

## Migrants and the Law

by Dato' Seri Mohd Hishamudin Yunus<sup>1</sup>

In 2017, international migrants numbered some 258 million.<sup>2</sup> Nearly two-thirds of all migrants live in Asia (79.6 million) or Europe (77.9 million). The entire American region hosted the third-largest number of international migrants (67.2 million), followed by Africa (24.7 million). The largest number of all international migrants live in the US (49.8 million), followed by Saudi Arabia and Germany with 12.2 million migrants each, the Russian Federation (11.7 million) and the UK (8.8 million).

Nearly all countries are concerned by migration, whether as sending, transit, or receiving countries, or as a combination of these. Malaysia, on her part, had announced in 2015 that she would accept 3,000 migrants from Syria over the three years that followed.<sup>3</sup> But that same year, what made headlines was the shocking discovery of human smuggling camps and the bodies of illegal immigrants dumped in mass graves at Songkhla and Padang Besar near the Thai-Malaysia border.<sup>4</sup> In March 2019, a Royal Commission of Inquiry was established to inquire into all available evidence relating to the discovery of the smuggling camps and the mass graves, including whether there had been a proper and thorough investigation by the relevant authorities on the existence of the mass graves following the discovery.<sup>5</sup>

### Migrants: International law perspectives

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("the Convention"), which entered into force on 1 July 2003, is a multilateral treaty governing the protection of migrant workers and families with respect to their human rights. As of March 2019, 54 states have ratified

the Convention. So far, countries that have ratified the Convention are primarily countries of origin of migrants, such as Mexico, Morocco and the Philippines. For these countries, the Convention is an important instrument to protect their citizens living abroad. In the Philippines, for example, ratification of the Convention took place in a context characterised by several cases of Filipino workers being mistreated abroad: Such cases hurt the Filipino population and prompted the ratification of the Convention. No migrant-receiving state in Western Europe or North America has ratified the Convention. Other important receiving countries, such as Australia, the Arab states of the Persian Gulf, India and South Africa, have not ratified the Convention.

The ASEAN member states have recognised the importance of labour migration in the region. In January 2007, ASEAN made a significant move to address the issues of migrant workers by adopting the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers ("the Declaration"). The adoption of this Declaration, followed by the subsequent setting up in 2008 of the ASEAN Committee in the Implementation of the ASEAN Declaration (ACMW), demonstrates the association's commitment to protecting the rights of migrant workers.

The Declaration calls upon ASEAN member states to ensure the dignity of migrant workers by undertaking the following obligations:

- (1) the protection of migrant workers from exploitation, discrimination, and violence;
- (2) the governance of labour migration; and
- (3) the fight against trafficking in persons.

1 Chairman, Independent Committee on Management of Foreign Workers; Barrister-at-Law, Lincoln's Inn; Diploma in International Commercial Arbitration, CIArb; Fellow, Asian International Arbitration Centre; former judge of the Court of Appeal, Malaysia  
 2 257.7 million, according to the Migration Data Portal (24 January 2019) <[https://migrationdataportal.org/?i=stock\\_abs\\_&t=2017](https://migrationdataportal.org/?i=stock_abs_&t=2017)> (accessed 20 March 2019)  
 3 "Malaysia accepts first of 3,000 Syrian migrants", *BBC News Asia* (9 December 2015) <<http://www.bbc.com/news/world-asia-35048291>> (accessed 19 March 2019)  
 4 "Malaysia confirms discovery of 23 trafficking camps, 139 grave sites believed to contain migrants", *ABC News Online* (25 May 2015) <<http://www.abc.net.au/news/2015-05-25/malaysia-mass-graves-of-suspected-migrants-deeply-concerning/6494908>> (accessed 19 March 2019)  
 5 "Former Chief Justice Arifin Zakaria heads RCI on Wang Kelian", *Borneo Post Online* (6 March 2019) <<https://www.theborneopost.com/2019/03/06/former-chief-justice-arifin-zakaria-heads-rci-on-wang-kelian/>> (accessed 19 March 2019)

While the Declaration does not contain concrete and specific provisions on how to implement those obligations, it is nevertheless a significant move towards the creation of a sectoral mechanism or instrument that can further promote and protect the rights of migrant workers in the region. Thereafter, the ASEAN Committee on the Implementation of the ASEAN Declaration was charged with the task of drafting an ASEAN instrument on the protection and promotion of migrant workers' rights.

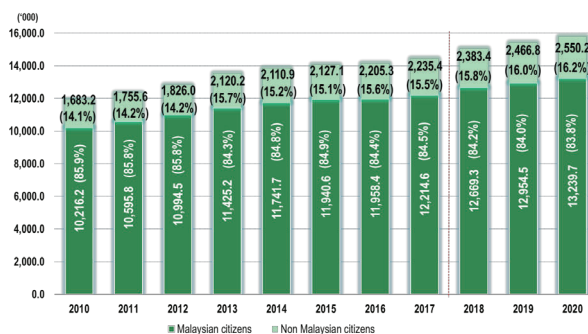
Ten years later, the ASEAN member states signed the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers 2017 ("the ASEAN Consensus"). The ASEAN Consensus stipulates the general principles, fundamental rights of migrant workers and members of their families, specific rights of migrant workers, obligations and commitments of ASEAN member states. It aims to establish a framework for closer cooperation among the member states on addressing the issues of migrant workers in the region. However, it must be noted that the ASEAN Consensus is a non-legally binding document.

### Migrants in Malaysia: Facts and Figures

Malaysia is, and has always been, very dependent on migrant labour for its economic growth and national development. However, it is an unfortunate fact that the majority of migrants here are undocumented. These migrants, documented or otherwise, are employed in various sectors such as manufacturing, construction, plantation and domestic help. The majority of them come from Indonesia, while the rest are from countries such as Nepal, Bangladesh, India, Myanmar, Pakistan, the Philippines, Thailand, Vietnam, Cambodia, Laos, Sri Lanka and China.

In 2010, there were 1.7 million non-citizen workers constituting 14.1% of the employed workforce. In 2017, the non-Malaysian citizens' component of the labour force totalled 2.2 million, or 15.5% of the employed workforce in Malaysia (see **Figure 1**).<sup>6</sup> The trajectory of growth in foreign workers has been steady between 2010 and 2017 with a deceleration observed in recent years.

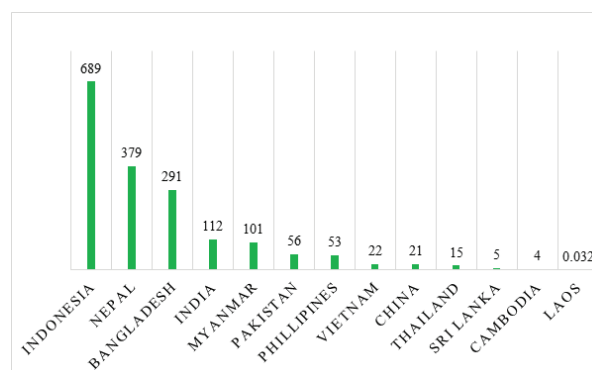
**Figure 1: Employed Persons by Citizenship, 2010-2020**



Source: Labour Force Survey Reports 2010-2017, Department of Statistics Malaysia and ILMIA estimates

Through June 2018, the largest contingent of foreign workers (those holding temporary employment passes (PLKS<sup>7</sup> workers) were from Indonesia, representing 39% of these workers (**Figure 2**). The next largest group of PLKS workers came from Nepal (22%), followed by Bangladesh (17%), India (6%) and Myanmar (6%).

**Figure 2: Foreign Workers by Nationality as at June 2018**



Source: Immigration Department of Malaysia

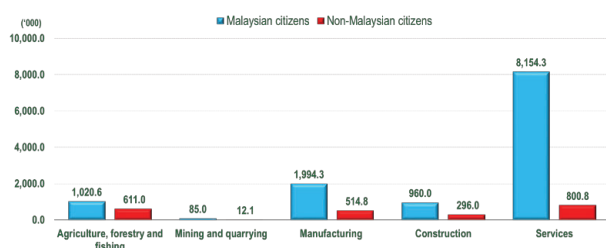
On the basis of recent trends, and with current growth targets and policies, the number of foreign workers is estimated to rise to 2.6 million, or 16.2%, of the employed workforce, by 2020.

<sup>6</sup> The Department of Statistics of Malaysia denotes foreign workers to be employees who are non-Malaysian citizens employed in the formal and also informal sectors. These foreign workers may be persons who hold a valid employment pass but also include those who do not have valid employment documents. The latter group of workers is referred to in this article as "undocumented foreign workers".

<sup>7</sup> Pas Lawatan Kerja Sementara (Temporary Employment Pass)

Foreign workers have a large presence in the agricultural sector, where they make up just under 60% (611,000 workers) as a ratio to the number of Malaysian workers (1.02 million) employed in this sector in 2017 (Figure 3). The next sector that employs many foreign workers is construction, where the number of foreign workers are 31% relative to Malaysians. The manufacturing sector is next in hiring foreign workers with a ratio of 26%. Another prominent sector where foreign workers are concentrated in is services, where they accounted for some 10% as a ratio of the Malaysians working there in 2017.

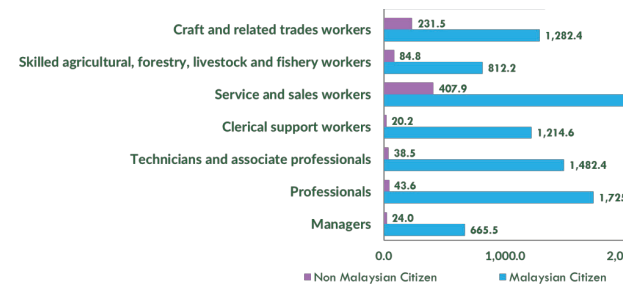
**Figure 3: Employed Persons by Industry and Citizenship (2017)**



Source: Labour Force Survey Report 2017, Department of Statistics Malaysia

Foreign workers are employed mostly in low- and semi-skilled occupations (Figure 4). There are more foreign workers in elementary occupations (in accordance with the Malaysia Standard Classification of Occupations, or MASCO) than there are Malaysian workers. Some 42% of non-citizen workers in 2017 were engaged in elementary occupations that were mainly associated with 3D jobs that require low educational qualifications and low skills. The next popular occupation where demand for foreign workers predominate is as plant and machine operators and assemblers, in which 19.6% of foreign workers took up positions. About 18% of foreign workers were employed in service and sales jobs.

**Figure 4: Employed Persons by Occupation and Citizenship (2017)**



Source: Labour Force Survey Report 2017, Department of Statistics Malaysia

In Malaysia, matters pertaining to terms and conditions of work for migrants are regulated by the Employment Act 1955 and the Workmen's Compensation Act 1952, under the administrative jurisdiction of the Labour Department. Issues regarding relations between employers and migrant workers are covered by the Industrial Relations Act 1967, while labour unions are regulated by the Trade Unions Act 1959. These laws are all overseen and implemented by the Ministry of Human Resources (MOHR).

In addition to the above laws, migrant workers' affairs are also regulated by immigration laws and regulations, supplemented by policies from the Ministry of Home Affairs (MOHA), which issues work permits.

It is heartening to note that Malaysia has recently ratified the International Labour Organisation Equality of Treatment (Accident Compensation) Convention, 1925 (No 19), and the Conference Committee on Application of Standards under the International Labour Organization. Following these ratifications, the government has announced that with effect from January 2019, employers who hire foreign workers with valid documents, including expatriates, must register these workers with SOCSO<sup>8</sup> and contribute to the

8 Social Security Organization established under the Employees' Social Security Act 1969

Employment Injury Scheme under the Employees' Social Security Act 1969. The benefits under this scheme include: medical, temporary disablement, permanent disablement benefits, constant-attendance allowance, dependant's benefit and rehabilitation and repatriation costs, including funeral expenses. The SOCSO scheme in its present form, however, does not cover hospitalisation and medical expenses in respect of incidents that do not arise from the workplace or in the course of travelling to and from work. It is therefore suggested that an insurance scheme for medical expenses outside the SOCSO scheme should also be introduced for foreign workers. The scheme should also cover outpatient treatment and employers should be made responsible for the scheme's subscription fees.

Migrant workers bring economic benefits to the growth and sustainable development of Malaysia. Studies have shown that the presence of foreign workers is positive for the creation of skilled and semi-skilled jobs for Malaysians. However, there are negative effects where low-skilled Malaysians have to compete with these migrant workers for jobs. In addition, the generally low wages associated with migrant workers are believed to exert downward pressure on wage levels for this group of Malaysian workers and, more broadly, for wage formation as a whole. As migrant workers are mostly employed in low-skilled and labour-intensive industry, undue dependence on them is also a contributory factor in holding back industry from automating and investing in innovative production equipment and processes to increase productivity and move into higher value outputs of goods and services.

### **Migrant workers: Legal Issues and proposed solutions**

There are several legal issues surrounding migrant workers in this country, chief of which are highlighted below:

#### *(a) Equality before the law*

Article 8 of the Federal Constitution provides that "All persons are equal before the law and entitled to equal protection of the law". This guarantee of equality extends to all persons whether citizens or not; and, accordingly, to all migrant workers whether documented or undocumented. This right to equality is also reflected in our Employment Act 1955, which applies to all workers, irrespective of whether the person is a local worker or a foreign worker. Even a migrant worker is accorded the right to make a complaint about discrimination at work to the Director General of Labour. However, there is a legal problem when it comes to trade unions. Although the Trade Unions Act 1959 provides that a migrant worker can be a member of a trade union, yet under the law, he/she is prohibited from holding an executive position in trade unions.<sup>9</sup> It can be argued that this prohibition is discriminatory in nature and is in contravention of Article 8 of the Constitution.

Unlike local workers, migrant workers are not allowed to form their own associations in Malaysia. Yet, associations to represent the interest of migrant workers would play an important role to safeguard their welfare. Thus, it is suggested that foreign workers be allowed to form associations to represent their interest in the country.

#### *(b) Seizing of migrants' passports*

In Malaysia, it is common practice for employers to seize the passports of migrant workers upon arrival here. This practice is, however, illegal under the Passports Act 1966.<sup>10</sup> Nevertheless, the withholding of migrant workers' passports is widely used as a mechanism of control by employers over the workers which enhances their vulnerability and restricts their movements.

<sup>9</sup> Trade Unions Act 1959 [Act 262], s 28(1)(a)

<sup>10</sup> [Act 150]. Section 12(1)(f).

*(c) Access to justice*

Access to justice is a basic fundamental human right for all persons, regardless of their citizenship or immigration status. Migrant workers face numerous barriers in accessing the administrative legal system provided under the labour laws, and the civil and criminal justice systems in Malaysia. Migrant workers are often fired by employers for filing complaints with government officials, NGOs or trade unions. Termination of employment results in the cancellation of the work permit, which is the basis in law for the migrant's right to stay in Malaysia. Thus, filing a complaint prompts action by the employer that makes the migrant complainant subject to immediate deportation.

Therefore, it is imperative that the administrative and legal framework governing foreign workers be reformed to remove the various obstacles to foreign workers accessing justice in Malaysia's administrative and legal system. The Legal Aid Bureau (Biro Bantuan Guaman) and the Yayasan Bantuan Guaman Kebangsaan (YBGK) schemes should be made available to foreign workers. Opening up these schemes to foreign workers will enable them to gain access to justice in the administrative and legal system available in Malaysia.

*(d) Outsourcing of migrant workers*

In some cases, it is not the factories but the outsourcing agents who manage the bureaucratic aspects of the recruitment and migration process, and the wages of migrant workers. These outsourcing companies have become direct employers to the migrant workers, and are approved and regulated by the MOHA. Workers hired by such labour outsourcing companies remain employees of the companies and not the employees of the factories where they work. This means that the responsibility for labour management has moved from the employer (for

whom the migrant worker is actually working) to the outsourcing companies.

The legal issue that arises is in designating who is the responsible employer for the purpose of ensuring that wages, conditions of work and other aspects of the treatment of migrant workers (such as accommodation, access to medical care and so on) comply with the relevant labour laws. Under this outsourcing arrangement, it becomes technically possible for a factory owner to disclaim liability for the unlawful treatment accorded to migrant workers in his/her factory because they were provided through a labour contractor. There should be a law to prohibit such outsourcing practice of migrant workers.

*(e) Insurance schemes*

It is mandatory for employers to insure all foreign workers on their payroll. Employers intending to take out such insurance policies for foreign workers must go through the Skim Perlindungan Insurans Kesihatan Pekerja Asing (SPIKPA), an appointed third party service provider that sees to the healthcare needs of foreign workers such as packaged health insurance and hospitalisation benefits. However, the insurance scheme does not cover non-hospitalisation treatment. It is a common complaint that the premium cost is unduly high and the RM20,000 overall coverage annual limit is insufficient to accommodate a major medical emergency.

A second insurance scheme, as required under s 26(2) of the Workmen's Compensation Act 1952, is the Foreign Worker Compensation Scheme. This is for the protection of migrant workers in respect of employment workplace injury, but it is unclear if injury sustained outside the workplace is sufficiently covered.

*(f) Access to EPF Scheme and Employment Insurance Scheme (EIS)*

Currently, migrant workers are not treated equally as local workers in the sense that they are not covered by the Employees Provident Fund (EPF) Scheme<sup>11</sup> and the Employment Insurance System (EIS).<sup>12</sup> Thus it is suggested that it should be mandatory for employers and migrant workers to participate in the EPF scheme or similar pension saving-type funds. The contributions by migrant workers and employers ought to be at the same rate as paid by Malaysian workers and their employers. It is further suggested that foreign workers be included in the EIS.

*(g) Human smuggling and trafficking*

Malaysia prohibits all forms of human smuggling and trafficking through the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670]. However, enforcement actions to detect and punish criminals engaged in human smuggling or trafficking have not been pursued with conviction and determination. For example, investigators discovered in 2015 illegal migrant camps and the burial ground for deceased migrants on the border with Thailand, which have implicated both federal and state enforcement officials as well as local government authorities. However, none of the perpetrators have been brought to book and further progress on prosecution appears to have stalled.

The majority of human smuggling and trafficking victims are from Indonesia, India, Bangladesh, Myanmar and China. These victims are likely to be undocumented workers subjected to forced labour from debt bondage at the hands of their employer, employment agent or informal labour recruiters.

*(h) Forced labour issues*

The International Labour Organization defines “forced labour” as work that is performed involuntarily and under the menace of any penalty (ILO Forced Labour Convention 1930) (No 29). It refers to situations in which persons are coerced to work through the use of violence or intimidation, or by subtler means such as manipulated debt, retention of identity papers or threats of denunciation to immigration authorities.

Various indications are used to ascertain when a situation amounts to forced labour such as restriction on worker’s freedom of movement, withholding of wages or identity documents, physical or sexual violence, threats and intimidation or fraudulent debt from which workers cannot escape. There have been several reports of forced labour practices and conditions involving migrant labour in Malaysia, especially in the palm oil, electronic industry and manufacturing sectors.

Present laws against forced labour in Malaysia are stated in the Penal Code<sup>13</sup> and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. It is imperative that Malaysia take urgent enforcement measures to address this issue.

*(i) Other transgressions and shortcomings*

There have been reports about unreasonable and illegal deductions of wages of migrant workers to offset expenses incurred in the recruitment process, as well as in fulfilling the Malaysian employment law requirements.

The government’s policy on prohibiting family members of migrant workers from joining them here and prohibition on marriage are discriminatory and against international human rights, and should be reviewed. The MOHR

11 The Employees Provident Fund Scheme is governed by the Employees Provident Fund Act 1991

12 The Employment Insurance System is governed by the Employment Insurance System Act 2017. The EIS is primarily aimed at helping laid-off employees who are looking for another job and who contribute to SOCSO. The scheme took effect on 1 January 2018 and is administered by SOCSO.

13 The prohibition against forced labour is provided for under s 374 of the Penal Code

should formulate a policy that accords with international standards, Malaysia's obligation under CEDAW<sup>14</sup> and domestic law.<sup>15</sup>

### Conclusion

While it is true that some migrants choose to come to Malaysia, the vast majority do so because of economic hardship in their own countries. They view Malaysia as a place where they can find decent employment in order to alleviate such hardship, and that of their families back home.

Migrants are entitled to be treated with dignity as human beings. While we have a moral duty to make them feel welcome and secure, we must not overlook the fact that there are also Malaysians who emigrate overseas — such as to Australia, the UK, Canada, New Zealand and the US — towards whom we expect the host countries to accord respect, not to mention fair and dignified treatment.

We must appreciate the migrants' contribution to the economic development of our country, and there must not be any feeling of prejudice towards them. They should not be looked upon as desperate or vulnerable people whom employers can take advantage of to exploit or ill-treat. Instead, they deserve a decent wage and fair terms of employment; and nothing less than equal protection of the law.

**LH-AG**

### About the author



**Dato' Seri Mohd Hishamudin Yunus** (mhy@lh-ag.com) served 23 years on the Bench and wrote close to 750 judgments in the High Court and the Court of Appeal before retiring in 2015. He is a consultant with Lee Hishammuddin Allen & Gledhill.

<sup>14</sup> Convention on the Elimination of All Forms of Discrimination Against Women

<sup>15</sup> Under s 27 of the Contracts Act 1950, any agreement in restraint of marriage is void