Prohibition of Night Work

- 1) *“Except in accordance with regulations made under this Act or any exemption granted under the provision to this subsection no employer shall require any female employee to work in any industrial or agricultural undertaking between the hours 10 pm in the evening and 5 am in the morning nor commence work for the day without having had a period of eleven consecutive hours free from such work: Provided that the Director General may, on application made to him in any particular case, exempt in writing any female employee or class of female employees from any restriction in this subsection, subject to any conditions he may impose*
- 2) *Any person:*
  - a) *Who is affected by any decision made or condition imposed under the proviso to subsection 1; and*
  - b) *Who is dissatisfied with such decision or condition, may within thirty days of such decision or condition being communicated to him appeal in writing therefrom to the Minister*
- 3) *In deciding any appeal made to him under subsection 2, the Minister may make such decision or order thereon, including the alteration or removal of any condition imposed or the imposition of any further condition, as appears just and such decision or order shall be final”*

### b. Article 37 - Length of Eligible Period and Entitlement to

#### Maternity Allowance

- 1) *“a. Every female employee shall be entitled to maternity leave for a period of not less than sixty consecutive days (also referred to in this Part as the eligible period) in respect of each confinement and, subject to this Part, she shall be entitled to receive from her employer a maternity allowance to be calculated or prescribed as provided in subsection (2) in respect of the eligible period*
  - aa. *Where a female employee is entitled to maternity leave under paragraph (a) but is not entitled to receive maternity allowance from her employer for the eligible period under paragraph (c), or because she has not fulfilled the conditions set out in subsection (2)(a), she may, with the consent of the employer, commence work at any time during the eligible period if she has been certified fit to resume work by a registered medical practitioner”*

*“b. Subject to section 40, maternity leave shall not commence earlier than a period of thirty days immediately preceding the confinement of a female employee or later than the day immediately following her confinement:*

*a. Provided that where a medical officer or the registered medical practitioner appointed by the employer certifies that the female employee as a result of her advanced state of pregnancy is unable to perform her duties satisfactorily, the employee may be required to commence her maternity leave at any time during a period of fourteen days preceding the date of her confinement as determined in advance by the medical officer or the registered medical practitioner appointed by the employer*

*bb. Where a female employee abstains from work to commence her maternity leave on a date earlier than the period of thirty days immediately preceding her confinement, such abstention shall not be treated as maternity leave and she shall not be entitled to any maternity allowance in respect of the days during which she abstains from work in excess of the period of thirty days immediately preceding her confinement*

*c. Notwithstanding paragraph (a), a female employee shall not be entitled to any maternity allowance if at the time of her confinement she has five or more surviving children.*

*d. For the purposes of this Part, children mean all natural children, irrespective of age”*

2) *“a. A female employee shall be entitled to receive maternity allowance for the eligible period from her employer if:*

*i. she has been employed by the employer at any time in the four months immediately before her confinement; and*  
*ii. she has been employed by the employer for a period of, or periods amounting in the aggregate to, not less than ninety days during the nine months immediately before her confinement*

*b. A female employee who is eligible for maternity allowance under subsection (1)(a) shall be entitled to receive from the employer for each day of the eligible period a maternity allowance at her ordinary rate of pay for one day, or at the rate prescribed by the Minister under section 102 (2)(c), whichever is the greater”*

*“c. A female employee employed on a monthly rate of pay shall be deemed to have received her maternity allowance if she continues to receive her monthly wages during her abstention from work during the eligible period without abatement in respect of the abstention*

*d. Where a female employee claims maternity allowance under this section from more than one employer, she shall not*

*be entitled to receive a maternity allowance of an amount exceeding in the aggregate the amount which she would be entitled to receive if her claim was made against one employer only”*

- 3) *“Where there are more employers than one from whom the female employee would be entitled to claim maternity allowance in accordance with subsection (2) the employer who pays the maternity allowance shall be entitled to recover from such other employer, as a civil debt, a contribution which shall bear the same proportion to the amount of the maternity allowance paid to the female employee as the number of days on which she worked for such other employer during the period of nine months immediately preceding her confinement bears to the total number of days on which she worked during the said period:*

*a. Provided that if the female employee has failed to comply with section 40 (1) or (2), the employer who pays the maternity allowance shall not thereby be prevented from recovering contribution calculated in accordance with this subsection”*

#### **c. Article 38 - Payment of Maternity Allowance**

*“The maternity allowance referred to in section 37(2) and accruing in each wage period under the contract of service of the female employee shall be paid in the same manner as if such allowance were wages earned during such wage period as provided in section 19.”*

#### **d. Article 39 - Payment of Allowance to Nominee on Death or Female Employee**

*“If a female employee, after giving notice to her employer that she expects to be confined, commences her maternity leave and dies from any cause during the eligible period, her employer or any employer who would have been, but for the death of the female employee, liable to pay any maternity allowance shall pay to the person nominated by her under section 41 or, if there is no such person, to her legal personal representative, an allowance at the rate calculated or prescribed as provided in section 37 (2) from the day she commenced her maternity leave to the day immediately preceding her death.”*

### e. Article 40 - Loss of Maternity Allowance for Failure to Notify

#### Employer

- 1) *“A female employee who is about to leave her employment and who knows or has reason to believe that she will be confined within four months from the date upon which she leaves shall before leaving her employment notify her employer of her pregnancy and if she fails so to do, she shall not be entitled to receive any maternity allowance from such employer*
- 2) *A female employee shall within a period of sixty days immediately preceding her expected confinement notify her employer of it and the date from which she intends to commence her maternity leave and if she commences such leave without so notifying her employer, the payment of maternity allowance to her may be suspended, notwithstanding section 38, until such notice is given to her employer*
- 3) *Any employer who dismisses a female employee from her employment during the period in which she is entitled to maternity leave commits an offence*
- 4) *Any female employee whose employer provides free medical treatment for his employees and who when she is pregnant persistently refuses or fails to submit to such medical treatment offered free by her employer as a registered medical practitioner certifies to be necessary or desirable in connection with her pregnancy, expected confinement or confinement shall, if she would otherwise be entitled to receive any maternity allowance, forfeit such allowance to the extent of seven days*
- 5) *The want of or any defect or inaccuracy in any notice required to be given in accordance with this section shall not be a bar to the maintenance of any claim to maternity allowance unless the employer is proved to have been prejudiced by the want, defect or inaccuracy of such notice*
- 6) *The failure to give any such notice within the period specified in this section shall not prejudice the right of a female employee to receive any maternity allowance if it is found that the failure was occasioned by mistake or other reasonable cause: Provided that any dispute as to whether such failure was occasioned by mistake or other reasonable cause shall be referred under section 69 to the Director General for his decision*
- 7) *Notice to an employer or, if there is more than one employer, to one of such employers, may be given either in writing or orally or to the foreman or other person under whose*

*supervision the female employee was employed or to any person designated for the purpose by the employer.”*

**f. Article 41 - Payment of Allowance to Nominee**

*“A female employee may nominate some other person to whom the maternity allowance may be paid on her behalf and any payment of the maternity allowance made to the person so nominated shall, for the purposes of this Act, be deemed to be a payment to the female employee herself.”*

**g. Article 42 - Restriction on Dismissal of Female Employee**

**After Eligible Period**

- 1) *“Where a female employee remains absent from her work after the expiration of the eligible period as a result of illness certified by a registered medical practitioner to arise out of her pregnancy and confinement and to render her unfit for her work, it shall be an offence, until her absence exceeds a period of ninety days after the expiration of the eligible period, for her employer to terminate her services or give her notice of termination of service*
- 2) *Subject to subsection (1), where a female employee is dismissed from her employment with wages in lieu of notice at any time during the period of four months immediately preceding her confinement, she shall, in computing the period of her employment for the purposes of this Part, be deemed to have been employed as if she had been given due notice instead of wages in lieu thereof.”*

**i. Article 60J - Termination, lay-off and retirement benefits**

- 1) *“The Minister may, by regulations made under this Act, provide for the entitlement of employees to, and for the payment by employers of:*
  - a. *termination benefits*
  - b. *lay-off benefits*
  - c. *retirement benefits*
- 2) *Without prejudice to the generality of subsection 1, regulations made by virtue of subsection 1 may provide:*
  - a. *for the definition of the expression termination benefits, lay-off benefits, or retirement benefits, as the case may be, and for the circumstances in which the same shall be payable*
  - b. *for the application thereof to employees who were in employment under a contract of service immediately before the commencement of such regulations and who*

*continue in such employment after the commencement thereof*

- c. for the application thereof to all employees generally or to any particular class, category or description of employees*
- d. for the exclusion from the application thereof of any particular employee or employees, or any class, category or description of employees*
- e. for the payment of different rates or amounts of termination benefits, lay-off benefits, or retirement benefits, as the case may be, to different classes, categories or descriptions of employees”*

## **7. Malaysian Law, Industrial Relations Act 1967**

### **a. Article 20**

- 1) *“Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.*
- 2) *Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.*
- 3) *Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award. Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal”*

## C. Theoretical Framework

### 1. Legal Protection Theory

Based on Article 1 number 1, Law Number 39 of 1999

concerning Human Rights (hereinafter abbreviated as HAM), stated:

*“Human Rights are a set of rights that are inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and Government, and every person for the honor and protection of human dignity”*

Basically, all human beings inherent rights since they are still in the womb which must be respected upheld and protected by the state.

Types of Human Rights are:

- 1) Personal rights.
- 2) Economy rights.
- 3) Rights of legal equality.
- 4) Political rights.
- 5) Social and cultural rights.
- 6) Procedural rights.
- 7) Rights to build.

Legal protection is an effort to fulfill rights and assisting to provide security to witnesses and/or victims, legal protection for victims of crime as part of community protection can be realized in various forms, such as through the provision of restitution, compensation, medical services, and legal assistance. Legal protection

is given to legal subjects in the form of preventive and repressive instruments, both oral and written<sup>42</sup>.

In other words, it can be said that legal protection as a separate picture of the function of law itself, which has the concept that the law provides justice, order, certainty, benefit, and peace. The above definition invites some experts to express their opinions regarding the notion of legal protection, such as<sup>43</sup>:

- 1) According to Satjipto Raharjo, defining legal protection is protecting human rights that are harmed by other people and the protection is given to the community so that they can enjoy all the rights granted by law.
- 2) According to Philipus M. Hadjon, Legal Protection is a collection of rules or rules that will protect something from other things. Concerning consumers, it means that the law protects the rights of customers from something that results in not fulfilling these rights.
- 3) According to Muktie, A. Fadjar Legal Protection is a narrowing of the meaning of protection, in this case only protection by law. The protection provided by law is also related to the existence of rights and obligations, in this case that is owned by humans as legal subjects in their interactions

<sup>42</sup> “Perindungan Hukum Terhadap Pekerja Anak Dan Perempuan,” accessed July 24, 2019, <http://www.hukumtenagakerja.com/perindungan-tenaga-kerja/perindungan-hukum-terhadap-pekerja-anak-dan-perempuan/>.

<sup>43</sup> “Pengertian Perlindungan Hukum Menurut Para Ahli – Tesis Hukum,” accessed July 24, 2019, <https://tesishukum.com/pengertian-perindungan-hukum-menurut-para-ahli/>.

with fellow humans and their environment. As subjects of human law have the rights and obligations to carry out legal action.

The meaning of the word protection in general is to protect something from things that are harmful or what are meant by something can be the interests of someone or even objects / goods. In addition, the word "protection" also implies the protection given from someone to someone who is weaker. Thus, legal protection is all the government's efforts to provide a guarantee of legal certainty to protect its citizens so that their rights are not violated and those who violate them will be subject to sanctions in accordance with the applicable rules and regulations. Legal protection is a protection given to legal subjects following the rule of law, both preventive (prevention) and in a repressive form (coercion), both written and unwritten to enforce legal regulations.

#### 1) Preventive Legal Protection

According to Philipus M. Hadjon, in preventive legal protection, legal subjects are given allowed to submit an objection or opinion before a government decision gets a definitive form<sup>44</sup>.

The aim is to prevent disputes. Since the goal is to prevent disputes, government is really careful in making their decision and is encouraged to be careful in making decisions based on discretion. To put it simply preventive legal protection aim to

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<sup>44</sup> "Perbandingan Hukum - Bahan Kuliyah Fakultas Hukum, Op.cit"

prevent conflict to arise by making rules that giving guidance to their citizen for them to obey it. Also it gives them the limitations about the things that they should or not.

## 2) Repressive Legal Protection

According to Philipus M. Hadjon, Repressive legal protection aims to resolve dispute. Any cases that Handled in the General and Administrative Courts in Indonesia is included in this category of legal protection. Basically repressive legal protection is the last resort in legal protection<sup>45</sup>. Repressive legal protection will be focusing to the punishment for the violators such as fines and imprisonment.

From the brief explanation, the author will examine whether the regulations related to female workers both Indonesia and Malaysia have is in accordance with the existing legal protection law. Then the author will also compare the laws of the two countries which one of them that more protecting the rights of female workers.

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<sup>45</sup> Ibid