

Malaysia National Stakeholder Conference

Developing a Comprehensive Policy Framework for Migrant Labour

Compilation of Conference Papers and Presentations



Bar Council
Malaysia



International
Labour Organization

Copyright © International Labour Organization 2008

First published 2008

Publications of the International Labour Office enjoy copyright under Protocol 2 of the Universal Copyright Convention. Nevertheless, short excerpts from them may be reproduced without authorization, on condition that the source is indicated. For rights of reproduction or translation, application should be made to ILO Publications (Rights and Permissions), International Labour Office, CH-1211 Geneva 22, Switzerland, or by email: pubdroit@ilo.org. The International Labour Office welcomes such applications.

Libraries, institutions and other users registered with reproduction rights organizations may make copies in accordance with the licences issued to them for this purpose. Visit www.ifro.org to find the reproduction rights organization in your country.

ISBN 978-92-2-121462-5 (print)
978-92-2-121463-2 (web pdf)

International Labour Organization and Bar Council Malaysia
Malaysia National Stakeholder Conference: Developing a Comprehensive Policy Framework for Migrant Labour;
Compilation of Conference Papers and Presentations

Jakarta, International Labour Office, 2008
198 p

ILO Cataloguing in Publication Data

The designations employed in ILO publications, which are in conformity with United Nations practice, and the presentation of material therein do not imply the expression of any opinion whatsoever on the part of the International Labour Office concerning the legal status of any country, area or territory or of its authorities, or concerning the delimitation of its frontiers.

The responsibility for opinions expressed in signed articles, studies and other contributions rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office of the opinions expressed in them.

Reference to names of firms and commercial products and processes does not imply their endorsement by the International Labour Office, and any failure to mention a particular firm, commercial product or process is not a sign of disapproval.

ILO publications and electronic products can be obtained through major booksellers or ILO local offices in many countries, or direct from ILO Publications, International Labour Office, CH-1211 Geneva 22, Switzerland. Catalogues or lists of new publications are available free of charge from the above address, or by email: pubvente@ilo.org

Visit our website: www.ilo.org/publns

Printed in Indonesia

Preface

Fundamental labour rights, as entailed in the ILO Core Conventions, apply to all workers without exception, including migrant workers and workers in the informal sector. All ILO member countries have, as a result of their membership of the ILO and the adoption of the 1998 ILO *Declaration on Fundamental Principles and Rights at Work*, committed to the implementation of these conventions in national laws and practices. The ILO Core Conventions provide for freedom of association, and are opposed to discrimination against workers, forced labour practices and child labour.

According to the Malaysian Ministry of Home Affairs, as of 31 December 2007, the documented Malaysian work force consisted of 9,370,614 nationals (81.8%), 42,000 higher-skilled (expatriate) migrant workers (0.4%) and 2,044,805 documented lower-skilled migrant workers (17.8%). In total, the workforce comprised some 11,457,419 workers. Of the documented lower-skilled migrant workers, 56.14% are Indonesian. In addition, an estimated 1.2 million undocumented lower-skilled migrant workers work in Malaysia, of these an estimated 60% are Indonesian, according to the World Bank (2008) and other sources. Migrant workers, whether documented or undocumented, work in a wide range of economic sectors in Malaysia, such as domestic work, plantations, agriculture, construction, manufacturing and services.

Despite the importance of migrant workers to the Malaysian economy, a number of national and international reports have independently documented the continuing high prevalence of labour and human rights violations against migrant workers throughout the migration process and in their employment in Malaysia. A substantial number of these violations concern central provisions of the ILO Core Conventions. Furthermore, Malaysia continues to grapple with persistently high numbers of undocumented migrant workers, some entering without proper documentation, others becoming undocumented after a period of work in Malaysia.

The many cases of labour and human rights violations against migrant workers in Malaysia, as well as the high number of undocumented migrant workers, point towards structural deficiencies in labour migration policies and labour protection systems.

Noting this situation with concern, the Malaysian Bar Council, in cooperation with other Malaysian stakeholders, organized the National Conference “*Developing a Comprehensive Policy Framework for Migrant Labour*” which took place on 18-19 February, 2008 in Petaling Jaya, Malaysia. The Conference was supported by the *ILO Project on Combating Forced Labour and Trafficking of Migrant Workers*, which is funded by the Government of Norway. The purpose of the Conference was to identify the root causes of migrant workers’ problems within the Malaysian labour migration system, and propose measures to address these problems.

The presenters and participants at the Conference consisted of representatives from Malaysian Government Ministries with a migration mandate, such as the Ministry of Human Resources, the Immigration Department and the Ministry of Health, as well as representatives from National Trade Union Confederations and Federations, NGOs, the Malaysian Bar Council and the ILO. Over the

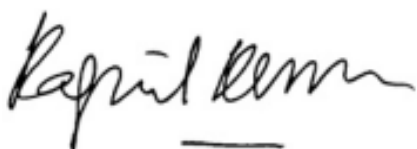
course of the two-day Conference, the resource persons presented methodical analyses and outlines of documented problems within various sections of the Malaysian labour migration system and recommended policy and administrative measures to remedy these problems.

Towards the end of the Conference, the participants reviewed and provided input to a national rights-based policy framework and plan of action, compiled by the Malaysian Bar Council and other stakeholder members of the Conference Steering Committee.

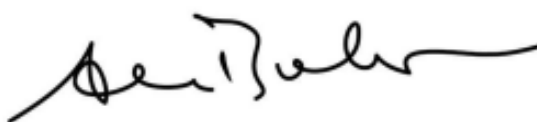
In order to document the findings and recommendations of the Conference, as well as to support the work to strengthen the Malaysian labour migration policy framework, the organizers of the Conference, supported by the ILO Project, have compiled the papers and presentations made in this publication.

The papers and presentations are published in the format in which they were presented and the information, data and opinions in the papers and presentations are exclusively attributable to the institutions or persons making them.

In compiling and publishing the papers and presentations from the Conference and making them available to a wider audience, it is our hope that the publication will support the work of Malaysian stakeholders in addressing labour and human rights violations against migrant workers in Malaysia, and that the publication furthermore will contribute to the international debate on the importance of national and international minimum standards for the protection of migrant workers in this era of globalization.



Ragunath Kesavan
Vice President,
Malaysian Bar,
Kuala Lumpur, Malaysia



Alan Boulton
Director,
ILO Jakarta Office,
Indonesia

Table of Contents

Preface	3
Contents	5
Abbreviations	7
Agenda	8
Keynote Address <i>Mah Weng Kwai, President of Law Association for Asia and the Pacific (LAWASIA)</i>	11
 SESSION I : RIGHT TO LIVELIHOOD	 17
Access to Justice and Employment Law <i>Khamis Ar. Majid, Director, Johore Manpower Office, Department of Labour Peninsular Malaysia</i>	 18
Access to Justice and Employment Law <i>Muhendaran Suppiah, Malaysian Bar</i>	 32
Recruitment and Placement of Migrant Workers To Malaysia: Inconsistent, Unclear and Deregulated without a Human Rights Approach <i>Dr. Irene Fernandez, Director of Tenaganita</i>	 38
Right to Organize: Developing a Comprehensive Policy Framework for Migrant Labour <i>A. Balasubramaniam, Vice President of Malaysian Trade Union Congress (MTUC)</i>	 48
 SESSION II : ARREST AND DETENTION	 55
Arrest, Detention and Prosecution: Special Briefing by Enforcement Division <i>Datuk Ishak Mohamed, Immigration Enforcement Chief, Immigration Department of Malaysia</i>	 56
Arrest, Detention and Prosecution of Migrant Workers <i>Ravi Neeko, Malaysian Bar</i>	 81
Situation of Foreign Domestic Workers in Hong Kong <i>Cynthia Ca Abdon-Tellez, Director of Mission for Migrant Workers- Hong Kong (MFMW-HK)</i>	 90

SESSION III : SOCIAL CHALLENGES	98
Access to Healthcare and Living Conditions	
<i>Dato' Hj. Ramlee Hj. Rahmat, Deputy Director General of Public Health, Ministry of Health</i>	99
Migrant Workers Health and Living conditions	
<i>Cynthia Gabriel, Regional Coordinator, Coordination of Action Research on AIDS & Mobility Committee Against Torture (CARAM) Asia</i>	111
Improving Health Conditions of Migrants in Priority Provinces of Thailand	
<i>Nigoon Jitthai, Migrant Health Program Manager, International Organisation for Migration (IOM) Thailand</i>	121
Social and Cultural Rights of Migrant Labours in Malaysia: An Overview from a Rights-Based Perspective	
<i>Yap Swee Seng, Executive Director, The Malaysian People's Voice (SUARAM)</i>	148
Violence and Xenophobia towards Migrant Workers	
<i>Anil Noel Netto, Treasurer, Aliran</i>	155
Rights of Migrant Workers: Expectations and Challenges	
<i>David Abraham, Vice President for Foreign Affairs Indonesian Attorneys Association (IPHI)</i>	161
SESSION IV : RECOMMENDATIONS	164
Developing a Comprehensive Policy Framework for Migrant Labour	
<i>Lotte Kejser, Chief Technical Advisor, International Labour Organization (ILO) Jakarta</i>	165
A Rights-Based Policy Framework and Plan of Action	
<i>Dato' M. Ramachelvam, Chairperson, Bar Council Ad Hoc Committee on the Immigration Act</i>	177
Annex 1. Specimen of Employment Contract for a Domestic Helper Recruited from Outside Hong Kong	184

Abbreviations

ASEAN	The Association of Southeast Asian Nations
BNP2TKI	<i>Badan Nasional Penempatan and Perlindungan Tenaga Kerja Indonesia</i> (National Agency for the Placement and Protection of Indonesian Overseas Labour)
CARAM Asia	Coordination of Action Research on AIDS & Mobility
CAT	Committee against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of Children
ESCR	Economic, Social and Cultural Rights
FDHs	Foreign Domestic Helpers
FDWs	Foreign Domestic Workers
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
IOM	International Organization for Migration
IPHI	Indonesian Attorneys Association
KHEDN	<i>Kementerian Hal Ehwal Dalam Negeri</i> (Malaysia's Ministry of Domestic Affairs)
KKDN	<i>Kementerian Keselamatan Dalam Negeri</i> (Malaysia's Ministry of Internal Security)
Komnas Perempuan	<i>Komisi Nasional Anti Kekerasan terhadap Perempuan</i> (National Commission on Violence against Women)
LAWASIA	Law Association for Asia and the Pacific
MFW-HK	Mission for Migrant Workers-Hong Kong
MOH	Ministry of Health
MOM	Ministry of Manpower
MOU	Memorandum of Understanding
MTUC	Malaysian Trade Union Congress
NGOs	Non-Governmental Organizations
OSHA	Occupational Safety and Health Administration
RELA	<i>Ikatan Relawan Rakyat</i> (the People's Volunteer Corps of Malaysia)
RM	Ringgit Malaysia
SUARAM	<i>Suara Rakyat Malaysia</i> (the Malaysian People's Voice)
SUHAKAM	Human Rights Commission of Malaysia
TIP	Trafficking in Persons
UNHCR	United Nations High Commissioner for Refugee

Agenda

MONDAY, 18 FEBRUARY 2008

Time	Program	Speaker
08.00 am – 09.00 am	Registration	
09.00 am – 09.15 am	Introductory Address	Dato' M. Ramachelvam, <i>Chairman, Ad Hoc Committee on the Immigration Act</i>
09.15 am – 09.30 am	Welcome Address	Ragunant Kesavan, <i>Vice President, Malaysian Bar</i>
09.30 am – 10.00 am	Keynote Address	Mah Weng Kwai, <i>President, LAWASIA</i>
10.00 am – 10.30 am	Tea	
10.30 am – 01.00 pm	Session 1: Right to Livelihood Access to Justice and Employment Law	Khamis Ar. Majid, <i>Pengarah Penguatkuasaan, Jabatan Tenaga Kerja Semenanjung Malaysia, Kementerian Sumber Manusia</i>
	Access to Justice and Employment Law	S. Muhendaran, <i>Malaysian Bar</i>
	Recruitment and Placement	Dr. Irene Fernandez, <i>Director, Tenaganita</i>
	Rights to Organize	A. Balasubramaniam, <i>Vice President, MTUC</i>
01.00 pm – 02.00 pm	Lunch	
02.00 pm – 03.30 pm	Session 2: Arrest and Detention Arrest, Detention and Prosecution	Dato' Ishak Hj. Mohamed, <i>Penguatkuasa, Jabatan Imigresen Malaysia</i>
	Arrest, Detention and Prosecution	Ravi Nekoo, <i>Malaysian Bar</i>

Time	Program	Speaker
	Situation of Foreign Domestic Workers in Hong Kong	Cynthia Ca Abdon-Tellez, <i>Director, the Mission for Migrant Workers, Hong Kong</i>
03.30 pm – 04.00 pm	Tea	
04.00 pm – 05.30 pm	Session 3: Social Challenges Access to Healthcare and Living Conditions	Dato' Dr. Hj/ Ramlee Hj. Rahmat, <i>Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan Malaysia</i>
	Access to Healthcare and Living Conditions	Cynthia Gabriel, <i>Regional Coordinator, CARAM Asia</i>
	Healthy Migrants for Healthy Thailand	Jitthai Nigoon, <i>Migrant Health Program Manager, International Organisation for Migration (IOM) Thailand</i>

TUESDAY, 19 FEBRUARY 2008

Time	Program	Speaker
09.00 am – 10.30 am	Session 3: Social Challenges (Continued)	Yap Swee Seng, <i>Executive Director, SUARAM</i>
	Social and Cultural Rights	Anil Netto, <i>Treasurer, Aliran</i>
	Violence and Xenophobia Rights of Migrant Workers – Expectations and Challenges	David Abraham, <i>Vice President for Foreign Affairs, Ikatan Penasehat Hukum Indonesia (IPHI)</i>
10.30 am – 11.00 am	Tea	
11.00 am – 12.45 pm	Session 4: Recommendations ILO's Multilateral Framework on Labour Migration A Rights Based Policy Framework and Plan of Action	Lotte Kejser, <i>International Labour Organization (ILO) Jakarta</i>
12.45 pm – 01.00 pm	Closing Address	Dato' M. Ramachelvam, <i>Chairman, Ad Hoc Committee on the Immigration Act</i>
01.00 pm	Lunch	

Key Note Address

By Mah Weng Kwai

President the Law Association for Asia and the Pacific (LAWASIA)

Ladies and gentlemen, the task before this conference is a large one as it examines an area of law that is of particular economic and political importance in our Asia Pacific region and one which has a profound effect on the fabric of our human society.

I am, then, honoured and pleased that, as president of LAWASIA, the Law Association for Asia and the Pacific, I have the opportunity to speak here today.

LAWASIA holds as one of its primaries aims the obligation to promote *the administration of justice, the protection of human rights and the maintenance of the rule of law*. It is an organisation that seeks to *encourage communication and liaison between members in relation to general and specialised areas of law*. Where are these objectives relevant, if not in this discussion forum?

This is perhaps best conveyed by one of our most eminent members, the Honourable Justice Michael Kirby of the High Court of Australia, who, speaking at a LAWASIA conference on labour law here in Kuala Lumpur in 2006 said:

*It is the obligation of judges and lawyers in migrant-supplying and host countries to ensure, so far as the law allows, the protection of the basic standards of human dignity and human rights of all immigrants, and of migrant labour, coming within their jurisdiction. We should do this because of the basic rules of international law. We should also do it because of the lessons of the past concerning the serious deprivations of the basic rights of such persons. We should do so to uphold and extend the protection of international law.*¹

The problems created in many of our countries by inadequate or ill-conceived legislative reactions to an influx of workers from outside are historically evident and long-standing.

We have in our region numerous examples of the challenges posed to modern societies by historical shortcomings in the societal and legislative responses to foreign workers and their descendants. That is an issue we have faced and continue to face in our own country.

On the other hand, the recent rapid expansion of international labour migration since the era of globalisation hit us in the 1980s has seen new sets of problems emerge not only for Malaysia but also for our regional neighbours.

Whether the challenges are created by past mistakes or current trends, they have required and will continue to require governments to put regulatory regimes in place that seek to establish best practice.

¹ *Labour Migration: International & National Progress*, the Hon Justice Michael Kirby AC CMG, paper given by Antonio A Morales, Minister and Consul General, Philippine Embassy, LAWASIA Labour Law Conference, KL 2006

This is a necessary thing and in a perfect world, a good regulatory system protects all stake-holders - both sending and receiving societies and their economies as well as the welfare of the migrant workers themselves.

In a less than perfect world, regulation and its enforcement can be unsatisfactory, which sees rights abused and an imbalance in the protection of interests.

In this, we have the opportunity to learn from the successes and mistakes of our neighbours and that interaction is of considerable relevance to LAWASIA as well as to those whose vision is more internally focussed.

Our own immediate region puts up examples of where a developing wider awareness of the issues in both destination and source countries serves to build regulatory regimes whose focus is multi-dimensional. That the intricacy of the challenges created by current and historical trends in labour migration merit a multi-dimensional reaction is undeniable.

We are all well aware that, in our immediate region, Malaysia, Singapore, Thailand, Hong Kong, Japan, Taiwan, and Brunei are major countries of destination for foreign workers, and that Philippines, Indonesia, Sri Lanka and Thailand are the main countries of source.

The demand of migrant workers in receiving countries and the supply of workers from sending countries are simply a matter of economics. High labour demand in receiving countries drive wages up and to levels which are very attractive to workers in sending countries. It is the promise of better pay and return on another country which turns workers into foreign workers.

It is fair to say that widespread criticism of protections provided to foreign workers along with pressure from business communities for conditions that focus solely on commercial outcome have seen a trend where governments of both sending and receiving countries must contemplate ongoing legislative changes that provide balance. Some successes have been achieved, some criticism remains ineffectively addressed.

An understanding of how the countries of our region focus their regulatory schemes, and to what extent, provides a potential framework for regional cooperation in what is a clearly a regional challenge.

We must also add to our field of vision the overarching guidance provided by conventions of the International Labour Organisation (ILO) and their importance in setting benchmarks to be achieved by all. I again refer to Justice Kirby, who opined, in respect of the ILO Multilateral Framework of Labour Migration 2005, that:

to date, this document stands alone as a comprehensive collection of principles on labour migration policies, grounded in international best practice and drawing on the international instruments regulating human rights and labour standards.²

A natural divide occurs in the emphasis placed on regulatory measures imposed by the sending and by the receiving countries.

2 *ibid.*

The Philippines, with more than 8 million working overseas, representing almost 10% of its population, provides a good starting place.

The foreign exchange generated by repatriated income from foreign workers is significant and the Philippines government does not deny the importance of this both to its national economy and social stability.

Unsurprisingly, Philippines' foreign policy has a stated focus on the welfare of overseas Filipino workers and the Migrant and Overseas Workers Act of 1995, along with other Filipino legislation mandates the state's requirement to:

- ♦ provide effective diplomatic and consular representation to Filipino workers overseas;
- ♦ provide social, economic and legal services;
- ♦ ensure that overseas Filipino workers are deployed only in countries where their rights are protected.

The Philippines has a network of administration focused on overseas workers with major responsibility falling to the Departments of Labor and Employment and Foreign Affairs. It has 27 Philippines Overseas Labor Offices in consular or embassy locations, which aim to provide a comprehensive list of services and assistance to migrant workers.³

It does not claim to be free of challenges, not the least of which is whether the protective measures are able to implement. But this regime does at least acknowledge the obligation to make the effort.

Moreover, the Philippines is a signatory to the multi-lateral conventions, declarations and resolutions relating to the protection of foreign workers and that is of fundamental importance.

It has both signed and ratified the International Convention on the Protection of Migrant Workers' Rights, which can be taken as an indication of some political will and interest in this area.

In this, it sets an example to Indonesia as another major source country of migrant workers in the region. The ILO estimates foreign exchange contributed by Indonesian migrant workers to be over US\$ 1.5 billion dollars. The problems that Indonesia faces in dealing with conditions for migrant workers are well documented and have, at times, properly attracted international criticism.

Efforts have been made by the Indonesian authorities to address these:

- ♦ Reform in Indonesian labour law over the past decade has seen laws such as Law on Deployment and Protection of Indonesian Migrant Workers Abroad, UUPPTKILN No. 39/2004 enacted.
- ♦ In March 2007, the National Agency for the Placement and Protection of Overseas Labor (BNP2TKI) was established which aimed to ensure affordable, safe and rapid labour export procedures.
- ♦ Indonesia is a signatory to the 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

3 *Philippines Perspective: Legal Framework, Issues and Challenges for Overseas Filipino Migrants*, paper given by Antonio A Morales, Minister and Consul General, Philippine Embassy, LAWASIA Labour Law Conference, KL 2006

- ♦ The 2006 Citizenship Law passed in Indonesia has, to some extent, addressed issues posed by confusion over citizenship of children born to an Indonesian migrant parent, which at least recognises this as an issue related to worker migration.

It is fair to say that these measures have not entirely won over critics and is has been a further source of criticism that, although Indonesia signed the International Convention on the Protection of Migrant Workers' Rights in 2004, it has not as yet ratified it.

As a general observation, it is interesting to note that of the other labour exporting countries of our region, some, such as Pakistan and Bangladesh do have in place recruitment and replacement mechanisms that aim to protect their nationals working abroad. Others, such as Sri Lanka and Thailand offer little by way of protection and intervention.

This does perhaps raise the question of whether prevailing fundamental value systems put emphasis on the welfare of all citizens.

We must also take into regional consideration initiatives in destination countries that provide both control of and protection to the foreign workers whose presence is pivotal in meeting labour shortages.

It is previous practices in this sphere that have attracted severe criticism from civil society and that have required governments to bring down legislation to address this.

Practices pertaining to the abuse of foreign domestic workers in our near neighbour Singapore have seen the Singaporean government, through its Ministry of Manpower (MOM) establish improved minimum standards for employment of foreign workers, regulation of employment agencies and a regulatory regime for employers including provisions in the penal code that punish those who are guilty of criminal abuse of workers.

MOM umbrellas a Foreign Manpower Management Division that has the responsibility of overseeing labour policy, complaints, management as well as providing advisory and mediation services to foreign workers experiencing problems.⁴

The trend for reform continues in Taiwan where its Council of Labor Affairs (CLA) has recently promulgated an amendment to regulations governing the employment of foreign workers to provide better protection of their rights. Amendments of Regulations on the Permission and Administration of the Employment of Foreign Workers include requirements that employers pay monthly wages in full directly to foreign workers after deducting health and labour insurance fees, room and board expenses and income tax.

In Hong Kong SAR, the Labour Ordinance nominally establishes the same statutory protection for foreign workers as for local workers and provisions such as minimum mandatory wages and standard employment contracts are in place.

⁴ *International Labour Migration in Southeast Asia: Governance of Migration and Domestic Workers*, Amarjit Kaur in *Intersections: Gender, History and Culture in the Asian Context*, Issue 15, May 2007, Murdoch University

That has not, however, prevented considerable criticism of the “Two Week’ rule, established in response to concerns that migrant workers were abusing earlier regulations that left wide opportunities for job-hopping and disadvantaged the importing employer.

Under this rule, a foreign domestic worker or imported worker whose contract is terminated prematurely is permitted to remain in Hong Kong SAR for the remainder of the permitted limit of stay, or for two weeks from the date of termination of the contract, whichever is the shorter. This has provoked challenges on the grounds of racism, in that it affected mainly a significant number of Filipino domestic workers and had the ability to leave them in vulnerable and precarious conditions.

In Japan, admission of foreign workers has long been subject to strict laws although labour shortages in some sectors are changing this landscape.

Foreign migrant workers are protected by Trade Union Law, Labor Standards Law, Minimum Wage Law, Industrial Safety and Health Law and Employment Security Law among others.

It may be notable, however, that the Japanese government has undertaken recent consideration of the introduction of ‘language ability’ tests for long-term foreign residents and overseas workers, as part of anti-terrorism initiatives. Yet another current and future influence on the fate of the migrant worker emerges.

The Korean government has recently passed three new labour laws - the Contractual and Part-time Worker Protection Act, the Dispatched Worker Protection Act and the New Labor Relations Act - that give protection to foreign workers through contract arrangements and regulations that prevent the employer abuse or discrimination. Fines for breaches are heavy.

India, in addition to dealing with issues of foreign labour and economic migration from countries around its borders, legal and otherwise, has also to contend with problematic labour migration flows in its federation of states.

As recently as last week, when I was in India, front pages of national newspapers reported on rioting in Mumbai related to this problem. Workers from interstate are leaving the city in large numbers to avoid the violence.

With its revered court system, India’s legal reaction to political elements accused of provoking this violence will be instructive.

This very brief comparative view builds a picture of the kaleidoscope that makes up Asia-Pacific reaction to circumstances that require both control and protection of foreign workers.

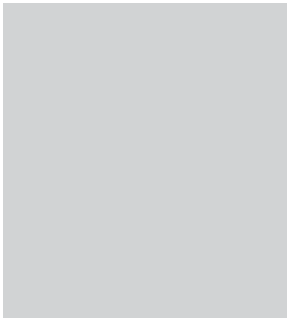
The picture is a constantly changing one but it does point to a general understanding that it is incumbent on governments to reform legislation governing labour recruitment and migration so that a balance can be found between the basic rights of human beings in both sending and receiving societies and the irresistible force of commercial interests.

It is into this that we must fit the Malaysian model, taking instruction from the examples and experiences of our neighbours but mindful of our own circumstances.

The challenges posed by international movement of labour will not, however, simply disappear with the introduction of better legislation.

A willingness to effectively implement and to enforce universally-agreed standards, along with a readiness to react to changing conditions remain pivotal in ensuring that the countries of the Asia Pacific region can meet them.

These are just some of the issues from our need for foreign workers. While the ideal situation may not be immediately within our reach, it is imperative that we make a concerted effort in that direction. The Organising Committee has put together a very exciting and stimulating program with many eminent speakers to share with you their experience and expertise in this area of the law. With this, I wish you a very successful conference and thank you in anticipation for the advancements in migrant labour law and policies which I hope will result from this conference.



SESSION I : RIGHT TO LIVELIHOOD

Access to Justice and Employment Law

Khamis Ar. Majid,

Director, Johore Manpower Office,
Department of Labour Peninsular Malaysia

Definition

Migrant Worker: A person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State to which he or she is not a national.

(Part 1 – Article 2) (UN Con 45/158 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their families)

Foreign Employee: An employee who is not a citizen

(Sect. 2 Employment Act 1955)

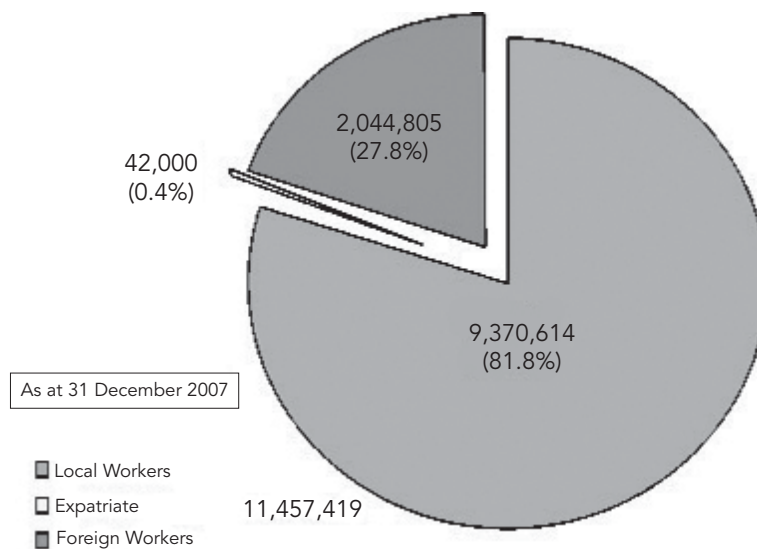
History of FWS in Malaysia

Malaysia has relied on the regional labour market for low-to-medium skilled workers since the early-1970s to fuel growth and facilitate structural adjustment.

Due to the esteem need especially in construction, agriculture and plantations that experienced labour shortages, the state had permitted a free inflow of low-skilled inexpensive labour till the early 1980's. A cabinet decision was made on 14 July 1982 to restrict and regulate the inflow of FWs.

The increasing needs for FWs especially in manufacturing has urged the government to permit FWs to work in other sectors in the year 1992.

National Workforce



Source: Ministry Of Home Affairs, Economic Planning Unit, Labour Department

National Workforce (cont...)

Sector	% of total	Actual (million)
Services	51.4	5.8
Manufacturing	29.2	3.4
Agriculture	12.2	1.4
Construction	6.8	0.8
Mining	0.4	0.05
Total	100	11.45

Category of Foreign Workers

Documented FWs

- ♦ Enter legally and is employed under a valid temporary employment visit pas (TEVP) issued by the Department of Immigration;
- ♦ Entitled to the protection and benefits provided under the various labour laws and regulations enforced in Malaysia;
- ♦ Generally employed in lower and unskilled jobs.

Expatriate

- ♦ Issued with employment pass;
- ♦ Allowed to bring spouses and family into the country;
- ♦ Employed in executive and higher managerial and technical jobs.

Undocumented FWs

- ♦ Enter and work in the country in breach of Immigration Laws;
- ♦ Not eligible for protection under the law (contract void);
- ♦ Vulnerable to exploitation and abuse.

Category of Foreign Workers

Country	Domestic Worker	Construction	Manufacturing	Services	Plantation	Agriculture	Total
Indonesia	294,784	211,016	206,780	41,012	290,484	103,974	1,148,050
Nepal	31	4,499	172,311	1,904	2,584	8,060	189,389
India	128	7,382	28,446	60,049	22,451	23,575	142,031
Myanmar	61	14,857	79,986	6	1,484	7,911	104,305
Vietnam	31	5,251	104,946	2,951	79	645	113,903
Bangladesh	21	40,497	128,664	21,843	14,207	12,006	217,238
Filipina	10,443	1,640	2,858	1,103	4,662	2,577	23,283
Thailand	426	1,122	793	15,532	53	530	18,456
Pakistan	2	4,647	3,140	1,706	971	6,045	16,511
Cambodia	7,458	173	2,592	240	207	95	10,765
China	18	2,284	959	3,137	221	14	6,633
Sri Lanka	883	106	1,880	731	99	265	3,964
Laos	1	13	16	-	1	1	32
Uzbekistan	-	6	1	4	-	-	11
Lain-lain	8	16	-	50,210	-	-	50,234
Total	314,295	293,509	733,372	200,428	337,503	165,698	2,044,805

Source: Immigration Department

Legislations Applicable to Foreign Workers

Documented FWs

- ♦ Employment Act 1955 (Peninsular Malaysia)
- ♦ Sabah Labour Ordinance (State of Sabah)?
- ♦ Sarawak Labour Ordinance (State of Sarawak)
- ♦ Workmen's Compensation Act 1952
- ♦ Workers' Minimum Standard of Housing and Amenities Act 1990
- ♦ Children and Young Persons Act 1966
- ♦ Industrial Relations Act 1967
- ♦ Trade Unions Act 1959
- ♦ Occupational Safety and Health Act 1994
- ♦ Wages Council Act 1947
- ♦ Immigration Act 1959/60

Rights to Organize and Collective Bargaining

Right of FWs to join trade unions is governed under the:

- ♦ Trade Unions Act 1959
FWs can become a member of a trade union but not an official of the trade union.
- ♦ Employment Act 1955
A contract of employment shall not contain a clause prohibiting a worker including FWs from joining a trade union.
- ♦ Industrial Relations Act 1967
A worker cannot be dismissed for his union's activities.

Redress for Grievances

The right of redress for FWs under the labour laws:

- ♦ Complaint of non-compliance of the labour laws committed by employers can be given to the Labour Department.
- ♦ File claims against employers on matters governed by the contract of services or the provisions of the laws in the Labour court.
- ♦ Report unjust/unfair dismissal for conciliation in the Industrial Relations Department and Industrial Court.

Rights of Foreign Workers

- ♦ Statutory benefits under the Employment Act 1955 such as payment of wages, hours of work, shift work, overtime work, rest day, rest day pay, paid holidays, annual leave, paid sick leave etc;
- ♦ Written contract of services stipulating the agreed terms and condition of employment;
- ♦ FWs can seek redress on the terms and condition of service in the contract of service through the labour court

Legislations Applicable to Foreign Workers

Part XII B Employment Act, 1955

- ♦ Every employer is required to report / submit information pertaining to FWs under his employment to the Director General of Labour within 14 days of their employment.
- ♦ The Director General of Labour is empowered to investigate and take action on discriminatory and unfair treatment of workers.
- ♦ Local workers are protected against retrenchment in the event of any redundancy exercise.

Types of Complaint

- ♦ Non-payment of wages / statutory benefits (O/time);
- ♦ Wages paid is less than what was agreed in the contract;
- ♦ Excessive deduction from wages (without consent and /or approval);
- ♦ Job specification differs from the original offer;
- ♦ Long working hours without compensation / rest;
- ♦ Annual leave / rest days not granted;
- ♦ Forced to work with different employers;
- ♦ Abusive act of employers; and
- ♦ Poor living conditions.

Complaint Received from Foreign Workers (2005-2007)

No.	Country	Number of Cases			Total
		2005	2006	2007	
1.	Bangladesh	39	32	59	130
2.	Cambodia	0	1	0	1
3.	China	5	1	1	7
4.	India	44	63	53	160
5.	Indonesia	289	307	209	805
6.	Japan	0	2	0	2
7.	Myanmar	15	15	15	45
8.	Nepal	32	22	34	88
9.	Pakistan	5	23	9	37
10.	Philippines	48	49	30	127
11.	Singapore	1	1	0	2
12.	Thailand	4	0	2	6
13.	Uzbekistan	2	0	0	2
14.	Sri Lanka	0	4	4	8
15.	Vietnam	24	28	15	67

Amount Claimed, Amount Ordered, No. of Workers Involved in Labour Cases

2005

No.	Country	Amount Claimed (RM)	Amount Ordered (RM)	No. of Workers
1	Bangladesh	87,491.00	11,784.00	96
2	Cambodia	0.00	4,000.00	1
3	India	23,463.23	7,093.20	13
4	Indonesia	182,580.92	31,206.05	5507
5	Nepal	7,925.50	2,459.44	10
6	Philippines	397.00	746.00	5
7	Singapore	21,459.50	10,729.75	2
8	Vietnam	2,221.60	1,671.48	3
	Total	325,538.75	69,689.92	5637

Amount Claimed, Amount Ordered, No. of Workers Involved in Labour Cases

2006

No	Country	Amount Claimed (RM)	Amount Ordered (RM)	No. of Workers
1	Bangladesh	80,648.86	34,178.86	21
2	China	20,532.75	0.00	16
3	India	412,820.75	35,993.35	168
4	Indonesia	426,136.19	57,438.01	158
5	Japan	12,000.00	0.00	2
6	Mauritius	560.00	0.00	1
7	Nepal	277.50	0.00	1
8	Philippines	14,774.00	13,365.00	14
9	Vietnam	171.00	77,872.00	127
	Total	967,921.05	218,847.22	508

Amount Claimed, Amount Ordered, No. of Workers Involved in Labour Cases

2007

No	Country	Amount Claimed (RM)	Amount Ordered (RM)	No. of Workers
1	Bangladesh	83,532.83	0.00	18
2	India	139,207.00	25,366.91	56
3	Indonesia	118,592.19	77,069.08	45
4	Mauritius	4,743.00	2,750.00	3
5	Montserrat	940.00	0.00	1
6	Nepal	182,467.58	89,000.00	34
7	Pakistan	19,112.74	0.00	1
8	Philippines	2,568.34	0.00	2
9	Taiwan	564.52	564.52	1
	Total	551,728.20	194,750.51	161

Social Security Protection

Under the Workmen's Compensation Act, 1952 every employer is obliged to insure his FWs under the FWCS:

- ♦ Lump sum payment for injuries or death;
- ♦ Payments for injuries sustained during work; and
- ♦ Payment for repatriating the deceased body to the country of origin.

Labour Department is empowered to assess claim, receive payment and execute the disbursement.

Note : (i) 170,000 employers employing FWs had insured their foreign workers under FWCS
(ii) Enforcement activities is stepped up to prosecute defaulting employers.

Workmen's Compensation Act 1952

2005

Country	Amount Assessed (RM)	Fatal	PD	TD
Bangladesh	530,204	16	65	379
Cambodia	8,714	0	0	8
China	18,901	0	4	15
India	732,268	14	71	330
Indonesia	5,645,193	139	312	2,213
Malaysia	2,888	0	0	6
Myanmar	1,073,097	25	140	390
Nepal	2,698,457	73	352	1,242
Pakistan	36,005	1	3	10
Philippines	48,844	1	6	16
Sri Lanka	0	0	0	4
Thailand	43,146	3	5	15
Vietnam	1,137,653	30	141	606
Total	11,975,369	302	1,099	5,234

Workmen's Compensation Act 1952

2006

Country	Amount Assessed (RM)	Fatal	PD	TD
Bangladesh	956,902	16	90	376
Cambodia	13,116	0	1	10
China	70,417	1	5	11
India	849,942	26	69	368
Indonesia	6,194,799	175	425	2,337
Korea, Republic of	25,000	1	0	0
Malaysia	302	0	0	2
Myanmar	1,030,615	22	125	513
Nepal	2,704,258	81	371	1,567
Pakistan	47,165	1	7	36
Philippines	123,322	4	13	25
Sri Lanka	33,841	0	2	44
Taiwan, Province of China	517	0	0	1
Thailand	133,238	4	3	6
Vietnam	1,115,797	24	147	655
Total	13,299,232	355	1,258	5,951

Workmen's Compensation Act 1952

2007

Country	Amount Assessed (RM)	Fatal	PD	TD
Bangladesh	661,000	22	65	484
Cambodia	915	0	0	5
China	22,622	2	3	13
Cocos (Keeling) Islands	1,001	0	0	1
India	630,006	12	48	296
Indonesia	5,007,634	136	324	1,893
Japan	363	0	0	1
Malaysia	73	0	0	2
Myanmar	863,879	30	92	463
Nepal	2,024,135	55	230	1,155
Pakistan	48,900	2	2	33
Philippines	33,153	1	3	27
Sri Lanka	21,462	0	1	16
Thailand	49,236	2	1	6
Vietnam	806,055	24	104	565
Total	10,170,435	286	873	4,960

Measures to Improve the Management of Foreign Workers

- ♦ Intensify statutory inspections on places of employment with special focus on employers employing large number of FWs.
- ♦ Investigate complaints without giving prior notice to employer.
- ♦ Enlighten employers of their legal and social responsibility towards FWs through promotional visit to places of employment.
- ♦ Prioritise settlement of claims by FWs against employers via the labour court system.
- ♦ Prosecute and impose heavy penalty on errant employers for offences committed under the labour laws.

Measures to Improve the Management of Foreign Workers

- ♦ Expand the coverage of the Workmen's Compensation Act, 1952 to cover domestic workers.
- ♦ Introduce a new provision in the law to deal with cases of sexual harassment involving workers in a place of employment.
- ♦ Introduce new provisions in the Employment Act to protect the wages and condition of work for foreign domestic servants and to control exploitative employment of foreign workers.
- ♦ Provide a standard contract of service for foreign domestic servants to guarantee better protection and for effective enforcement in the labour court.
- ♦ Enact a new law on the employment of foreign workers to eliminate and combat unscrupulous and illegal employment.

Measures to Improve the Management of Foreign Workers

- ♦ Strengthening the manpower capacity of the government agencies responsible over the employment of FWs to effectively enforce the laws.
- ♦ Stepping up enforcement on places of employment in particular those employing a large number of FWs.
- ♦ Enhancing FWs data and information collection through the National Employment Return (NER), e-Pampasan, Labour Market Database (LMD) and Electronic Labor Exchange (ELX) for effective monitoring, management and policy planning.
- ♦ Sharing data and information in the MOHA Foreign Workers Biometric Data System to improve monitoring of employers with FWs.

Measures to Improve the Management of Foreign Workers

- ♦ Enrol the services of a registered third party service provider (TSP) who is authorised and approved by the government of the source country to take care the interest of its citizen working in this country. The TSP can bring cases to the attention of the relevant authorities, look after the FWs during difficult time and provide counselling service to the FWs at the work place.
- ♦ Undertake awareness and advocacy initiatives such as:
 - i) Requiring FWs, including domestic workers to undergo induction course in their source country before coming to Malaysia.
 - ii) Supplying FWs with a guide book containing basic information pertaining to labour and immigration laws, procedures to file complaint and lists of addresses and telephone numbers of labour offices throughout the country.

Measures to Improve the Management of Foreign Workers

- ♦ Enrol the services of a registered third party service provider (TPS) who is authorised and approved by the government of the source country to care for the interest of its citizen working in this country. The TPS can bring cases to the attention of the relevant authorities, look after the FWs during difficult time and provide counselling service to the FWs at the work place
- ♦ MOHR to establish a Joint Consultation Committee with the Department responsible for labour in the source country to discuss and resolve issues pertaining to employment of FWs.
- ♦ MOHR will undertake a study on foreign workers need for consideration and decision of the Cabinet Committee on Foreign Workers.
- ♦ Set up a Special Committee on Foreign Workers comprising members representing government agencies and employers' and workers' organisations with the function to determine the number and sector where FWs can be employed.

Conclusions

- ♦ FWs contribute to the economy of the country and as such all parties are required to protect and promote their interest and welfare while working in this country.
- ♦ Employers and trade unions should join forces to eliminate illegal, exploitative, discriminatory and abusive employment of FWs.
- ♦ Serious attempt must be made by employers to recruit local workers through the ELX system and implement appropriate measures to retain them in employment.
- ♦ Strong efforts should taken by employers to introduce and utilise technology to enhance business efficiency, increase productivity and reduce dependency on FWs.
- ♦ Strict compliance of the labour laws is essential in the employment of FWs.
- ♦ Government, employers and trade unions should hold regular dialogue and consultation to discuss and resolve issues and problems relating to the employment of FWs.

**“Universal and
lasting peace can be
established only if it
is based upon social
justice”**

- Paris Peace Conference

Access to Justice and Employment Law

Kuhendaran Suppiah

Malaysian Bar

Introduction

"Reduced dependency on foreign workers and more and better paying jobs for the locals. With these objectives in mind, the Government will go all out to reduce the number of foreign workers in the country with set targets and strict enforcement of Home Affairs Ministry regulations. By reducing the number of foreign workers in many of the industries, employers will be forced to hire local workers at "reasonable" salaries.

We are going to re-look at the policy of managing foreign workers in this country. We have a total of 2.3 million foreign workers, students and expatriates and short-term workers from southern Thailand; we want to lower (the number) to the 2006 figure of 1.8 million," ministry secretary-general Datuk Raja Azahar Raja Abdul Manap told Sunday Star. The Ministry's target is 1.8 million foreign workers by next year and 1.5 million by 2015. However, it faces a dilemma because it has approved applications from employers last year to bring in 200,000 foreign workers this year."

Page 6 of Sunday Star, 20th January 2008

Based on the above newspaper report, the only conclusion that I can arrive at is that Malaysia is heavily reliant on foreign workers particularly migrant workers. It seems to suggest from the quote that without the services of foreign workers, our country may not be in the position to carry out developments in many industries particularly in the manufacturing, agricultural, construction and service industries.

Foreign workers can be defined into 2 categories namely

- a. migrant workers—"unskilled and semi-skilled"
- b. expatriate employees – professional capacity

In this paper, I will address the issues relating to migrant workers on the relevant employment laws applicable to them, whether they have access to justice if their employment rights are contravened and finally the shortcomings that migrant workers face in seeking legal redress if their employment rights are contravened.

Employment and Migrant Workers

A migrant worker is permitted to work in our country provided that he/she has a valid work or employment permit. **Please refer to section 6 and 10 of the Immigration Act 1959 and Regulation 9 of the Immigration Regulations 1963.** Therefore the pre-requisite for a migrant worker to lawfully earn a living in this country is subject to a valid employment permit issued by the Immigration Authority. If a migrant worker is earning a living in Malaysia without a valid employment permit, he is regarded as an illegal immigrant and thus he/she will be subject to criminal proceedings if caught.

The Relevant Employment Laws

- a. Employment Act 1955;
- b. Trade Union Act 1959; and
- c. Industrial Relations Act 1967

Employment Act 1955

Section 2 of the Employment Act 1955 defines an employee to be a person or class of person provided for in the **First Schedule of the Employment Act 1955**.

The **First Schedule of the Employment Act 1955** defines an employee as any person irrespective of his occupation entered into a contract of service with the employer under which such person's wages do not exceed RM 1500 per month.

The **First Schedule of the Act** also provides that the person engaged in manual labour or a person engaged in such mechanical propelled vehicles operated for transport or a person who supervises, or oversees other employees engaged in manual labour, employed by the same employer in and throughout the performance of their work, or the person is engaged in any capacity in vessels registered in Malaysia who is not an officer certified under the Merchant Shipping Acts of the United Kingdom also falls within the definition of employee. The definition of employee also includes domestic servant. However Section 12, 14, 16, 22, 61 and 64, Parts IX, XII and XIIA of the Employment Act 1955 are not applicable for domestic servants.

The Employment Act 1955 does not exclude migrant workers from the definition of employee. By **Section 60 L of the Employment Act 1955** which provides that the Director General of Labour may inquire into a complaint from a foreign employee if he/she is being discriminated against a local employee by the employer in respect of the terms and conditions of employment. Therefore it is clear that the Employment Act 1969 also affords sufficient protection for migrant workers who can lodge a complaint to the Labour Department if the employer contravenes any of the terms and conditions of employment or if the employer contravenes any provisions of the Employment Act 1955. (Please refer to **Section 69, 7 and 7A of the Employment Act 1955** for further details)

Trade Union Act 1959

Can a migrant worker become a member of a local trade union?

Section 28(1) of the Trade Union Act 1959 provides as follows:

"a person shall not act as a member of the executive of trade union or any branch thereof, or of any federation of trade unions and shall be disqualified for election as such members, if –
(a) he is not the citizen of the Federation

From the above section, it is clear that a migrant worker is not prohibited from being a trade union member provided that he/she falls within the scope of the trade union. The only restriction imposed by the **Trade Union Act 1959** is that the migrant worker is prohibited from holding an executive position in the trade union. **Section 8 of the Employment Act 1955** prohibits an employer from restricting an employee from joining, participating in or organising a trade union. Further **Section 4, 5 and 7 of the Industrial Relations Act 1967** prohibits an employer and trade unions from

intimidating, coercing a workman joining a trade union or to cease to a member of the trade union. The issue now is whether a migrant worker is subject to the terms and conditions provided in a Collective Agreement entered into by an employer and the trade union.

Section 17(1) and 32 of the Industrial Relations Act 1967 clearly states that a Collective Agreement taken cognizance of by the Industrial Court or handed down as an Award by the Industrial Court is binding on all workmen who are employed or subsequently employed in the company. That being the case the issue is whether a migrant worker is a workman under the Industrial Relations Act 1967.

Section 2 of the Industrial Relations Act 1967 defines workman as follows:

“workman” means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Based on the above definition, it is clear that migrant workers are not excluded from the definition of workman. Further, the said definition provides a wider scope compared to the definition of employee under the Employment Act 1955.

In view thereof, the migrant worker is entitled to the terms and conditions provided in a Collective Agreement irrespective of whether he is a member of the trade union. The only pre-condition is that a migrant worker must fall within the scope of the Collective Agreement. Please refer to the Industrial Court case of *Chong Wah Plastics Sdn. Bhd. & Ors v Idris Ali & Ors* (2001) 1 ILR 598, which was subsequently upheld by the High Court and the Court of Appeal. Dato Faiza bin Haji Tamby Chik J. in handing down the judgment of the High Court in the said case (Usul Pemula No R2-25-41-2001) observed as follows:

“The only interpretation would be whether in the absence of any express provision which excludes foreign workmen from the Collective Agreement, they can be said to be covered by the Collective Agreement. A Collective Agreement is required to be in writing. The Collective Agreement relevant to this Application already have an article expressing the categories that are excluded. Foreign employees are not excluded. On the other hand, the relevant laws also do not exclude foreign employees from the definition of “employee” or workmen. Thus there was nothing for the First Respondent (Industrial Court) to interpret, save read the relevant laws and the Collective Agreement without having to determine any dispute of facts.....”

Dato Faiza bin Haji Tamby Chik J went on to observe further in the following manner:

“It is very unconvincing to argue that the decision of the First Respondent (Industrial Court) goes against the purpose of beneficent social legislation to preserve and promote industrial harmony. The objectives of the Industrial Relations Act 1967 can be, by no stretch to imagination, said to intend different standards of wages for local and foreign employees. In fact if Parliament had such intentions, it would not have enacted Section 60 L of the Employment Act effective 1st August 1998 to prevent discrimination on terms and conditions of employment between local and foreign employees. In fact this Section allows either of them to complain if they feel discriminated.”

Based on the observation made by Dato Faiza bin Haji Tamby Chik J. in *Chong Wah Plastics Sdn. Bhd.*, I am of the view that migrant workers do fall within the definition of workman and as such **Section 17(1) and 32 of the Industrial Relations Act 1967** is applicable to migrant workers.

Dismissal and Migrant Worker

Section 20 of the Industrial Relations Act 1967 provides that any workmen who are dismissed can seek the remedy of reinstatement if he/she considers his/her dismissal is without just cause and excuse. The question is whether a migrant worker can seek the remedy of reinstatement under **Section 20 of the Industrial Relations Act 1967**.

In the case of *Assunta Hospital v Dr. A. Dutt* [1980] 1 MLJ 96, Mohamed Azmi J. had this to say with regards to the reinstatement of a non-citizen:

"In deciding whether or not to order reinstatement, the Industrial Court must, of course, consider whether or not to order Dr. Dutt has been dismissed without just cause or reason, and since Dr. Dutt is not a citizen, it must also consider evidence on immigration problems pertaining to Malayanisation policy of the Government. Whether Dr. Dutt would be allowed by Immigration Authorities to extend his stay in this country under Visit Pass (Temporary Employment) is an important matter for the court to decide. In lieu of reinstatement, the Industrial Court can award compensation."

It is to be noted that Assunta Hospital being dissatisfied with the decision made by Mohamed Azmi J appealed to the Federal Court. At the Federal Court, Raja Azlan Shah CJ (as he was then) had this to say with regards to the reinstatement of a non-citizen:

"As for the non-citizenship status of Dr. Dutt, we shared the astonishment of the judge at the relevance of this point. Our views can be stated shortly; whether Dr. Dutt can get an extension of his visit-pass so as to be able to stay in this country or the issue of a work-permit in order to be able to take up the appointment are not matters that can influence the court in the proper exercise of the jurisdiction conferred on it by the Minister's reference of the representations for reinstatement. If an order is made ordering reinstatement and the workman is unable to obtain either the visit pass or the work-permit, the employer would not be in contempt of the order. It is for the workman to make effective. All that the hospital had to do is to make the post available to the workman. As for any suggestion that the order for reinstatement would influence the Ministry of Home Affairs to issue the visit pass or the work-permit, there cannot be any truth in it, and it cannot possibly be said that the Ministry of Home Affairs is bound to comply with the order for reinstatement." (please refer to *Assunta Hospital v Dr. A. Dutt* [1981] 1 MLJ 115)

It is clear that based in both the High Court and Federal Court decision in the case of *Assunta Hospital v Dr. A. Dutt*, a migrant worker can seek the remedy of reinstatement under the Industrial Relation Act 1967 and it is the discretion of the Industrial Court to order the appropriate remedy if it makes a finding that the dismissal is without just cause or excuse. Therefore it is tried law that a non-citizen who is seeking a remedy of reinstatement would inadvertently fall within the definition of workman under **Section 2 of the Industrial Relations Act 1967**. (Please see *Chong Wah Plastics Sdn. Bhd. v Mahkamah Perusahaan Malaysia & Ors Usul Pemula No. R2-25-41-2001*). It is my view that in deciding the appropriate remedy, the Industrial Court should take into account the issues of non-citizen and work permit.

In addition, in the case of *Chong Wah Plastics (supra)*, it was also held that migrant workers can file a complaint under **Section 56 of the Industrial Relations Act 1967** provided that they fall under the scope of the Collective Agreement.

Conclusion on Applicable Employment Laws

In the circumstances, it is my view that as far as access to justice is concerned, regardless of whether a person is a local or a migrant worker, similar protections are afforded by the existing employment laws.

However, I would express a note of caution with regards to migrant worker's entitlement to the terms and conditions in a Collective Agreement based on what Dato Faiza bin Haji Tamby Chik J has said in the case of *Chong Wah Plastics Sdn. Bhd. v Mahkamah Perusahaan Malaysia & Ors.*, where he clearly expressed the belief that migrant workers may be excluded from the Collective Agreement if the employer and trade union agrees to do so, provided that it is expressly stated in the Collective Agreement. Although, this issue is yet to be tested in the court of law, it is my view that based on **Sections 8 and 60L of the Employment Act 1955** and **Sections 17 and 32 of the Industrial Relations Act 1967**, and the definition of "employee" and "workmen", such express provision to exclude a migrant worker from being bound by the Collective Agreement would and should be held unlawful by our courts.

Access to Justice: the Problems

As I have mentioned above, a migrant worker is afforded every right under the Malaysian law to seek the appropriate remedy if his employment rights are being breached by the employer. But in reality the migrant worker will encounter problems in exercising his legal rights, as it is necessary for the migrant workers to remain in the country in order to pursue the remedies available to him/her under Malaysian Law.

Generally when a migrant worker is terminated or dismissed from his/her employment, the employer will also terminate his/her work permit. In *Dr. A. Dutt v Assunta Hospital*, Award No. 178 of 1999 the learned Industrial Court Chairman made the following observation on the Company's conduct:

"On the very first day of hearing i.e 5th July 1976, the Court was surprised to hear that the Hospital's Management, knowing that the case was to begin that day, should have had the Immigration Department to seize the Claimant's Passport at his home so as to ensure his departure by mid-night of 5th July 1976 back to India. The Court had to call for Encik Mohd. Desa, a senior M.C.S Officer as Head of the Malaysianisation Secretariat of the Immigration Department, and after hearing him in Chambers it was agreed that the Claimant should remain in the country on a Special Pass on a month-to-month basis until such time as this case was completed."

In this instance, the main problem faced by a migrant worker is that it would be difficult for him/her to pursue a complaint for unlawful dismissal pursuant to **Section 20 of the Industrial Relations Act 1967** or a complaint under **Section 69 of the Employment Act 1955** for failing to comply with the terms of the Employment Act or the terms and conditions of employment. There are numerous instances when the employer cancelled the migrant worker's employment permit because the migrant worker filed a complaint in the Labour Department pursuant to the employer's breach of the terms of the Employment Act or the terms and conditions of employment. Once the migrant worker's work permit is cancelled and/or terminated, the migrant worker is left with no alternative but to leave the country with immediate effect, otherwise his or her stay in the country becomes unlawful which is an offence under the **Immigration Act 1959**.

We must bear in mind that the majority of migrant workers come from poor background and they are here in our country doing unskilled and semi skilled work. Therefore, due to financial constrains, they are unable to travel as often from their country of origin back to our country in order to pursue their legal rights.

The current policy is that a migrant worker may be allowed to stay in our country to pursue the legal remedy provided under the law by means of a special pass. **Regulation 14 of the Immigration Regulations 1963** gives the discretion to the immigration authorities to issue a special pass to a foreigner to stay in the country for a period not exceeding one (1) month for a special reason. (Please refer **Regulation 14(1) and 14(2) of the Immigration Regulations 1963**). **Regulation 14 (2)** also gives discretion to the immigration authorities to extend the period of the stay. The issuance of the special pass is done with a fee whereby the immigration authorities charge a fee to renew the special pass for each month. This is provided for under **Regulation 34 of the Immigration Regulations 1963**, (Please refer **Third Schedule of the Immigration Regulations 1963**).

Secondly, this special pass does not allow a migrant worker to seek employment elsewhere whilst pursuing his/her case at the Industrial Court or Labour Court. Therefore, it is extremely cumbersome for the migrant worker to live in the country without a job and at the same time to pursue his case and pay for the special pass.

It is my view that although the current employment law is adequate enough in theory to protect the rights of a migrant worker, the migrant worker may however encounter many practical difficulties in pursuing these rights due to the restrictions explained above.

It is recommended that the relevant authorities should amend the law or make a policy decision whereby a migrant worker should be allowed to remain in the country whilst pursuing his/her legal rights in the Industrial Court and/or Labour Court and at the same time he/she should be allowed to be gainfully employed so as to enable them to earn a livelihood.

Conclusion

In summary, I am of the view that the existing laws in our country do provide a migrant worker access to justice with regards to employment issues. However in pursuing the same, a migrant worker has to endure much difficulty as highlighted in the preceding paragraphs.

Access to Justice and Employment Law

Dr. Irene Fernandez

Director Tenaganita

The Principles and Premise

Every State has the sovereign power to regulate the admission and stay of non citizens within its own territory and has a valid interest in resisting irregular migration, as well as combating smuggling and trafficking. Like any other State powers, however, these must be exercised in accordance with international law, including norms that protect the rights of asylum-seekers and refugees.

Migration is a complex and multidimensional topic, which is linked, inter alia, to development, social and economic policies, as well as human rights. Recognizing the centrality of the human person to the process of migration, human rights cut across all aspects of international migration.

While it is important to maintain a clear distinction between forced displacements on the one hand, trafficking in persons and labour migration on the other, there is a growing realization that the three intersect. There is also a nexus of inequalities that determines the forms of migration. Forced displacement is part and parcel of broader migratory movements, albeit that forced displacement does require a special protection regime for refugees and asylum-seekers.

We need to be cognizant of the fact that the concept of migration is changing, forced migration is not only recognized as forced displacement arising from conflicts and disasters, but also seen when the state develops concrete policies and steps to export its people for contractual labour as a means to earn income. This need arises from a failed economy.

There is a need for a frank and open discussion amongst all stakeholders involved in migration and refugee issues, and more efforts need to be made to give a voice to civil society within this discussion.

Social responsibility practices in the business community need to include labour standards applicable to migrant workers and refugees. Employers need to be accountable for their treatment of migrant workers and refugees; this accountability cannot be made contingent on the legal status of the migrant worker or refugee.

Everyone, regardless of their status, is entitled to decent working conditions.

Introduction

The state of our policies, conditions of recruitment and placement can be understood from the reactions that have been made globally during the last 3 years. Here are a few examples.

- ♦ The United States government blacklisted Malaysia in the list of human trafficking offenders when it placed Malaysia in tier 3 in its report on Trafficking in Persons 2007.
- ♦ Transparency International Malaysia issued the early warning that migrant workers recruitment and placement industry as the second most corrupted industry.

- ♦ Before that, the New York-Based Human Right Watch had also gave warning to Malaysia on the matter in its reports on Domestic Workers and in its statements related to the People's Volunteer Corps of Malaysia or RELA's arrest, abuse and detention of immigrants
- ♦ During the UN High Level Dialogue, in February 2007, Malaysia also came into the limelight because of human trading and trafficking issues.
- ♦ Malaysia again became the center of focus on March 15, 2007 at the UN Human Rights Council meetings in Geneva for its exploitative and inhumane migrant policies with regards to the Bilateral MoU and Mafia type of uniform unit, RELA, which were given excessive power to conduct raids as bounty hunters when various civil society groups especially from Indonesia presented complaints. The UN Special Reporters in his 2007 report to the Council, made references to the treatment of Indonesian workers in Malaysia after his visit to Indonesia.

Why are we placed in such a poor standing globally? Have we failed miserably in our care and protection of migrant workers in spite of historically being a migrant country? Or has the government and certain sectors of our business community seen the migrants as a quick way to make money through recruitment and placement and then intense exploitation of the migrant workers.

Migration is Big Business

The institutionalization of international labor migration (ILM) by both labour-exporting and labour-importing countries has resulted in the emergence of a migration industry that has in turn led to increased migration and its perpetuation. The migration industry comprises several layers of intermediaries: official recruitment agencies, private entrepreneurs (licensed and unlicensed), and labour contractors and brokers, for example. It is also supported by network-creating and network-dependent relationships in source and destination country. It is undoubtedly a multi billion dollar business.

Labour migration is largely managed by the private sector – including employers and recruitment agencies - which can play an important role in supporting and protecting migrants. But their efforts to maximize profit can also harm the interests and rights of migrant workers and their families.

The market for migrant workers is highly imperfect, characterized by high transaction costs, information gaps and often misplaced expectations, which can open the way for biased and unfair labour practices, often also to unscrupulous recruitment and job placement agencies, middle men and even smugglers and traffickers violating the fundamental human rights of the migrant workers.

Employers in many countries, developed and developing, are often insufficiently monitored and penalized for exploiting contracted labour. Many recruiting agents reap abnormal profits at the expense of the migrant workers. Such practices go unpunished largely because of the difficulties for migrant workers to seek legal remedies in the host country, due to language barriers and a lack of knowledge of the local legal system; but also because of a lack of enforcement by governments.

Many of these stakeholders – particularly recruitment agencies in countries of origin, and employers in countries of destination - remain largely disconnected due to language barriers (important, e.g. for recognition of skills) and geographical distance, and fail to establish a fully functional market with free flow of information, transparency and fair competition.

We therefore tend to assume that the risks of migration are effectively reduced by the varied forms of assistance from intermediaries in matters such as documentation, transportation and accommodation. But experiences of the workers and the numerous cases of complaints taken up by various organizations however, show that the various layers and fees involved have also led to unauthorized or irregular migration as well as a tremendous increase in the recruiting fees.

Bilateral Agreements and MOUs

Malaysia depends on bilateral agreements (for example, Memoranda of Understanding, or MOUs) with neighboring countries as instruments for negotiating rules governing cross-border movements. The MOUs are 'elaborate systems' for the temporary employment of the nationals of one country in the other and require active participation and oversight by both countries.

These MOUs specify the terms and conditions of workers, recruitment and both governments are required to ensure the return of workers to their countries upon completion of their employment contracts. The MOUs are also revised as the situation requires in either country. The MOUs are thus a governance structure for recruitment and repatriation policies. However, very little is specified on areas for the protection of workers in host countries unless specified by the source country. The Malaysian government in its last MOU with the Indonesian government has abdicated its responsibilities to areas of protection of rights of workers and instead has left it to market forces.

Four distinct phases correspond with the state's regulation of migrant labour drives since the 1970s. During the first phase, 1970–80, the Malaysian government followed a liberal policy towards foreign worker recruitment. In the second phase, 1981–88, foreign labour recruitment was legalised, an official channel was created for labour recruitment, and bilateral agreements were signed with governments of source countries. In the third phase, 1989–96, a legalisation programme was commenced to halt illegal immigration. Thus public sentiment and 'societal' borders led to a change of policy and in 1989 the further importation of foreign labour was frozen. Concurrently, the state implemented a programme to legalise/regularise the status of Indonesian migrants. And it only began to formalize the recruitment in 1985 when it signed the first Memorandum of Understanding with Indonesia.

The fourth phase, enacted since 1997, has been marked by three important developments. First, the financial and economic crisis of 1997–98 marked a turning point in state policy towards foreign labour recruitment and resulted in a refinement of policies. Following the expose by Tenaganita on the inhumane treatment of migrant workers in detention camps and the rise in undocumented workers, new measures were framed to control unauthorised migration and an amnesty programme was introduced that permitted illegal migrants to depart without penalty.

A work-permit system based solely on offshore recruitment was enforced, resulting in workers being categorised in a more rigid manner. Crucially, employment permits became both location- and employment-specific, and legislative and police action were strengthened to combat irregular migration. Then, the government enacted new legislation which officially formalised a diversified recruitment policy designed to reduce dependence on any one racial group.

Management of Migration

The Immigration Department oversees, and the *Immigration Acts* of 1959 and 1963 provide, the basis for immigration rules and procedures in Malaysia. The Department comes under the authority of the Ministry of Home Affairs. The inability of the Immigration Department to handle the influx of migrant labour in the 1980s and the absence of mechanisms to regulate this flow resulted in a slew of *ad hoc* measures, implemented in a disorganised manner, to deal with the issue. In 1981, the Malaysian Government passed legislation for the establishment of legal recruitment agencies for foreign contract labour. Various committees were formed to formulate policies relating to the recruitment of foreign labour by agencies on behalf of employers directly from source countries. The committees were also charged with stamping out irregular migrant inflows.

Following illegal worker regularisation drives and amnesty periods between 1989 and 1992, a Cabinet Committee on Foreign Labour was set up in 1992 to examine the issue of migrant labour. Subsequently, a one-stop agency, known as the Special Task Force on Foreign Labour was formed and all recruitment agencies (save those for domestic workers) were disbanded. Then in 1995, after Tanaganita's Memorandum, the Cabinet committee was disbanded and the total management of migration came fully under the purview of the Home Ministry. The responsibility for foreign worker recruitment was handed back to the Immigration Department.

Crucially, the Malaysian government also instituted a foreign worker levy system to reduce its dependence on less-skilled migrant workers. The Malaysian government also had on hand three main mechanisms to secure its borders and regulate the entry of migrant labour: the work permit system, the foreign levy scheme and internal enforcement measures.

The *Immigration Act* was also amended in 1997. These developments coincided with the beginning of the Asian economic and financial crisis and there were massive deportations of illegal migrants. However, the Ministry of Human Resources could only take action in concert with the Immigration Department. This led to a situation where conflicting policies and poor coordination between the Ministry of Human Resources and the Immigration Department resulted in processing delays and abuse of migrant workers, particularly domestic workers.

Concurrently, legislative and police action to combat irregular migration was strengthened. New detention camps were established to hold unauthorised workers. Furthermore, amendments were made to the *Immigration Act*, particularly in 2002, which resulted in the imposition of harsh punishments for immigration violations. It thus became a criminal offence for foreign workers to work without a work permit or visa, and punitive measures, including caning of workers, were implemented. Documented domestic workers who had been abused or had run away from their employers were also regarded as illegal workers and detained in detention camps. Errant employers who employed more than five illegal workers were also subject to fines, imprisonment and caning. But no employer has been imprisoned under the change. Meanwhile our prisons and Immigration detention centres continue to be overcrowded with immigrants.

In July 2005, the Malaysian Home Ministry, following lobbying by employers' groups, established a one-stop centre with the intention of reducing the processing period from a 'couple of weeks' to 'one day.' The former technical committee, which comprised officers from various ministries who met on a weekly basis to scrutinize applications for foreign workers, was disbanded. Under the new procedures, officials from the various ministries have been assigned to the one-stop centre to

process the applications as they come in. In addition, from August 2005, levies for the workers, previously paid at the Immigration Department, are required to be paid at the Home Ministry, with approval letters issued within a day. The Immigration Department's premier role in the labor recruitment process has now been modified to that of granting visas only.

Though this may sound good on paper, it does raise serious concerns as the right to work and stay is dependent on the issuance of the work permit, its cancellation and control of the work permit by the employer.

As stated above, Malaysia has had many difficulties coming to grips with its foreign labor recruitment policies. There are currently two main employment-related work permits or work visas: a work pass (*Pas Penggajian*) or an 'employment pass' for expatriates or professionals; and a 'work permit' or contract worker pass (*Pas Lawatan Kerja Sementara*) or Visit pass for the temporary (contract) employment of semi-skilled and unskilled workers, including domestic workers.

The visit pass for temporary employment covers the manufacturing, construction, plantation, services and domestic worker sectors. Unskilled and semi-skilled workers receive one-year work permits, which are renewable up to five years (six years in total). There are age restrictions associated with these permits, and workers are prevented from bringing dependents into the country. Consequently, no resettlement of dependents is allowed. There are also restrictions on source countries for this category of migrant workers.

One of the key concerns for migrant workers as well as for employers is the increase in the costs of recruitment and various forms of fees that need to be paid. It is well known that now if a family wants to employ a domestic worker, the agency will demand RM 7,000. About 5 years ago, it was only RM 3,500. A Bangladeshi worker pays RM 12,000 where the payment is made to middle men, "lobby fees" and various other fees called bonds. The deduction is more than half of the workers wages. But salaries are not what were promised. Thus the migrant worker remains in a form of bonded labour.

Failed Policies in Recruitment Has Become Problematic

Though the Malaysian government through the last 25 years has relied on foreign labour, yet, it has not had a comprehensive policy in recruitment and placement of employment of migrant workers. As described above, it is clear that the country practiced a form of adhocism in its policy. The government reacted to problems and issues of concern regarding migrant workers through interim measures and temporary policy changes. Such strategy brought about various trends, forms of recruitment and employment of migrant labour. The country has had no clear strategy or long term plans on the kind of labour force it intends to create to meet its future economic growth.

To make matters worse, Malaysia recruits migrant workers from more than 12 countries in Asia. The workers are mainly semi skilled and unskilled workers. Malaysia's aim is to be as competitive as possible in the globalized market. However, the country is very much challenged with the highly competitive market prices of products from China and India.

The current government wants to sustain or increase the economic growth of three key sectors, namely, the plantation, the construction and the manufacturing sectors. The interest to keep wages low comes from the government's direct interest in investment and in the development of the small and medium industries, particularly with the GLC companies.

Faced with this intense competitive market, Malaysia believes that through the recruitment and employment of a cheap, temporary labour force, it can meet the competitiveness and thus be able to market its products and attract foreign direct investment. But has this form of deregulated labour with schizophrenic policies developed a sustained labour force with clear rights protection?

Failure of the Outsourcing Strategy

Let's take a look at its latest labour flexibilization policy called "Outsourcing". The 9th Malaysia Plan states that Malaysia will continue to promote the development of the small and medium enterprises and will focus on corporate agriculture as its third engine of growth. In order to provide incentives for a higher level of profit, the Ministry of Home Affairs introduced a policy whereby any enterprise or industry that required less than 50 workers, the labour would be supplied through a labour contractor called "Outsourcing" company.

In August 2005, the Malaysian government replaced the direct recruitment system with the outsourcing system to bring in Bangladeshi workers. The government had frozen recruitment for the last 10 years. The ban was lifted on the condition that Bangladesh agrees to send the workers under the Outsourcing system of recruitment and placement. Businesses requiring less than 50 workers would have to use specialized outsourcing companies. Furthermore, the outsourcing companies would be responsible for administrative matters. The system would transfer all responsibility from employer to the outsourcing companies.

The very word 'outsourcing' means these companies are labour contractors and not, as any employment contract would have it, as employers in the real sense. They take migrant workers and 'send' them out to work – changing them from one job to another, working irregularly and without monitoring and supervision. Again on paper it sounded positive as each migrant worker, even if he has no work will be paid a minimum of RM400. But the outsourcing form of recruitment blew up on the face of the Home Ministry. Thousands of Bangladeshi workers were stranded at the airport where the companies did not pick them up for employment. Hundreds of others, abused, beaten with no food and no work, broke free and began to demand their government to act. There was over recruitment with no jobs available. There was no proper verification from the Immigration department before approving the license to recruit. Efficiency was understood as approval being given to outsourcing companies within 24 hours. In less than a year, the government had approved the recruitment of 300,000 Bangladeshi workers. Where did we go wrong?

- ♦ Nepal currently has agreed to allow its people be recruited under outsourcing. But Nepal has also stated that Nepali workers cannot be recruited for employment in construction, in plantations and as domestic workers. Recent cases reveal that Nepali workers are told that they are being recruited as security personnel.
- ♦ When they arrive into Malaysia, the workers are being sent to work in the plantations through the outsourcing scheme and not as security personnel.
- ♦ The outsourcing strategy of recruitment and placement is now used as the escape clause or route to overcome bans on certain forms of recruitment. Therefore it undermines any policy the government of the source country can put in place.
- ♦ Outsourcing gives wide powers to the placement of jobs. It goes against what was promised to the workers. Nepali workers are mountain people and are not suited for plantation work. It can lead to higher risks for the workers.

- ♦ In Malaysia, outsourcing comes in conflict with the Employment Act. It is unclear who is the employer defined in the Act. For the foreign worker, under the Immigration Act, the name of the company in the work permit is deemed to be the employer. The worker is expected to work under the company in its premises except for certain jobs like Cleaning. Therefore the worker can be arrested if he is working in Pahang in a plantation when he should be a security guard under "Get Rich" enterprise.
- ♦ The responsibility of the principal employer is unclear. In a case of an accident at the workplace, who then is accountable? How will the OSHA authorities take action? Who is the employer from whom the claim can be made for compensation under the workman's compensation scheme?

Consequently workers were locked up, beaten, abused and threatened with arrest and violence, if they did not obey. Their passports were taken away and held captive. In short, this form of speedy approval both by the Malaysian and the Bangladeshi governments, with no monitoring, no accountability has led to trafficking in persons.

Recruitment and employment of migrant workers cannot be seen as business to make huge profits from the poor. It is unjust and inhuman. Workers are not commodities but human beings. The answer does not lie from moving from one country to another but by taking the bull by the horn to address this long overdue problem.

The recruitment and placement of workers must be seen as an important service to employers who need the workers where the rights of the workers are protected at every stage of recruitment, placement and employment.

Tenaganita has on several occasions called on the government to establish a comprehensive policy on the recruitment and employment of migrant workers. The call has also been made by the Employer's Federation, yet it has fallen on deaf ears.

The question is who is benefiting from the recruitment of migrant workers? If the government wants to arrest the corruption being ingrained in the recruitment of migrant workers, then it must have a comprehensive policy that is holistic, rights based, transparent and which creates an enabling environment for labour harmony.

Following the fiasco in the recruitment and placement of Bangladeshi workers, the Malaysian Cabinet's decision to freeze the recruitment of Bangladeshi workers does not address nor resolve the problems in recruitment and management of migrant workers in the country. It is unjust.

The Malaysian government, in particular the Ministry of Home Affairs has been in a continuous state of self denial to the various problems faced by migrant workers. Its recalcitrant behavior and schizophrenic ad hoc policies have created the mess.

Its policy of outsourcing created confusion throughout recruitment and placement of workers, in particular workers from Bangladesh. The outsourcing companies are very much linked with patronage politics where their goal is to make fast money from the poor workers.

From the cases we have handled, the problem lies on the outsourcing companies who "sell" the workers to agents who then keep them in captive and make use of them for temporary work without paying their wages. The end result is trafficking in persons.

Placement Affects process of justice and right to redress.

Furthermore, the Ministry of Human Resources complicates the issue by now making the workers to go to the Labour departments at the various places where they had worked. With the current practices of outsourcing, the worker is sent to work in various places. But when his wages are not paid and the worker wants to file his case of unpaid wages in the Labour court, he now has to go to the various Labour courts where he has worked.

The problem could be easily resolved if one labour department which is closest to the registered address of the company takes the complaint and ensures unpaid wages are paid quickly.

We are aware that the current government is not transparent. It has been fast track recruitment. The Human Resources ministry does not have in place a Labour Strategy Policy in place. In the absence of such a policy, there cannot be a proper planned recruitment policy. How do we meet the local employment priorities as a priority in employment? What skills do Malaysians have to give the competitive edge? Or is the competition based purely on an exploitative labour force to provide the productivity output?

Domestic Workers

I would like to address the recruitment of domestic workers separately. Than other migrant workers the domestic workers are not recognized as workers but as servants. They work in individualized and isolated work situation. Their regime is under different MOUs. And these workers in our homes are unprotected. And specific recognition is given to the recruitment agencies of domestic workers.

Domestic worker recruitment agencies in Malaysia are bound by the following conditions: they must provide a bank guarantee of RM 100,000 and a security bond; they are required to be licensed with the Department of Manpower; and they must inform the Immigration Department if the domestic worker's employment is terminated. Employers also have to meet certain conditions, including: a joint average monthly income of RM 4,000 per month; adherence to a standard employment contract; and the provision of a bank guarantee of RM 1,000 to the Immigration Department. Only legally married couples with children are allowed to hire domestic workers.

In 1987, the Malaysian and Philippines governments came to an agreement on a standard employment contract for Filipino domestic workers, after much-publicized reporting on the injustices suffered by these workers. This employment contract served as a legal document to protect Filipino domestic workers. Initially, workers hired under two-year contracts, were required to be paid a minimum monthly salary of RM 540 (US\$ 200 in 1987), now RM 1,200 per month, had a working day of ten hours, and were to be given at least a continuous period of eight hours of sleep. They were also granted two rest days per month, a free return airfare, free medical services, and free board and lodging.

In contrast, Indonesian domestic workers earned between RM 350 and RM 450. Indonesian domestic workers are excluded from most labour protections stipulated under Malaysia's employment laws and recent bilateral labour arrangements with Indonesia. They are not entitled to any rest days nor is there a limit to their working days, most of them work 16–18 hours per day. Following widespread publicity on the abuse of domestic workers, the Malaysian government blacklisted employers who

mistreated their domestic workers. In April 2003 the government also instituted a lifetime ban on employers who physically abused their domestic workers.

In May 2006, Malaysia and Indonesia signed an MOU setting out a standard contract for Indonesian domestic workers in Malaysia. New domestic worker recruited are to receive RM 400 (US\$105) to RM 500 (US\$135) a month. However, the Indonesian Komnas Perempuan (National Commission on Violence against Women), has argued that since the Malaysian signatory was the Home Minister rather the Manpower Minister, the issue of abuse of Indonesian. To quote Komnas, the MOU *'regulates how workers should be transported from Indonesia and how they should work,'* but there is no mention in the agreement about protection for these workers. Tenaganita in its critique of the MOU, stated that the standard working contract is a type of 'bonded agreement' that ensures that domestic workers will be forced to continue working even if they are abused by their employers. Komnas stated that it will take the case of the Indonesian workers to an international human rights forum.

Meanwhile the Minister of Human Resources in his press statement after signing the MOU stated that he would leave it to the market forces to decide on wages and terms of the contract. This was not only a disservice to the women migrants who are unrecognized and unprotected but paved the way for the women to be trafficked.

Cost analysis carried out by the Philippines shows that by offering free public placement services the government recruitment arm could cut down as much as 50% on initial migration costs shouldered by the migrants, compared to the costs charged by private agencies. The South Korean Employment Permit System adopts a government-to-government placement approach to minimize exploitation of temporary migrant workers, notably the excessive recruitment fee. Recruitment and deployment under its MOUs with countries like Bangladesh and the Philippines will thus be via the government recruitment arms. This could reduce the costs of migrating to nominal cost-recovery level.

But in Malaysia, when abuse of the worker increases, we seem to seize the opportunity to make money out of the vulnerable condition of the worker. Thus high bonds or specific compulsory insurance required by the government. The recent case was the insurance for domestic workers that could be bought only from two companies at RM75. On the other hand, PAPA has its own insurance policy for RM45 with better benefits and yet this is not acceptable by the government.

Rights-Centered Policies

In trying to bring changes to the policies related to migrant workers in the country, should we then engage the recruitment agencies who are a powerful force in migration? According to the ILO and certain UN agencies, it is recognized, especially in countries of origin that the relationship between government and private recruitment agencies is often a vertical one: the government licenses, monitors and supervises the employment agencies.

It is the responsibility, under the ILO Convention 181, Private Employment Agencies Convention 1997, of both origin and destination countries to ensure that recruitment agencies do not engage in exploitative or hazardous activities in their work with migrants. Also the UN Protocol against Trafficking compels governments to criminalize the actions of agencies that exploit vulnerable migrants such as women and children for slave labour or the sex industry. But prosecutions against

traffickers have been rare, in part because of the difficulties in legally interpreting the Protocol and of amassing relevant evidence against the perpetrators. Our Parliament passed the Anti trafficking in Persons Act in June 2007. But the Act has yet to be enforced fully. It will be very important for us to monitor the impact of such an act on recruiting agencies and outsourcing companies.

However a human rights-centered migration policy can play a critical role here, since victims of trafficking may generally be more willing to give evidence against perpetrators if they are permitted to remain in the host country at least temporarily. Too few governments offer such an option. Italy being one of the few also allows the possibility of longer term/permanent residence where the victim has found a job. In general, unilateral regulatory action against recruitment agencies has not eradicated abuses and exploitation of migrant workers by both legal and illegal recruitment agencies.

But at the end of the day, it is really the political will that will make the difference. Most of all the change can only come when Malaysians recognize that the persons we bring from the poorer countries to sustain or develop our economy and the nation are not vectors of diseases, not criminals, not people who threaten the security of the country, but are real people. We have in our midst not just workers but human beings like each one of us with a soul, with feelings, with families, with dignity and rights. It is in this belief that today we are challenged to develop a comprehensive legal framework with rights and equality guaranteed. Therefore, change can be brought about in recruitment and placement through:

- ♦ Review of current policies and practices pertaining to the recruitment and placement of migrant workers to ensure that they provide a transparent, effective, efficient and economic means of ensuring that the supply and demand sides of labour are met, while also adequately protecting migrants and refugees from exploitation.
- ♦ Abolish of the manpower outsourcing agencies which exploit the workers by making them work more than 16 hours a day in more than one location without overtime payment.
- ♦ Recognizing the ILO Declaration on Fundamental Rights and Principles at Work, entailing the principles of non-discrimination, freedom of association, and bans on forced labour and child labour, is a central guide to determining workers,' including migrant workers' fundamental rights. These standards are constituted by the ILO Conventions 29, 98, 100, 138 and 182 (among others). Appropriate and rights respecting employment and labour standards are crucial in all circumstances where there is evidence of worker exploitation. Moreover, the promotion and protection of workers' rights needs to extend to migrant workers (both documented and undocumented) and refugees.
- ♦ Impose annual fit and proper evaluation test by independent body on the Malaysian and Foreign migrant workers agencies before the license renewal.
- ♦ Instill good governance concepts into the migration and forced displacement debate. For instance, a review of foreign labour recruitment and labour policies of countries in the region is urgently needed. Such a review should incorporate human rights considerations and counter-corruption initiatives into business practices of State and non-State actors. In general, there needs to be a zero tolerance policy as regards corruption. Capacity building initiatives need to be increased at all levels in the migration and refugee arena.

Right to Organize

A. Balasubramaniam

Vice President Malaysian Trade Union Congress (MTUC)

MTUC Biggest Challenges

ILO Convention

- ♦ Malaysia has ratified Convention 98 in 1961 (Right to Organise and Collective Bargaining)

Tripartite Consultation

- ♦ Social Dialogue –Ratified 144 in 2002

Federal Constitution

Article 8

1. All persons are equal before the law and entitled to the equal protection of the law.
2. Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground religion, race, decent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law.

Trade Union Act 1959

Definition of Trade Union

- ♦ “trade union” or “union” is any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak,
- ♦ as the case may be – within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries.

Registration of Trade Union

- ♦ The Director General shall refuse to register a trade union if:
 - he is of the opinion that the trade union is likely to be used for unlawful purposes or for purposes contrary to, or inconsistent with its objects and rules; or
 - any of the objectives of the trade union are unlawful.

Recognition of Trade Union by Employer

1. Claim for recognition of “rank and file” workmen should exclude *managerial, executive, confidential* and *security* positions. If classification is disputed – the Minister decides.
2. An employer is required to grant recognition if the union represents the *majority of eligible workers*. When an employer fails to grant recognition the Minister may make a decision which is final.
3. During the period of time pending a decision on the recognition of workers union *shall not go on strike or picketing* and the employer shall not lock-out the workers or terminate them except for misconduct.
4. Claim for recognition in respect of the same workman cannot be made by any other trade union unless a *period of three years* has passed, or the trade union accorded recognition is no longer in existence.

Industrial Relations Act 1967

Protection of Rights of Workmen and Employers & Their Trade Union

- ♦ No person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of, and join a trade union and to participate in its lawful activities.
- ♦ No trade union of workmen and no trade union of employers shall interfere with each other in the establishment, functioning or administration of that trade union.
- ♦ No employer or trade union of employers and no person acting on behalf of such an employer or such trade union shall support any trade union of workmen by financial or other means, with the object of placing it under the control or influence of such employer or such trade union of employers.

Rights of Migrant Workers

- ♦ Easy to recruit foreign workers
- ♦ No minimum standards



Rights of Migrant Workers

- ♦ No effort made to ensure that the fundamental rights of migrant workers were protected
 - a. Victimization of workers
 - b. Human trafficking



Rights of Migrant Workers

- ♦ REALITY CHECK
- ♦ Women are caught for immigration offences – arrested, detained, deported
- ♦ The real guys – still out there



Rights of Migrant Workers

The problems faced by the workers

1. Substituted contracts
2. "Nil"- Employment benefits
 - a. no public holidays
 - b. no annual leave
 - c. no overtime
 - d. wages not paid on time
 - e. medical bills to be borne by themselves
 - f. workers insurance –deducted by the employer
 - g. safety equipment – deducted from salary
 - h. living quarters cramped
 - i. deductions made for transport, electricity



Rights of Migrant Workers

Legal resource?

1. Depends on whether these workers have legal documents or not.
2. Even if there are legal documents these documents may be revoked.
3. Conditional Special Pass
 - ♦ cannot work
 - ♦ monthly renewal –RM100.00.



Exp: Indian Migrant Workers Cases



Rajasekaran talking to the one of Indian nationals. The man who lying on his friend's lap is ill.



Social Dialogue: The Meaning

- ♦ Social Dialogue includes all types of :
 - Negotiations
 - Consultations
 - or simple exchange of information between, or among representatives of
- ♦ Governments,
- ♦ Employers and
- ♦ Workers

What Enables Conditions for Social Dialogue?

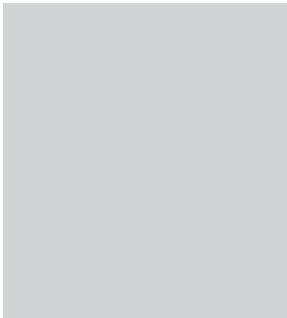
What enables conditions for social dialogue:

- Strong, independent workers' and employers' organizations with the technical capacity and access to the relevant information to participate in social dialogue.
- Commitment and political will of all parties.
- Respect for the fundamental rights of freedom of association and CB Convention 98 ratified in 05.06.1961.

The Types Social Dialogue

The types of social dialogue:

- Tripartite; the NLAC in Malaysia.
- The Bipartite between labour and management (or trade unions and employers organization e.g. MAPA- MCBA
- It can take place at the national, regional or enterprise level.
- It can take a variety of forms.



SESSION II : RIGHT TO LIVELIHOOD

Arrest, Detention and Prosecution

(Special Briefing by the Enforcement Division)

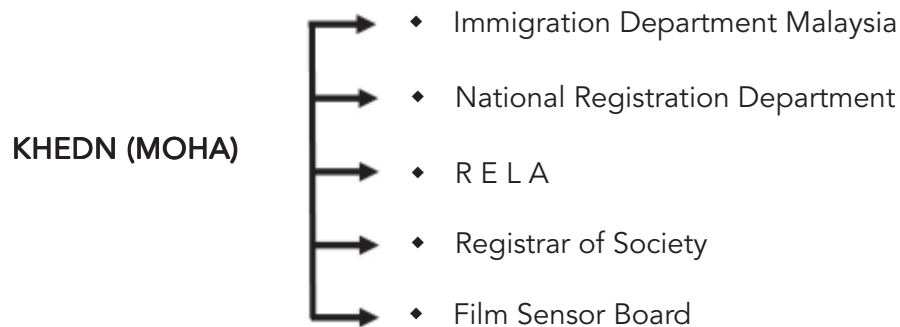
Datuk Ishak Mohamed

Immigration Enforcement Chief

Immigration Department of Malaysia

Background of Immigration Department of Malaysia

Departments under supervision of Ministry of Home Affairs



Objective of Immigration Department Malaysia:

Management of immigration matters in respect to national interest

Function of Immigration Department of Malaysia

1



Issuing of Travel Documents i.e. Passport for Malaysian citizens and permanent resident.

Issuing Visa, Pass and Permit for foreigners to enter, stay or worked this country.

2



Supervision of exit or entry of Malaysian citizens and non citizens through Gazetted point of entry/ exit.

3



Enforcing the Immigration Act, Passport Act and Immigration Regulations.

Motto of Immigration Department of Malaysia

To Facilitate and Control

Objectives of Immigration Department of Malaysia

- ♦ To ensure the exit/entry of every Malaysian citizen and those who deal with foreigners in this country is in compliance with the rules and regulations, regulated by the Government.
- ♦ To ensure the entry and stay of foreign nationals in this country is in compliance with the rules and regulations, of the government at all times.

Sources of Authority of Enforcement Division

Acts and Regulations

- ♦ Malaysian Constitution
- ♦ Immigration Act 1959/63 (Amended 2002)
- ♦ Passport Act 1966/63 (Amended 1997)
- ♦ Anti Trafficking in Person (2007)
- ♦ Immigration Regulations 1963 (Sec.54(1) Immigration Act 1959/63)
- ♦ Immigration's Circulars 1963 (Sec.3(2) Immigration Act 1959/63)
- ♦ Depot Immigration Regulations (Depot Regulations 2003)

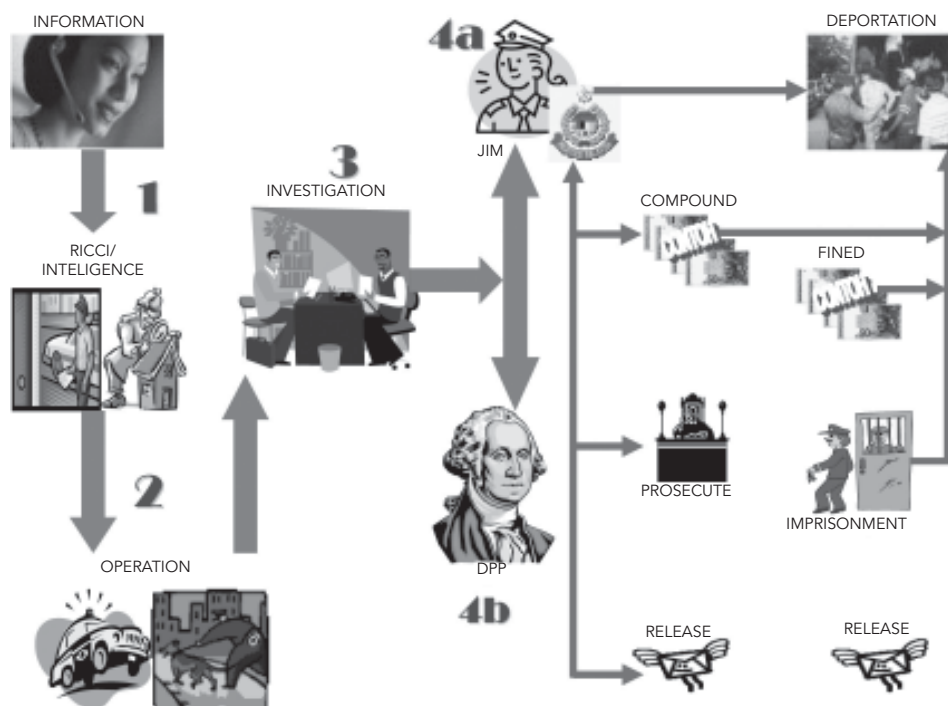
Power of Immigration Officer

Powers under the Passport and Immigration Act

- ◆ Power to search and arrest
- ◆ Powers to detain
- ◆ Power to investigate
- ◆ Power to confiscate and seize
- ◆ Power to summon witness
- ◆ Power to prosecute



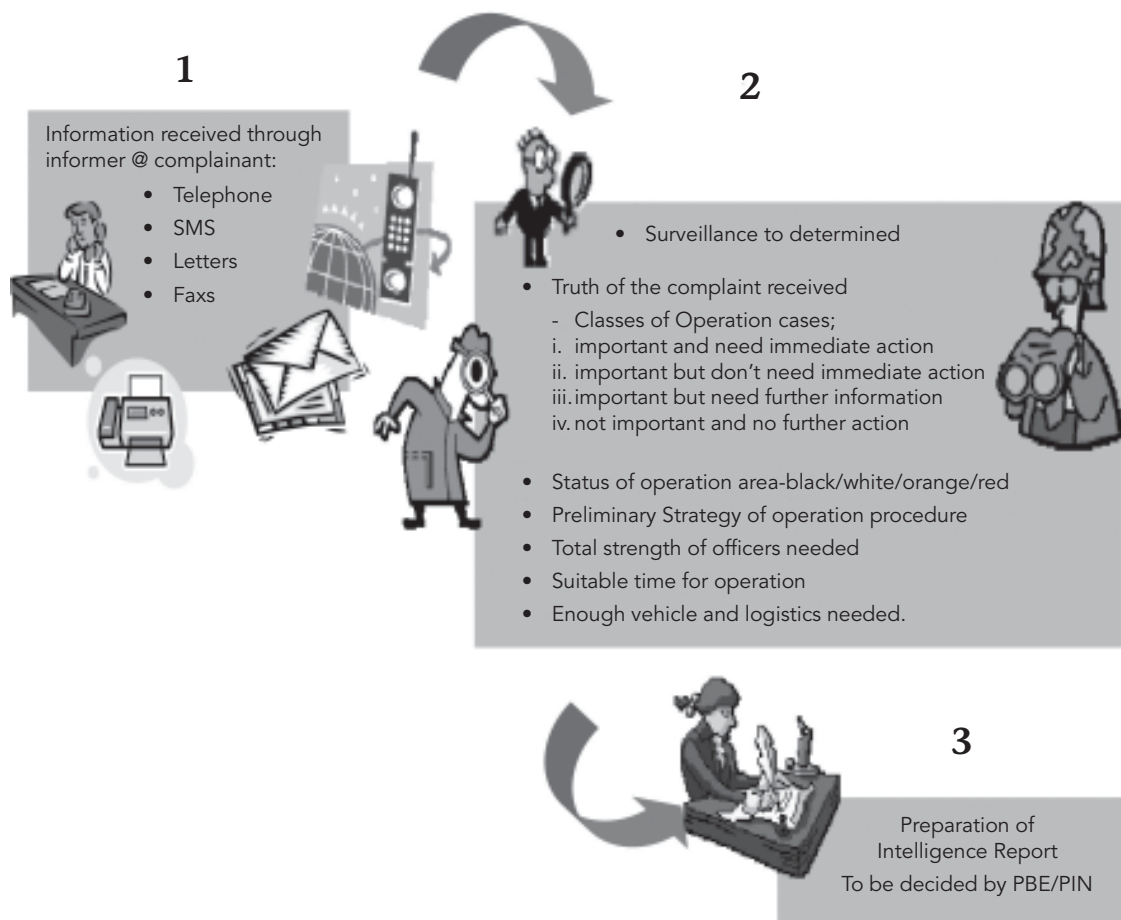
Job Flow of Enforcement Division



Intelligence

- ♦ The aim of Intelligence is to ensure truthful of information is received and that operations are conducted and successfully without any problems arising between the enforcement officers and the arrested person.

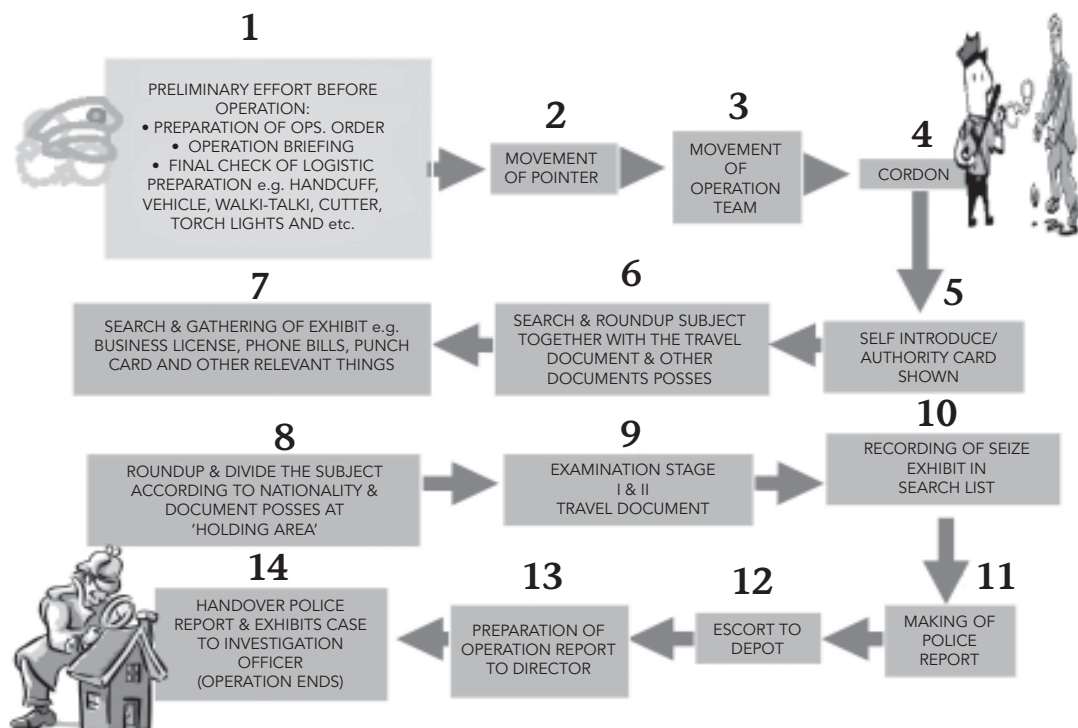
Intelligence Flow Chart



Operation

- ♦ The aim of Operation is to ensure that the identified person to be arrested together with the relevant exhibits of the offence can be proven and subject to prosecution and sentencing on the said Immigration offence committed.

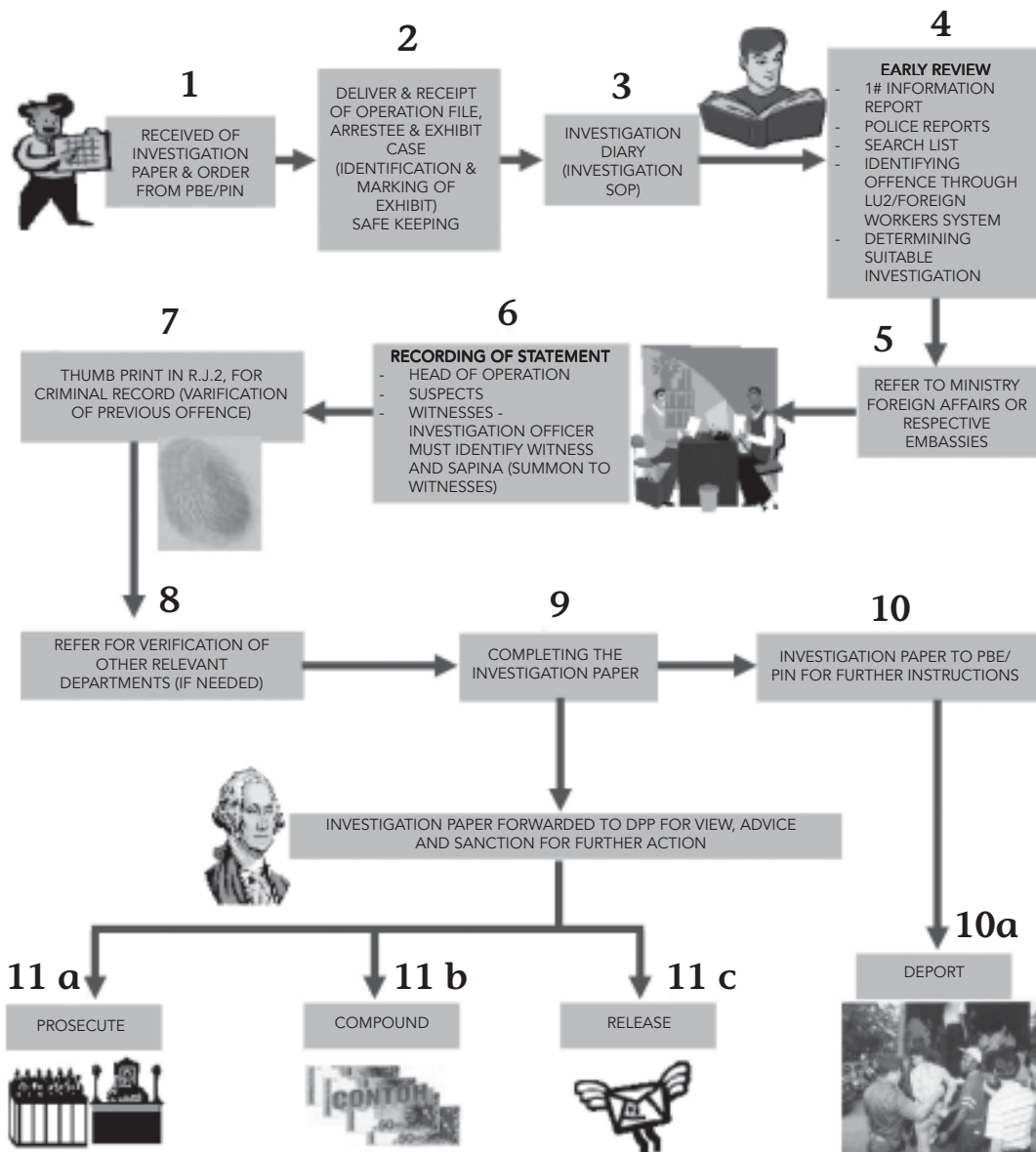
Operation Flow Chart



Investigation

- ♦ The aim of Investigation is to convince the Deputy Public Prosecutor (through Investigation Paper & gathering of exhibit) that the subject had contravened the conditions provided in the Immigration Act, Passport Act and Immigration Regulations.

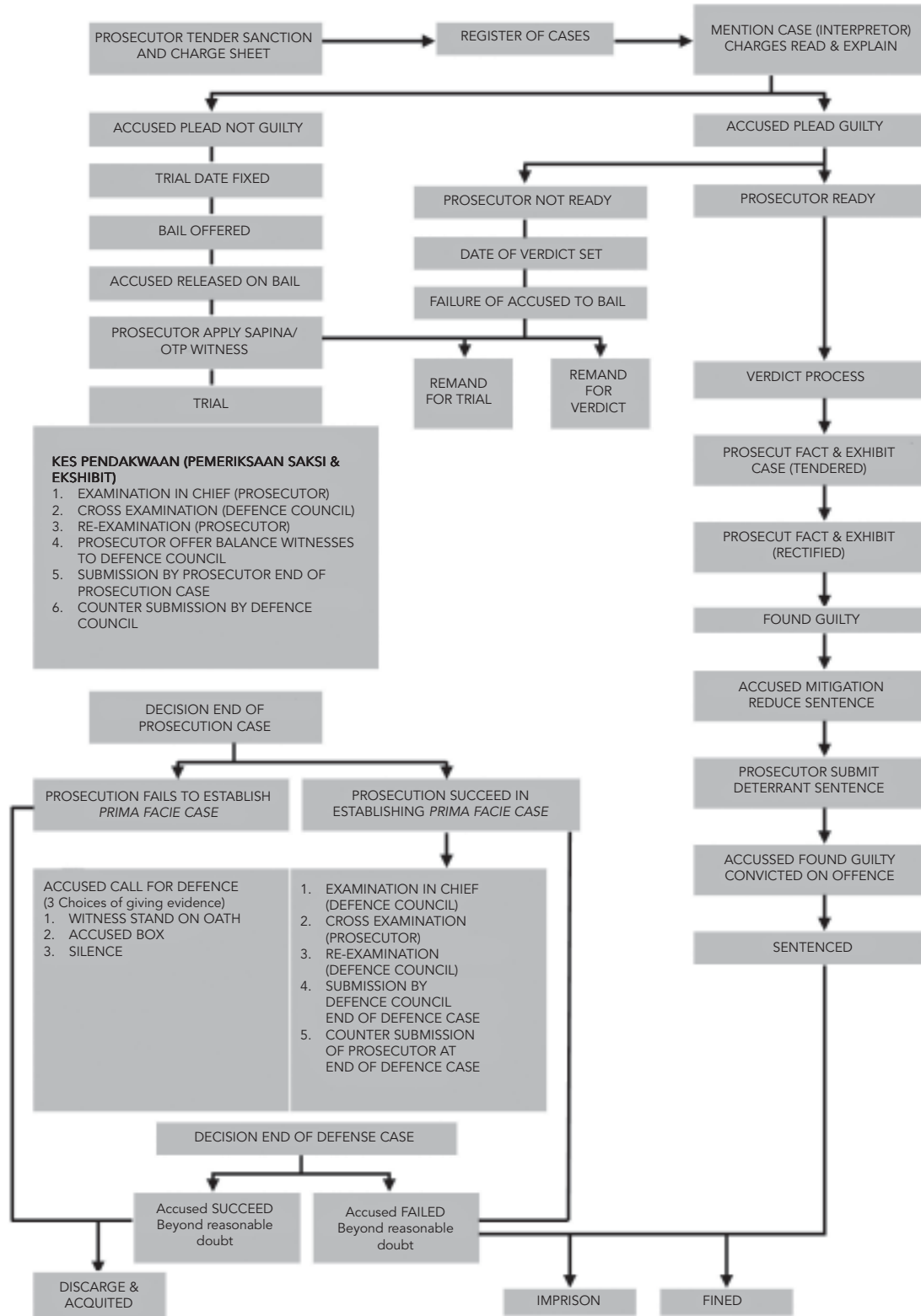
Investigation Flow Chart



Prosecution

- ♦ The aim of Prosecution is to establish a Prima Facie case to convince the Court (through submission and exhibit) that the accused had contravened the provisions of the Immigration Act, Passport Act and Immigration Regulations and that the accused is sentenced accordingly to the offence committed.

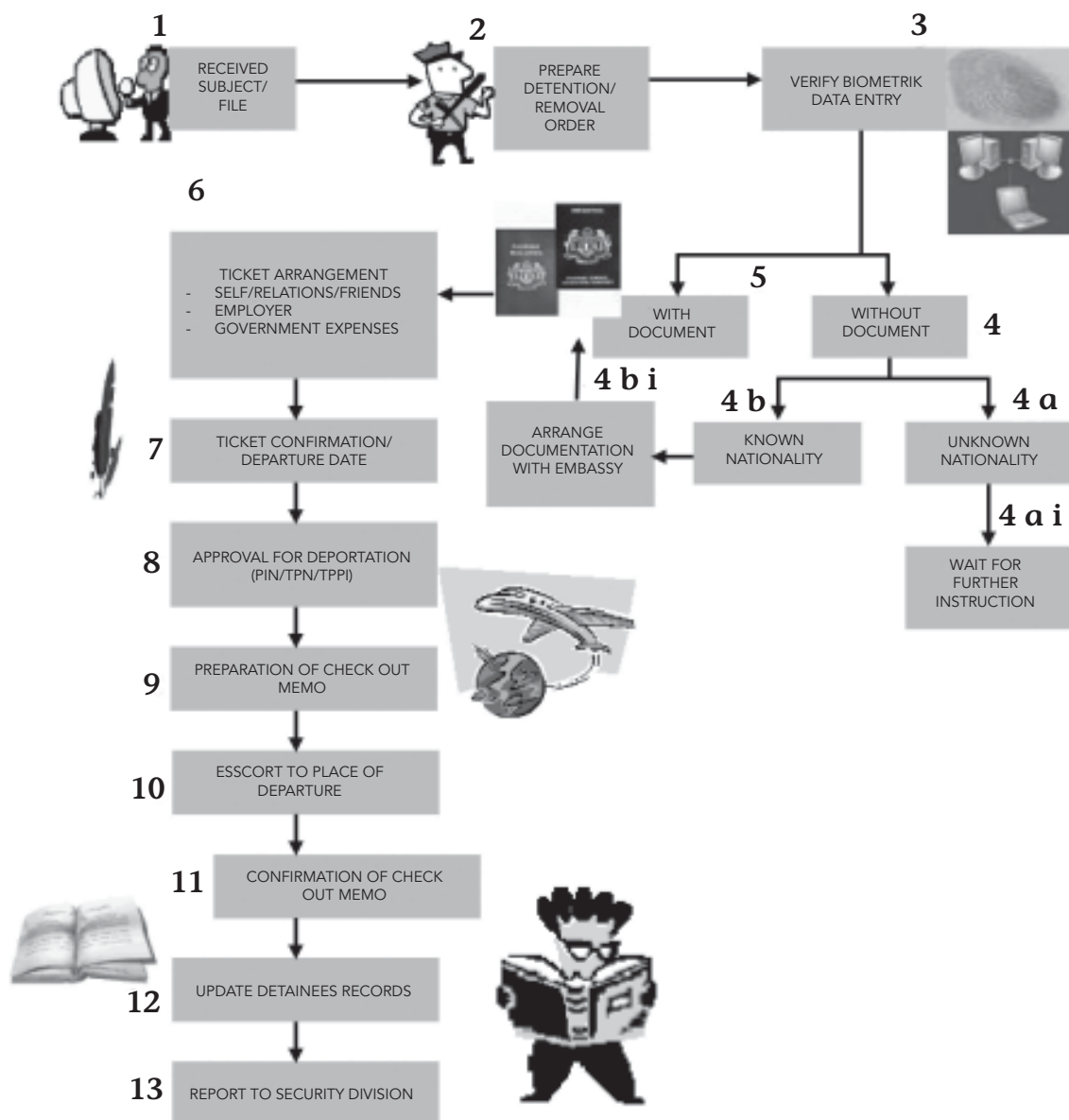
Prosecution Flow Chart



Deportation

- ♦ Deportation process of illegal immigrants from the depot to country of nationality/after serving their sentence and/or after the decision to deport was made by PBE/PIN.

Deportation Flow Chart



Deportation



Deportation



Section 6 (1) (c)

ENTRY WITHOUT
VALID PASS OR
PERMIT

Fine not exceeding RM 10,000.00
@ imprisonment not more than 5 years
@ both AND liable to whipping not
more than six strokes.

Section 15 (1) (c)

OVERSTAY

Penalty, fine minimum
RM 10,000 or maximum imprisonment
5 years or both

Section 55 B (1)

EMPLOYING
ILLEGAL FOREIGN
WORKER ONE OR
MORE

Fine not less than RM 10,000.00 but
not more than RM 50,000.00 @ impris-
onment not more than 12 month or
both for each such employee

Section 55 B (3)

EMPLOYING
ILLEGAL FOREIGN
WORKER MORE
THAN 5 PERSONS

Imprisonment not less than 6 month
but not more than 5 years and shall be
liable to whipping of not more than 6
strokes.

Section 56 (1) (d)

HARBOURING

Fine not less than RM 10,000.00 and not
more than RM 50,000.00 for each person
harboured and proven to the satisfaction
of the Court that the person at the same
time harboured more than 5 such person
shall be liable to imprisonment not less
than 6 month but not more than 5 years
and not more than 6 strokes

Reg. 39 (b) Immigration Regulations 1963

CONTRAVENTE
THE CONDITION
OF THE PASS

Imprisonment not more than 6 month
@ fine not exceeding RM 1,000.00 @
both

Section 55D Immigration Act 1959/63 (Amended 2002)

FORGERY OR
ALTERNATION OF
ENDORSEMENT
OR DOCUMENT

Fine not less than RM 30,000 and imprisonment not less than 5 years but not more than 10 years and shall be liable to whipping not more than 6 strokes

Issues & Current Challenges

Fundamental Issues of Immigration Enforcement:

- ♦ Illegal Immigrants
- ♦ Overstayers
- ♦ Misuse of Passes/Permit (Social/Student/Workers)
- ♦ Forgery/Distribution of Travel Document/Pass/Permit
- ♦ Refugee vs. UNHCR
- ♦ Smuggling (Human Trafficking) & Entry Points Irregular Entry
- ♦ Operation (Effective)
- ♦ Investigation (Effective)
- ♦ Prosecution (Effective)
- ♦ Deportation (Effective)

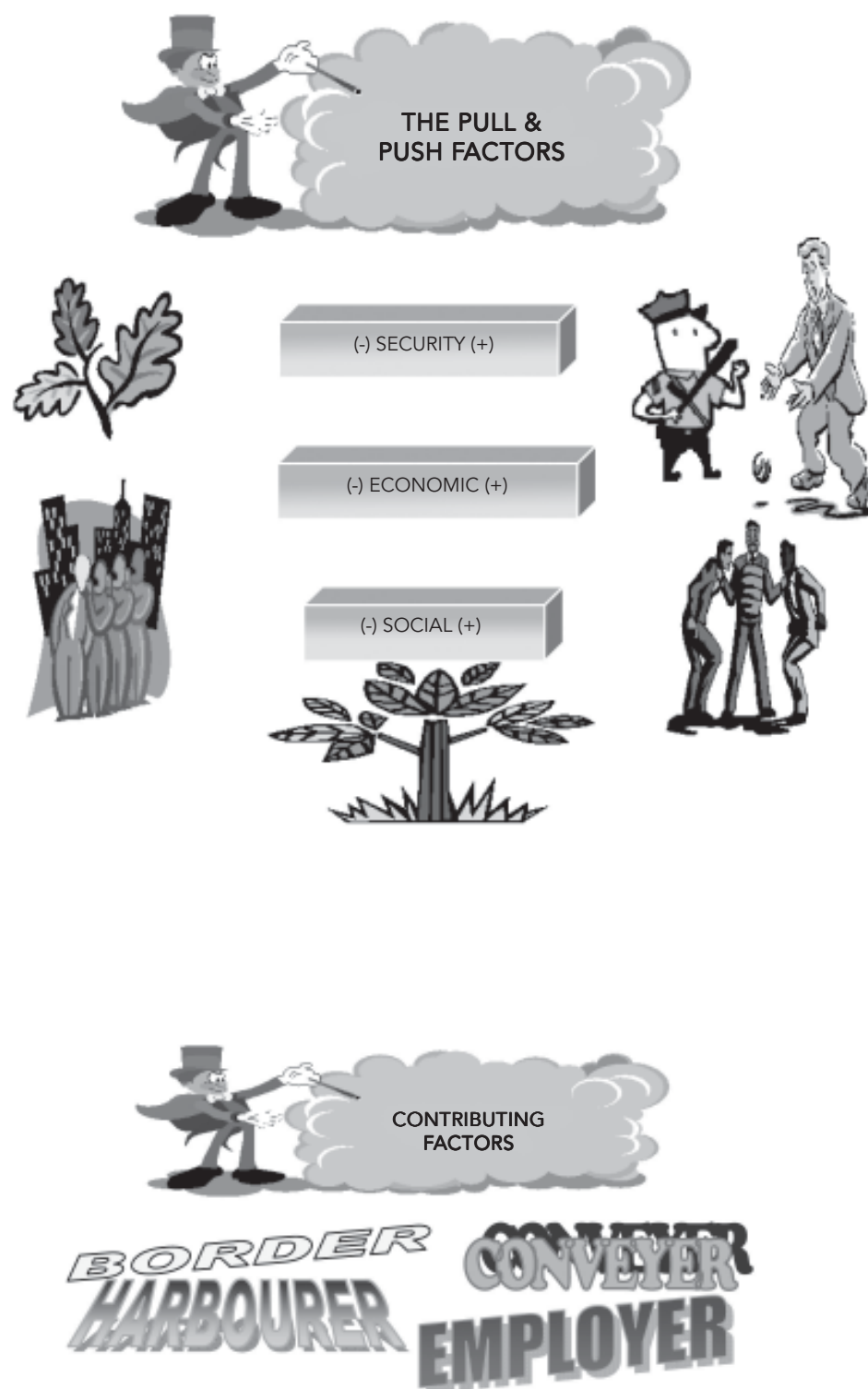
Main Issue of Overflooding



Meanings of Illegal Immigrants (PATI)

- Enter and stay in this country illegally (*Offence under Section 6(1)(c) Immigration Act 1959/63 (Amend. 2002)*;
- Stay after the expiration period of pass issued (*Offence under Section 15(1)(c), Immigration Act 1959/63 (Amend. 2002)*;
- Misuse of visit passes/work pass issued (*Offence under Regulation 39(b) Immigration Regulations 1963* ;
- Enter/stay in the country on forged visit pass (*Offence under Section 56(1)(l) Immigration Act 1959/63 (Amend. 2002)*;
- Foreign domestic maid or foreign worker abscond from the employer;

Why Are They Here?



How Many They Are?



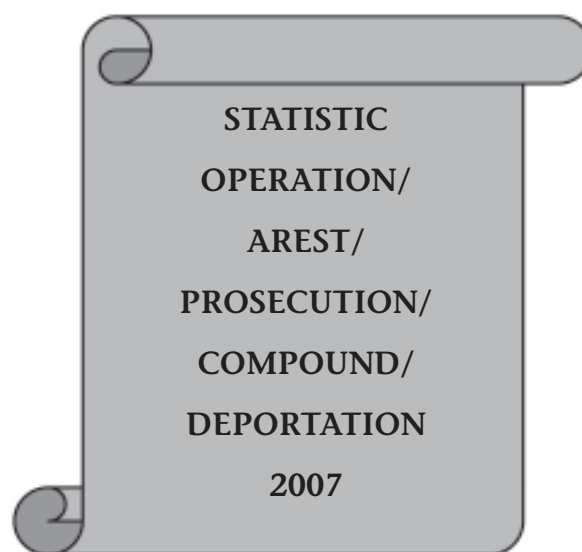
Legal Foreign Workers According to Sector

NO	SECTOR	TOTAL
1	MANUFACTURE	766,105
2	CONSTRUCTION	302,440
3	DOMESTIC MAID	315,703
4	AGRICULTURE	356,335
5	SERVICE	202,357
GRAND TOTAL (MILLION)		2,106,116

Additional Numbers of Refugees under the Shelter of UNHCR

There are 44,531 illegal immigrants in the country who have registered with UNHCR and are under their shelter. The top four groups are the Indonesian Acehnese (19,523), Rohingya (11,277), Myanmar (11,198) and other nationals (2,533).

Importance of Enforcement



Statistics of Enforcement Division

FROM 01 JANUARY 2007 until 31 DECEMBER 2007

SUBJECT	TOTAL
OPERATION	6,194
ARREST	58,882
PROSECUTION	22,754
COMPOUND	RM 9,181,191
DEPORTATION	65,080

Management of Illegal Immigrants Using Biometric System



Immigration Depot (Illegal Immigrant)

Concept of "Immigration Depot":

Foreigners whom are suspected to have committed immigration offences....to enable necessary arrangements being made

- Examination;
- Inspection;
- Investigation;
- Detention;
- Deportation;
- Convicted foreign prisoners-pending deportation process

Authority in the Establishment of Depot

Source of authority in the establishment of depot lies under the jurisdiction of the Director General of Immigration Malaysia under section 51A immigration act 1959/63

Section 51A Immigration Act:

"The Director General may designate any place as an immigration depot for the examination, inspection, investigation or detention of persons under this act."

16 Main Immigration Depots

11 DEPOTS IN PENINSULA



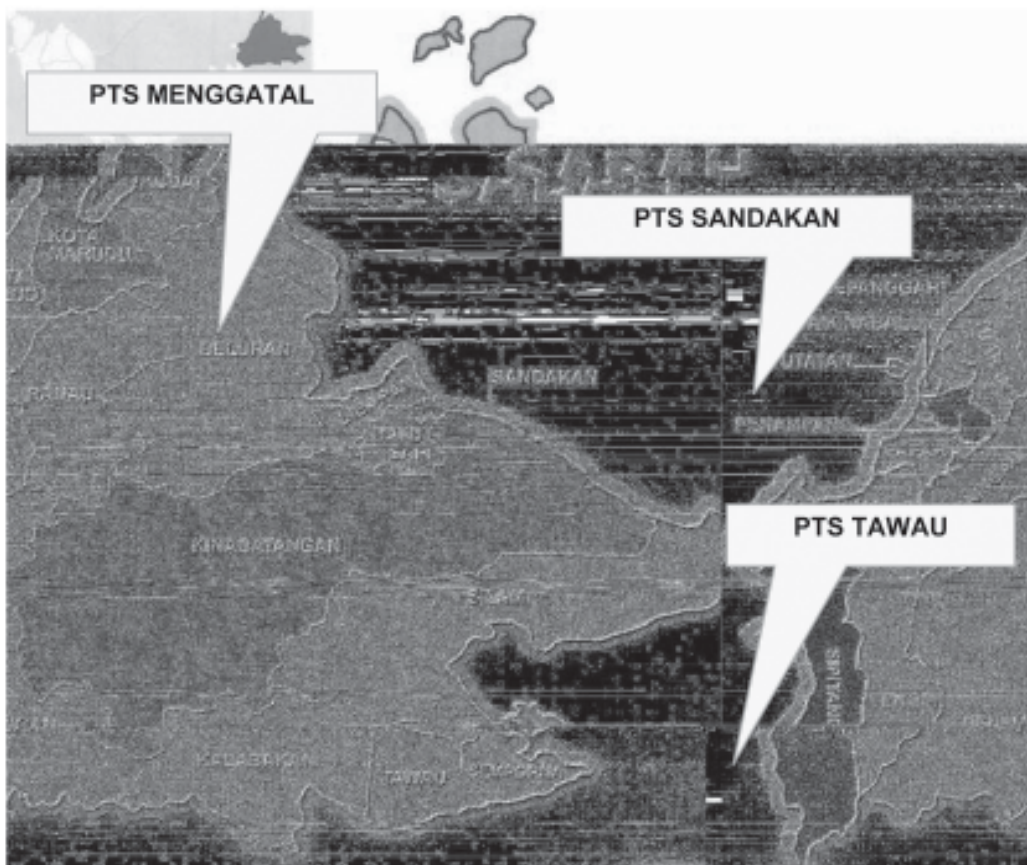
16 Main Immigration Depots

2 DEPOTS IN SARAWAK



16 Main Immigration Depots

3 DEPOTS IN SABAH



Session Court PATI

THE ESTABLISHMENT OF SESSION COURT PATI

SESSION COURT	DATE OF ESTABLISHMENT
Semenyih	15 December 2006
Semuja	22 December 2006
Tanah merah	03 January 2007
Lenggeng	04 January 2007
Sandakan	10 January 2007
Tawau	10 January 2007
Menggatal	11 January 2007
Langkap	15 January 2007
Juru	23 January 2007
Kemayan	05 February 2007
Machap Umboo	06 February 2007
Belantik	08 February 2007
Pekan Nenas	06 March 2007
Ajil	06 March 2007
Klia	

Statistic Session Court PATI

(FROM 15 DEC 2006 UNTIL 31 JAN 2008)

JUMLAH KES YANG DI DAKWA

BIL	MAHKAMAH	AKTA IMIGRESEN 1959/63 (PIN 2002)														AKTA PPT 1966				PER. IMM. 1963				JUMLAH
		SEKSYEN										SEKSYEN 56				LAIN LAIN	SEKSYEN		LAIN LAIN	PERKARA		LAIN LAIN		
		6(3)	5(2)	9(3)	15(4)	36	26(4)	55A	55B	55D	55E	(1A)(c)	(1)(d)	(1)(i)	(1)(l)		12(1)	2(2)		39(b)	36			
1	SEME NYIH	5,410	0	36	3,742	0	3	5	45	5	21	61	20	0	1,140	58	310	0	0	931	0	14	11,801	
2	SEMUJA	228	1	0	225	0	5	3	0	0	2	4	1	4	22	1	21	0	4	44	2	0	567	
3	TANAH MERAH	257	11	0	67	0	0	0	0	4	8	6	65	1	45	4	76	1	0	16	0	0	561	
4	LENGGENG	1,321	0	0	642	0	0	0	5	0	0	0	0	0	108	0	0	0	0	22	12	0	2,110	
5	TAWAU	287	0	0	21	1	2	0	0	0	0	0	1	0	0	0	0	0	0	3	0	0	315	
6	SANDAKAN	321	0	0	106	0	0	0	1	0	0	0	0	0	10	0	1	0	0	1	0	0	440	
7	MENGGATAL	1,209	0	2	329	0	0	0	0	0	0	0	0	0	101	0	2	0	0	2	0	0	1,645	
8	LANGKAP	2,087	0	0	390	0	0	0	1	0	0	0	1	0	164	0	3	0	0	2	0	0	2,648	
9	JURU	1,110	0	0	501	0	0	0	3	2	0	2	1	0	6	137	3	1	0	35	0	0	1,801	
10	KEMAYAN	876	0	0	155	0	0	0	0	0	0	0	3	0	64	0	3	0	0	20	0	0	1,121	
11	MACHAP UMBOO	398	0	0	479	0	0	0	2	0	0	0	0	0	24	0	0	0	0	76	0	0	979	
12	BELANTIK	1,188	7	0	191	0	2	6	1	0	12	1	2	0	99	0	3	0	0	57	0	0	1,569	
13	AJIL	176	0	0	185	0	0	0	8	0	4	0	1	0	50	2	0	0	0	34	0	0	460	
14	PEKAN NENAS	2,474	0	0	1,153	0	0	1	12	0	2	0	2	0	281	71	9	0	0	53	0	0	4,058	
15	LABUAN	70	0	0	35	0	2	0	0	0	0	0	0	0	0	0	2	0	0	11	0	0	120	
JUMLAH		17,412	19	38	8,221	1	14	15	78	11	49	74	97	5	2,114	273	433	2	4	1,307	14	14	30,195	



**BUNGA SELASIH
AKAR KAYU
TERIMA KASIH
THANK YOU**



Arrest, Detention and Prosecution

(Special Briefing by the Enforcement Division)

By Ravi Nekoo

Malaysian Bar

Introduction

The Influx of Migrant Labour to Malaysia

Since 1997, Malaysia has become one of the largest importers of foreign labor in Asia. Approximately 20 percent of its workforce is comprised of migrants, primarily employed in construction, palm oil plantations and domestic service. More than 90 percent of Malaysia's 240,000 domestic workers are Indonesian. Recently, Malaysia has shown interest in recruiting domestic workers from Cambodia, Sri Lanka and Thailand because labor agencies have recruited only 12,000 Indonesian domestic workers in the previous six months instead of the typical 60,000. This was due to the rapid economic growth. To sustain the economic activities, labour was needed. The construction industry needed manual workers, the plantation sector needed labourers, and the service industry such as hotels, petrol kiosks, restaurants needed people to work at their businesses. The local labour resource within the country was not enough to fulfill the void either because the locals did not want to do work which is dirty, difficult and dangerous, commonly known as "the 3Ds". Besides being a threat to health and safety, this sort of work hampered their social lives. Further, working in places such as construction industries and other service industries requires long hours and the salaries were not attractive to the locals. So the low paying and long hours regime was a further "put off". Then there was another consideration, locals had better options, at least comparatively. There were more educational opportunities, more financial assistance being offered to open up own businesses etc.

The entry of the migrant workers into Malaysia

It can be said that there are two types of migrant workers in Malaysia. One who has the legal documents and the other who are undocumented.

Undocumented Workers Coming Through Agents/Middle-Men

- a. The undocumented workers come to Malaysia, sometimes, with the help of certain middle-men. These middle-men exist in their home country as well as here in Malaysia. The workers who use these men come from India, Bangladesh, and Nepal etc. They would have sold all their belongings, borrowed money from relatives, friends and also loan-sharks to make their way to Malaysia. They would have paid these middle-men about RM 12,000-RM 15,000. Once in Malaysia, the passports of these migrants would have been stamped with a visitors' visa. In Malaysia, an agent would receive them. These migrants would then be taken to the employers who are ever ready to employ them. Being undocumented and living in a foreign country, these migrant workers now can be easily exploited. Even though they are exploited, these migrant workers have no choice; they are not able to lodge a complaint to the authorities because of

their official status as illegal workers. They came to Malaysia on borrowed money, which must be returned when they go back to their homeland. Then there is family pride also involved. Unable to lodge any complaint, not able to return empty handed and having to face with the prospect of being embarrassed if they go home without accomplishing what they set out to do, these migrant workers suffer.

- b. Undocumented workers who come to Malaysia on their own. This is another category of workers. They just slip through the Malaysian borders and then begin looking for work here. Usually they would have relatives and friends who help them find an employment. They are easily employed as their status of being “undocumented” and their need for a job makes them easily exploitable.

Documented Workers

Then there are the documented workers. These workers would have come into the country with a valid work permit. The name of their employer, their nature of job they would be doing in Malaysia would be stated in the work permit. The duration of the employment would also be inserted in the work permit. These workers come to Malaysia as legal workers. However the problem arises once they step into the Malaysian shores. There are times when these workers are taken elsewhere to work for a different employer. The problem then starts. These workers would never get the jobs they were promised or the salaries. Again left with little choice, they plod on as they too would have come to Malaysia on borrowed money or sold all of their belongings to raise the money to come to Malaysia. Like the undocumented workers they too have now broken the local laws by working for an unauthorized employer. Like the undocumented workers, they too do not have the luxurious option of dropping everything and going back to their homeland. They cannot go back empty handed as they have loans to repay and family commitments to meet. Once again, since they need their work for survival and their employers are well aware of this fact, these workers are also exploited.

The immigration laws and its inadequacies

Most of the migrant workers are charged under Section 6 and Section 15 of the Immigration Act 1959/63 for breaching the visa requirements.

a. Section 6 Immigration Acts 1959/63

- i. **Section 6** requires the migrant worker to possess a valid pass when he enters the country. Failure to do so would attract the punishment of imprisonment.
- ii. **Section 6(3)** was amended by virtue of Amendment Act A985. The amended section was gazetted on 30 January 1997 and came into force on 1 February 1997. The amended section imposes a term of imprisonment as well as the additional punishment of whipping for the migrant workers who enter into the country without valid documents.
- iii. The most telling part of this section is the discretion given to the courts to impose the additional punishment of whipping on the migrant workers. Though whipping is at the discretion of the courts but the experience of the Bar Council Legal Aid Centre at the courts in Semenyih was that it was a norm for the migrant workers to be imposed with the sentence of imprisonment as well as whipping.
- iv. The position of the Bar Council has always been that to mete out the rattan as a punishment on the migrant workers is unnecessary. It is respectfully submitted that inflicting pain on someone as a form of punishment is, for a lack of a better word, barbaric. Such punishment

only serves to bring back memories of societies built on built on military might, slavery and the treatment of criminals as humans without any rights. It is imperative that civil society such as ours behaves better than its criminals. Whilst it is agreed that prison as a corrective centre is a necessary to rehabilitate an offender, any form of pain inflicted on the offender would only set the clock back to the early days when different human beings are treated differently because of their social status, colour, creed and cast. Further cruelty as a form of punishment also in our times run contrary to the UN Declaration of Human Rights forbids “torture or... cruel, inhuman or degrading treatment or punishment”.

- v. Further let’s ask ourselves why these migrant workers leave their homelands, their loved ones and in the process incur a huge debt and travel thousands of miles away to a foreign country. It surely cannot be their intention to commit crime. They merely want to improve their basic living standards in the capitalist based economy. They want to secure their own future. Surely, this cannot be such a crime to punish them with the cruelty of whipping.
- vi. At this stage, on behalf of the Malaysian Bar, I call upon the authorities to re-look at whipping as a form of punishment for migrant workers.

b. Section 15 of the Immigration Act 1959/63

- i. **Section 15** states that any person whose entry permit is cancelled cannot remain in Malaysia. If he does then he would be, on conviction, be liable to a fine of not less than ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.
- ii. When migrants are brought in, there are circumstances when these migrant workers deal with agents. The agents tell them that the jobs ready and available for the workers. The migrant workers then, short of selling their limbs, sell everything else in order to pay these agents. It is said that the migrant workers pay about RM 12,000.00 to RM 15,000.00 to get these permits. These permits must state the employer with whom the migrant workers would be working. However on arrival in Malaysia, these workers are literally “carted away” to somewhere else. This is the start of the problem.
- iii. The problem is that when Migrants come to the country, their very presence and their ability to work legally is linked to a work permit, which stipulates a named employer. The moment he is not working with the employer noted on his permit he is flouting the local immigration law and becomes a criminal offender. The question then arises, whose fault is it? He had dealt with agents, he had paid them, and he was duped and cheated. He was in fact a victim. But the local law treats him as a criminal.
- iv. Then we say that that a migrant worker, who has been victimized, may seek justice through the Labour Court and/or the Industrial Relations Department or even lodge a police report. But usually what happens is that the errant employer immediately terminates the work permit leaving the migrant worker in a dilemma having no right to continue to be in the country, without work and capacity to earn a living. Then we are told that there is a procedural remedy whereby the victims may be allowed to stay in this country pending the disposal of their court cases, but then the problem is that they are not allowed to work in any other places. So this is where I shall argue that the law which is supposed to protect the victims now becomes illusory – a mirage because here the law allows the migrant worker to stay in the country pending the disposal of his case, but the law does not allow him to work and sustain himself whilst waiting for the completion of the trial.
- v. The migrant worker is then forced to leave the country without having his legal recourse.

The enforcement of the law

Arrest of Migrant Workers by RELA Officers

The fact that should not be overlooked is that migrant workers have brought development to this country. The other fact remains that there are genuine cases of migrant workers having been duped by locals into coming to Malaysia. However in spite of these issues, recently the Malaysian government has authorized almost half a million RELA volunteers to help maintain public order, primarily through the apprehension of undocumented migrant workers.

What are troubling are the powers given to these RELA personnel to carry out the arrests. On 1 February 2005, the **Essential (Ikatan Relawan Rakyat) (Amendment) Regulations 2005** came into force. Under this amended regulations RELA volunteers have been given additional powers.

The new regulations came under **Regulation 4A, 4B and 4C**. Regulation 4A (1) (a) allows the RELA volunteers to carry firearms and use the same in the performance of their duties. Regulation 4A (1) (b) allows these RELA officers to stop any person believed to be an illegal immigrant and make such inquiries from the person and also require them to produce the documents. Regulation 4A (1) (c) allows the RELA officers to arrest these persons under certain circumstances and Regulation 4A (2) and (3) empowers the RELA officers to handcuff a person. Regulation 4B allows these RELA officers to enter and search any premises and arrest any person believed to be an illegal immigrant.

The Complaints that RELA Officers Use Excessive Force and Act Unreasonably

An article, "RELA and Malaysia's Invisible War" in the Malaysian publication Aliran Monthly, January 24, 2007, termed the victims "hunted, hounded, harassed and detained," continuing, "While most Malaysians are sleeping peacefully in the wee hours of the morning, it is a time of terror for the migrants. It does not matter if they are documented or undocumented migrants. These are the dark hours of fear and terror of raids conducted by RELA (the People's Volunteer Corps). Reports of these night raids read like horror stories, about human beings brutalized and humiliated, robbed, dragged out of their beds, forced into trucks that take them away to certain detention centres, of which the general public know very little about."

The Human Rights Watch also has documented complaints about RELA volunteers often employing unnecessary force and illegal policing practices. Fully uniformed, armed, and unaccompanied by police or immigration officers, there have been complaints of these RELA volunteers breaking into migrant lodgings in the middle of the night without warrants, brutalizing inhabitants, extorting money, and confiscating cell phones, clothing, jewelry, and household goods, before handcuffing migrants and transporting them to detention camps as "illegal immigrants." These were reported by the Human Rights Watch.

Some of the actions of the RELA members have been included in this report produced by the Human Rights Watch. They are as follows:-

- On March 2, 2007 at 2:30 a.m., 10 RELA volunteers raided a factory in Jenjarom, Selangor state, injuring two Nepalese workers and detaining eight others.
- On March 8, 2007 a RELA officer detained an Indian immigrant with identification certifying his legal status. It took four days for the worker's employer to obtain his release from a detention camp for illegal immigrants.

- On March 6 and 7, 2007, RELA volunteers, who had come to Kampung Berembang, a village near Kuala Lumpur, supposedly to hand out flyers related to court orders, instead helped a developer evict 50 families and tear down their houses. Several villagers were arrested. The demolition went ahead despite an injunction to desist until a scheduled hearing was held. By helping the developers, RELA volunteers engaged in activities – some were spotted operating bulldozers – well beyond their mandate. In addition, they used excessive force while doing so.
- On January 28, 2007 a RELA raid in Kampung Sungai Merab, Denkil, resulted in the arbitrary arrest of 14 persons recognized by UNHCR as refugees.

Though RELA headquarters has since issued a circular announcing that a raiding team leader would be responsible for conducting body searches on force members before and after raids to ensure they were abiding by the law. This is to make sure that volunteers do not steal or plant evidence, the team leader is instructed to check that volunteers are not carrying cell phones or weapons and only a limited amount of money. RELA officials have also responded to complaints by announcing new training procedures.

Detention of Migrant Workers

In the statistics released by the Bureau of Democracy, Human Rights and Labour (United States) on March 6, 2007, it quotes the figures apparently given by our Internal Security Ministry that currently there are 42,483 individuals were incarcerated in prisons and illegal migrant detention centers.

In this report the issue of overcrowding was raised. There were also concerns that immigrant detainees were not medically screened prior to placement in the camps. One positive aspect of this report was that it had highlighted the visit of SUHAKAM officials visited various prisons and immigration detention camps on an ad hoc basis.

The truth of these matters may only verified by those who have direct knowledge of the conditions in the detention centre.

Whilst these problems persist, there was a cabinet decision that RELA take over the management of Immigration Detention Centres/Depots. Several NGOs have raised their concerns that this move will give RELA greater control over the migrant workers starting from arrest and detention to the deportation of migrants and refugees. It must be borne in mind that RELA volunteers do not have the specialized skills, experience, and training required to manage the detention centres and handle the detained migrant workers. A task of this magnitude given to RELA would only cause a further violation of human rights.

Prosecution of Migrant Workers in Court

Around the end of 2006, a special court called Immigration Sessions Court was started in several detention centres. The first of such court was in Semenyih. The primary purpose of this court was to use the detention centre as a sort of one-stop centre, where the migrant workers may be punished and then deported without having to take them to Sungei Buloh prison. But the reality is the Sungei Buloh prison is still being used to detain the migrant workers.

The most common offence, as explained earlier, under which the migrants are charged are the Section 6 and Section 15 offences i.e. entering the country without lawful permits or remaining in the country without lawful permits. All of the arrested migrant workers would first be kept under remand, during these times they do not have access to lawyers. They also do not have the services of interpreters at the police lockups. They are unable to contact their embassies or High Commissions and the arresting authorities too do not contact the embassies or High Commissions. The migrants are then brought to the detention centre as the court is there, namely the Session Courts. Here, the charge is read to them. Again the experience of the Bar Council Legal Aid Centre at the Semenyih Sessions Court in the detention Centre that the migrant workers were not provided with interpreters. Embassy or High Commission officers were also not present. This may be because they have not been informed. Once the charge is read to them, the migrant workers are asked whether they want to plead guilty or not. The consequence of pleading guilty is usually not told. The migrant workers are not asked if they would like to have legal representation. Under such circumstances, the migrants usually would plead guilty, not always because they want to, but because under the circumstances that would seem the best option. The court would then pass a sentence of imprisonment and as a matter of fact, the courts would impose the additional punishment of whipping. The whole process is done as mechanically as is seen in the conveyor belt where baggage is moved about in the airport.

The fact that the migrant workers are not told of their legal rights at the outset of their arrest. The fact that the embassy or high commission officials are not informed. At the police station they are not provided access to interpreters or a telephone call causes an infringement on the fundamental liberties of these migrant workers. Then they are produced in court. It is usually expected of them to plead guilty. They are not asked if they would like to have the services of an interpreter. The smattering of Malay which they speak as a result of having associated with the locals in the last few months is deemed sufficient for them to plead guilty to the charge. Not having the support of the embassy officials, their friends and relatives or the legal representatives, though they are given two options: to plead guilty or claim trial – the conclusion is foregone – these workers usually plead guilty. Once they plead guilty, they are sent to the prisons to serve the sentence.

In a report of I dated 30 January 2008, Suhakam Commissioner Datuk Khalid Ibrahim had said immigration offenders make up about 40% of the total number of inmates and this has caused overcrowding, financial strain on the prisons and stress to the wardens. They had proposed that these migrant workers should be deported immediately without having to hold them in prison.

Whilst at one breeze, it seems a sound idea, but we have to consider the plight those migrant workers who want to seek a legal recourse in Malaysia. These workers should be given a right to claim their dues before they leave the country.

All is not Well with Our Immigration Policies and Laws

At the turn of the 21st Century, Malaysia experienced an immense construction boom, especially in and around the largest city, Kuala Lumpur. Refugee and immigrant labor was crucial to achievement of enormous projects from the signature Petronas Twin Towers to entirely new cities: the government seat Putrajaya and high-tech Cyberjaya. Kuala Lumpur's luxury hotels, high rise condos and other urban amenities have been built by hands from Burma and Indonesia, changing the look of what was once a rather sleepy tropical nation.

Unfortunately, instead of receiving gratitude and sympathy, the foreigners have been victims of a new, intensified wave of persecution in the last two years. A vigilante force called RELA has been given free reign to invade, attack and arrest refugees from Burma. The migrant workers are detained in detention centres before they are deported. The migrant workers are whipped.

In June 2007, the US Government announced that Malaysia was added to its Trafficking in Persons (TIP) Report, on the Tier 3 list of the world's worst human trafficking offenders. Of course, we are not proud of this. One of the main reasons for Malaysia's inclusion was the government's failure to protect foreign workers from unpaid labor. Workers not paid by some construction companies, with immigration raids called before paydays. The ongoing RELA raids, with their indiscriminate dragnet of foreigners, have added even more abuse to this hopeless cycle. All this has to be stopped at once.

Let's look at the solutions offered so far:

1. The Cabinet has come out with the following solutions:-
 - a. to allow RELA officers to arrest migrant workers
 - b. to allow RELA officer to take over the detention centres
 - c. The Inspector General of Police had reported (NST, 17 Feb 2007) that foreign workers were accountable for about 2 per cent of crime cases in 2006 at one time suggested that migrant workers. Following this on February 2007 the cabinet had proposed that all foreign workers be confined to their *kongsi* (work areas) and have their movements monitored by the management to prevent them from committing crimes.
2. SUHAKAM had proposed that since jailing foreigners is causing overcrowding at the prisons, migrant workers should be deported (The Star 30/1/2008).
3. Parliament had enhanced the punishment of migrant workers by imposing the sentence of whipping for the offenders who enter the country without a valid document.

Are These Solutions?

Respectfully these are not solutions, they are merely criminalizing the migrant workers. We need a more comprehensive policy to ensure that migrant workers who are brought into this country are really employable and they would be employed by the employers designated in their permits.

There is a need to look at the *modus operandi* of outsourcing companies. The number of visas approved and given to these companies need to be scrutinized.

The problem is really in our own backyard. We need to clean up these problems first before we go on a witch hunt.

Summary of the Problems

1. The lack of a comprehensive migration policy between sending countries such as Indonesia, Bangladesh with Malaysia.
2. The extensive involvement of middle-men both in Malaysia and in the sending countries without any comprehensive regulatory mechanism to monitor their *modus operandi* has become a

menacing problem. These agents who are merely geared to profit-making would do anything to feed from the desperate hands of the migrant workers who want to leave their homeland to secure a better future. The freehand given to these agents without a strict of regulatory mechanism had caused these problem to escalate. The lack of will the authorities to investigate and weed-out these unscrupulous agents has become a real problem.

3. The recent phenomenon – the outsourcing company. In a press statement made by Tenaganita on 24 September 2007, it was pointed out that the Ministry of Home Affairs has appointed outsourcing companies. Any employer who is eligible but requires less than 50 foreign workers must appoint an out-sourcing company to be their labour supplier. The employer must sign a contract with these companies. These outsourcing companies would then recruit the foreign workers and then apply for the permits from the Immigration Authorities. It has been reported by Tenaganita that in recent times the Ministry of Home Affairs have approved the recruitment of 300,000 workers from Bangladesh alone. The workers pay about RM 12,000.00. They sell all that they have to raise this money. The outsourcing company makes millions out these workers. The worry is: Are there 300,000 jobs available? Is there any mechanism to check the availability of these jobs? How are the rights of these workers being protected when they arrive in Malaysia?
4. Though we say that every person in Malaysia is accorded equal protection under the law, the reality is different. As explained earlier since the migrant workers work permit is tied to the employer, if the migrant worker makes a complaint regarding his employer, all that the employer has to do is cancel the work permit and immediately the migrant worker becomes an illegal. He has to leave the country. If he wants to continue seeking legal recourse, he can apply for a special permit but this permit does not allow him to work. Given the fact that court matters can take a long time to complete the pertinent question is how is the migrant workers going to survive in a foreign land without working?
5. The problem of inexperienced, gun-totting RELA volunteers going on a rampage to arrest the migrant workers is a worrying trend and has damaged fundamental liberties. If that is not enough, the current proposal that these RELA volunteers take over the management of the detention centre itself is worrying as they are inexperienced and incapable of taking over such a mammoth task and maintaining the minimum standards of human rights.
6. The attitude of the Labour Department who only wants to deal with workers who have valid documentation must be addressed.

Some Proposed Remedies

- A. The More Active Involvement of Embassies/High Commissions
 1. The starting point of the problems of the migrant workers is their home country. In the past, Malaysia has been the receiving country of migrants from mainly Indonesia and Bangladesh. There is a need to develop a comprehensive policy with the Governments from these countries on the necessary steps that must be taken when a citizen of this country is arrested.
 2. It must be made absolutely necessary for the representatives of the embassies or high commissions to be informed of the arrests of the migrant workers by our local police and in turn it should be made absolutely necessary for the representatives of the high commission/embassy to be present at the police station and then at the court to render these migrant workers any assistance that is required. To that extent the embassies and high commissions must have a hotline and the local police must allow the migrant workers to contact their embassy/high commission immediately upon their arrest.

3. In fact all high commission/embassies must have personnel to attend to the problems of these migrant workers at all times.
4. The high commission/embassy must be able to provide interpreters to the arrested migrant workers be it in the police station or later, at the court.

B. One-Stop Government Agency Dealing with Migrant Workers Issues

1. One of the major shortcomings in the employment of migrant workers is that it comes under the purview of Ministry of Home Affairs i.e. the Immigration Department. The emphasis has always been from a national security angle. Under this situation the migrant workers are only classified into two categories: legal or illegal. This has to change.
2. A one stop agency comprising the Human Resource Ministry, the Home Ministry, the Health Ministry and other relevant ministries which require the services of these migrant workers must be roped in. The embassy officials and high commissions must also be involved in this one-stop agency.
3. This one-stop agency can also consider all issues pertaining to the legal and welfare problems faced by the migrant workers such as :
 - a. an errant employer who refuses to pay the salary of the migrant workers
 - b. a claim to be made under the Workmen's Compensation Scheme.
 - c. the health issues faced by the migrant workers.
 - d. the working conditions of a migrant worker i.e. whether there is compliance with the Occupational Safety and Health Act 1994.
4. Private companies set up to hire migrant workers should be made to comply with stringent requirements. Heavy penalty should be imposed on these companies if they bring in workers who are not employable as promised. A regulatory body to monitor these companies must be set up and they must come under the one-stop agency for migrant workers.

C. Humanizing the current laws

1. The current laws tend to criminalize the migrant workers. This has to change.
2. The migrant workers must be accorded the minimum standards accorded to the citizens of this country when they are arrested, detained and the prosecuted.
3. The laws empowering RELA volunteers to arrest and detain migrant workers should be repealed immediately. RELA volunteers should not be given the power to arrest and detain the migrant workers. Only suitably qualified and trained enforcement officers should be given this right.
4. The courts must not impose the rattan whimsically on the migrant workers. The migrant workers are after all not criminals. They are the victims of economic repression. They have come to Malaysia to work. They have contributed to the economic well being of the country. In fact, we have all benefited from their presence. We are still benefiting from their presence. Just because we are economically better off than them does not give us a right to punish them. Just because we are born in a country that is economically better than them does not give us a right to punish them. The laws have to be more compassionate.

Situation of Foreign Domestic Workers in Hongkong

Cynthia Abdon Tellez

Director of Mission for Migrant Workers (MFMW-HK)

Introduction

All the laws, policies and practices of the Hong Kong government were inherited from the colonial government

Even after 1997, when Hong Kong was given back to the People's Republic of China, no major policies were changed as far as immigration and labor policies towards foreign domestic helpers are concerned.

Process of Hiring FDHS

- ♦ Mainly arranged through a private recruitment agency
- ♦ In Hong Kong, the agency fee is pegged at **10% of the first month's salary**
- ♦ Overcharging of private recruitment agencies is rampant
- ♦ Every migrant worker has to pay numerous governmental fees

Important Notes on Hong Kong Laws, Policies & Practices

- ♦ Compared to other countries where migrant workers are not even considered workers or where their work is not covered by formal legal protection, some of the provisions of the laws in HK are better and progressive
- ♦ But we can also learn from our negative experiences in application and implementation of these laws and policies to improve policy-making
- ♦ Hong Kong has inherited the system that comes from pre-1997 arrangements, thus
- ♦ Conventions of the International Labour Organisation (ILO)
- ♦ Migration for Employment Convention 1949
- ♦ Contracts of Employment (Indigenous Workers) Convention 1939 continues to be applied

Most Important Policies

1. In Hong Kong, there is a single standard Employment Ordinance Cap. 57 which covers employment and labor rights for **both** local and migrant labour.
 - ♦ Theoretically, the migrant worker is governed similarly as the local worker, skilled or unskilled.
 - ♦ All entitlements granted to workers in general covers the migrant workers, again, in theory.
2. There is a Minimum Allowable Wage but only for the FDHs. The skilled workers salary is based on the prescribed salary according to the skill and type of work of the worker.
3. The FDH is the only migrant worker in Hong Kong with a standard employment contract that can be obtained at the Immigration Department
4. All contract-related complaints and claims are within the jurisdiction of the labour department and its defined mechanisms.
5. An FDH can enforce terms if he/she terminates the employment and has to bring a civil action, firstly by referral to the Labour Department, and thereafter to the Labour Tribunal – and if successful in the Labour Tribunal, to the District Court to enforce the award of the Tribunal. The whole process can often take over a year, during which time the FDH is not allowed to work to support themselves. They have to find a means to survive in a foreign country.

Comparative Analysis of HK Laws & Policies Related to Migrant Workers

A. Minimum Allowable Wage or MAW

- ♦ Migrants are assured of a minimum wage. Employer cannot (in principle and by law) give lower than the MAW

Positive Aspects/Advantages

- ♦ Annual review of MAW by HK government under non-transparent and arbitrary economic indicators.
- ♦ In the last five years, there were 5 attempts to reduce the salaries of FDH, but because of the strong clamor and protests of FDHs, only 2 were implemented but with a very substantial cut of more than HK\$400 or 11% wage cut

Needs Improvement

Comparative Analysis of HK Laws & Policies Related to Migrant Workers

B. The Standard contract

Entitlements:

- ♦ Minimum wage
- ♦ Rest day – one (1) rest day (not less than 24 hours) per seven days worked
- ♦ Statutory holidays
- ♦ Paid annual leave – 14 days in a 2 year contract
- ♦ Free medical treatment
- ♦ Suitable accommodation
- ♦ Food
- ♦ Compensation in case of Work Injury or Occupational Disease
- ♦ Maternity Leave – continuous period of 10 weeks
- ♦ Sick leave
- ♦ Long Service Payments after working for five years with same employer

Positive Aspects/Advantages

- ♦ Month by month contract. No job security. After termination, employers can hire new FDH but FDH cannot work
- ♦ 24 hour rest day per week is not fully implemented
- ♦ Working hours not specified
- ♦ Food provision unmonitored
- ♦ Long service payments only when employer terminates contract

(Please refer to Employment Contract for a Domestic Helper Recruited from Outside Hong Kong in Annex)

Needs Improvement

Comparative Analysis of HK Laws & Policies Related to Migrant Workers

C. Processes and Mechanisms for Resolving Cases or Disputes

Labour Cases:

- ♦ There are mechanisms (conciliation, labour tribunal, etc) to resolve labour disputes supposedly in the fastest way and with minimal expense
- ♦ Breaches of Contract by Employer:
 - ♦ Underpayment of wages
 - ♦ Illegal deployment
 - ♦ Unsuitable accommodation
 - ♦ Breach of implied duty of trust and confidence

It is unlawful for an employer to terminate a domestic helper who:

- ♦ Is on paid sick leave
- ♦ Suffers work injury
- ♦ Contracts a disease out of and in the course of employment
- ♦ Is pregnant
- ♦ Has given evidence/information for the enforcement of the Employment Ordinance

Termination Entitlements:

- ♦ Wages in lieu of notice (if no prior notice of termination given)
- ♦ Statutory holiday/ rest day pay (if not taken)
- ♦ Accrued annual leave pay
- ♦ Severance pay/ long service pay (if applicable)
- ♦ Air fare
- ♦ Fare to place of origin
- ♦ Traveling allowance

- ♦ A Migrant has to wait for 7 days before the complaint is entertained in a conciliation meeting. The reason being given is to provide the employer a chance to comply with their obligations.

- ♦ There can be postponements of conciliation meetings. In every postponement, the migrant has to apply for an extension of visa which she/he pays.

- ♦ If after conciliation, the obligations were not satisfied by the employer, the case has to be referred to Labour Tribunal (LT). This will take months to resolve. The LT has no authority to enforce its decision. So for enforcement – it's either go through a sheriff (which is costly) or to the District Court which can also take more time.

Positive Aspects/Advantages

Needs Improvement

Comparative Analysis of HK Laws & Policies Related to Migrant Workers

C. Processes and Mechanisms for ... (Cont'd)

Remedies:

- ♦ Re-instatement
- ♦ Award of terminal payment
- ♦ Award of compensation (for unreasonable and unlawful dismissal)

Positive Aspects/Advantages

- ♦ **Meanwhile the FDH is not allowed to work.** Where she/he will get food or daily expenses and to the support the family is not the concern of the HK government nor their sending governments. Meanwhile the employer is enjoying the services of a newly hired FDH.

Needs Improvement

Immigration Cases: New Condition of Stay

- ♦ NONE

Positive Aspects/Advantages

- ♦ Being used by unscrupulous employers to threaten FDHs.
- ♦ This immigration policy automatically cuts the two-year visa of FDHs to 2 weeks when the contract is prematurely terminated. As a matter of policy, FDH cannot process a new contract in Hong Kong.

Needs Improvement

Immigration Cases: Exceptional Cases

- ♦ Migrant worker can process in Hong Kong without having to leave.

Positive Aspects/Advantages

- ♦ The burden of proof is on the migrant worker even if the initiating party in terminating the contract is the employer.

Needs Improvement

Immigration Cases: Illegal Work

- ♦ Supposedly, to prevent exploiting the migrant workers and stealing potential jobs for the locals.

Positive Aspects/Advantages

- ♦ The migrant worker is the victim here.
- ♦ It is only upon instruction (sometimes under threat) of the employer that a migrant does extra work WITHOUT extra pay, outside of what is specified in the contract.
- ♦ The problem with the ID is that they want to get the migrants as witness and at the same time prosecute them also for breach of condition of stay.

Needs Improvement

Immigration Cases: Direct Visa System

- ♦ Cheaper and faster because no need to pass through private recruitment agency

Positive Aspects/Advantages

- ♦ Most of the time, the FDH has to exit HK and wait for the visa which takes minimum of 6 weeks.

Needs Improvement

Immigration Cases: Non-Change of Status

- ♦ NONE

Positive Aspects/Advantages

- ♦ Once a migrant enters Hong Kong as domestic worker, by policy she/he will remain as FDH.
- ♦ Change of status even if one has already complied with the prescribed period of stay cannot be granted. It is only granted to professionals and other categories, not to FDH.

Needs Improvement

Police Cases

- ♦ Relatively attending to cases
- ♦ Duty Lawyer Scheme providing legal counsel and assistance
- ♦ Legal Aid mechanism

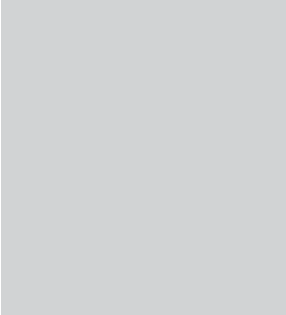
Positive Aspects/Advantages

- ♦ When employer complains, the FDH is immediately brought to station, subjected to criminal prosecution and most of the time detained. When FDH complains even for injuries sustained from physical abuse, employers are only warned.
- ♦ Duty Lawyer Scheme lawyers are different each time and can only attend to the FDH 30 minutes before the hearing. Thus the quality of legal assistance is in question.
- ♦ Legal Aid is not easily accessible

Needs Improvement

Summary

- ♦ Hong Kong, in its statute, should observe the letters of various Conventions. It is good that the provisions are set out, so that when they are ignored, they can be referred to.
- ♦ It is very important because much depends on whether the spirit of the Conventions is applied or not, and how the scheme actually operates in practice. In Hong Kong, the terms that were intended to be a shield for the workers are in many instances turned into a means to control and exploit them.
- ♦ While one can look to HK for the outline of a system which, on the surface, provides regulation of employment of migrant domestic workers, one has to be very careful to look at how such a system operates in practice.
- ♦ It would be good for the policy makers if they can, along with legislation, establish mechanisms for dialogue and consultations with the most affected sectors of the society – the migrant domestic workers themselves, in the case of HK. It is vital that the primary stakeholders are consulted in policy-making.



SESSION III : SOCIAL CHALLENGES

Access to Health and Living Conditions

Dato' Haji Ramlee Bin Haji Rahmat

Deputy Director General of Public Health

Ministry of Health

Introduction

- Inherent need for labour in Malaysia
- Malaysian is an exporter and importer of labour
- The main countries of origin of migrants: Indonesia, Philippines, China, India, Bangladesh, Nepal, Pakistan, Sri Lanka and Vietnam

Demographic Estimates: Malaysia

Total population	26.6 million
Total working population	10.6 million
Total migrant workers	2.0 million

Sources: Department of Statistics Annual Report, Malaysia, 2006 and Immigration Department, 2006

Medical Examination of Foreign Workers

Year	No. of examinations	Unfit	% Unfit
2007	1,361,781	41,342	3.0
2006	1,345,751	45,368	3.4
2005	1,158,152	38,225	3.3
2004	909,050	26,073	2.9
2003	716,020	18,706	2.6
2002	402,517	8,893	2.2
2001	500,133	9264	1.8
2000	525,681	10,538	2.0
1999	545,222	13,930	2.5
1998	565,737	24,415	4.4

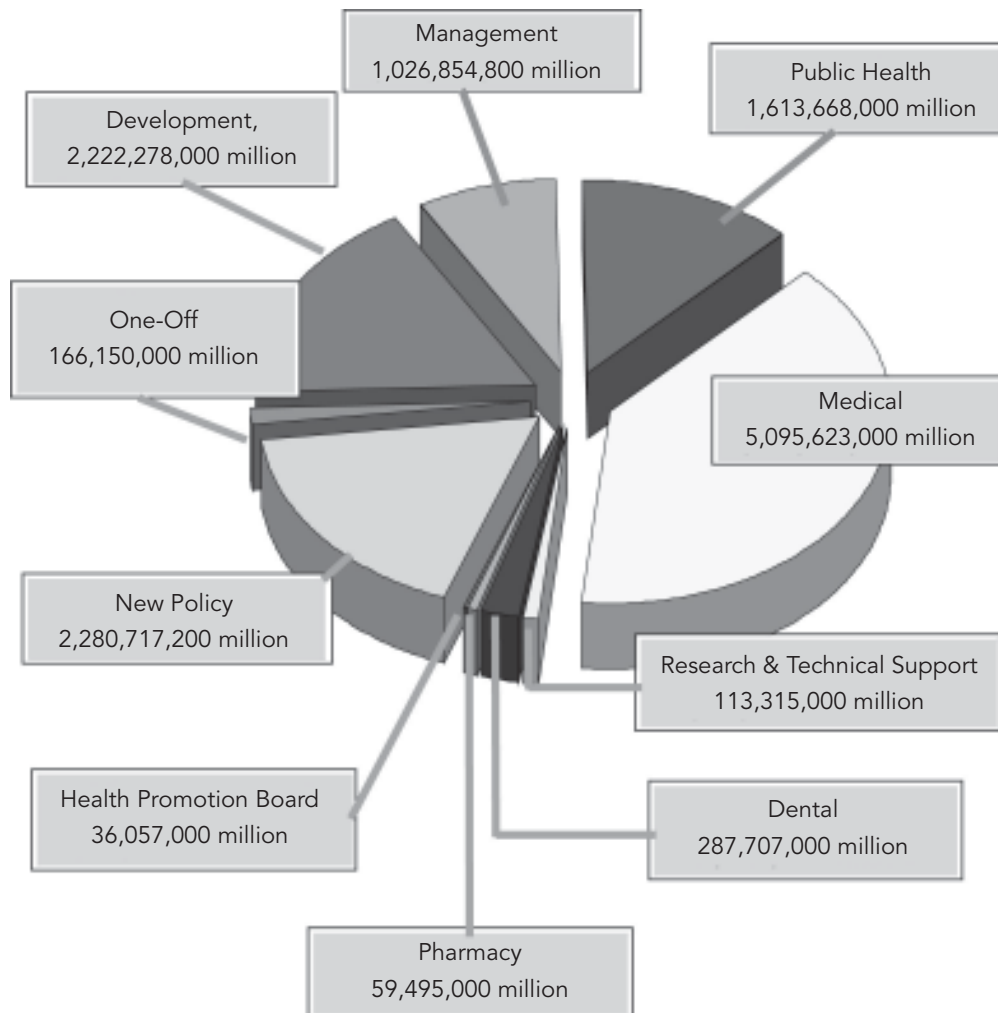
Source: International Health Unit, MOH, 2008

Medical Examination of Foreign Workers from Selected Countries

	2002	2003	2004	2005	2006	2007
Indonesia	296,636	468,908	600,372	733,211	796,703	635,445
Nepal	33,438	70,961	89,805	136,296	196,353	174,902
Bangladesh	42,428	78,653	54,253	49,685	19,293	248,292
Philippines	7,668	9,561	11,900	14,036	13,933	12,746
India	15,234	31,092	49,088	83,644	101,774	64,279
Vietnam	61	26,563	58,796	63,636	95,636	102,423

Source: International Health Unit, MOH, 2008

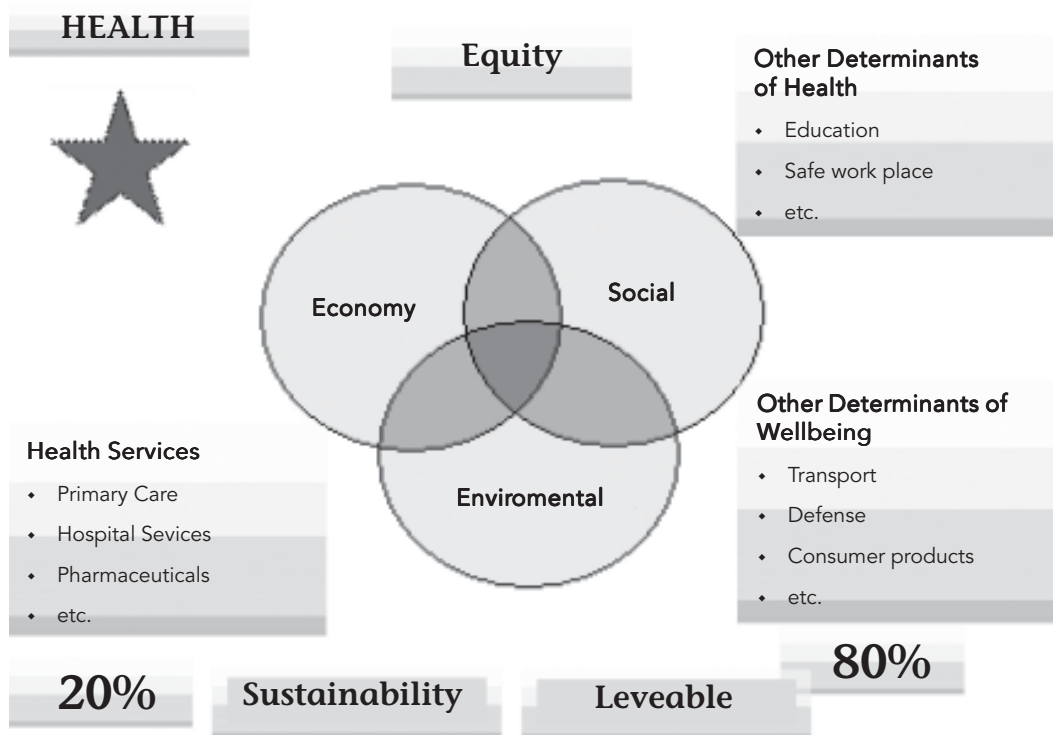
Allocation of Budget for Medical & Health Services 2008 (RM 12,901,865,000 million)



Ministry of Health (MOH)

- ◆ Acts as the main custodian of health care in the country
- ◆ Healthcare is an important prerequisite for achieving sustainable social development
- ◆ All workers local or foreign have access to health care
- ◆ Offers a comprehensive package of preventive and curative care including dental care

Concept of Health (MOH)



MOH Vision

- ♦ Malaysia is to be a nation of healthy individuals, families and communities
- ♦ Through a health system that is
 - Equitable
 - Affordable
 - Efficient
 - Technologically appropriate
 - Environmentally adaptable and
 - Consumer-friendly
- ♦ With emphasis on quality, innovation, health promotion
- ♦ Respect for human dignity and
- ♦ Which promotes individual responsibility and community participation towards an enhanced quality of life

MOH Vision

Is to build partnerships for health to facilitate and support the people to:

- ♦ Attain fully their potential in health
- ♦ Motivate them to appreciate health as valuable asset
- ♦ Take positive action to improve further and sustain their health status to enjoy a better quality of life

Health Services Goals

1. **Wellness Focus:** Provide services that promote individual wellness throughout life.
2. **Person Focus:** Focus services on the person and ensure services are available when and where required.
3. **Informed Person:** Provide accurate and timely information and make informed health decisions.
4. **Self-Help:** Empower individuals and families to manage health through knowledge and skills transfer.
5. **Care provided at home/close to home:** Provides services into rural and urban homes, health setting and community centers.
6. **Seamless, continuous:** Manage and integrate health care delivery across care setting, episodes of care and throughout life.
7. **Services tailored as much as possible:** Customize services to meet individuals and group needs and special circumstances.
8. **Effective, efficient and affordable services:** Provide improved access to an integrated high quality care delivery services at reasonable cost.

Health Case Accessibility

- ♦ Available irrespective of citizenship status
- ♦ Easily accessible with a minimal fee
- ♦ Available 24 hours a day
- ♦ Free of charge for 3rd class admissions for Infectious Diseases
e.g. Dengue, Malaria
- ♦ Available in the private sector subject to payment

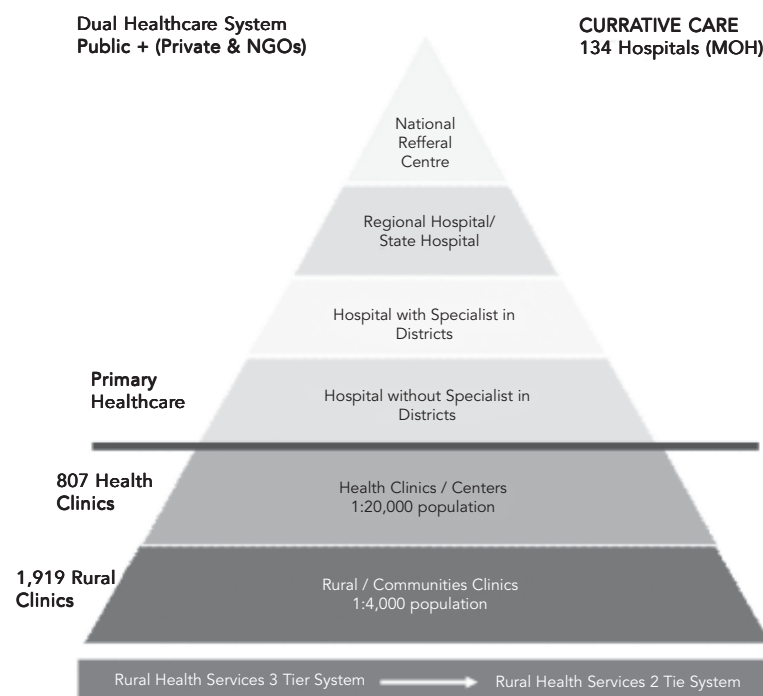
Services Offered by MOH

- ♦ Preventive services
- ♦ Outpatient services
- ♦ Hospitalization
- ♦ Dental services
- ♦ Mobile clinics land /sea /air

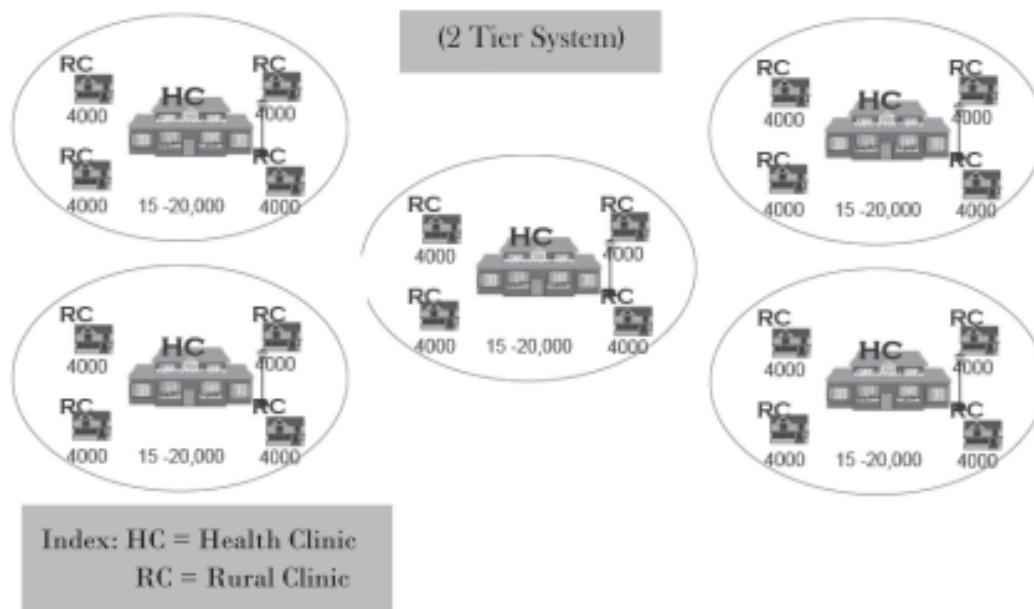
Preventive Services

- ♦ Immunization
- ♦ Prevention and control of endemic diseases
- ♦ Treatment of minor ailments and injuries
- ♦ Essential drug supply
- ♦ Health education
- ♦ Food safety and nutrition
- ♦ Safe water supply and environmental sanitation
- ♦ Maternal and child health

Malaysian Health Coverage



Health Service & Its Ratio to Population



Health Service & Its Ratio to Population

Types of Premises	No. of Premises		Total
	Government Sector	Private Sector	
Hospital	134	232	366
Health Clinics	2,965	N.R.	2,965
Dental Clinics	3,571	1,433	5,004
Radiotherapy Centre	3	19	22
Radiology Clinics	N.R.	35	35
GP's/Non-X-Ray Sp. Clinic	N.R	6,300	6,300
Total	6,673	8,019	14,692

Source: Information and Documentation System Unit, Ministry of Health

Government Health Service Facilities

Health Facility	No. of premises
Health Clinics	807
Rural Clinics	1,919
Maternal and Child Health Clinics	88
Mobile Clinics	151
Total	2,965

Source: Information and Documentation System Unit, Ministry of Health

Fee Schedule

Types of Services	Charges (RM)	
	Malaysian	Non Malaysian
Out patient Clinic	1	15
Dental Clinic	1	15
Referral to Specialist Clinic: From Govt Doctor	Free (1 st visit) 5 (follow up)	60 (1 st visit) 60 (follow up)
From Private Practitioner	30 (1 st visit) 5 (follow up)	
Hospital Ward :		
First Class	30-80	30-80
Second Class	20	20-30
Third Class	3	3
Normal Delivery	10-300	500

Source: Malaysian Fee Acts 1951

Utilization of Services by Non Citizens 2006

Facility	Hospital Attendances	%	Health Clinic Attendances	%	Deliveries %
2006	76,812	4.1	360,123	1.0	24,966 7.2
2005	67,134	3.7	337,419	1.0	21,765 6.3
2004	64,902	3.6	338,611	1.0	22,411 6.4
2003	62,633	3.6	465,421	1.5	21,878 6.3
2002	55,944	3.4	541,275	1.9	20,163 5.7

Source: Information and Documentation System Unit, Ministry of Health

Living Facilities

- ♦ No specific legislation governing living quarters for all workers
- ♦ Provision of accommodation is subject to work contract
- ♦ Workers Minimum Standards of Housing and Amenities Act 1990: specific governance of estate and mining workers

Workers Minimum Standards of Housing and Amenities Act 1990

Housing and Other Amenities:

- ♦ Building to comply with requirements
- ♦ Supply of water and electricity and maintenance of houses
- ♦ Nursery
- ♦ Allotment of land
- ♦ Community hall, sports and other recreational facilities

Workers Minimum Standards of Housing and Amenities Act 1990

Health, Hospital, Medical Treatment and Sanitation:

- ♦ Employer to construct and maintain estate hospital
- ♦ Payment and recovery of hospital expenses by employer
- ♦ Sick worker being admitted to Government hospital
- ♦ Transportation of sick workers to hospital
- ♦ Medical treatment in estate on which a hospital is not maintained

Conclusion

Migrant workers are privy to accessible and affordable health care services and adequate living conditions while residing in Malaysia.

Continued availability of these services, are subject to their cooperation in prevention of transmission of Infectious Diseases and adherence to the laws of the country.

References

- ♦ Department of Statistics Annual Report, Malaysia, 2006
- ♦ Labour Force Survey Report, Malaysia, 2006
- ♦ Ministry of Health Annual Report, Malaysia, 2006
- ♦ Fees Act 1951
- ♦ Workers Minimum Standards of Housing and Amenities Act 1990
- ♦ Local Government Act 1976

Migrant Workers Health and Living Conditions

By Cynthia Gabriel

Regional Coordinator, CARAM Asia

Health is a Fundamental Human Right

Article 12 of the Economic Social and Cultural (RSC) Rights Convention and the constitution of the World Health Organisation defines health as a basic human right, and describes the right to health to mean “the complete physical, mental and social well being, and not merely the absence of disease”. This does not render that everyone has a right to be healthy, but it merely means that states have to protect and fulfill the aspirations enshrined in the definition outlined in the above conventions.

There are three aspects to the right to health that States must guarantee:

1. Healthy workplace and living conditions
2. Access to health education and information
3. Affordable and accessible healthcare.

Are these rights guaranteed in Malaysia? Are these rights made available for non citizens? Can non citizens set claim to these rights, when residing in Malaysia?

CARAM Asia in its longstanding work on migrant population and its vulnerabilities to contracting HIV and other diseases, believes that the health status of migrant workers serves as one of the most important and tangible indicators of a migrant’s well being.

Living conditions in many host countries often reflect an existence of relative poverty, as the migrant worker earns depressed wages lower than that of most local citizens. Poorly ventilated, overcrowded housing and a lack of nutritious food quickly result in the rapid deterioration of a migrant worker’s health.

A migrant’s well-being is deeply connected to a range of socio-political and economic issues. In order to address the health concerns of migrants, their vulnerabilities against a range of factors must be understood.

Vulnerability of Migrant Workers in Malaysia

Protectionist policies ensure that migrant workers are scrutinized from a national security stand point. While welcoming short term contractual labour to fulfill labour demands fast tracked by economic globalization, States erect barriers to ensure that long term settlement of the migrant worker is never made a consideration. They are sent home when their usefulness ceases economically, or when there are changing market demands, or because of their age, illness or a discovered disability.

International labour migration has today formed an integral part of national economies, both at host and source countries. Remittances resulting from migration amount to more than 170 billion Euros per year. Source countries depend on these transfers to pump up their economy and encourage the outflow of their citizens in search of a better life.

These push and pull factors promote and sustain migration. It is evident then that migrant workers are regarded as economic tools and are made vulnerable by external demands quite outside their control, forcing them to accept weakened labour contracts, depressed wages and poor job conditions, or risk losing their jobs altogether. Human security and rights are discarded in the name of development.

Reinforced xenophobic attitudes and racist scapegoating in host countries exacerbates social exclusion and stigmatization. Language and communication barriers often add to their sense of marginalization, insecurity and the creation of the “othering” factor. This affects not only their legal and socio-economic situation, but also their access to a range of rights including access to affordable healthcare services.

Migrant workers on short term contractual labour often represent the underclass sectors of society in their source country, and under conditions of poverty are forced to migrate alone, leaving their families behind, as a consequence. Single entry visa policies further mean that the migrant worker is barred from traveling out of the host country during the contractual period, rendering a long and sustained period of separation away from their families.

The anonymity of being a foreigner and the social exclusion and loneliness often experienced, have pointed to increase in unsafe and risky behavior including sexual activities, and even in the lure of drugs and the escapism it provides.

It must be emphasized though that being a migrant itself is not a risk factor to contaminable diseases; it's the very structure and conditions of the migration process that often lead them towards becoming a socially vulnerable high risk group. This raises the dire question of the delicate balance that is expected of the State and its policy makers. Between recognizing that migrants may be at risk of contracting illnesses in their new environment due to a range of factors described above, and the common ‘othering’ of laying blame on the migrant workers for perpetuating the understanding that migrants are vectors of grave diseases, and a threat to the public health of a host country.

Migrant Workers and Mandatory Testing

Migrant workers are generally more vulnerable with regards their health compared to the local population of the country where they work or with a comparable population in their home country.

As described above, migrants bear the heightened risk of HIV infection. Unfortunately, governments in host countries do not view migrants' health as priority. In Malaysia, undocumented migrants do not exist as a population in the eyes of the authorities. The only policy with regard to persons without legal status is to expel them from the shores of our country.

Mandatory testing for legal or documented migrant workers is linked to the issuance of their work permits. This policy was crafted from the **Immigration Act 1959, Section (8)**, which defines persons

that are prohibited from entering Malaysia as:

"any person suffering from mental disorder, or being a mental defective or suffering from any contagious disease."

The Mandatory testing policy was coined from a security perspective and had gained strength on the pretense of protecting local populations against grave diseases. Interestingly this policy doesn't apply to tourists/expatriate communities, rendering a discriminatory and biased assumption that the poor and unskilled migrants are the transmitters of such diseases and in need to be controlled.

In Malaysia, deportation has become a grave and immediate consequence of mandatory testing, violating the right to work and to be economically productive. Basic medical care is not given consideration. This policy to deport can be traced as far back as 1993, when a directive from the Ministry of Health, required all medical officers to notify the Immigration Department if they came across foreigners with any major disease. Such policies that fail to include a public health and rights perspective only reinforces stigma and in turn makes them more vulnerable.

Regrettably, like much of the policies on migrants in Malaysia, policies related to mandatory testing have been far from consistent. A circular issued by the Immigration department in May 2006, states that migrant workers with a clean bill of health for three consecutive years would be deemed free of any disease. It also stated that in this case it was not compulsory anymore for a migrant worker to submit a medical report hereafter.

Undocumented migrants however have posed a big threat to this particular policy. They are inaccessible, in hiding, and almost always never access the public health system, for fear of being arrested and deported. This drives them further underground and as such become unreachable to health services, increasing the threat to health and diseases.

In Malaysia, this is further complicated with the large presence of refugees and their vulnerable conditions. Where then does a policy like mandatory testing find its rationale?

Unfortunately, it is not in the interest of governments of migrants source countries to demand better policies for their nationals, because the national income and remittances due to labour export has become too important for them.

Foreign Domestic Workers (FDW) and their Heightened Vulnerabilities

Foreign domestic workers frequently work in inhumane circumstances: very long work hours, an unreasonable number of tasks, poor nutrition, isolation and confinement to the employer's house, deprivation of their passport and papers, and no days off. Such conditions can have a severe negative impact on the health of FDWs leading to both physical and mental health problems.

Given their isolation and restrictions on their movement, most FDWs rely on their employers for their health care, but this often results in inadequate access to health information and in delayed diagnosis and treatment. Further, FDWs in their role as labour commodities are frequently subjected to medical tests without their consent and deported for treatable conditions such as STIs, TB and

HIV. In Malaysia women migrant workers are also deported if they are pregnant, denying them of their right to work and the benefit of the labour contracts that they signed.

Since domestic work is not recognised as work under the national labour laws of both receiving and sending countries, FDWs cannot avail of the labour and health protections and the benefits enjoyed by workers in other sectors. Most receiving countries in the region do not require employers to negotiate terms of reference or work contracts with domestic workers; the default assumption of employers is that female domestic workers are available at all times.

Dependence on their employers for meeting their health needs often results in poor access to health information and in delayed diagnosis and treatment. Most FDWs are in the prime of their reproductive age (18-45 years). Governments and employers need to recognize the psychosocial and sexual needs of migrant women and their right to bring their spouses, children and access to medical benefits that include maternity leave.

The government's recent move to introduce insurance schemes for domestic maids, are only an important starting step towards their health protection needs. Such rights must be bargained and agreed upon while negotiating bilateral contracts.

Privatisation of Health Care and Its Impact on Migrant Workers

Shrinking healthcare budgets, and the transfer of responsibility of health care and services from the state to private companies, have caused migrant workers to be further marginalised from affordable treatment care and support.

Economic and political globalisation through the international financial institutions and through free trade agreements have attempted to turn health care into a service for trade and profits. In Malaysia, not only has this virtually cut off affordable health services for migrants, it has doubly discriminated against foreign workers by introducing double fee payment, where a foreign worker is expected to pay first class rates for third class treatment.

Migrant Workers in Detention Centres

The National Human Rights Commission (SUHAKAM) had, in 2003, released a report on the overcrowding of detention centres in Malaysia. An overwhelming majority of the detainees were reported to be illegal immigrants, undocumented immigrants serving time for not having proper documents, overstaying, etc.

Inadequate food, medical care, poor sanitation, and abuse by guards in government camps for illegal undocumented immigrants, is a real problem that needs urgent solutions. Overcrowding in prisons were found to be detrimental to health and directly led to promoting the spread of HIV infection. Due to poor access, the conditions of illegal immigrants in detention centres remain understudied, and it is left unclear the severity of how contaminable diseases are spread and health conditions treated. Up to date data on the numbers of cases of HIV among illegal immigrants resulting from prison conditions remain vague and is complicated by deportation policies.

At present the Malaysian Government does not have any agreement with the International Committee of the Red Cross (ICRC) that permits visits to prisoners. NGOs and the media allegedly were not permitted to monitor prison conditions. Access to illegal immigrant detention camps was restricted, although UNHCR officials were given access to several camps to identify and interview potential refugees at various times during the year.

Recommendations

1. Develop a more integrated response with regard to migrant workers. All ministries tasked with the responsibility of coordinating various aspects pertaining to migrant labour should have a coordinated approach to migrants
2. Holistic treatment has to be emphasized, taking into account that health is more than the absence of diseases. The issue of HIV has to be addressed in relation to sexual and reproductive health in general, and this treatment also accorded to migrant populations.
3. Mandatory testing practices to be replaced with a more rights based approach where testing should accompany pre and post test counseling, and where there should be access to adequate information, and the rights to privacy upheld.
4. Deportation practices to be reviewed, but instead referral networks and basic access to treatment and care should be given consideration.
5. Foreign domestic maids to be recognized as workers, and protected under national labour laws, so that their rights to days off, and access to healthcare and services can be met.
6. Migrants in detention centres should be sent home and facilitated appropriately, instead of languishing in overcrowded prisons in Malaysia.

Powerpoint Presentation Version

Health as a Fundamental Human Right

- Article 12 ICESCR & constitution of WHO
- Definition:

"the complete physical, mental and social well being, not merely the absence of disease"

Three aspects to the right to health:

- Healthy workplace and living conditions
- Access to health education and information
- Affordable and accessible healthcare.

Vulnerabilities of Migrant Workers



- **POLITICAL** – national security, immigration, foreigner
- **ECONOMIC** – economic tool, cheap labour, poor job conditions, 3D jobs
- **SOCIAL** – xenophobic attitudes, deconstruct of family life, loneliness, discrimination, no support systems, growing disempowerment, & the "othering" factor.

Mandatory Health Screening & Migrant Workers

- Section 8, Immigration Act 1959
- Derived from a national security perspective, on the pretext of protecting local populations.
- Targeted at low skilled foreign workers. Expatriate communities exempted.
- Deportation an immediate consequence.
- Basic medical and referral services absent.



Creating an Enabling Environment for Migrant Workers



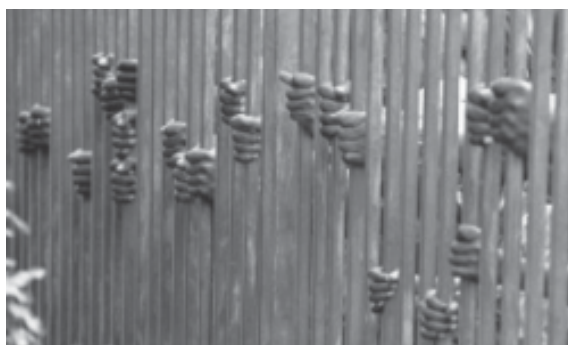
- Voluntary not mandatory
- Pre/post counseling
- Language accessibility
- Informed consent
- Confidentiality and privacy rights
- Basic treatment, care and support + referral systems
- Review deportation as only solution.
- Address current policies of undocumented migrants and the public health system

Foreign Domestic Workers (FDWs)

- Female migration
- FDWs particularly vulnerable – informal sector, isolated workplace, confinement to employers home, no off days, physical and sexual abuse etc.
- Dependence on employers for health needs.
- Language difficulties, inadequate health information and sometimes delayed diagnosis.
- Domestic work not recognized under national labour laws.



Migrants in Detention



- SUHAKAM report 2003
- Overwhelming number of illegal immigrants
- Overcrowding, deplorable conditions, lack of medical facilities and inadequate nutrition.
- Spread of communicable diseases. Meningitis, TB etc.
- Poor conditions contribute to increased HIV infections.
- Limited access by the international agencies, NGOs, etc.
- Mental health issues among undocumented persons and refugees.
- RELA and the taking over of detention centers for illegal immigrants.

Healthcare Systems & Migrant Workers

- Privatization policies
- Shrinking healthcare budgets
- Costlier medical care
- Migrants and double fee policy
- Accesses for migrant workers become even more limited, resulting in self treatment, and delayed attention to curb diseases.
- Undocumented migrants do not access healthcare systems for fear of being found out.



Public Health & Migrant Workers

AGAINST

- Public health needs often cited as basis for restriction of human rights in the context of HIV and other health epidemics.
- HIV status – used to discriminate, segregate and isolate.
- Punitive measures drive away vulnerable groups and those in most need, such as undocumented migrants.

FOR

- Public health and human rights do not conflict but share common goals.
- Good public health policy should be rights based and helps empower marginalized communities
- PLWH & families can better cope with HIV, when rights based measures are instituted.

Recommendations

- Integrated and coordinated response between ministries towards labour migration needed.
- Access to treatment issues for the migrant worker, HIV & AIDS, sexual reproductive health issues, emergency issues need to be addressed in a holistic manner.
- Evolve a more rights based approach towards health testing of migrant workers, and deportation practices reviewed.
- Recognize domestic work as work, so that their health and well being issues are safeguarded.
- Speed up the sending home of migrants in detention centers, to avoid overcrowding in prisons. Adhere to the UNGA 1990 basic principles for the treatment of prisoners.

Healthy Migrants for Healthy Thailand

Nigoon Jitthai

Migrant Health Program Manager

International Organisation for Migration (IOM)

Migration Flow to Thailand



- ♦ Est. 2M migrants in all 76 provinces
- ♦ About 150,000 asylum seekers in 9 temporary shelters along Thai-Myanmar border
- ♦ Mainly irregular/undocumented migrants

Source: Mekong Migration Net Work

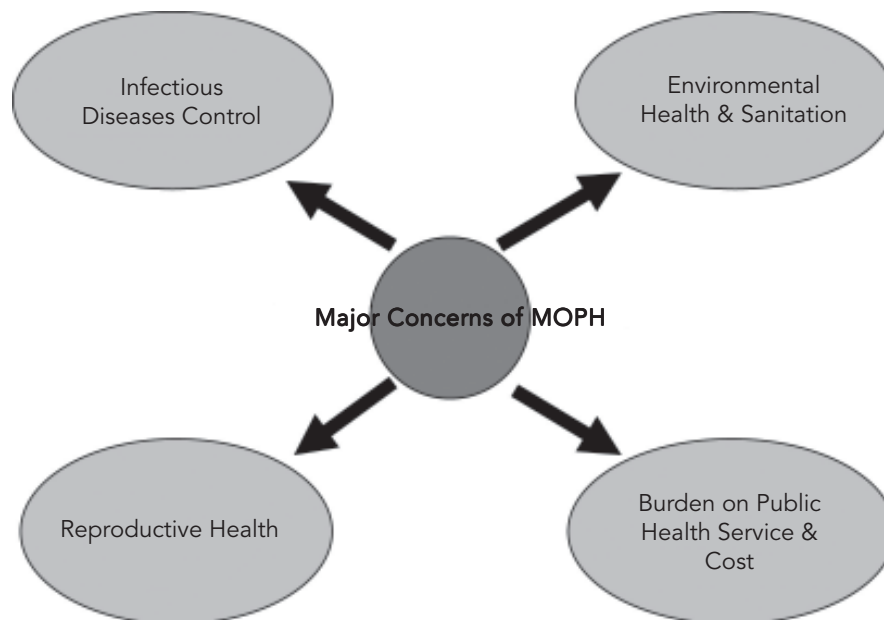
International Migrant Labours in Thailand

- Focusing on 3 nationalities
 - ♦ Burmese, Cambodian, Laos
- > 1.28M registered in 2004 (1st time w/ MOI)
 - ♦ including about 100,000 dependents
 - about 850,000 obtained work permit (MOL) & national health insurance “30 Baht Scheme” (MOPH)
 - ♦ the registered number reduces yearly
 - ♦ only about 500,000 registered in 2007

Why Worry?

- Health is the basic human rights
- Healthy migrants benefit communities at large
 - ♦ GDP
 - ♦ Stabilization of societies ? peace & security
 - ♦ Health economic
 - ♦ Country & regional diseases control & prevention

Concerns of MPOH



Concerns of MOPH



Migrant Health Exam by MOPH for Work Permit Since 2004

- ♦ Psychosis
- ♦ Active TB
- ♦ Leprosy (overt stage)
- ♦ Filariasis (overt stage)

- ♦ Syphilis (3rd stage)
- ♦ Drug dependence
- ♦ Alcoholism
- ♦ Pregnancy → dropped

Unit cost structure under the Universal

Coverage (30 Baht) Scheme: THB 1,300/year/person

- | | |
|---------------------------------|-----------|
| ♦ Administration | 130 (10%) |
| ♦ Health Promotion & Prevention | 206 (16%) |
| ♦ Curative care + referrals | 914 (70%) |
| ♦ High cost care | 50 (4%) |

IOM-MOPH Migrant Health Program (MHP) in Thailand



BACKGROUND

- 1999 : At 78th IOM Council Session in Geneva, the Royal Thai Government requested IOM to address the needs of displaced persons & migrants living along Thai-Myanmar border
- 2001-2002 : IOM-MOPH joint assessment in 8 priority provinces
- 2003 : The MOU signed between MOPH-IOM & official launch of the program for the course of 3 years
- 2007 : The MOU addendum signed for 3 more years with some amendments to the subprojects

Who Are Migrant Workers in Our Context?

- ♦ Camp residents
- ♦ Asylum seekers
- ♦ Displaced persons

- ♦ Professional workers
- ♦ Tourists
- ♦ Students

- ♦ Internally displaced persons
- ♦ Ethnic minorities
- ♦ Labor migrants

- ♦ Seafarers
- ♦ Construction workers
- ♦ Factory workers
- ♦ Sex workers
- ♦ Immigration detainees
- ♦ etc.

Program Goal: “Healthy Migrants, Healthy Thailand”

To assist the government to improve health & well-being of migrants & host communities in priority provinces of Thailand through the provision of comprehensive, participatory, sustainable and cost-effective health services.

Migrant Health Exam by MOPH for Work Permit Since 2004

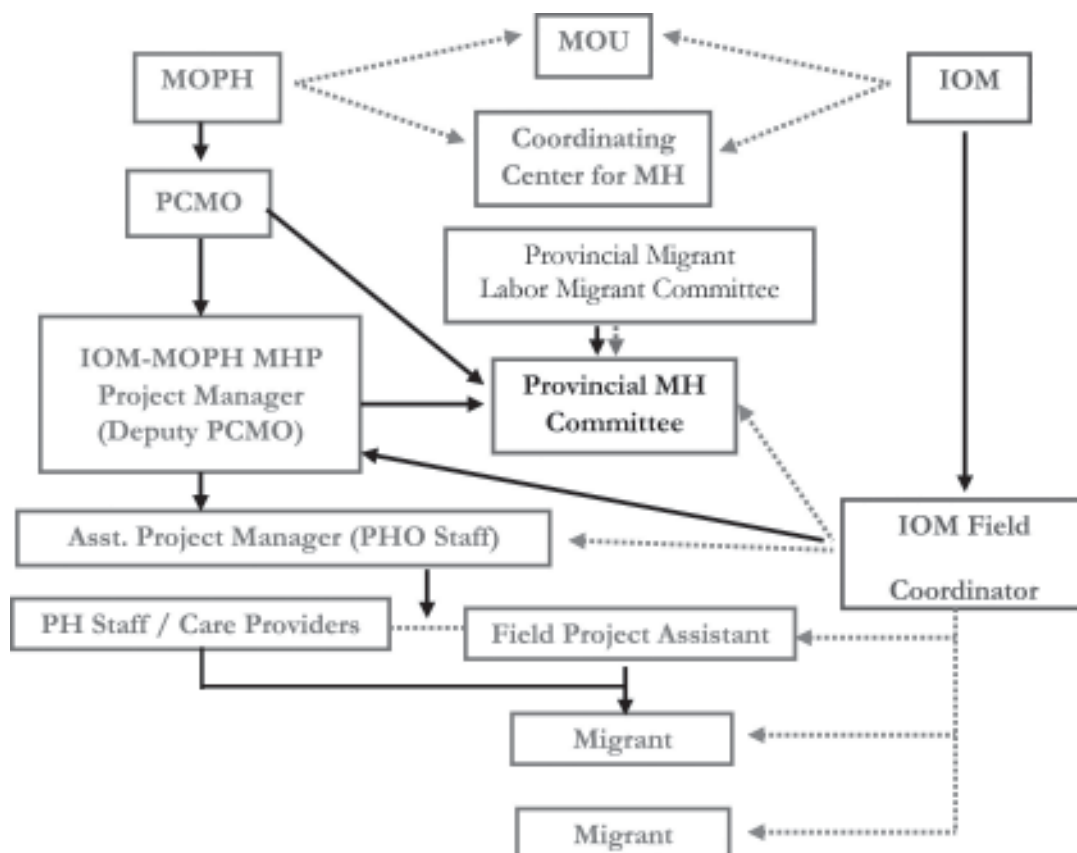


- Area with large # of (unregistered) migrants
- Source/potential source of infections
- High level of health concern and burden e.g. limited access to public health service
- Collaboration/request from local/central GOs

Program Strategies

- 1) Strengthening capacity of relevant GO & NGO counterparts
- 2) Increasing access to quality, migrant-friendly health services
- 3) Developing sustainable & replicable MHP model
- 4) Strengthening collaboration among stakeholders
- 5) Advocating & implementing migrant health policy
- 6) Responding to crisis/disaster faced by migrants

Program Strategies



Key Achievements-1

Strategy	Results
S1. Strengthening capacity of relevant counterparts	• >120 migrant CHWs and >1,000 migrant CHVs recruited, trained and actively involved in providing health services to their communities • >200 PH staff and 35 immigration officers trained

Key Achievements-2

Strategy	Results
S2. Increasing access to migrant-friendly health services (In 2006 alone)	• >700 outreach conducted for >120,000 migrants • >58,000 migrants received public PC • >6,100 received contraceptives • >22,200 vaccinations provided • 25 incinerators, 16 slow-sand filters, 12 latrine installed/built • >1,200 detainees received TB/HIV info • >400 detainees received TB services, etc.

Key Achievements-3

Strategy	Results
S3. Developing sustainable and replicable migrant health program model	• Program structure in 5 provinces established • 4 Provincial Migrant Health Committees established • Networks of local GOs, TAO, NGOs, CBOs established in all targeted provinces • MHP's activities integrated to the provinces' annual w/p

Key Achievements-4

Strategy	Results
S4. Strengthening collaboration w/ stakeholders (In 2006 alone)	• 24 events organized/co-organized with other stakeholders including the 1st National Migrant Health Conference

Key Achievements-5

Strategy

S5. Migrant health policy advocacy and implementation

Results

- 4 workshops with >130 participants
- Migrant Health Strategies for Thailand drafted in 2006 with GOs & NGOs
- With MOPH and WHO (2007-2008):
 - Pilot MHIS
 - Assessment on Migrant Healthcare Financing Options

Key Achievements-6

Strategy

S6. Humanitarian assistance for crisis/disaster affected migrants

Results

- Assessment conducted and found >7,000 migrants affected by Tsunami
- Distributed basic requirements (3 provinces)
- 138 migrant victims identified
 - 76 deaths discovered & released
 - 58 cremations assisted
 - 14 cases assisted in filing for GO compensation >13 cases approved

Key Achievements-7

Let's reduce HIV Vulnerabilities together.
We care you, you care yourself!

For Life,
With Love



- ♦ **HIV & Safe Mobility in GMS:**
Audion visual tool & life-skills
manual

- ♦ **Avian Influenza Awareness
Raising:** Audio visual tool &
PLA training manual



Key Achievements-8

- Increase health knowledge, awareness & access to PH services among migrants
- Improved attitudes of GO care providers & greater involvement / ownership of local authorities on MH management
- Positive change on MH policy
- Replication of the MHP model by NGOs and IOM in other countries (embedding to MOPH structure, MCHWs/MCHVs)

Good Practices-1

- Meaningful involvement of migrants (MIMP)
 - 1st program in Thailand to establish networks of paid, full-time migrant CHWs
 - Linkage of migrant CHWs & Thai VHVs
- “Migrant-friendly” public health services
 - Introduction of migrant “Family Health Folders”
 - 6 migrant health posts established
 - Health services in migrant’s languages
- Mutual partnership, effective collaboration
- Participatory approach
 - health authorities: from planning – evaluation
 - migrants
 - Thais in the host communities
- Sustainable & systematic approach
 - embed the project to PHO’s structure focusing on human capacity strengthening

Good Practices-2

- Multi-sectoral approach
 - facilitate active engagement of NGO & non-health sectors (TAO, Labor Dept., business owners, etc) & Thais host communities to address human security concerns
- Comprehensive programming
 - community health development approach
- Cost-effectiveness approach
 - leverage the limited resources, avoid duplication, integrate project to the GO workplan, etc.

Key Factors to Success

- Commitment from relevant GO agencies
- Clear vision on migrant health solutions of the team, particularly the project manager
- Periodic, systematic monitoring & technical support to the project implementation by the provincial team
- Awareness & responsibility of CHWs in helping their peers and communities
- Understanding & cooperation from Thais in the host communities
- Integration of MCHWs to public health facilities
- Involvement of the health authorities at central & local levels early in the stage
- Regular communication w/ national authorities
- Transparency & co-management of the program/activities & funding at field level

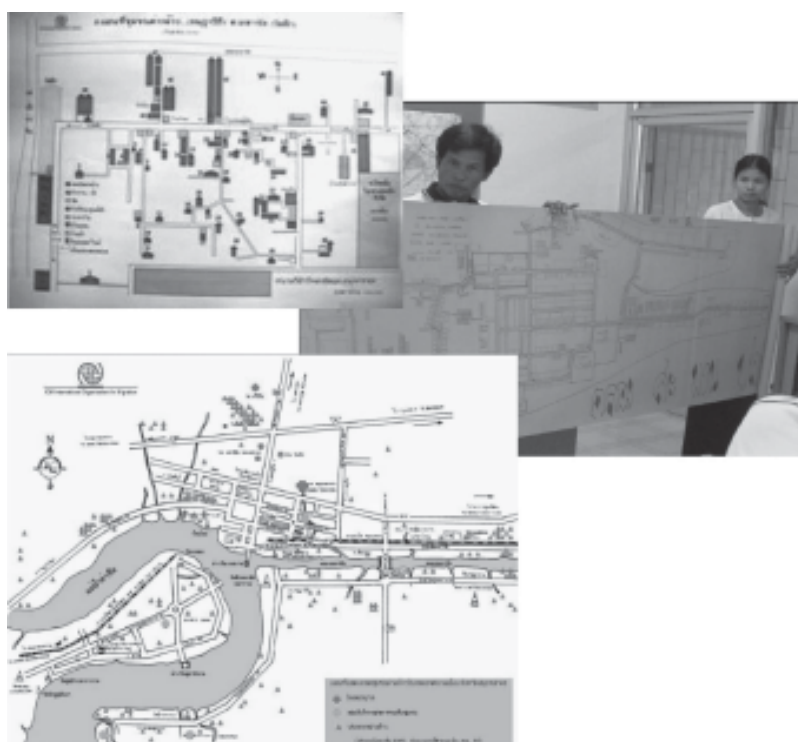
Key Factors to Success

- Understanding & cooperation from Thais in the host communities
- Integration of MCHWs to public health facilities
- Involvement of the health authorities at central & local levels early in the stage
- Regular communication w/ national authorities
- Transparency & co-management of the program/activities & funding at field level

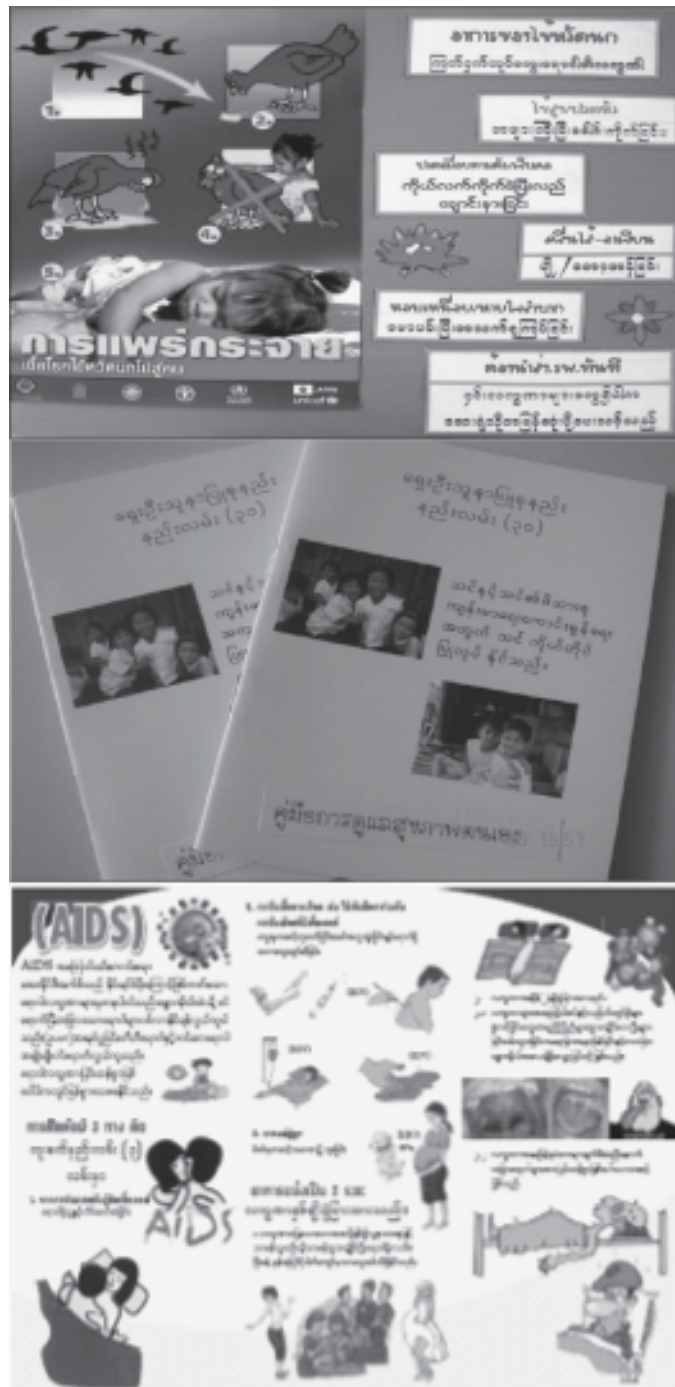
Ready to Take Off: Trained MHCWs & MHCVs



Community Maps Produced by MHCWs & MHSV



IEC Materials Produced by MHCWs



Their Activities

The Government Nurse Provided ANC to a Migrant Mother at the Mobile Clinic



Migrants and some Thais received primary care at the mobile clinic



Their Activities

MCHWs assisted GO care providers at the mobile clinic



MCHW provided medical interpretation to migrant patients



Their Activities

MCHWs conducted outreach growth monitoring and immunization



Their Activities



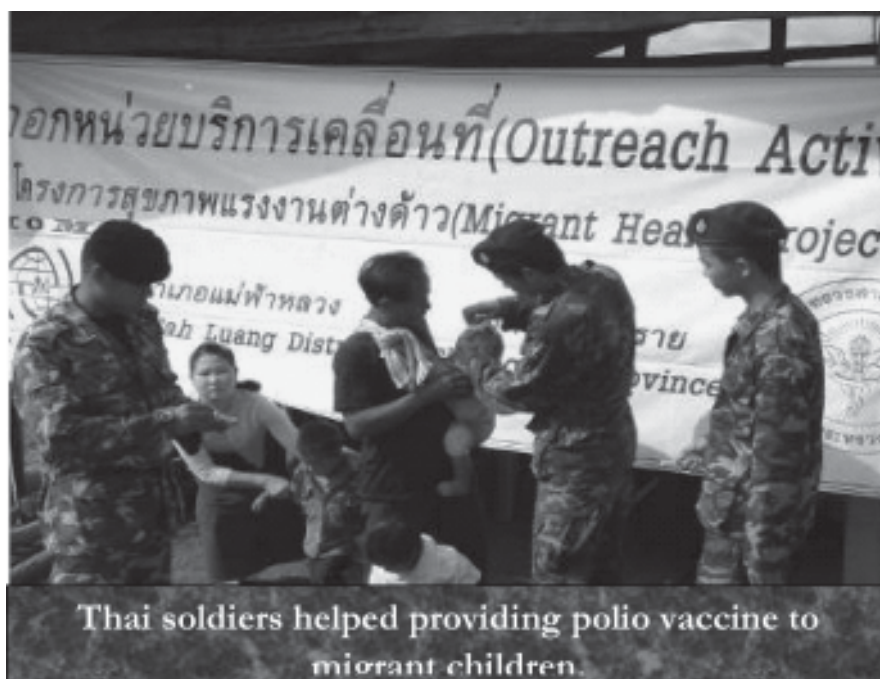
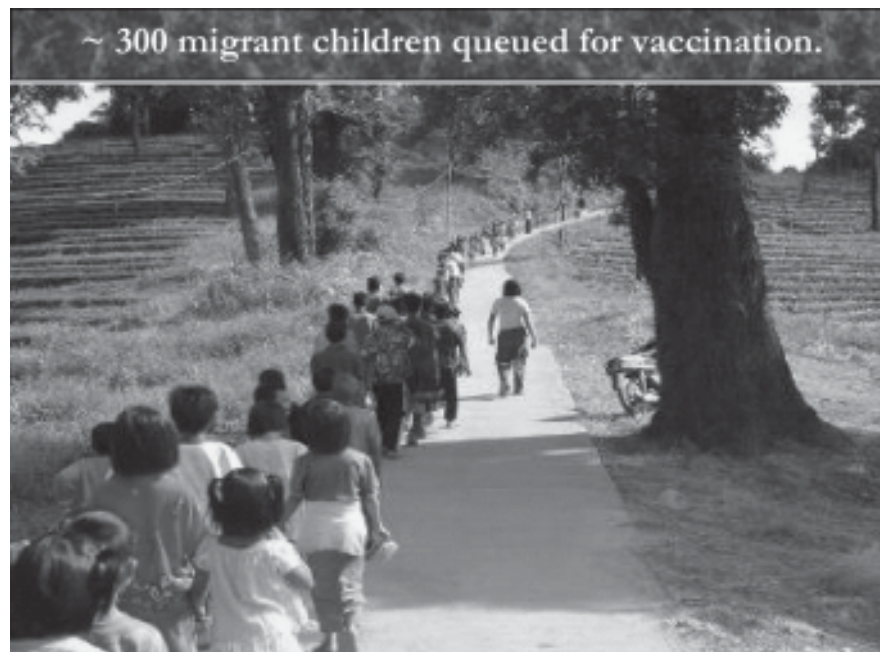
MCHWs conducted outreach growth monitoring and immunization



Their Activities



Their Activities



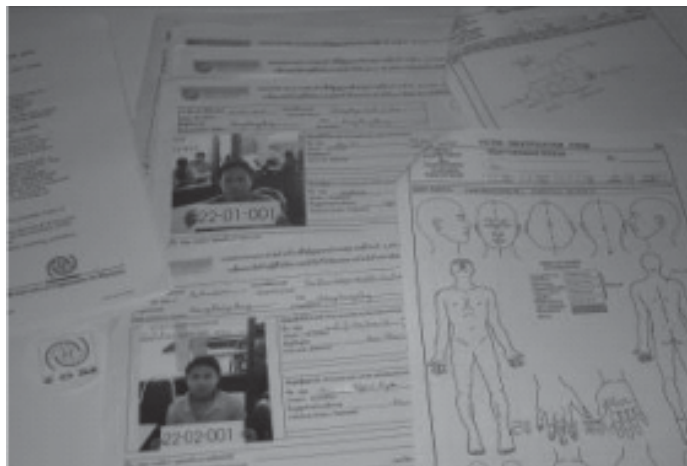
Their Activities



Radio sets distributed to both Thai and migrant for disaster preparedness



Migrant tsunami victims identification form



Their Activities

Released migrant tsunami victims from the cemetery



Assisted migrant families w/ the blessing ceremony & cremation

Their Activities



Tsunami Walk Rally



Their Activities

Family health folders and MHIS



Bilingual signs at the public health facilities



Their Activities



Environmental health & sanitation



Key Achievements-7

1. Mobility is a complex & time sensitive issue.
2. Migrants can be defined but hard to reach.
3. No access = No data, No data = No problem / is the problem!
4. Lack of standardized health indicators for migrants in Thailand ? develop M&E system i.e. database, MHIS
5. High mobility among some targeted migrants
 - Monitoring mobility through outreach
 - Focus on human capacity building
 - Network business (franchising)
6. Lack of awareness on the right to health and powerlessness of migrants
 - Awareness raising, facilitate the access
7. Stigma & discrimination towards migrants
 - Sensitization
8. Lack of qualified staff & staff turnover
 - Develop & improve HR development plan
 - Team approach (PH staff pooling)
9. No clear migrant and migrant health policy, although improving ? lack of interest on GO in some sites
 - Advocate together with MOPH on policy
 - Exposure to the program ? cross-fertilization
 - Peer support
10. Limited \$\$ with too many small grant projects
 - Tap into regional projects
 - Activities prioritization
 - Portfolio management
 - Migrant health care financing options assessment

With Sincere Thanks To:



Social and Cultural Rights of Migrant Labors in Malaysia

An Overview from a Rights based Perspective

Yap Swee Seng

Executive Director SUARAM

Introduction

Malaysia is the host to an estimated 2.6 million migrants, both documented and irregular, mostly from South and Southeast Asian countries. Out of this, about 150,000 are political asylum seekers and refugees, primarily from Indonesia, Burma and southern Philippines.¹ In order to survive in Malaysia, most of these asylum seekers and refugees are left with no choice but to take the risk by joining the undocumented work force.

The most authoritative international instrument on social and cultural rights is the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Unfortunately, despite being a member of the United Nations Human Rights Council, Malaysia has yet to ratify this most fundamental international bill of rights, let alone the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention). Malaysia is also not a party to the 1966 International Covenant on Civil and Political Rights (ICCPR). The only two international human rights instruments that Malaysia has ratified are the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1989 Convention on the Rights of Child (CRC).

While all rights are interdependent and indivisible, this paper will focus on the state of the social and cultural rights of migrant laborers in Malaysia. It will examine the enjoyment of the social and cultural rights of migrant laborer in Malaysia and the problems faced by the migrant laborer. It proposes policy reforms that are needed to realize the full enjoyment of the social and cultural rights for the migrant laborer in Malaysia.

Social and Cultural Rights in International Law

In the preamble of the ICESCR, it recognizes that human rights derive from “the inherent dignity of the human person”. This is not only true for civil and political rights, but also economic, social and cultural rights. What human dignity can we speak about when many continue to be deprived of basic needs such as clean water, food, proper clothing, shelter, healthcare, education? A person’s dignity would be seriously undermined as well if he or she is denied of cultural, linguistic or religious identity.

1. Suaram (2007), Malaysia Human Rights Report 2006: Civil and Political Rights, p.101.

The ICESCR spells out the economic, social and cultural rights in part III, which include the right to work (Article 6), the right to of everyone to the enjoyment of just and favorable conditions of work (Article 7), the right to form and join trade union (Article 8), the right to social security (Article 9), the protection to family, especially mothers before and after childbirth and children (Article 10), the right to an adequate standard of living, including adequate food, clothing and housing (Article 11), the right to highest attainable standard of physical and mental health (Article 12), the right to education (Article 13) and the right to take part in cultural life (Article 14).

There are also provisions in the CEDAW and the CRC that protect and promote the social and cultural rights.

CEDAW stipulates the obligation of the state parties to protect women from discrimination in determining nationality of their children (Article 9), in the field of education (Article 10), employment (Article 11), healthcare (Article 12), economic and social life (Article 13) and recognizes these similar rights for the women in rural areas (Article 14).

CRC protects child's right to privacy (Article 16), right to health (Article 24 & 25), right to social security (Article 26), right to an adequate living standard (Article 27), right to education (Article 28), right to own culture, religion and language (Article 29 & 30), right to rest and leisure (Article 31), among others.

State of Social and Cultural Rights for Migrant Laborers

While the general state of enjoyment of social and cultural rights by migrant laborers in Malaysia is unsatisfactory, there is still a vast difference between documented and undocumented migrant laborers when it comes to the extent of the enjoyment of these rights. The other two groups that are indirectly linked to the undocumented migrant laborers, the stateless children and the refugees, suffer almost similar fate with undocumented migrant laborers due to their status.

Documented Migrant Laborers

Documented migrant laborers are legally registered but there is a vast difference in terms of enjoyment of social and cultural rights between the highly skilled migrant laborers or professional foreign workers and the low skilled or unskilled migrant laborers.

Most of the low skilled or unskilled migrant laborers that are deemed as "3D" – dirty, dangerous and demeaning, which are shunned of by local people. These are low-paid jobs in sectors such as construction, agriculture and services. In general, their wages are too low to sustain an adequate standard of living when it comes to food, housing, clothing etc.

For instance, the ICESCR defines adequate food as "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture".² It further defines the right to housing as "the right to live somewhere in security, peace and dignity".³

2 General Comment 12 of the UN Committee on Economic, Social and Cultural Rights.

3 General Comment 4 of the UN Committee on Economic, Social and Cultural Rights, para 7.

While migrant laborers in Malaysia living in overcrowded low cost apartment is a common phenomenon, it is no where near to the adequate criteria set by the Committee on ESCR in terms of the right to housing such as principle of availability of services, materials, facilities and infrastructure essential for health, security, comfort and nutrition, principle of habitability with adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors, principle of cultural adequacy etc.⁴

On the right to health, migrant laborers are made to pay medical fee that is double of what is paid by locals. This is not only hampering the access to healthcare by the migrant laborers, especially those who are earning low wages, it also constitutes discrimination against migrant laborers. The ICESCR clearly stipulates that the rights in the Covenant must be “exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵ The Committee on ESCR further emphasizes the principle of non-discrimination that “health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds” and “economically accessible.”⁶

On the right to education, migrant laborers with children face huge difficulties. Public schools in Malaysia practically do not accept children of migrant laborers and private schools or international schools are too expensive for the majority migrant laborers who are earning a low income.

As for the domestic workers, most of them are deprived of their rights to rest and leisure as most of them are not given a rest day in a week by their employers. The isolated environment where they are working further limits their freedom of movement, and thus highly restricts their right to participate in social and cultural life.

The main reason for the failure of migrant laborers to enjoy their social and cultural rights fully lies with the low income that they received. Most migrant laborers working in Malaysia are only earning an average wages of RM350-RM500.

In its minimum wage campaign for the workers, the Malaysian Trade Union Congress (MTUC) has demanded RM900 as the minimum income for a person based on essential and basic needs in 2000. It has further demanded a RM300 of cost of living allowance (COLA).⁷ In another word, the minimum income for an adequate standard of life in Malaysia would be RM 1,200. This is a stark difference from what has been received by most migrant laborers.

Article 2(1) of the ICESCR requires state parties to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Therefore, while government cannot be hold accountable for the livelihood of each and every individual migrant laborer in the country, it however, has the obligation to adopt legislations on minimum wage to ensure the full realisation of economic, social and cultural rights.

4 General Comment 4 of the UN Committee on Economic, Social and Cultural Rights, para 8.

5 Article 2(2), International Covenant on Economic, Social and Cultural Rights,

6 General Comment 14, UN Committee on Economic, Social and Cultural Rights, para 12.

7 Memorandum of MTUC to the Malaysian Government 2007

Undocumented Migrant Laborer

As all dealings with the government agencies in Malaysia would require identity card, passport or work permit, undocumented migrant laborers face a much grimmer fate in Malaysia in comparison with the documented migrant laborer.

Without a work permit, undocumented migrant laborers are generally working irregularly with a much lower wages compared to those documented migrant laborers. There are also many instances where employers exploited them in work and refused to pay wages due to their vulnerable undocumented status. Their extremely low and irregular wages of severely undermine their access to adequate food, clothing, housing, social security, healthcare, education and they could not pay for the bills full enjoyment of social and cultural rights.

The requirement of proper documentation in Malaysia also practically means that the door for the access to public services such as education, healthcare, housing, social security are also closed to undocumented migrant laborers. For instance, an undocumented migrant laborer that seeks medical treatment in government hospital would be reported and be arrested.

In the private sector, undocumented laborers are also confronted with many difficulties. For instance, the Immigration Act prohibit the renting of a house to undocumented persons.

Stateless Children

Many undocumented migrant laborers give birth and raised their children in Malaysia without registration with the Malaysian government and proper documentation. These children become stateless and without documentation, they are denied of all access to healthcare, education, housing and employment opportunities.

To make matters worse, the indiscriminate and insensitive raids and deportation of undocumented migrant laborers by the Immigration Department and RELA often separated the parents from their children. These stateless children become street children, as exemplified in the mass deportation of undocumented migrant laborers in Sabah in 2002 that practically left the state with thousands of stateless, parentless and homeless street children.⁸

Refugees

Malaysia is not a party to the 1951 Convention relating to the Status of Refugees 1951 and the 1967 Protocol relating to the Status of Refugees, therefore the government is not making any difference between economic migrant laborers and asylum seekers that fled political persecution in their home countries.

As these asylum seekers awaiting registration and the eventual resettlement to a third country by the United Nations High Commission for Refugees (UNHCR), a process that may take years, these asylum seekers may have to work in order to make a living.

8 Malaysiakini, "Children 'Orphaned' as Families Split by Deportation", 6 September 2002.

Refugees suffer the same kinds of exploitation in employment as experienced by undocumented migrant laborers. Wages are low and irregular. They had no access to workers compensation. This led to most asylum seekers living their life with minimum food, clothing and shelter. Some of them are forced to stay in makeshift camps in the forest or work place to avoid arrest, thus depriving them further of proper access to clean water and proper sanitation facilities. There is hardly any standard of living that can be spoken of.

Due to their undocumented status, asylum seekers and refugees faced similar fate as any other undocumented migrant laborer in terms of total denial of access to education, employment, housing etc.

On the right to education, public schools do not enroll refugee children. The refugee communities are forced to organize their own classes for their children or attended classes organized by NGOs. The CRC obliges state party to make primary education compulsory and free to all. The policy of Malaysia of not enrolling refugee children in primary school is a violation of child rights and its obligations under the CRC.⁹

On the right to healthcare, refugees with UNHCR documents receive medical services at half price. They also receive free HIV/AIDS treatment from public health services. However, despite being a party to the CRC, Malaysia does not provide free public health services to refugee children.¹⁰

The Question of Undocumented Persons

Many governments have justified their discrimination in social and cultural rights against undocumented persons based on their status of non-citizen and the lack of resources.

However, from a rights based perspective, all persons should enjoy all human rights equally without discrimination.

Article 2(1) of the ICCPR obliges state parties to “undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction on the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

The Human Rights Committee that monitors the implementation of the ICCPR further explained that “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”¹¹

What about economic, social and cultural rights? Article 2(2) of the ICESCR declares that state party to the Covenant should guarantee these economic, social and cultural rights “without discrimination of any kind as to race, colour...national or social origin...or other status.”

9 Article 22 & 28 of the Convention on the Rights of the Child.

10 World Refugee Survey 2007, US Committee for Refugees and Immigrants, p.89.

11 General Comment No 15, UN Human Rights Committee.

However, Article 2(3) of the ICESCR makes an exception to this rule for developing countries by stating that “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

Thus, as a general rule, this exception to the rule of equality must be construed narrowly (only if they serve a legitimate State objective and are proportional to the achievement of that objective) and not to the detriment of human rights. In another word, states may draw distinctions between citizens and non-citizens on economic rights but not on social and cultural rights.¹²

Conclusion

The exploitative low wages in Malaysia for migrant laborers cannot be a legitimate objective and the deprivation of their economic rights is detrimental to the enjoyment of social and cultural rights of migrant laborers. Malaysian government must legislate minimum wage law and policies to ensure the enjoyment of an adequate standard of living for all workers, including migrant laborers.

As for social and cultural rights, there should be no discrimination against non-citizens, whether they are documented or undocumented. Therefore,

1. As a state party to the CEDAW, Malaysia should not discriminate against domestic worker and must amend the Employment Act. Foreign domestic workers must be given a day off in a week, as any other local worker, in order to respect the right to rest and leisure and the right to participate in social and cultural life.
2. Malaysian government should live up to its obligations and commitment made under the ratification of the Convention on the Rights of the Child by providing compulsory primary education free to all, including the children of migrant laborers and refugees regardless of whether they are documented or undocumented.
3. Malaysian government should stop immediately the indiscriminate and insensitive raids and arrests on undocumented migrant laborers and refugees to avoid separation of the parents from their children and contributing to homeless and stateless street children. Malaysian government also has the obligation under the CRC to assist in the reunion of separated parents and children.
4. RELA violent raids on migrant laborers and refugees, such as breaking into houses violently, burning down their shelter, sexual harassment and manhandling migrant laborers and refugees cannot be condoned. Malaysian government should abolish the RELA to avoid further violations of the rights to housing, right to health, right to education and other social and cultural rights.
5. Public health services should be opened to all migrant laborers regardless of their documented or undocumented status. Medical services should be provided free to all refugees, especially children refugee.
6. Malaysia must withdraw all its reservations made to the CEDAW and CRC.

12 “The Rights of Non-Citizen”, Office of the UN High Commissioner for Human Rights, p.12.

As a member of the UN Human Rights Council, Malaysia must show its commitment to the protection and promotion of human rights, by ratifying the rest of the core international human rights instruments, especially the ICESCR, the ICCPR, the Migrant Workers Convention and the Convention and Protocol relating to the Status of Refugees.

Malaysia should also recognize the huge contribution of migrant laborers to our economy. Therefore, treating migrant laborers as a threat to security under the Internal Security Ministry is not only inappropriate, it does not bode well with the membership of Malaysia with the UN Human Rights Council. Migrant laborers must be treated as any other human beings and Malaysia must formulate a comprehensive policy on migrant laborers based on human rights principles and framework.

Violence and Xenophobia towards Migrant Workers

Anil Noel Netto

Treasurer Aliran

We live in a globalised world, where borders are increasingly open for people to move around. Budget airlines, people can book their tickets on the internet, hop on a plane and explore foreign lands.

However, the borderless world is only available to a privileged minority. The concept of a borderless world is an illusion for the vast majority of humanity. The poor and the working class find it difficult to move in search of work, much less leisure.

Out there, it is a world of corporate-led globalisation, which places the interests of capital (and those who own or control it) ahead of labour (and the rights of workers). The global economy facilitates movement of capital, but restricts movement of workers who toil in assembly lines and sweat shops. The corporate sector is interested in unregulated labour – workers with few rights that can be enforced. Migrant workers fit neatly into this category.

As a result, labour is turned into a commodity and the rights of workers are whittled away. If the rights of Malaysian workers have been weakened, how much more dire are the circumstances migrant workers?

Violence and Xenophobia

Foreign workers in Malaysia are more vulnerable to abuse and exploitation than locals.

It's a paradoxical relationship - almost a relationship of convenience for Malaysian employers. On the one hand, many Malaysians profit from migrant workers and expect them to do the job that Malaysians shun – the dirty, difficult and dangerous work. On the other, migrant workers are perceived to be undesirable “aliens” and therefore in need of strict controls.

They are granted few rights. Instead, they are seen as chattels to be bought or hired for a specific period of time and then disposed before they demand higher wages or become more assertive.

The commoditisation and the temporary nature of their labour make them vulnerable to exploitation. Indeed, many middlemen stand to make profits from the inflow of labour.

Who profits from migrant workers? The list is long:

- the Malaysian government (through foreign workers' levies),
- fomema and doctors (through fees for medical check-ups),
- insurance companies (through purchase of medical insurance),
- the Health Ministry (through higher charges for foreign patients),
- recruitment agents, both Malaysian and foreign (through substantial agents' fees),
- employers, especially those in the plantation, manufacturing and construction industry (through savings resulting from low wages),
- short-term labour contractors, including outsourcing labour contractors and agents who hire out foreign part-time maids (through middle-man profits).
- corrupt and abusive officials (through protection money and extortion).
- RELA personnel (through allowances)
- airlines and ferries (through fares for incoming and outgoing workers)
- phone companies (through calls made by migrant workers to their home countries)

How Malaysians Attitudes are Shaped

But while many Malaysians profit from migrant workers, they are also often seen as undesirable. Why is that? Because migrant workers take up jobs that Malaysians shun, employers tend to see themselves as superior. The lowly paid workers are seen as uneducated with inferior cultural values. They may even be seen as less than human and when this happens we hear of atrocious acts of violence and abuse.

The basic rights that Malaysians take for granted – EPF, overtime pay, rest days, annual leave – are often not granted to migrant workers. It is even difficult for them to join trade unions.

Compounding this is the fact that migrant workers are often only seen and not heard. They are all around us – in restaurants, airports, hotels – but Malaysians seldom actually talk to them or listen to their experiences in our country. Their voices are rarely heard unless a problem or abuse case crops up and even then, their views receive cursory coverage.

The mainstream media are largely responsible for this state of affairs. Although foreigners make up roughly about 10 per cent of our population, we rarely hear their voices on television and radio, nor do we hear their views in print.

Because they do the work that many Malaysians shun, they are sometimes seen as less than human, with no feelings, to be subjected to long hours of work without rest. And because their voices are largely unheard, they gradually turn into "objects" to be feared. Prejudice, xenophobia and even violence creep in.

Not surprisingly, migrant workers are often blamed for social problems and crime. They are charged higher rates for medical treatment in government hospitals even though employers already pay a foreign workers' levy.

As Marina Mahathir has observed:

The bogeyman tactic is rather like Margaret Thatcher starting a war over some distant islands in order to distract the populace from local economic issues.

Here, we see the constant blaming of foreign workers for everything, from lack of jobs, to crime and violence, and to the spread of diseases. None of it can really stand up to scrutiny.

It may be politically correct to complain about foreign workers taking jobs from locals, but these are not jobs that locals want.¹

She adds that it is not true that foreigners are running around full of disease and infecting locals: "Malaysians still make up the vast majority of people infected with HIV, and they are certainly infecting each other and not foreigners."

Because they are seen as undesirable objects, it becomes easier to resort to violence and dehumanising forms of punishment which we would rarely impose on expatriate workers from the developed nations.

We see such dehumanising conditions in the long working hours – often without overtime pay – that Malaysian employers inflict on foreign workers. Workers are given cramped accommodation either in cabins or overcrowded residential houses. Domestic workers are subjected to almost slave-like working conditions and are vulnerable to verbal and sexual abuse.

The conditions binding the migrant workers to a single employer for the duration of his or her stay here leave them even more vulnerable. They cannot switch employers if they are abused or exploited. If they decide to return home earlier than planned, they usually have to contend with huge debts at home as a result of loans taken to finance their trip here.

We can also see violence in some of the crackdowns against undocumented workers and the whipping sentences meted out to foreign workers, not to mention the harsh and at times dehumanising conditions at detention camps.

The rise in xenophobia towards migrant workers is also attributed to the increasing crime rate and the large numbers of unemployed graduates. This sort of xenophobia has no basis. Police statistics show that while serious crime rose 40 per cent in 2006, only 2 per cent of the incidents were attributable to foreign workers.²

According to the Office of the United Nations High Commissioner for Human Rights, "The deliberate association of migration and migrants with criminality is an especially dangerous trend, one which tacitly encourages and condones xenophobic hostility and violence. Migrants themselves are criminalised, most dramatically through widespread characterization of irregular migrants as 'illegal', implicitly placing them outside the scope and protection of the rule of law."³

Ironically, the rise in crime rate could be due to our economic development, which concentrates profits in the hands of a few while alienating the working class. Working class Malaysians are finding

1 Mahathir, Marina, "The bogeyman's to blame", <http://musingwithmarinamahathir.blogspot.com/2008/01/bogeymans-to-blame.html>
 2 Kuppusamy, Baradan, Inter Press Service, "Malaysia tries to shackle foreign workers" reproduced in Asia Times Online http://www.atimes.com/atimes/Southeast_Asia/IC03Ae02.html
 3 <http://www2.ohchr.org/english/bodies/cmw/faqs.htm>

it increasingly hard to cope with the rising cost of living even as the huge corporations rake in hefty profits. Thus, they find it easier to point fingers at migrant workers as the source of their woes.

There are a few other reasons for the rise in xenophobia. There is a racial dimension: the workers are seen as different, coming from countries that are less developed. They speak a different language and practise a different culture, which we are not accustomed to.

The temporary and transient nature of contract labour that excludes workers from the basic rights of citizens is another factor. Another possible factor is the allocation of dirty, degrading and dangerous work to migrant workers.

Double standards

If we study the problem carefully, we can also see double standards in our treatment of migrant labour vs. expatriates:

Migrant workers

- Seen as “labourers” or manual workers.
- Often cheated. Contracts sometimes not worth the paper they are written on.
- Compulsory Fomema medical checks.
- Harassed on the streets and often asked for papers.
- Passports usually held by employers. Thus, they are “trapped” and suffer in silence.
- Usually negative media coverage - frequently linked to crime or social problems.
- Little legal recourse or access to legal representation if employers fail to live up to terms of employment.
- Deplorable, cramped accommodation.
- Usually paid wages at or below the poverty line.
- Unlikely to be given much annual leave.
- Often not medically insured resulting in higher medical bills at general hospitals.
- Agents and middlemen make profits from various “commissions”, fees and levies.

Expatriates (Why Are They Not Called Migrant Workers, Too?)

- Seen as “knowledge workers”
- Usually have proper, enforceable contracts.
- Unlikely to be whipped or sent to immigration detention centres.
- Usually in possession of their own passports and can leave the country if dissatisfied with employers or working conditions.
- Favourable media coverage especially in the business press.
- Legal options and representation more readily available.
- Usually above average accommodation provided.
- Usually highly paid.
- Usually given generous perks - including annual leave and medical insurance.
- Usually no agents or middlemen involved. Employers deal directly with the workers concerned.

So why the discrimination? Is it based on racism thing, or is it blue-collar/white-collar discrimination? Or could it be that the former belong to the working class while the latter are part of the capitalist class and closely connected to the elite circles of power and business? Why can't they all be called - and treated as - "expatriate workers", with the same rights and privileges? Changes are needed in laws and policies, and equally important, changes in attitude.

In order for attitudes to be changed, the media can play an important role.

- Raise awareness of migrant workers' rights
- Highlight human rights violations
- Give migrant workers a voice
- Show their important and positive contributions to the Malaysian economy
- Treat migrant workers as equals of Malaysian workers
- Promote recognition of household work and the role played by maids

In the Declaration and Programme of Action at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, South Africa, 2001), states were encouraged to conduct information campaigns to ensure that residents in the host country receive accurate information about migrants and migration issues. Such information should include the migrant workers' positive contribution to the host society.

In the case of Malaysia, the migrant workers' positive contributions have enabled the country to record steady economic growth. Domestic maids have allowed both parents to enter the job market. Through their blood, sweat and tears, migrant workers have also built some of the most prominent landmarks in Kuala Lumpur such as the Petronas Twin Towers and the KL International Airport, and toiled in the plantation sector.

Unfortunately, the media are controlled by corporate interests and influenced by their sources of revenue: the advertisers from the corporate sector. The media therefore consciously or unconsciously imbibe the values of the corporate sector. Thus, sadly, they are unlikely to give much space for migrant workers to make their voices heard.

In conclusion, here are some possible measures that should be taken to improve the lot of migrant workers and protect them from violence and xenophobia:

- Ratify the International Convention on the Protection of Rights of all Migrants and Members of their Families.⁴
- Ensure that migrant workers are treated no differently from Malaysian workers.

4 "The entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families will reinforce and complete a series of other provisions under the main United Nations human rights treaties. Many of the provisions of such treaties in fact provide for the protection of migrants. Particularly relevant in this regard are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. The Committees monitoring the implementation of these treaties have on many occasions expressed concern that often there is a failure to implement their provisions without discrimination in respect to migrants. Also, the ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) contain provisions designed to protect migrants." - Office of the UN High Commissioner for Human Rights

- Ensure that Government agencies coordinate efforts to protect migrant workers.
- Introduce standard employment contract that protects the rights of migrant workers.
- Introduce special permits for migrant workers to stay on while investigations, inquiries and court proceedings are going on.
- Introduce orientation courses to educate migrant workers about their rights and who they can contact in case of emergencies.
- Lift controls on the media so that migrant workers have an avenue to put across their grievances and make their voices heard.
- Ensure that migrant workers have official channels to air their grievances.
- Allow migrant workers to join trade unions to protect their rights.

Rights of Migrant Workers

Expectations and Challenges

David Abraham

Vice President for Foreign Affairs IPHI

Recent decades have shown without a doubt that migrant workers have become an important part of several economies around the globe, both receiving countries as well as the sending country. Malaysia, with its booming economy and development, has seen an increase in the presence of migrant who are needed to supply its hunger for workers that could not be fulfilled by its local work force. This situation has in part been caused by the increase in economic standing of local Malaysians, thus causing the unwillingness of the local work force to engage in rough and manual labor, this creates a new market for foreign migrant workers. This situation long established in countries such as the US is now appearing in Malaysia.

This new market has quickly been filled by migrant workers from less affluent nations, such as fellow ASEAN members, as well as further away. The fellow ASEAN member countries such as The Philippines, Indonesia and Thailand have “exported” more than 2 million migrant workers to Malaysia. The majority of this number is Indonesian migrant workers in Malaysia because of similarities in culture, religion as well as language, thus eliminating culture shock as well as language barriers between them and their employers.

It is undeniable that many of the large construction projects in Malaysia would not have been a reality without the presence of Indonesia’s large migrant workforce. This social group represents the third largest one in Malaysia after the Malays (Bumi Putera—known in Indonesia as Pribumi) and the Chinese Malaysians, which have been a formidable political power base. These Indonesian migrant workers need the jobs as much as the Malaysian labor market needs the workers. The situation could be a mutual symbiotic relationship.

The Indonesian migrant workers clearly want to escape economic chaos in Indonesia, where jobs are hard to come by, and the Malaysian labor market has become used to the presence of these migrant workers, and thus a certain degree of dependence has developed. Should an abrupt stop in this supply of migrant workers take place, it could have far-reaching consequences in the construction industry as well as others. There would be the economic consequences to migrant workers back home or the economic consequences for migrants would also create problems for the Government of Indonesia, which is still trying to recover from the Asian crisis in 1997.

Therefore, we see that both parties (all three as a matter of fact), have an interest in maintaining the status quo. Cooperation needs to be carefully planned and set into motion in order to prevent further problems (Problems exist on both sides as a side effect of the presence of Indonesian migrant workers seeking employment in Malaysia). In contrast, the Government of The Philippines

has been actively involved in negotiating better working conditions for their migrant workers in Malaysia and has been successful to a certain extent, unlike the Indonesian Government. Without similar steps by Indonesia, after suffering unfair conditions and without even inhumane treatment, the Indonesian migrant workers could come to a conclusion that "enough is enough" and refuse to be placed in Malaysia. (Already, some migrant workers refuse to be placed in some Middle Eastern countries, where many Indonesian migrant workers have met with unfortunate fates or even death.)

It is crucial that solid action to protect the rights of Indonesian Migrant workers be implemented under the laws of Malaysia. These migrant workers need to receive legal aid, due process and equality before the law. The Constitution of Malaysia actually already addresses these issues, however some ambiguities in terminology, has caused the denial of rights to Indonesian Migrant Workers. One example is the term "persons" in part II titled "fundamental liberties" point (1) states that "*No person shall be deprived of his life or personal liberty, save in accordance with law*" Some would argue that persons includes any human being, as stated in the universal declaration of human rights. However, the term person could mean *only* Malaysians citizens. If this is the case, this would mean that migrant workers are not protected under the constitution.

Another issue faced by Migrant Workers is disputes between these workers and their employers. In this situation, these migrant workers initiate legal action after obtaining representation from some legal aid body (lets take the Malaysian Bar Council). The entire process is then halted by the fact that the employer could revoke the migrants' work permit, resulting in deportation proceedings, without due process of law. How would these migrant workers defend their rights when faced with a dilemma like this?

Another issue faces migrant workers. Any legal representation provided by the Malaysian Bar Council as stated above, is on a pro bono basis, one would have to assume that it is very limited in quality as well as quantity, since at the end of the day no lawyer can represent clients on a pro bono basis all the time, lawyers were asked to practice law on a pro bono basis all the time, it would defeat the purpose of studying law and becoming a lawyer.

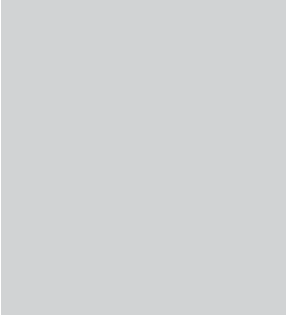
The fact that 95% of Indonesian migrant workers in Malaysia who face legal issues are NOT represented by council illustrates the problems with this legal structure. The other 5 fortunate enough to be represented by council, receive much lighter sentences or are found not guilty. All this, despite the fact that the Indonesian Government charged a levy on migrant workers departing for Malaysia, that is supposed to pay for some form of insurance to guarantee legal representation. Reports have been made that these so-called lawyers were more a token than actually providing the necessary representation to these migrant workers who are confused. In some instances they have little knowledge of Indonesian laws and regulations, so one can imagine how limited these individuals' knowledge must be of Malaysian laws and regulations, in spite of the crash course in Malaysian law they receive prior to their departing for Malaysia. Some have criticized this as being another scheme to extort from migrant workers every last possible cent. The question that cannot be avoided is where is the money that has been collected from the migrant workers find its way to? Just for the record, a high ranking Indonesian diplomat at the Indonesian Mission in Kuala Lumpur was recently arrested for allegedly being involved in collecting illegal moneys from these migrant workers. Just an official placed in the post to protect these migrant workers has turned against them. Both Malaysia and Indonesia need to take steps to remedy the situation.

Indonesia became a democracy during the last decades, and has freedom of the press. The issue faced by migrant workers in Malaysia are making their way to local papers and creating a backlash against Malaysia and Malaysians. Demonstrations have been more frequent at the Malaysian Mission in Jakarta and sometimes at the Indonesian Department of Manpower.

IPHI, the Indonesian Attorneys Association, has taken concrete steps in approaching the Malaysian Bar Council as well as other relevant authorities and NGOs to put in place a system for local Malaysian lawyers to receive handsome remuneration for their services in representing and defending Indonesian migrant workers in Malaysia, and in the process take the necessary steps to make sure that laws and regulations which are unconstitutional can and will be challenged in the relevant courts.

This plan might be a flawed. How do we compensate these local lawyers so that they will be ready, willing and able to perform their duties and represent these migrant workers? Indonesia's President DR. Susilo Bambang Yudhoyono has formed a new body called BNP2TKI, which has the task of reforming the system of training and placing Indonesian migrant workers. BNP2TKI has been bestowed all the powers that has been previously the "property" of the Department of Manpower, which now only handles "administrative duties". This is a possible solution present.

IPHI, together with The Malaysian Bar Council, could present proposal to DR. Yudhoyono and the BNP2TKI. This proposal should include a mechanism to collect funds and distributed them to the lawyers defending the rights of the migrant workers. It is absolutely imperative that an open book auditing system be conducted, overseen by highly recognized lawyers with a "clean track record" to guarantee that the plan will be carried out with according to regulations and free of corruption!! Possible? Absolutely! Probable? Has to be, or else we will have a crisis on our hands!



SESSION IV: SOCIAL CHALLENGES

ILO's Multilateral Framework on Labour Migration

Lotte Kejser

Chief Technical Advisor
ILO Jakarta Office

Contents of Presentation

1. Data on International Labour Migration
2. Benefits of International Labour Migration
3. Issues of Concern in International Labour Migration
4. International Labour Rights
5. ILO Multi-Lateral Framework on Migration
6. ILO Plan of Action on Labour Migration
7. Summary & Conclusion

Data on International Labour Migration

Data Estimates:

Globally : 191 million international migrants, 90% of these migrant workers and their families (2005)

Asia & Middle East : 25 million

ASEAN : 13.5 million migrants, 35% to Malaysia

Remittances (formal and informal): USD 250 billion annually, (higher than direct assistance and foreign assistance)

Push/Pull Factors: Globalization, driven by:

- Growing international and regional differentials in economic, social, political and demographic development
- Communication & transport technology improvements

Development Benefits from International Labour Migration

Migration – Development Nexus

Labour migration has the potential to serve as an engine of growth:

- 3% increase in labour migration may increase global income by USD 356 billion, much more than trade liberalization.

Development benefits in receiving countries:

- rejuvenates workforce, enable labour-intensive production, promote entrepreneurship, supports pension schemes, and meets the demand for high-skilled labour for emerging industries

Development benefits in sending countries:

- Remittances flows (global estimate USD 300 billion), investment, technology & skills transfer through return migration and diasporas. Problem of brain drain in some high-skilled employment sectors.

Issues of Concern in International Labour Migration

Migration Policies towards High-Skilled and Low-Skilled Labour in Receiving Countries

- Fast-track, flexible placement procedures for high-skilled workers
- Bureaucratic, restrictive and costly placement procedures and work permit conditions for low-skilled workers, encouraging undocumented migration flows, or subsequent undocumented status, as well as trafficking, in response to demand for low-skilled labour in destination countries

Protection Deficit towards Migrant Workers in both Sending and Destination Countries

- Fundamental international labour and human rights standards not met in sending and destination countries' placement systems (work permits conditions, immigration status, and access to justice etc.)
- The result is massive labour and human rights violations, rent-seeking migration management rationales dominant in policies and practices, diminished realization of development potential

Issues of Concern in International Labour Migration

Absence of Multi-Lateral Regime and Cooperation on Labour Migration

- States' sovereign right to determine own migration policies
- Growing international consensus about the need for closer inter-state cooperation, (bilateral agreements, multi-lateral treaties, regional consultative processes), to promote more effective migration processes and protection of migrant workers.

International Policy Framework

- Large body of International Labour and Human Rights Standards developed over more than 50 years
- All International Labour and Human Rights Standards apply to migrant workers unless otherwise stated in the instruments.
- Most countries have ratified all the common conventions
- Yet these conventions are mostly not applied to migrant workers by states

ILO & UN Conventions on Migrant Workers

ILO C. 97 Migration for Employment (45 ratifications including Sabah, Malaysia)

ILO C 143 Migrant Workers (21 ratifications including Philippines)

ILO C 181 Private Employment Agencies (adequate protection, prevent abuse) (20 ratifications, no ratification by ASEAN Countries yet)

ILO C 95 (1949) Protection of Wages (at termination, prohibits deduction for ob/retaining employment)

ILO C.118 Equality of Treatment (Social Security) (equality in all 9 branches of social security) (38 ratifications including Philippines)

ILO C 157 Maintenance of Social Security Rights (for int. migrant workers, in both sending and receiving countries) (3 ratifications including Philippines)

UN C Protection of Rights of Migrant Workers & Their Families (36 ratifications including Philippines)

Together, 80 countries have ratified one of the 3 Migrant Workers Conventions.

ILO's Core Conventions: Decent Work

**All labour rights conventions apply to migrant workers
& no of ratifications high -> easy to apply**

Non-Discrimination (ILO C 100 & 111) (ILO C 100: 166 ratifications, including Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Singapore, Thailand, Viet Nam, China, Ro Korea, Mongolia, and Japan. ILO C 111: 168 ratifications including Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam)

Freedom of Association (ILO C 87 & 98) (ILO C 87: 149 ratifications including Cambodia, Indonesia, and Philippines. ILO C 98: 159 ratifications including Cambodia, Indonesia, Malaysia, Myanmar, Philippines, and Singapore)

Ban on Forced Labour (ILO C 29 & 105) (ILO C 29: 173 ratifications including Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam. ILO C 105: 171 ratifications including Cambodia, Indonesia, Philippines, and Thailand)

Ban on Child Labour (ILO C 138 & 182) (ILO C 138: 150 ratifications including Cambodia, Indonesia, Malaysia, Philippines, Singapore, Thailand and Viet Nam. ILO C 182: 168 ratifications including Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Singapore, Thailand and Viet Nam)

Human Rights Conventions

**All human rights conventions apply to migrant workers
& no of ratifications high -> easy to apply**

- **ICCPR I.C. Civil and Political Rights** (160 ratifications including Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam)
- **ICESCR I.C. Ec. Soc. Cultural Rights** (155 ratifications including Cambodia, Indonesia, Lao PDR, Philippines, Thailand and Viet Nam)
- **Suppl. C. on the Abolition of Slavery.. and institutions and practices similar to slavery** (serfdom, debt bondage) (119 ratifications including Cambodia, Lao PDR, Malaysia, Philippines, Singapore)
- **CAT C. against Torture** (144 ratifications including Cambodia, Indonesia, and Philippines,)
- **CERD C. Elimination of Racial Discrimination** (173 ratifications including Cambodia, Indonesia, Lao PDR, Philippines, Thailand, Viet Nam)

Human Rights Conventions

**All human rights conventions apply to migrant workers
& no of ratifications high -> easy to apply**

- **CEDAW C. Elimination of Discrimination Against Women** (185 ratifications including Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam)
- **CRC C. Rights of the Child** (193 ratifications including Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam)
- **Trafficking Protocol**
- **Treaty bodies & Procedures** (signing optional protocols may be required to have access to these bodies and procedures)
- **Special Mechanisms**, such as Reporters on rights of migrants, -migrant workers, -torture, -violence against women, -trafficking

ILO Recent Global Work on Labour Migration

ILO Report *A Fair Deal for Migrant Workers* (2004) ->

ILO Resolution on Migrant workers (2004) (*92th session of the ILO International Labour Conference*)

ILO Multilateral Framework on Labour Migration (2006): *Non-binding guidelines approved by member states*

ILO Plan of Action on Labour Migration (2006): *ILO technical assistance for tripartite constituents and other stakeholders*

ILO Multilateral Framework on Labour Migration

Adopted at the 92nd session of the ILO International Labour Conference, 2004 as part of the ILO Resolution on Migrant workers (2004)

Paragraph 23 of the Resolution: “In order to assist member states to develop more effective labour migration policies the tripartite constituents have agreed to develop a non-binding multi-lateral framework for a rights-based approach to labour migration which takes account of national labour market needs.

Such a framework will be drawn from, and based on, available information on policy and best practices in countries engaged in international labour migration, existing proposals to enhance the economic benefits of labour migration, relevant international labour standards, the 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up, and other relevant international instruments.”

- Entails more than 120 provisions, as well as an overview of relevant international standards and best labour migration practices

ILO Multilateral Framework on Labour Migration

Guiding principles adopted by ILO constituents

No.	Framework Areas	Summary of the Guidelines
1.	Decent Work	• Decent and productive work in freedom, equity, security and human dignity • Freely chosen employment, recognition of fundamental rights at work, an income where basic needs and family and social responsibilities are met, adequate level of social protection for migrant workers and their families

ILO Multilateral Framework on Labour Migration

No.	Framework Areas	Summary of the Guidelines
2.	Means of International Cooperation on Labor Migration	• Developing international and regional cooperation to promote managed migration for employment purposes • entails information exchange, inter-governmental and tripartite dialogue at regional, international and multilateral levels, and the promotion of bilateral and multilateral agreements
3.	Developing the Global Knowledge Base	• Improving government capacity for collecting, analyzing and disseminating data on labour migration, which feeds into labour migration policy making • Development of International Labour Migration Data Bases and exchange of data • Promoting research on labour migration issues, including collation of best practices
4.	Effective, Fair and Coherent Management of Labor Migration	• Ensuring coherence between labour migration policies and other national economic and social policies • Expanding avenues for regular labor migration, taking into account labor market needs, gender issues and demographic trends • Ensuring key role of labour ministries, and stakeholders in articulating labour migration policies • Formulating and implementing labour migration policies which are coherent, comprehensive, consistent, transparent and sensitive to gender and to vulnerabilities, guided by international human rights and labor standards.

ILO Multilateral Framework on Labour Migration

No.	Framework Areas	Summary of the Guidelines
5.	Expanding Avenues for Regular Labour Migration, with a View to Labour Market Needs and Demographic Trends	• Regular labour market analysis • Transparent policies for admission, employment and residence of migrant workers • Policies and procedures which facilitate the movement of migrant workers, through bilateral, regional and multilateral agreements • Temporary work schemes where required to fill specific sector shortages in destination countries
6.	Social dialogue with tripartite partners and consultations with civil society and migrant associations	• national procedures for social dialogue & civil society consultations, involvement and participation in migration policy-making, monitoring and implementation
7.	Human Rights and Labour Rights Protection of Migrant Workers, regardless of status	• Ensuring that national laws and practices that promote and protect labour and human rights apply to ALL migrant workers, using international human rights and labor rights standards as a guide • Providing information to migrant workers on their human and labor rights and assisting them with defending their rights • Providing effective enforcement mechanism for the protection of migrant workers rights and providing training on human rights to all government and non-government officials involved in migration

ILO Multilateral Framework on Labour Migration

No.	Framework Areas	Summary of the Guidelines
8.	Preventing of and Protection against Abusive Migration Practices	• Protection against forced labour, trafficking, exploitative and abusive recruitment, training, employment, debt bondage, retention of ID & salary • Effective policies, complaints mechanism and access to justice, remedies and compensation, regardless of immigration status, and penalties against violators • Awareness-raising on hazards of migration • Assistance and protection to victims
9.	Migration Process: Orderly and transparent migration	• Facilitate all stages of migration through information, training and assistance in language understandable to migrant worker • Facilitate movement between country of origin and destination, to enable family ties and contact • Simplify procedures and reduce fees and costs to migrant workers and employers • Ensure skills accreditation
10.	License & supervise recruitment and placement agencies	• standardized system of licensing, after consultations • Ensure understandable and enforceable contracts for migrant workers • Ensure sanctions and enforcement deter unethical or illegal practices • Ensure that fees of agencies are not borne directly or indirectly by migrant workers

ILO Multilateral Framework on Labour Migration

No.	Framework Areas	Summary of the Guidelines
11.	Social integration and Inclusion	• Ensure that agency bond deposit is paid when required to compensate workers who have suffered contractual non-performance • Incentives for agencies that meet or exceed recognized performance criteria • Promotion of the economic, social and cultural integration and inclusion of migrant workers and their families in destination countries through: • Non-discriminatory legislation & policies & bodies • Collection of aggregated data • Vocational training and education for migrant workers definitely • Avenue for migrant workers to improve their legal status • Representation and associations by migrant workers • Language and cultural orientation • Support for family and community support ties • Awareness-raising on contribution of migrant workers • Birth of children of migrant workers in destination secures right to registration, nationality, health and educational support

ILO Multilateral Framework on Labour Migration

No.	Framework Areas	Summary of the Guidelines
12.	Migration and Development	• Recognition and maximization of the contribution of labor migration to employment , economic growth and development for the benefit of both sending and destination countries • Integrating and mainstreaming labor migration in employment, labor market and macro-and micro economic policy development • Promoting labour migration's role in regional integration • Promoting incentives for enterprise development by migrant workers • Facilitating remittances transfers and access to banking services, through competition and providing incentives to promote the productive investment of remittance, through tax incentives. Facilitate the transfer of capital skills and technology by migrant workers through incentives • Adopting measures to mitigate the loss of workers with ethical skills, including by establishing guidelines for ethical recruitment • Promoting linkages with trans-national communities and business initiatives

ILO Plan of Action on Labour Migration (2006)

- Implementation of Multi-Lateral Framework on Labour Migration
- Implementation of International Labour and Human Rights Standards
- Promotion of Employment
- Enhancing Social Protection
- Promoting Social Dialogue, enhanced role for tripartite partners and other stakeholders.
- Improving Institutional Capacity
- Enhancing the Knowledge Base

Promoting Productive & Effective Labour Migration

WHILE ENSURING THE PROTECTION OF MIGRANT WORKERS

- Labour migration may have considerable development benefits for both sending and receiving countries
- Requires a flexible, practical, transparent labour migration management system, focusing on the needs of the labour market, while ensuring the effective protection of migrant workers. Presently in many sending and receiving countries, fee-seeking and rent-seeking by public bureaucracies, placement agencies etc. drive the implementation and effects of labour migration policies
- The resulting violation harms regional relationships and impedes realization of development benefits of labour migration.
- There is a need for broader stakeholder impact on labour migration policy-making, to ensure policy coherence with wider economic and social development in sending and receiving countries

A Rights Based Policy Framework and Plan of Action

Dato' M. Ramachelvam

Chairperson Bar Council Ad Hoc Committee on the Immigration Act

Putting Things in Perspective

Let us start with a very simple question: “Can Malaysia do without migrant workers?” I think that the answer is obvious. Malaysia has been experiencing full employment since the early 1990s. The number of documented migrant workers in the country is 2.1 million and including undocumented migrant workers constitute roughly 25% to 30% of the total labour workforce. In fact the percentage of migrants in the Malaysian workforce is probably the highest in the region or even the world.¹ In the construction industry the portion of migrant workers is between 70-90%.

Imagine if all migrant workers were sent home; imagine the impact that such a move would have on our economy and the Malaysian way of life. I have chosen to start with this seemingly obvious question in order to help put this entire matter in perspective. We need migrant labour and we are going to be unable to do without it for years to come.

The second important point that needs to be made is that migrants come to this country to work. It is work, and how best migrant labour can meet the demands for labour in small and medium sized companies and other labour-intensive sectors of the Malaysian economy that should be at the heart of a comprehensive policy about migrant labour.

Rights-Based Approach

The rights-based approach is based on the belief that every human being, by the mere fact of being human, is a holder of rights. This fundamental principle is enshrined in Article 2 of the Universal Declaration of Human Rights which states, “...everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs”. The principle of non-discrimination and equal rights for all persons is also enshrined in Article 8 of the Federal Constitution.

The rights based approach means that we no longer consider persons as Indonesian or Bangladeshi or migrant workers, but as a human being whose dignity and well-being we should be concerned about. This requires a major paradigm shift in the thinking of both policy makers as well as Malaysians

1 Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

in general, who have come to view migrant labour as a necessary evil and migrant workers as some lower form of human life!

18 Point Plan of Action

1. Ratification of International Conventions

The Malaysian government, as a show of its commitment to such a rights based approach, should ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and all international human rights conventions and International Labour Standards that are applicable to non-citizen migrant workers. Three specific instruments that were put together to specifically deal with the situation of migrant workers are – ILO Conventions 97 and 143 on migration for employment and the 1990 International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families.

2. A Comprehensive Labour Policy

There is a need for a national labour policy. The labour policy will provide projections for all the form and type of labour Malaysia needs to respond to the economic plans and growth. The policy should define the kind of skills and capacities to be developed, and all issues pertaining to recruitment and placement.

At the core of this policy should be the principles of minimum wage, equal treatment and the right to redress. The rights of migrant workers need to be defined and recognised especially in areas of conflict. The right to seek redress when there are labour rights violations and the need to seek health care treatment should be recognised by all related agencies so that the legal status requirements are easily met without any form of conditions.

Thus there needs to be a process where the legal status of the migrant worker is separated from the employment rights and responsibilities. The fact that migrant workers are not documented should in determine his/her employment rights.

3. Central Role to be Given to Ministry of Human Resources

As discussed previously, at the heart of a comprehensive policy on migrant workers is the issue of “work” not security. Hence the power to permit companies to recruit migrant workers should rest with the Ministry of Human Resources rather than the Ministry of Home Affairs.

If there is a demand for foreign labour then the Ministry of Human Resources is in the best position to determine the specifics of this demand. In which industries is there a demand for migrant workers? What is the reason for the demand? What is the background and employment record of companies that want to bring in migrant workers? Is the recruitment of migrant workers being made at the expense of local workers? What are the terms and conditions under which these migrant workers are going to be employed?

In fact since it is the Ministry of Human Resources to which migrant workers turn to when they faced problems at the workplace, it seems painfully obvious that it should be the Ministry of Human Resources that determines which companies deserve to be given the permission to recruit migrant workers!

4. Formation of an Inter-Ministerial Coordinating Body

The central role played by the Ministry of Human Resources should be complemented by the formation of an Inter-Ministerial Coordinating Body.

Various Ministries and government agencies are involved in the management of migrant workers, but this work is poorly coordinated. The Ministry of Home Affairs (KHEDN) is responsible for approving outsourcing companies and approving applications for those who want to bring in migrant workers. The running of detention centres for migrant workers is under the Jabatan Penjara² which is part of the Ministry of Internal Security (KKDN). Meanwhile when migrant workers face work related problems they turn either to the Labour Department or the Industrial Relations Department, which are under the Ministry of Human Resources.

An example of poor coordination between different government agencies is epitomized by the recent story in the NST³ that 442 foreigners continue to remain in prison even after having served their sentences as a result of lack of coordination between the Prisons Department and the Immigration Department. The lack of inter-departmental coordination is also apparent when hundreds of migrant workers are denied a special pass by officials in the Immigration Department despite their need to remain in the country to pursue claims that they have made in the Labour Office.

An inter-ministerial/departmental body needs to be set up to deal with all matters pertaining to the recruitment, placement and employment of foreign workers. Such a body should see representation from the following Ministries – Human Resources, Home Affairs, Internal Security, Health and Education. A body of this nature, which houses Ministries and Departments, related to the various dimensions of the situation of migrant workers, would be a minimum starting point to the developing of coherent and workable policy pertaining to migrant workers.

Such a coordinating body should be chaired by the Ministry of Human Resources, the pivotal Ministry for the management of migrant workers.

The current Inter-Ministerial Coordinating Body (which is a Cabinet Committee) does not work. There is a lack of transparency and questions arise on the effectiveness. In fact, what we need is a high level interagency monitoring and evaluation mechanism where the committee is given the powers of not only monitoring and evaluating the migration concerns and problems, but addressing areas of conflict, developing a consolidated approach including capacity building, and conducting multi-stakeholder dialogues and consultation.

5. Scrapping Labour Outsourcing

Thousands of migrant workers have been exploited and left stranded without jobs or food as a result of the policy of allowing outsourcing companies to operate.⁴ Migrant workers have lost thousands of ringgit as a result of unscrupulous agents. The system has failed and has led to a form of bonded labour and trafficking in human persons.

² The Immigration Department used to be in charge of running these detention centers. However as a result of many problems, from June 2002, the Prisons Department began taking over the running of these centers. Between June 2002 and December 2005, control of all 11 detention centers passed from the Immigration Department to the Prisons Department. There has been a recent statement that RELA is going to be tasked to take over the running of these detention centers.

³ Free, but they're still in jail: NST 9 February 2008

⁴ Since the 80s, migrant workers have been brought into the country by direct recruitment. (1) From August 2006, all Bangladeshi workers are brought in by outsourcing companies (2) Companies that require less than 50 workers are required to secure their workers through an outsourcing company (3) Companies that require more than 50 workers

Only employers should be given the right to recruit. Contractors for labour should not be given this opportunity. Such direct recruitment will take place within the framework of MOU's signed between the Malaysia and the sending countries, which clearly outlines the need to adhere to basic international labour standards.

6. Equal Rights

Migrant workers should receive the same rights and protections as local workers. If we look at the provisions of both the Employment Act and the Industrial Relations Act, we will find that migrant workers are "covered". In fact the Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers.

Terms and conditions of employment of foreign workers shall be no less favourable than that of Malaysian workers. It shall comply with ILO's Decent Work principles namely a living wage, safe work, non-discrimination in employment and terms and conditions of employment and social dialogue.

7. Real Access to Justice

It is extremely difficult for a migrant worker to remain in the country in order to pursue a claim in the courts when he no longer has a valid work permit.

The current policy of issuing a special pass to migrant workers caught in such a situation is fraught with problems. Today employers have a free hand to flaunt the law and deny migrant workers their rights in law. When asked to account, employers have the luxury of arbitrarily cancelling the work permit, refusing to take part in negotiations and delaying the court process.

In order to remedy this situation:

- (a) A migrant worker should be allowed to remain in the country in order to pursue a claim which he/she has lodged; and
- (b) The migrant worker should be allowed to work during this period so he/she can support himself/herself.

This can be done by first issuing the migrant worker with a Special Pass and then a Visit Pass.⁵

8. Strong Sanctions against Exploitative Labour Practices

The maximum fine for breaches of Employment Act is RM 10,000. There is no provision for jail terms. A provision should be included that provides for harsher penalties, including jail terms, when employers blatantly and wilfully deny their workers their basic rights.

9. Wages Councils Act

Wages Councils should be set up for the following categories of workers; construction, restaurant and domestic to determine minimum wage levels in these sectors.

⁵ The Special Pass would allow the migrant worker to remain in the country and seek employment. Upon obtaining employment the migrant worker can then be issued with a Visit Pass so that he/she can work while waiting for the outcome of the legal action. The Visit Pass obtained under such circumstances will cease once the migrant worker's case is amicably settled or the relevant court makes a final decision.

10. Recognising Domestic Servants as Workers and Providing all Basic Benefits and Rights

Around 380,000 migrant workers are employed as domestic servants. The Employment Act provides very minimal protection to domestic servants. There is no provision that domestic servants receive a rest day, sick leave, annual leave or paid public holidays. There is no provision for overtime and also no restriction on the number of hours that a domestic servant can be made to work. It cannot be right that domestic servants be made to work 24 hours a day, 365 days a year!

Since domestic workers work in individualised and isolated work conditions, state intervention is necessary to ensure worker rights are accorded and protected. Thus domestic workers must be recognized as workers.

A new domestic workers act should be developed defining terms of; a comprehensive standard contract signed in source country and attested in Malaysia is enforced; days off determined; mechanisms for monitoring established; benefits defined and responsibilities and penalties stated; role of recruiting agents defined in MOU.

11. Recognizing the Right of Migrant Workers to become Members of Trade Unions and to take part in Trade Union Activities

The Trade Union Act does not prohibit migrant workers from becoming members of trade unions or taking part in trade union activities. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organize a trade union.⁶

Notwithstanding this, many standard employment contracts that are furnished to migrant workers provide an express prohibition against becoming a member of a trade union or taking part in trade union activities. All employers must be advised on the proper position in law and care must be taken to ensure that all employment contracts are free of such repugnant provisions.

12. Right of Refugees and Asylum Seekers to Employment

Refugees and asylum seekers are prohibited from working in Malaysia. Refugees and asylum seekers suffer great hardship as they have no right to legally work in Malaysia.

Therefore refugees and asylum seekers work in the informal sectors of the economy and are prone to exploitation.

It is proposed that refugees and asylum seekers who are in Malaysia be allowed to work based on the terms and conditions granted to migrant labour.

13. Developing a Simple Way to Determine if a Migrant Worker is Documented

The authorities should uphold and reaffirm the right of all migrant workers to keep their passports. In addition to this the i-kad that the Ministry of Home Affairs is proposing to introduce for all documented workers is a good idea, but such a card should be issued by the authorities within two weeks. As it is, the kad jalan that is issued is often only issued weeks after the migrant worker comes to the country, and it places the migrant worker in a very vulnerable situation. In addition to issuing the i-kad, arrangements must be made to have sufficient i-kad “readers” made available to enforcement agencies.

⁶ Section 8, Employment Act

Raids should only be conducted by those who are properly trained to handle arrests and only by those who have the necessary equipment to recognise if the documents carried by the migrant worker (including the i-kad) are genuine. Far too often, raids are carried out by departments and agencies, for example RELA, which do not have the ability to determine the authenticity of documents in the processions of migrant workers. The result of such raids is that they are ineffective and prove a great inconvenience to a large number of migrant workers who are documented. RELA has been formed through the emergency ordinance regulations. The perspective is then derived from the angle of security. The record of abuses and RELA's framework demands that RELA should be disbanded.

If the Immigration Department lacks capacity, then the department needs to be expanded and strengthened.

14. Deportation and Punishment for Immigration Offences

There are presently 11,900 foreigners in our prison system. Foreigners make up 33% of the prison population. It has to be pointed out, however that foreigner only account for 2%⁷ of the crimes committed in Malaysia and that the vast majority of foreigners in our prison system are there as a result of immigration offences.

The overcrowding in prisons causes many problems to the Jabatan Penjara and makes it difficult for them to concentrate on rehabilitation. We propose that it become policy to:

- (a) Deport migrant workers who are found guilty of immigration offences. Putting them into the prison system is a drain on valuable resources⁸;
- (b) Doing away with the punishment of whipping which we consider to be a form of cruel and inhumane treatment;

It is important to ensure that nobody is deported without due process and those arrested for alleged immigration offences must have access to legal representation.

15. Health

- (a) Regular mandatory testing of migrant workers is discriminatory, threatens the job security of workers and with deportation included, access to treatment becomes a problem. This form of screening brings about a profiling of migrants as vectors of diseases and creates a false sense of security that Malaysians are free from diseases. If there is a need to screen the health of migrants, then the health screening must be done with consent and counselling and the principle of confidentiality upheld. There should be proper screening of all migrant workers to prevent the spread of infectious diseases; and
- (b) Migrant workers should be entitled to the same medical benefits that Malaysian citizens are entitled to in the public health system. The present system of making migrant workers pay exorbitant rates for treatment in government hospitals is ill conceived. Discouraging migrant workers from seeking treatment is detrimental to everyone in the long run.

⁷ Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

⁸ It is estimated that it cost roughly RM25 per day to maintain a person in prison. What this means that when a Session Court judge sentences a migrant worker to 3 months in jail, it cost the taxpayer RM2150. Much more than the cost of paying for the deportation of the migrant worker concerned.

16. Education

Children of migrant workers should be entitled to free schooling the same as that of Malaysian children.

Migrants should be entitled to both medical care and free schooling because of their significant contribution to the GDP. In addition to this, it is important to point out that they pay a levy to the authorities. Between 1998 and 2002, RM700 million was collected in levies, but only between RM6 – RM14 million a year of this is used in direct operating expenditure.⁹

17. Undocumented Workers

Provide amnesty and opportunities for undocumented workers to be regularised. Mechanisms should exist where those who are undocumented can surrender and leave the country when they want to, without any threat of sanctions.

18. Governance

Principles of governance namely democracy, transparency and accountability must be adhered to ensure that corruption is eliminated.

A meaningful and effective system of social dialogue must be in place so that all stakeholders concerns will be discussed and effectively resolved through regular meetings.

⁹ Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

Employment Contract for a Domestic Helper Recruited from Outside Hong Kong – English version

D. H. Contract No. A 000001

EMPLOYMENT CONTRACT (For A Domestic Helper recruited from abroad)

This contract is made between
("the Employer", holder of Hong Kong Identity Card/Passport No.*) and
..... ("the Helper") on and
has the following terms:

1. The Helper's place of origin for the purpose of this contract is

2. (A)† The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Helper arrives in Hong Kong.

(B)† The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on, which is the date following the expiry of D.H. Contract No. for employment with the same employer.

(C)† The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Director of Immigration grants the Helper permission to remain in Hong Kong to begin employment under this contract.

3. The Helper shall work and reside in the Employer's residence at

4. (a) The Helper shall only perform domestic duties as per the attached Schedule of Accommodation and Domestic Duties for the Employer.

(b) The Helper shall not take up, and shall not be required by the Employer to take up, any other employment with any other person.

(c) The Employer and the Helper hereby acknowledge that Clause 4 (a) and (b) will form part of the conditions of stay to be imposed on the Helper by the Immigration Department upon the Helper's admission to work in Hong Kong under this contract. A breach of one or both of the said conditions of stay will render the Helper and/or any aider and abettor liable to criminal prosecution.

5. (a) The Employer shall pay the Helper wages of HK\$ per month. The amount of wages shall not be less than the minimum allowable wage announced by the Government of the Hong Kong Special Administrative Region and prevailing at the date of this contract. An employer who fails to pay the wages due under this employment contract shall be liable to criminal prosecution.

(b) The Employer shall provide the Helper with suitable and furnished accommodation as per the attached Schedule of Accommodation and Domestic Duties and food free of charge. If no food is provided, a food allowance of HK\$ a month shall be paid to the Helper.

(c) The Employer shall provide a receipt for payment of wages and food allowance and the Helper shall acknowledge receipt of the amount under his/her* signature.

6. The Helper shall be entitled to all rest days, statutory holidays, and paid annual leave as specified in the Employment Ordinance, Chapter 57.

7. (a) The Employer shall provide the Helper with free passage from his/her* place of origin to Hong Kong and on termination or expiry of this contract, free return passage to his/her* place of origin.

(b) A daily food and travelling allowance of HK\$100 per day shall be paid to the Helper from the date of his/her* departure from his/her* place of origin until the date of his/her* arrival at Hong Kong if the travelling is by the most direct route. The same payment shall be made when the Helper returns to his/her* place of origin upon expiry or termination of this contract.

8. The Employer shall be responsible for the following fees and expenses (if any) for the departure of the Helper from his/her place of origin and entry into Hong Kong:—

- (i) medical examination fees;
- (ii) authentication fees by the relevant Consulate;
- (iii) visa fee;
- (iv) insurance fee;
- (v) administration fee or fee such as the Philippines Overseas Employment Administration fee, or other fees of similar nature imposed by the relevant government authorities; and
- (vi) others:

In the event that the Helper has paid the above costs or fees, the Employer shall fully reimburse the Helper forthwith the amount so paid by the Helper upon demand and production of the corresponding receipts or documentary evidence of payment.

* Delete where inappropriate.

† Use either Clause 2A, 2B or 2C whichever is appropriate.

9. (a) In the event that the Helper is ill or suffers personal injury during the period of employment specified in Clause 2, except for the period during which the Helper leaves Hong Kong of his/her* own volition and for his/her* own personal purposes, the Employer shall provide free medical treatment to the Helper. Free medical treatment includes medical consultation, maintenance in hospital and emergency dental treatment. The Helper shall accept medical treatment provided by any registered medical practitioner.

(b) If the Helper suffers injury by accident or occupational disease arising out of and in the course of employment, the Employer shall make payment of compensation in accordance with the Employees' Compensation Ordinance, Chapter 282.

(c) In the event of a medical practitioner certifying that the Helper is unfit for further service, the Employer may subject to the statutory provisions of the relevant Ordinances terminate the employment and shall immediately take steps to repatriate the Helper to his/her* place of origin in accordance with Clause 7.

10. Either party may terminate this contract by giving one month's notice in writing or one month's wages in lieu of notice.

11. Notwithstanding Clause 10, either party may in writing terminate this contract without notice or payment in lieu in the circumstances permitted by the Employment Ordinance, Chapter 57.

12. In the event of termination of this contract, both the Employer and the Helper shall give the Director of Immigration notice in writing within seven days of the date of termination. A copy of the other party's written acknowledgement of the termination shall also be forwarded to the Director of Immigration.

13. Should both parties agree to enter into new contract upon expiry of the existing contract, the Helper shall, before any such further period commences and at the expense of the Employer, return to his/her* place of origin for a paid/unpaid* vacation of not less than seven days, unless prior approval for extension of stay in Hong Kong is given by the Director of Immigration.

14. In the event of the death of the Helper, the Employer shall pay the cost of transporting the Helper's remains and personal property from Hong Kong to his/her* place of origin.

15. Save for the following variations, any variation or addition to the terms of this contract (including the annexed Schedule of Accommodation and Domestic Duties) during its duration shall be void unless made with the prior consent of the Commissioner for Labour in Hong Kong:

(a) a variation of the period of employment stated in Clause 2 through an extension of the said period of not more than one month by mutual agreement and with prior approval obtained from the Director of Immigration;

(b) a variation of the Employer's residential address stated in Clause 3 upon notification in writing being given to the Director of Immigration, provided that the Helper shall continue to work and reside in the Employer's new residential address;

(c) a variation in the Schedule of Accommodation and Domestic Duties made in such manner as prescribed under item 6 of the Schedule of Accommodation and Domestic Duties; and

(d) a variation of item 4 of the Schedule of Accommodation and Domestic Duties in respect of driving of a motor vehicle, whether or not the vehicle belongs to the Employer, by the helper by mutual agreement in the form of an Addendum to the Schedule and with permission in writing given by the Director of Immigration for the Helper to perform the driving duties.

16. The above terms do not preclude the Helper from other entitlements under the Employment Ordinance, Chapter 57, the Employees' Compensation Ordinance, Chapter 282 and any other relevant Ordinances.

17. The Parties hereby declare that the Helper has been medically examined as to his/her fitness for employment as a domestic helper and his/her medical certificate has been produced for inspection by the Employer.

Signed by the Employer _____
(Signature of Employer)

in the presence of _____
(Name of Witness) (Signature of Witness)

Signed by the Helper _____
(Signature of Helper)

in the presence of _____
(Name of Witness) (Signature of Witness)

* Delete where inappropriate.

SCHEDULE OF ACCOMMODATION AND DOMESTIC DUTIES

1. Both the Employer and the Helper should sign to acknowledge that they have read and agreed to the contents of this Schedule, and to confirm their consent for the Immigration Department and other relevant government authorities to collect and use the information contained in this Schedule in accordance with the provisions of the Personal Data (Privacy) Ordinance.
2. Employer's residence and number of persons to be served
 - A. Approximate size of flat/house square feet/square metres*
 - B. State below the number of persons in the household to be served on a regular basis:
 adult minors (aged between 5 to 18) minors (aged below 5) expecting babies.
 persons in the household requiring constant care or attention (excluding infants).
 (Note: Number of Helpers currently employed by the Employer to serve the household)

3. Accommodation and facilities to be provided to the Helper

A. Accommodation to the Helper

While the average flat size in Hong Kong is relatively small and the availability of separate servant room is not common, the Employer should provide the Helper suitable accommodation and with reasonable privacy. Examples of unsuitable accommodation are: The Helper having to sleep on made-do beds in the corridor with little privacy and sharing a room with an adult/teenager of the opposite sex.

- ☐ Yes. Estimated size of the servant room square feet/square metres*
- ☐ No. Sleeping arrangement for the Helper:
- ☐ Share a room with child/children aged
- ☐ Separate partitioned area of square feet/square metres*
- ☐ Others. Please describe
-
-

B. Facilities to be provided to the Helper:

(Note: Application for entry visa will normally not be approved if the essential facilities from item (a) to (f) are not provided free.)

- | | | |
|---------------------------------------|------------------------------|-----------------------------|
| (a) Light and water supply | ☐ Yes | ☐ No |
| (b) Toilet and bathing facilities | ☐ Yes | ☐ No |
| (c) Bed | ☐ Yes | ☐ No |
| (d) Blankets or quilt | ☐ Yes | ☐ No |
| (e) Pillows | ☐ Yes | ☐ No |
| (f) Wardrobe | ☐ Yes | ☐ No |
| (g) Refrigerator | ☐ Yes | ☐ No |
| (h) Desk | ☐ Yes | ☐ No |
| (i) Other facilities (Please specify) | _____ | |
| | _____ | |
| | _____ | |

4. The Helper should only perform domestic duties at the Employer's residence. Domestic duties to be performed by the Helper under this contract exclude driving of a motor vehicle of any description for whatever purposes, whether or not the vehicle belongs to the Employer.
5. Domestic duties include the duties listed below.

Major portion of domestic duties:—

1. Household chores
2. Cooking
3. Looking after aged persons in the household (constant care or attention is required/not required*)
4. Baby-sitting
5. Child-minding
6. Others (please specify)

.....

.....

.....

.....

6. The Employer shall inform the Helper and the Director of Immigration of any substantial changes in item 2, 3 and 5 by serving a copy of the Revised Schedule of Accommodation and Domestic Duties (ID 407G) signed by both the Employer and the Helper to the Director of Immigration for record.

_____ Employer's name and signature	_____ Date	_____ Helper's name and signature	_____ Date
--	---------------	--------------------------------------	---------------

* delete where inappropriate

☐ tick as appropriate