

## Due Diligence for the Protection of Platform Workers in Malaysia: A Human Rights Analysis

**Maheran Makhtar<sup>1\*</sup>, Zuhairah Ariff Abd Ghadas<sup>2</sup> and Mahbubul Haque<sup>3</sup>**

<sup>1,2</sup>Department of Law, Universiti Sultan Zainal Abidin, Malaysia

<sup>3</sup>Department of International Relations, Universiti Sultan Zainal Abidin, Malaysia

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#### \*Corresponding Author

Maheran Makhtar

E-mail: [maheranmakhtar@unisza.edu.my](mailto:maheranmakhtar@unisza.edu.my)

#### Co-Author(s):

Author 2: Zuhairah Ariff Abd Ghadas

E-mail: [zuhairahariff@unisza.edu.my](mailto:zuhairahariff@unisza.edu.my)

Author 3: Md Mahbub Haque

E-mail: [mahbubh@unisza.edu.my](mailto:mahbubh@unisza.edu.my)

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### ABSTRACT

Platform work and platform workers are transforming the present employment landscape in most countries, including Malaysia. A platform-based economy provides various career opportunities with flexible working hours, autonomy and control and the potential for a high income. Despite the economic benefits of the platform-based economy, there are rising concerns about workers' precarious working circumstances and a lack of regulation to protect their human rights. In the platform-based economy, business risks are often passed to platform workers with weak legal human rights safeguards. This study employed a qualitative methodology based on document analysis, a systematic procedure for analysing or assessing printed and electronic documents to elicit meaning, acquire comprehension and produce empirical knowledge. This conceptual article aims to investigate the notion of due diligence as an essential component of corporate responsibility in the business and human rights (BHR) framework. Furthermore, this article examined the concept and application of human rights due diligence in a platform-based economy to protect platform workers' rights. This research discovers that there is a need for corporations of all sizes and sectors to understand the notion of corporate responsibility to respect human rights, and show commitments to incorporating human rights due diligence within their corporate governance, regardless of the method used to conduct business.

**Keywords:** due diligence, human rights in business, corporate responsibility, platform workers, platform-based economy

### Introduction

The platform-based economy is a term used to describe an intermediate decentralised exchange of products and services through digital platforms, where digital technologies are used to externalise most production activities to allow individuals to interact and where transactions are secured and controlled remotely (Acquier et al., 2017; Mäntymäki et al., 2019; Vallas & Schor, 2020). The platform-based economy may also be associated with other terms such as the sharing economy, gig economy or on-demand economy

(Kaushal, 2018), though each of these terms may imply different definitions and characteristics. The platform-based economy, especially in the service sector, provides various opportunities with flexible working hours, autonomy and control and the potential for a high income (Ang, 2017; Kaushal, 2018). This economic paradigm has resulted in the emergence of a new type of worker known as the platform worker. Platform workers, often called gig workers, are individuals whose jobs are organised and facilitated by digital platforms (Pesole et al., 2018; Urzi Brancati et al., 2020). The Department of Statistics Malaysia (2020) uses the phrase 'gig worker' to

describe those who work independently, in isolation, over geographically vast territories and in direct competition with one another, frequently categorised as independent contractors. Gig employment is often temporary or task-based, with a significant presence on online labour platforms.

Platform work and platform workers are currently transforming the employment landscape in most countries, including Malaysia. The platform work represents alternative and less structured work arrangements, particularly focusing on non-employees working only to complete a specific task for a specific time and payment, without further connection with their employer once the contract ends (Harun et al., 2020). The platform workers are, thus, considered self-employed as they have flexibility in their working hours, can perform work without jeopardizing existing commitments, and have a high possibility of earning good extra income (Berg, 2016; De Stefano, 2016; Domenech, 2018; Hall & Krueger, 2018). Despite the economic benefits of the platform-based economy, there are growing concerns about workers' precarious working circumstances and a lack of regulation to protect their human rights, such as employment security, earnings, working hours, occupational safety and health, social security and other fundamental rights at work (ILO, 2016). Several human rights issues were reportedly unaddressed in the platform-based economy, such as the issue of discrimination, inequality and lack of social protection and security for platform workers (Erickson & Sørensen, 2016; Makela et al., 2018), considered fundamental to the enjoyment of any other rights essential to assuring the dignity of person (Minkler & Sweeney, 2011).

Due to the lack of regulation to safeguard platform workers' human rights, the research is being conducted on the protection of platform workers' rights from the platform companies' corporate responsibility to respect human rights. The notion of corporate responsibility to respect human rights is founded on the principle of horizontal effect of human rights, which states that fundamental human rights are enforceable by individuals against government agencies and private individuals, such as business entities (Drzemczewski, 1979; Jagers, 2005). Based on this theory, it is internationally acknowledged that business entities, such as corporations and companies, have a responsibility to respect human rights, such as contained in various international soft law instruments on business and human rights, notably in the United Nations Guiding Principles on Business and Human Rights 2011.

The concept of corporate responsibility, as articulated in the Guiding Principles, is a core component of business and human rights and entails a demand for business enterprises to respect human rights by preventing human rights violations and, if necessary, addressing any violations of human rights by providing effective remedies (Guiding Principle 11). In the 2010 Report, Prof. John Ruggie suggested that responsibility is defined by the actual and potential human rights generated by a company's business activities and its relationships with other parties (John G Ruggie, 2010). Further, he advocates that the term responsibility to respect, rather than a duty to protect, is meant to specify that respecting rights is not an obligation that current international human rights law generally imposes directly on companies but a standard of expected conduct recognised in the voluntary and soft law instruments related to corporate responsibility. Accordingly, the Guiding Principles require corporate actors to incorporate due diligence mechanisms in addressing human rights impacts in business, in addition to the State's duty to ensure business enterprises avoid themselves from committing human rights violations (Guiding Principle 17). As companies and business enterprises currently do not have a legal obligation under international law and they are considered a non-state actor, the responsibility to ensure that companies and business enterprises do not violate any human rights principles falls on the State by developing regulation or standards to be complied by business enterprises. Commentary to Principle 1 of the Guiding Principles states that States may breach their international human rights obligations if they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.

Therefore, this conceptual paper aims to examine the concept of due diligence as a fundamental component of corporate responsibility for protecting workers' rights. Ebert et al. (2020) proposed that human rights due diligence could be evaluated in the platform-based economy, but it must be precise and provide industry-specific guidelines rather than vague and general assertions. Prior research has not adequately addressed human rights due diligence application in the platform-based companies as part of their corporate governance. For example, Jessica et al. (2020) and Jobin et al. (2019) suggest due diligence from the perspective of artificial intelligence (AI) and find solutions on how AI could be used to design the mechanism, monitor and evaluate the mechanism, impact assessment and provide remedy through an automated decision. Cumming et al. (2019), on the other hand, analysed the role of due diligence in crowdfunding platforms and discovered

that crowdfunding platforms have a considerable amount of flexibility of the extent to which due diligence is conducted in order to gain an economic benefit, improve platform performance and mitigate information asymmetries between the entrepreneur and the crowd. According to Aucouturier (2017), business respect for human rights, which includes human rights due diligence, must be achieved through compliance by incorporating it into the company's risk management system. He believes that promoting human rights through corporate social responsibility (CSR) is insufficient to ensure compliance with the Guiding Principles.

Therefore, this article investigates the concept and application of human rights due diligence as one of the mechanisms to be incorporated into a company's corporate governance to protect the platform workers' rights. The purpose of this paper is to impose corporate responsibility to respect human rights onto the platform companies, which then depart from the long-standing legal doctrine that shields platform companies from liability for human rights violations as network intermediaries and market facilitators (Ananny & Gillespie, 2016; Ebert et al., 2020; Jørgensen, 2019; Perren & Grauerholz, 2015; van Dijck & Poell, 2013).

## Methodology

This paper adopts a qualitative method using document analysis, a systematic procedure for reviewing or evaluating printed and electronic documents to elicit meaning, gain understanding and develop empirical knowledge (Bowen, 2009). In this paper, the researcher seeks to find meanings of the concept of human rights due diligence in the context of a platform-based economy. Documentary data in books, newspaper articles, academic journal articles and institutional reports were reviewed and analysed (Busetto et al., 2020; Morgan, 2022). This research analysed the texts of the Guiding Principles on Business on Human Rights, the 2018 United Nations Human Rights Special Procedures Summary Report, the OECD Due Diligence Guidance for Responsible Business Conduct 2018 and Guidelines on Submission of Corporate and Capital Market Product Proposals 2020. The documentary data provided rich data in the context of the research area as they provided background information and historical insights, contained questions that need to be observed and addressed and provided valuable additions to a knowledge base as a means to track changes and development and verify findings or corroborate evidence from other sources (Bowen, 2009).

## Literature Review

### *Platform Workers and Platform-Based Company; the Complicated Relationship*

The platform-based economy is an innovative economy model that emerges due to the rapid development of digitalisation. This economy model has shifted the traditional 'brick-and-mortar' business to a digital platform where all transactions are done online. The platform-based economy can be associated with other terms such as the sharing economy, collaborative consumption, peer-to-peer economy, access-based consumption, on-demand economy and gig economy, though each may have a different character and nature from one another (Botsman & Rogers, 2010; Hamari et al., 2016; Schor & Attwood-Charles, 2017). For example, the sharing economy traditionally refers to the sharing of personal assets that are idle and underutilised, such as the sharing of empty car spaces, personal belongings and vacant spaces in houses (Belk, 2007; Ranjbari et al., 2018). The on-demand economy refers to the idea that allows a transaction of goods and services via an internet platform, and the delivery of those goods and services is by virtual crowd or platform workers (Agote & Pereira, 2017). The gig economy, on the other hand, represents contingent work arrangements facilitated through on-demand digital platforms and markets (Tran & Sokas, 2017). Further, the gig economy refers to flexible short-term tasks where workers are not linked to any definite employment relationship, and payments are made after the task is delivered or performed (Friedman, 2014). The gig economy is predominately based on on-demand work, where workers are hired to perform a specific 'gig' to complete a specific task or project on a short-term contract (Bieber & Moggia, 2020; Prassl, 2018).

The economic benefits of the platform-based economy are significant to a country's sustainable development by reducing environmental risks and promoting human welfare (Kaushal, 2018). The use of technology benefits consumers by lowering costs, increasing options and making it easier to use. Moreover, this efficient and innovative way of utilising resources and conducting business creates new job opportunities, particularly in the product-service sector, known as platform work. Platform work can be classified into two types, (a) cloud work (or crowd work); a web-based digital platform that offers freelance marketplaces where performance is done via the internet, and (b) gig work, location-based digital labour where the work requires physical performances (Berg et al., 2019; Schmidt, 2017). The crowd work represents macro-tasks, high-skilled tasks,

such as graphic designers, computer programmers, translators or other professional services and micro-tasks, which represent lower skilled work, such as clerical tasks and copywriting, writing reviews and filling surveys. On the other hand, gig work is mostly low-skilled tasks such as providing services in the accommodation sector, transportation and delivery and personal or household services. The working arrangement has clear benefits in terms of flexibility since workers can choose when and where they work without jeopardising their existing commitments or other constraints (Domenech, 2018). The flexible nature of jobs in a platform-based economy also allows companies to save physical resources and maintain a cost balance that would have, in a traditional setting, including the cost of renting office spaces and hiring staff, while providing workers with task autonomy and control over the tasks they choose to complete (Wu & Li, 2019; Yaraghi & Ravi, 2017). As such, platform work is perceived a part-time work and does not entail real work because it allows workers to retain full-time jobs and, at the same time, secure some extra money (Berg, 2016; De Stefano, 2016; Hall & Krueger, 2016).

The classic employer and employee relationship between the parties in a platform-based economy are not transparent. Platforms assert that they do not employ workers but merely become a network or intermediary that matches the supply (business owners) by offering goods or services with the demand (consumers) and the workers who undertake to perform the task specified by the platform, the time and place of the service and the payment that they will receive (Chen et al., 2020; Juntunen, 2017; Ravenelle, 2017). Notwithstanding, there are circumstances when platforms act as employers rather than a network or intermediary because it controls the workers how to do the work, payment scheme and termination; but using the invisible cloak that is the platform (Aloisi, 2016; De Stefano, 2016). According to Aloisi (2016), virtual platforms are an 'invisible infrastructure', connecting supply and demand of services and facilitating interaction between individuals and platform companies, though, in reality, they are employers who efficiently exploit workers and expropriate work through the platform at the expense of workers' security and protection. The situation is recognised by some workers who take advantage of the flexibility and autonomy that a platform-based economy offers without realising that they trade flexibility with benefits and security (Hall & Krueger, 2018). The misclassification of platform workers as independent contractors is a way for platform companies to lower overhead costs and maximise profit at the expense of workers' wages and labour rights.

In many jurisdictions, platform workers are considered self-employed or independent contractors because the work is generally outsourced or contracted out by a digital platform to a pool of virtual workers; the work arrangement is facilitated by digital platforms and the flexibility and autonomous characteristics of the platform work (Eurofound, 2015, 2018a; Ravenelle, 2017). The Malaysia Employment Act 1955 for example, specifies that an employee is a person who has entered into a contract of service with the employer (section 2). To differentiate 'a contract of service' and a 'contract for service', the court, in the case of *Goi Ah Soong v Kumpulan Wang Simpanan Pekerja & Anor* [2013] 7 MLJ 777, states that a contract of service refers to an undertaking by a person to serve another and obey his reasonable orders within the scope and the duty of the undertaking, while a contract for service refers to a contract to provide work or service to the other, not as a servant but as an independent contractor. Platform workers generally undertake to provide work or service to the platforms, which equate to being an independent contractor instead of an employee, despite having some form of dependency on the platforms in terms of work and payment scheme and is subjected to evaluation mechanism. Nevertheless, the Employment Act 1955 was recently amended to include a provision of presumption of employment, in which it may classify platform workers as employees if they satisfy the requirements under the provision (section 101c Employment (Amendment) Act 2022). However, this provision lacked clarity in its application and is debatable among practitioners, especially for its relevancy to platform workers as it would transform the whole concept of platform work and platform workers (Venugopal & Jalaldin, 2022; Wong et al., 2022).

Generally, working in a platform-based economy does not mean that platform workers earn less than regular employees, but the business risks are shifted to them due to the categorisation of an independent contractor, with a lack of regulatory protection on their human rights, such as on their working conditions, workplace safety and health, security and insurance and the need for collective bargaining rights (Bieber & Moggia, 2020; Erickson & Sorensen, 2016; Eurofound, 2018b; Garben, 2019; Hauben et al., 2020; ILO, 2016). The shift from corporate to private responsibilities has implications for the protection of the fundamental human rights of workers. For example, the rights to security of employment and health insurance protection are avoided by platform companies simply because workers do not fit into the category of employee. For instance, the Malaysia Self-Employment Social Security Act 2017 (Act 789) requires

every self-employed person to register and make a contribution for every self-employment activity that he or she is carrying out. The First Schedule of the Act refers to the self-employed person as, *inter alia*, (a) the service of carriage of passengers using a public service vehicle or motor vehicle owned, managed, maintained or operated by that person, (b) the service of carriage and delivery of goods or foods by any person using any vehicle owned, managed, maintained or operated by that person and (c) the supply of goods or services through a website or in an online marketplace. This requirement suggests that platform workers are independently responsible for their social security in terms of unemployment, accident, sickness or disability. Moreover, hazardous physical work environment, traffic safety risks and workplace harassment, especially in the location-based gig work, are raising human rights issues in a platform-based economy that jeopardises the rights to safe and healthy working conditions of these workers (Ropponen et al., 2020). Therefore, it is essential to recognise that the basic needs and rights of workers have not changed over time, as there are no distinct differences between enterprises in a traditional economy and a platform-based economy in respect of market conduct, except the way a contract is concluded (Dittmann & Kuchinke, 2016).

Unlike traditional companies which are subjected to multiple laws and regulations, the platform-based economy benefits from the ambiguity and lacuna of law since existing law, especially on workers' rights, may not be applicable (Fajar, 2020; Yaraghi & Ravi, 2017). The lack of regulation, particularly for the protection of human rights of platform workers, is concerning because of the increasing number of human rights impacts on them, such as lack of social security protection, irregular payment schemes and lack of negotiating power.

As such, the question of relevancy to imposing human rights due diligence onto the platform companies is necessary in view of the lack of legislative framework on platform companies' responsibility and accountability for human rights violations. The human rights due diligence, as stated in the Guiding Principles, requires human rights risks to be evaluated through human rights lens and not as part of other incorporated due diligence, such as with mergers and acquisitions, contractual discussion or investment decisions which are apparent in the corporate due diligence (McCorquodale et al., 2017; Natour, 2016). Accordingly, the human rights due diligence mechanism could provide a useful structure that platform companies require to adhere to human rights standards by taking comprehensive and proactive human rights due diligence approach (Natour, 2016; Natour & Pluess, 2013).

## Analysis and Findings

### *Due Diligence in the Guiding Principles*

Many authors find it rather difficult to define due diligence. This is because understanding the concept and application of due diligence may be different from various perspectives, such as from the perspective of business actors and human rights scholars. According to the Black's Law Dictionary, due diligence means 'the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation' (Black, 1968). In the business context, due diligence is normally referred to a process of an investigation conducted by a business to identify and manage commercial risks, while human rights scholars approach due diligence as a standard of conduct or a yardstick set up for business actors to prevent them from committing any human rights violations (Bonnitcha & Mccorquodale, 2017; Kulesza, 2016; Martin-ortega, 2013). Moreover, due diligence in corporate governance is grounded in risk management that the business enterprises choose to address, but human rights due diligence imply evaluation of human rights risk to its stakeholders, such as its workers and community, which cannot be derogated by companies (Mares, 2018). In international human rights law, the doctrine of due diligence emerges to complement the positive obligations of a State to exercise management and control the activities of various actors carried out in its territory (Xue, 2009).

To address whether human rights due diligence in the Guiding Principles relate to due diligence as a standard of conduct or as risks management in corporate governance (Bonnitcha & Mccorquodale, 2017), Prof. John Ruggie responded that due diligence is used 'in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks, as explained in the Commentary to Guiding Principle 11 (John Gerard Ruggie & Sherman, 2017). He further states that if the company fails to conduct due diligence, it can neither know nor show that they respect human rights, nor can they credibly claim that they do (Natour, 2016; John Gerard Ruggie & Sherman, 2017). As such, human rights due diligence in the Guiding Principles reflects two core ideas, that is, (a) due diligence as the standard of conduct and (b) due diligence as a process to ensure the standard of conduct is adhered to and a mechanism for corporate governance.

Due diligence as a standard of conduct can be traced from Roman Law with the maxim a *diligens paterfamilias*, which refers to a situation where a person is to be liable for the accidental harm caused to others if the harm resulted from the person's failure to meet the standard of conduct expected of a *diligens paterfamilias* (prudent head of a household) (Bonnitcha & Mccorquodale, 2017). It is an objective standard that allows the conduct of a party to be assessed against an external standard of expected conduct rather than in light of the party's intentions and motivations. This doctrine has been influenced by the development of the tort of negligence or principle of fault in many domestic legal systems where a party's negligent conduct is determined by way of a standard of expected conduct (Cassel, 2016; van Dam, 2011).

The term 'standard' refers to a widely recognised benchmark for determining a state of conduct or behaviour used to interpret the parameters of binding obligations (Barnidge, 2012; Samuel, 2018). The doctrine of due diligence in international law defines and restricts the responsibility of a State concerning the conduct of third parties within its territory or jurisdiction. In the UN Human Rights Committee (HRC), General comment no. 31 (80), paragraph 8 states that,

'the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'(UN Human Rights Committee, n.d.).

Suggestively, due diligence is similar to the 'no-harm' principle in the international customary law that recognises the obligation of the State that not knowingly allow state-owned entities or private activities to act contrary to the rights of the people in the territory (Koivurova, 2013). Though States are not generally responsible for the conduct of non-state actors, they are still under the positive obligation to establish an

appropriate regulatory framework to ensure that private actors do not inflict harm or injury to others within the territory (Guiding Principle 1). Commentary to General Principle 1, for example, states that a State must protect human rights by establishing a 'full range of permissible preventative and remedial measures, including policies, legislations, regulations and adjudication and ensure that private actors adhere to these laws, though its duty exists independently from the business actors' responsibility to respect human rights (Commentary to Guiding Principle 11).

The notion of corporate responsibility to respect human rights, for which human rights due diligence is established, is global standard of expected conduct for all business enterprises wherever they operate (Commentary to Guiding Principle 11). Principle 11 states that business enterprises should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved; addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation (Guiding Principle 17). Thus, human rights due diligence applies as a standard of conduct in the context of a negative obligation to prevent foreseeable injury or harm (Buhmann et al., 2018; van Dam, 2011). According to Koivurova (2013) and Xue (2009), human rights due diligence is an obligation of conduct as a means and not an obligation of result. Human rights due diligence also entails due diligence as a process of ensuring the standard of conduct is adhered to or as a mechanism for corporate governance. Principle 17 states the responsibility of business enterprises to carry out human rights' due diligence by way of 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed'. Further, Principle 17 elaborates human rights due diligence as: (a) 'should cover adverse human rights impacts that the business enterprise may cause or contribute to through its activities or which may be directly linked to its operations, products or services by its business relationships', (b) the process of due diligence could vary in their complexity, depending on the size of the enterprise, the risk of serious human rights violations and the nature and context of the activity and (c) due diligence can be implemented long-term or regularly because human rights risks can change over time. Principle 18 further expands the application of due diligence, which provides that business enterprises should identify and access any actual or potential adverse human rights impact involved in business operations by engaging with the internal or external human rights expertise. This process intends to prevent and mitigate

adverse human rights impacts by integrating findings from the impact assessment and taking appropriate action (Principle 19), tracking the effectiveness of the response (Principle 20), communicating the human rights concerns to affected stakeholders and reporting formally on how the business enterprise address them (Principle 21).

In addition to the Guiding Principles, the United Nations Human Rights Special Procedures in its 2018 Summary Report uses the phrase 'corporate human rights due diligence' to represent a process by which business enterprises take proactive measures to manage potential and actual adverse human rights impacts on who are involved (United Nations Human Rights Special Procedures, 2018b). Furthermore, the Companion Note II provides several steps in which corporate human rights due diligence may be taken into action by recognising and evaluating the risk of human rights in which the business may be involved, as well as assessing human rights impact and developing a grievance mechanism to address the adverse effects (United Nations Human Rights Special Procedures, 2018a). The report acknowledges that corporate human rights due diligence has become a norm of expected conduct when incorporated in the OECD Due Diligence Guidance for Responsible Business Conduct, which provides guidelines for due diligence in practice (OECD, 2018). The OECD Guidelines refer to human rights risks as the likelihood of adverse human rights impact on people, environment and society that enterprises cause, contribute to or to which they are directly linked as compared to the management risk under the corporate governance aspect.

Generally, the concept and application of due diligence in the Guiding Principles emphasise on both corporate performance and a standard of conduct, obligations, enforceable rights or a liability standard that employs a certain standard of care required of business enterprises (Fasterling, 2017; Grabosch & Scheper, 2015; Tan, 2018). However, the human rights due diligence Guiding Principle approach might result in an overly process-oriented and risk-management approach that allows business enterprises to have too much flexibility and discretion, especially when legal obligations and complaint mechanisms are still significantly absent (Bonnitcha & Mccorquodale, 2017; Martin-Ortega, 2008). In particular, the legal uncertainty of the consequences of human rights violations caused by business enterprises, which the Guiding Principles avoid, has made businesses emphasis only the risks to businesses and not the risk to human rights (Fasterling, 2017; Grabosch & Scheper, 2015). Business enterprises

need to understand and appreciate their legal and moral obligations, in particular, to respect human rights, which may contribute to the significant implications for a company's success and the overall corporate culture by enabling human rights to be mainstreamed within corporate thinking and decision-making (Graetz & Franks, 2013; Harrison, 2013).

### **Due Diligence Requirement in Malaysia**

Several instruments on the requirements of due diligence established by the Security Commission of Malaysia ('SC') are applicable to mostly public listed companies. These instruments, however, do not specify human rights due diligence rather due diligence in the risk management process. For example, the SC introduces the Guidelines on Due Diligence Conduct for Corporate Proposals (effective from 1<sup>st</sup> February 2008) that sets out the obligations and standards expected of the due diligence working group (DDWG) to conduct reasonable inquiries of a particular company to ensure that information submitted to the regulators or the public is not false, misleading or contain any material omissions. The said guidelines are, however, replaced by the Guidelines on Submission of Corporate and Capital Market Product Proposals 2020 (effective 1<sup>st</sup> January 2021), which provides for SC's expectations in respect of the standards that must be observed by the parties involved in the preparation of proposals made to the SC and the obligations they must comply with. In the 2020 Guidelines, the SC requires the companies to demonstrate and maintain professional knowledge and skill at the level expected and to exercise due care and diligence in carrying out its functions, that is, in respect of the application for the listing and quotation of securities, registration of prospectus, transfer of listing and on the acquisition or disposal of assets (Securities Commission Malaysia, 2020). The 2020 Guidelines lack specification of human rights due diligence.

The Malaysia Companies Act 2016 also provides no legal requirement for companies to conduct a due diligence process. Nonetheless, section 213 of the Act requires the director of a company to act for a proper purpose and in good faith in the best interest of the company that the exercise of his power must be made with reasonable care, skill and diligence, known as the business judgment rule. Significantly, the business judgment rule is a defence mechanism to safeguard the director of a company against any liability from the adverse effect of the decision made by him (Yaacob & Yeon, 2020). The business judgment rule is, however, understood to be a due diligence process that involves a decision-making

process of risk evaluation that could be injurious to the company and not on human rights *per se*.

Compared to other jurisdictions on human rights due diligence, section 172 (1) of the United Kingdom's Companies Act 2006 imposes a duty on a company's directors to act in good faith to promote the company's success and benefit of its members. In doing so, directors must consider the interests of the company's employees, the impact of the company's operations on the community and the environment and the company's desirability to maintain a reputation for high business standards of business conduct. Similarly, in France, the Duty of Vigilance Law in 2017 mandates large French companies to publish and implement a vigilance plan to identify and prevent human rights risks linked to their business activities.

The French Law requires that a company which employs at least 5000 employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least 10,000 employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan that includes reasonable vigilance measures to allow for risk identification and the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury, environmental damage or health risks resulting directly or indirectly from the operations of the company and the companies it controls (Business & Human Rights Resource Centre, 2016). On the same note, the European Commission recently released a draft regulation on human rights and environmental due diligence. It requires large EU companies and some non-European companies doing significant business in Europe to assess their actual and potential human rights and environmental impacts throughout their operations and down their supply chains and to take action to prevent, mitigate and remedy identified human rights and environmental harms (Flacks, 2022). Companies that fail to conduct effective due diligence or implement preventative or remediation measures face administrative penalties and civil liability.

### ***Human Rights Due Diligence in the Platform-Based Economy***

In essence, human rights due diligence in the Guiding Principles can serve as a useful framework for delineating the responsibilities of various actors in addressing human rights concerns, as well as determining how companies can effectively manage human rights risks, and their

application can be extended into the digital sphere (Natour, 2016; Samway, 2016). Importantly, the United Nations Human Rights Special Procedures in 2021 notes that the capacity of business to respect human rights, as implied in the Guiding Principles, extends to all business activities, including the 'fast fashion' business model, where increasing human rights risks that lead to online and offline abuses are reported (United Nations Human Rights Special Procedures, 2021; United Nations Office of the High Commissioner for Human Rights, 2020). From the foundational and operational principles of corporate responsibility as highlighted in the Guiding Principles, the researcher opines that implementing corporate responsibility to respect human rights for platform companies is promising. Principle 14 of the Guiding Principles states,

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

The basic question in determining whether a certain business model is compatible with the corporate respect for human rights is 'how does the company's business model or the way it operates, link to impacts on people?' (United Nations Human Rights Special Procedures, 2021). It is undeniable that a platform-based economy is inextricably linked to people, and thus issues of human rights and legal risks such as workers' rights, consumer protection, safety and health are inevitable. Platform workers, particularly those participating in transportation and delivery services, have expressed concerns about their irregular payment scheme, working conditions and lack of social security guarantees (Abdul Jamal & Azaman, 2019; Bokányi & Hannák, 2020; David, 2020; Povera & Perimbanayagam, 2022). Though platform companies are generally protected by a long-standing legal doctrine that shields them from liability as network intermediaries and market facilitators (Ananny & Gillespie, 2016; Ebert et al., 2020; Jørgensen, 2019; Perren & Grauerholz, 2015; van Dijck & Poell, 2013), one can argue that platform companies are powerful entities as they wield enormous power over the diverse social and economic activities they facilitate.

Most notably, a platform-based economy could alter the employment relationship between platform companies and their workers, with the former viewing platform



workers as part of the human cloud by disintegrating or diffracting tasks into smaller tasks that can be performed anywhere and everywhere as long as they have an internet connection. Consequently, the casualisation of labour in a platform-based economy excludes social security legislation and other human rights safeguards (Schor & Fitzmaurice, 2015). Considerable legal liability has been shifted to platform workers, such as requiring workers to have their insurance policy, no health and safety inspections or no inspection of participants' criminal records, all of which pose apparent human rights risks to workers (Erickson & Sørensen, 2016). Furthermore, because they rely on each other for profit, platform companies have a strong relationship with platform workers. Thus, it makes no sense for platform companies to hide behind 'technological black boxes' when fulfilling their human rights responsibilities (Ebert et al., 2020). For example, Faris Natour (2016), advocates that the essential aspect of corporate responsibility to respect human rights is that businesses know and show how they respect human rights. Currently, there is no regulatory measure to generate the applicability of corporate responsibility and human rights due diligence in a platform-based economy in Malaysia. The present instruments established by the SC have no application onto the platform companies, but if they do, they lack a definitional framework for human rights due diligence, as well as procedural aspects for conducting human rights due diligence. Therefore, this research emphasises the need for corporations of all sizes to understand and commit by demonstrating corporate responsibility to respect human rights by embedding human rights due diligence, regardless of how they conduct business.

In this context, the Human Rights Commission of Malaysia (SUHAKAM) plays a significant role in addressing concerns on human rights issues in Malaysia. In 2015, SUHAKAM developed and presented a Strategic Framework for a National Action Plan on Business and Human Rights for Malaysia to the Government 2015. The Framework based on the Guiding Principles provides a policy direction for the formulation of a National Action Plan on Business and Human Rights for Malaysia towards promoting greater respect for human rights the State and non-State actors, including businesses, civil societies and individuals, as well as groups affected by adverse business-related human rights impacts. SUHAKAM has urged the Malaysian government to expedite the development of Malaysia's National Action Plan on Business and Human Rights (NAPBHR), which will establish responsibility on the part of business entities to respect human rights and promote accountability of business practices. Though SUHAKAM required private companies to comply with national

labour laws and international labour standards to ensure human rights compliance throughout their entire supply chain framework and to demonstrate that they can stand up to comply with international human rights and labour standards (SUHAKAM, 2022), this may be challenging for the innovative and technologically driven economy, such as the platform economy, in the absence of specific guidelines or standards.

## Conclusion

It is widely recognised that human rights are independent and indivisible, hence should be respected by all actors, including business enterprises in a platform-based economy. Human rights issues such as discrimination, inequality and exploitation of platform workers become abundant as they are classified as independent contractors whose basic rights protection generally falls outside the scope of employment law. Accordingly, human rights due diligence, as entailed in the corporate responsibility framework, provides useful guidelines for business enterprises to act with due diligence to prevent adverse harm or infringe the rights of others, particularly the workers. The no-harm principle, which becomes the basis of due diligence, requires business enterprises to take a proactive approach to prevent adverse harm to the stakeholders by acting with reasonable care and diligence. Additionally, human rights due diligence could potentially help the platform economy in its sustainability and improve its risk and crisis management in the future (Raja Suzana et al., 2020).

In the platform-based economy, where a substantial regulatory gap exists, especially for protecting the platform workers' rights, a voluntary approach to human rights due diligence may not be sufficient and pose difficulties in its application and implementation. Furthermore, the problems of a voluntary approach or self-regulation are invariably on enforceability mechanism, absence of governmental supervision and non-compliance mechanism and consequences, and is proven to be inefficient to satisfy certain objectives, particularly on the protection of fundamental rights (Castro, 2011; Mensi-Klarbach et al., 2019; Simons, 2004). Therefore, without binding legislation, a business enterprise can choose whether or not to conduct human rights due diligence, and its compliance cannot be appropriately measured without specific standards (Fasterling, 2017). To address the issue, this paper proposes specific industry instrument that could represent a standard of conduct that may be developed and could vary in forms such as guidelines, codes of

practice, performance standards and global framework agreements between relevant actors and resolutions. This instrument may provide the definitional context of human rights due diligence and how it can be implemented in the platform-based economy. However, these instruments are intended to encourage relevant actors (states and non-state actors) to improve good governance and self-compliance to the recognised legal norms, but they are not legally binding upon them (Samuel, 2018). Thus, future research may be conducted on developing a framework in which human rights due diligence becomes a standard of conduct establishing a code of conduct or a guideline to be adhered to by the platform companies. To achieve compliance, the code of conduct or guideline is established for a specific sector and must be monitored and enforced by appropriate governmental organisations.

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## Biographical Statement of Author(s)

**Maheran Makhtar** graduated with LLB (Hons) from the International University Islam Malaysia (IIUM) in 2008 and a Master in Comparative Laws in 2009 from the same University. She works as lecturer at the Faculty of Law and International Relations, Universiti Sultan Zainal



Abidin (UniSZA), and is currently pursuing her Ph.D in the area of business and human rights at the same University.

Her main areas of research interest are constitutional law, land law, and business and human rights.

### **Ms. Maheran Makhtar**

Department of Law  
Faculty of Law and International Relations  
Universiti Sultan Zainal Abidin  
Terengganu, Malaysia

**E-mail:** [maheranmakhtar@unisza.edu.my](mailto:maheranmakhtar@unisza.edu.my)

**Prof. Dr. Zuhairah** graduated with LLB (Hons) in Business Law from University of Huddersfield, United Kingdom in year 1991 and later obtained her Master in Comparative Laws from International Islamic University Malaysia in year 1992. She obtained her Ph.d in Business Law from the Graduate School of Management, University Putra Malaysia in year 2002.



At present, Professor Dr. Zuhairah holds the position as the Deputy Vice Chancellor (Academic and Internationalisation) of the University Sultan Zainal Abidin, Terengganu, Malaysia. She has also been the Dean of the Faculty of Law and International Relations (FLAIR), Universiti Sultan Zainal Abidin (UniSZA), Kuala Terengganu, Malaysia from 2014 until 2022.

**Prof. Dr. Zuhairah Ariff bt Abd Ghadas**

Department of Law  
Faculty of Law and International Relations  
Universiti Sultan Zainal Abidin  
Terengganu, Malaysia

**E-mail:** [zuhairahariff@unisza.edu.my](mailto:zuhairahariff@unisza.edu.my)

Prof. Dr. Zuhairah's area of specialization is in Business Law, particularly in the studies of legal framework and innovation of Business Entities.

**Dr. Mahbubul Haque** is currently working as faculty at the Faculty of Law and International Relations in University Sultan Zainal Abidin (UNISZA) Malaysia and formerly a faculty member of the Political Science in Prince of Songkla University, Thailand. Of Bangladeshi origin, Mahbub conducted research and advocacy work for rights of non-citizens in Bangladesh, Myanmar, Thailand, Malaysia and Indonesia. He obtained a Masters of Arts in History from Dhaka University, Bangladesh and a Masters of Arts in Human Rights from Mahidol University, Thailand. Later in 2014, he obtained a PhD in Human Rights and Peace Studies from the same institute in Thailand. Dr. Mahbub has received scholarships from



the Swedish International Development Cooperation Agency (SIDA) and Mahidol University.

During his student life in Bangladesh, he was actively involved in student politics and organized different international, national and local level movements. Dr. Mahbub has been working on Rohingya issues since 2005. He has published numerous research articles in internationally recognized academic journals. The USIM Press published his book, 2019 on Rohingya Survivors: Regional Security Implication of Gender Based Violence. Routledge published another book (as co-author) in this year The Rohingya Crisis: A Moral, Ethnographic, and Policy Assessment (1st Edition).

**Dr. Mahbubul Haque**

Department of International Relations  
Universiti Sultan Zainal Abidin  
Terengganu, Malaysia

**E-mail:** [mahbubh@unisza.edu.my](mailto:mahbubh@unisza.edu.my)