

International Migration and Governance in Malaysia: Policy and Performance

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Malaysia has been, and continues to be, a major destination country for migrants. In the late nineteenth and early twentieth centuries, migrant labour was a central plank of British colonial policy and was consistent with the country's role as a supplier of commodities of empire to the industrialised West. Since the 1970s and 1980s the leading sector in economic growth has been a range of export-oriented manufacturing industries, also associated with labour-intensive production. The resurfacing of labour shortages, improved transportation and communication networks and a resurgence of migration has brought new challenges to the Malaysian state. The current causes of migration are also different— people are no longer migrating for economic reasons only. Political, ethnic and religious unrest in the region is also resulting in migration across borders. Malaysia has thus had to establish policies in areas such as labour migration, refugees and human trafficking, and is at another crossroad of re-articulating its migration frameworks to better manage migration. The state's current regulatory structures and border control systems are also evolving and its periodic amnesties, detention and deportation programs and responses to the refugee crises are being played out against the background of the human rights of all migrants.

Introduction

Malaysia's national frontiers and the legislative frameworks governing migration and citizenship are fairly recent creations. During the period of European imperial expansion in the late nineteenth century, Malaya¹ and other Southeast Asian states were transformed into colonies or protectorates of Western powers. But borders were kept open, there were few restrictions on regional and international migration, and colonial governments considered the unhindered cross-border movement of people a natural corollary to free trade. In Malaya, the British colonial administration encouraged and facilitated Chinese and Indian labour migration to resolve labour shortages in the plantation, mining and other sectors of the economy. The colonial government generally viewed migrant workers as sojourners, to be repatriated when their services were no longer required. But by the 1930s, large numbers of migrants had formed settled communities and the indigenous Malays increasingly came to regard themselves as economically marginalised in the country (Kaur 2004a).

The British gradually tightened their open borders policy following depressed economic conditions in the 1920s and 1930s and introduced a more paternalistic policy towards the Malays. As economic conditions deteriorated even further and unemployment rose, the colonial administration introduced new legislation to curb foreign labour migration. After the Second World War, immigration virtually ceased and in 1957 the formal colonial structure was dismantled, consistent with the decolonisation process and the changing international environment. The new Malayan state initiated a program of import-substitution industrialisation, commenced the process of reconstructing its national, racial, cultural and economic borders and introduced further restrictions on immigration. Henceforth, only skilled migrants were to be allowed entry into Malaya.

¹ Prior to the Second World War, Malaya included Singapore. In 1948 the two British territories were separated when the Federation of Malaya was formed.

The program of industrialisation aimed at the domestic market lost momentum in the late 1960s and was replaced by an export-oriented industrialisation strategy, with the state seeking a share in global markets for manufactured goods. The post-independent state played a leading role in the transformation through its New Economic Policy and government maintained a firm control over the administrative machinery. By the 1970s Malaysia's industrialisation program had become heavily dependent on labour-intensive manufacturing production, consistent with the global reorganisation of industry and the redistribution of production tasks. Additionally, more labour was needed for the government's land settlement schemes and other development projects, accentuating labour shortages in the country. The recruitment of foreign labour thus again became an important aspect of Malaysia's larger developmental strategy. This period consequently marked the second phase of large-scale international labour migration into Malaysia, and foreshadowed the evolution of new border control regimes and migration governance structures (Kaur 2006a).

This paper first compares international labour migration in Malaya/Malaysia during the colonial and national periods. It then reviews the most recent changes in migration policy and explains why the Malaysian state enhanced its regulatory policies to better manage migration. Third, it assesses Malaysia's contradictory role in both steering migration and restricting it through policy instruments and internal enforcement measures. It then focuses on Malaysia's changing border control systems and the role of Rela (the People's Volunteer Corps) in regulating irregular migration. Finally, it explores the implications of these regulatory measures for temporary migrant workers, refugees and victims of human trafficking.

International Migration in Malaya: Historical and Contemporary Perspectives

The colonial period

The extension of British political hegemony in Malaya in the late nineteenth century resulted in major political, economic and social transformations. Vast areas of land were opened up for mining and agricultural enterprises and by 1940 Malaya had become the largest producer of industrial commodities such as tin and rubber for the global trade in commodities. The colonial administration also established modern bureaucratic structures, new legal, social and economic frameworks and turned to China and India for its labour supply since Malaya had a small population. The British developed specific contract labour systems that relied on the use of sanctions to enforce labour agreements to retain this labour force. In return for passage, organised travel arrangements, guaranteed employment and payment and accommodation at their destinations, migrants usually signed contracts for specific employment periods. However, these had their limits, especially when demand for labour outstripped supply. Since the demand for migrant workers was tied to the global market for commodities, colonial authorities largely regarded migrant workers as a temporary, circulatory workforce that was to be repatriated during economic downturns. Moreover, most migrant workers normally returned to their homelands following periods of employment abroad.

The mining and plantation labour systems that were developed in Malaya determined recruitment patterns and influenced employment relations and working conditions. The formalisation of employment legislation for migrant workers was effected through labour regulations that were codified in the separate British administrative units. However, enforcement of these labour codes was intermittent and flexible and labour protections varied, depending on the workers' ethnicity, geographical location and occupational category. The contrasting labour systems also impacted on the morbidity and mortality rates suffered by migrant workers (Kaur 2006b).

Compared to Chinese emigration, which was largely spontaneous, Indian labour emigration was regulated from the start. Both the Indian and Malayan administrations were thus able to impose a number of conditions on Indian recruitment and circulation. Moreover, since Indian workers were also needed for the construction of public projects, colonial government policies ensured that Indian labour had less job or residential mobility and remained essentially a circulatory labour force. Thus,

compared to Chinese workers, Indian workers had very little bargaining power. Moreover, plantations were more permanent fixtures and workers a “captive” community, unlike mining enterprises. Workers’ accommodation was also contingent on workers remaining employed and cessation of employment meant eviction, destitution and subsequent repatriation (Kaur 2006b).

Javanese labour migration to Malaya and Sabah represented the third largest migratory movement. The broad division of the Malay Archipelago into “labour-scarce” and “labour-surplus” areas had major implications for Javanese labour movements in the region since Malaya and Java represented these two extremes. In Java, with its huge, poor population, non-farm employment was crucial for survival strategies, and Javanese workers shifted or moved around during the colonial period to eke out a living. It is also important to place Javanese migration in the wider context of the long tradition of geographical mobility that was facilitated by network-creating and network-dependent relationships. Through their pilgrimages to Mecca, Javanese had established contacts with networks of pilgrim brokers (*Haji* sheikhs), who organised work and travel arrangements for their employment in Malaya and North Borneo (Sabah) via Singapore. These networks, which subsequently expanded to include Javanese settled in the latter two areas, have contributed, and continue to contribute to, the perpetuation of Javanese migration within the region (Bahrin 1965).

Restrictions on Migration, 1900-57

Briefly, three phases may be distinguished in colonial immigration policy and these corresponded with the general economic conditions in the country, global demand for Malaya’s commodities and labour activism. During the first phase, 1900-27, thousands of migrant workers migrated to Malaya to work in the expanding tin and rubber industries. For all three groups (Chinese, Indian and Javanese), entry was completely free and unrestricted. There was, nevertheless, repatriation of some groups of unemployed workers during the depressed economic conditions of the 1920s, but this was not linked to race or gender.

Worsening economic conditions in the late 1920s and early 1930s led to a major change in immigration policy. Despite an earlier commitment to unrestricted immigration, the colonial administration introduced new legislation that restricted labour mobility and migration. During this second phase, which lasted broadly from 1928-46 (and included the Japanese Occupation period), labour restrictions were linked to economic and security/political motives and discriminated against Chinese men. Thus key legislation was enacted to “regulate the admission of aliens in accordance with the political, social, and economic needs ... of the various administrations in Malaya” and “to provide a means of registering and controlling aliens resident in Malaya” (Parmer 1960, 93; Kaur 2006a). Indians were largely unaffected by these regulations since they were regarded as British subjects.

The third phase of immigration restriction was from about 1947-57 (Malaya became an independent state in 1957). In 1953 the British enacted an *Immigration Ordinance* (IO) that stipulated, for the first time, the specific categories of immigrants allowed entry into Malaya. Unlike the earlier restrictions based on race and gender, the IO also specified nationality and occupational category and thus put greater emphasis on the skills of the migrants. Permanent entry was restricted to, first, persons who could contribute “to the expansion of commerce and industry”; second, to persons who could provide “specialised services not available locally”; third to “families of local residents”; and fourth to other persons on “special compassionate grounds” (Saw 1988, 17). Overall, this legislation was designed to appease Malay nationalists and underlined the connections between race, occupation and economic role in the country. Intending immigrants were also required to hold a contract of at least two years duration with a Malayan firm and earn a salary of not less than M\$400 a month. This policy thus spelled the demise of unskilled labour migration to Malaya in the immediate post-independence period and underpinned future exclusionary migration legislation (Kaur 2004b).

The ending of colonial rule in Malaya led to further restrictive legislation to curb unskilled Chinese and Indian immigration into the country. Border controls and internal enforcement measures assumed even greater importance, coinciding with the prevailing political unrest in the country after

the Second World War. The subsequent Malayan Emergency (1948-60) resulted in the introduction of the Internal Security Act, and a compulsory system of identification cards for all residents aged twelve years and over. The identity cards categorised people on the basis of their nationality and residential/occupational status and, in effect, created the “other”. Both these internal enforcement measures are an enduring legacy of colonial rule and have been modified to meet the current needs of the national state.

The Malaysian State and New Immigration Frameworks

The migration goals of the newly independent Malayan government mirrored post-war colonial immigration policies. The *Immigration Act* of 1959, which replaced the *1953 Ordinance*, tightened entry rules under the reunification of families clause and prohibited entry of wives (and children) of local residents who had been living apart from their husbands for a continuous period of five years after December 1954. Migration regulations were also intended to restrict the quantity and manipulate the quality of migrants. The subsequent *Employment Restriction Act* of 1968 made admittance to the labour market for non-citizens contingent on the possession of work permits or labour contracts. The work permit system was also intended to ensure that only skilled non-citizens would have entrée into the country. Foreigners or “aliens” who had not taken out citizenship had to leave or were repatriated.

Notwithstanding this, less-skilled Indonesian migrants continued to head for Malaya/Malaysia since they were not classified as aliens. The Indonesians utilised informal entry channels, building on their pre-World War Two networks, and Malaysian firms recruited a large number locally. Occupational mobility was high among these migrants, especially in the construction and agricultural sectors, and labour brokers continued to play an important role in the transportation and job placement of the new migrants (Kaur 2006a).

Next, following the 13 May 1969 racial riots, Malaysia adopted an interventionist regulatory policy – the New Economic Policy –which inaugurated affirmative action strategies for the Malays and other indigenous communities. The state also became the pre-eminent player in economic development, implementing poverty reduction and income redistribution schemes for the Malays. Apart from the industrialisation program, large-scale development projects including infrastructure and land development schemes were established under the management of government agencies. The construction and plantation sectors also expanded and this growth took place against the backdrop of a tight labour market, consistent with sustained fertility decline and restrictive immigration policies. According to a World Bank Report (1995:58), 14 million new jobs were created in 1987-93 alone, while the labour market growth rate was 3.9 percent. The domestic labour force growth rate during this period was 3.1 percent. Thus, just as in the colonial period, the only realistic alternative for the Malaysian government was to import foreign workers to overcome labour shortages in the country.

The analogies between foreign labour recruitment during the colonial period and since the 1980s are striking. First, there has been little generational change in the specific conditions of migration and settlement and the connections between ethnicity and work. Second, the Malaysian government has reworked/modified the Asian contract labour system to incorporate a rotation mechanism. Employment through intermediaries and offshore recruitment procedures are key features, as is the provision of assisted passage. Other conditions include repayment of advances through salary deductions; employment with a specified employer; fixed-term employment, and the obligatory return to the country of origin upon completion of the contract (Kaur 2007a). Third, ethnicity and gender are paramount considerations in sustaining Malay/Muslim numerical supremacy and state policy prohibits unions between Malaysians and foreign workers (Kaur 2007a).

Managing Migration

Malaysia became the largest labour-importing country in Southeast Asia in the 1990s. These migrant workers have also represented between 20 to 25 percent of the labour force since the 1990s

(Kaur 2006a). In 2007 migrant workers comprised about 2.8 million of the 12 million labour force, according to official and media reports (*Malaysiakini*, 2 March 2007; 23 February 2007). Malaysia's reliance on an ever-increasing number of Asian countries for this workforce is listed in Table 1 below.

Table 1 Malaysia: Foreign Migrant Workers by Country of Origin, 1998-2005 (%)

	1998	1999	2000	2001	2002	2003	2005
Indonesia	53.3	65.7	69.4	68.4	64.7	63.8	68.9
Nepal	0.1	0.1	0.1	7.3	9.7	9.7	9.9
Bangladesh	37.1	27.0	24.6	17.1	9.7	8.4	2.9
India	3.6	3.2	3.0	4.0	4.6	5.6	6.9
Burma	1.3	0.9	0.5	1.0	3.3	4.3	4.6
Philippines	2.7	1.8	1.2	1.0	0.8	0.6	1.1
Thailand	0.7	0.5	0.4	0.4	2.4	0.9	0.3
Pakistan	1.0	0.6	0.5	0.4	0.2	0.2	0.7
Others	0.2	0.2	0.3	0.4	4.6	6.5	4.7
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: Malaysia, Department of Immigration, as cited in Ministry of Finance, *Economic Report, 2004/2005*; Kanapathy (2006), Table 2.

As shown above, Indonesia is the major source of migrant workers and, since 2005, migrant numbers from Nepal and India have also been increasing steadily.

Additionally, it is estimated that there are between 800,000 to over one million undocumented migrants in the country (Agence France-Presse, 14 July 2006; Kanapathy 2006, *Malaysiakini*, 2 March 2007) and the figure for Sabah is understated (*Malaysiakini*, 25 June 2008). Furthermore, it is believed that over 100,000 people in this category are from refugee and asylum seeker communities (CARAM Asia, 11 April 2008; Medecins Sans Frontieres 2007:3; Amnesty International 2004).

Not surprisingly, the state both acknowledges and responds to these two main categories of migrants, namely, documented or "legal" migrants and undocumented or "illegal" (irregular) migrants through its legislative and other frameworks.

Thus legal or documented migrants include people who enter (and are allowed to stay) on a temporary basis and who hold passports, visas, work permits and other valid documents, as required under the state's immigration legislation. Irregular or undocumented migrants include all persons who enter Malaysia without documents; or who subsequently become undocumented after arrival due to circumstances beyond their control; tourists who overstay; and migrants fleeing political, religious, and ethnic persecution. Before discussing these categories in detail (see below), it is necessary to provide an overview of the state's evolving legislation on labour migration.

Migration Policy and Performance

Phases and trends

In the late 1960s there were no clearly defined structures or mechanisms for the importation of less-skilled migrant labour, and employers were permitted to recruit migrant workers informally from Indonesia and Thailand through intermediaries. Thus, a regional migration system based on cultural and religious affinities developed with the tacit approval of the state. Rising labour shortages led to further foreign worker intakes, and the increased visibility of migrant workers by the end of the 1970s prompted the government to take measures to regulate migrant labour inflows. Since then the state has alternated between tightening immigration controls and loosening them through bilateral agreement and amnesties.

Four distinct phases may be observed in the evolution of Malaysia's migration policies since the 1970s. During the first phase, 1970-80, the Malaysian government followed a tolerant policy towards foreign worker recruitment. In the second phase, 1981-88, the government legalised foreign labour recruitment, established an official channel for labour recruitment, and signed bilateral agreements with governments of source countries. In the third phase, 1989-96, the state commenced a regularisation program to curb illegal immigration. Growing public uneasiness with the more pronounced visibility of Indonesian migrant workers also prompted the government to implement this program, which had its origins in the economic recession of 1985-86, and in 1989 it froze the further importation of foreign labour. Concurrently, Malaysia implemented a programme to legalise/regularise the status of Indonesian migrants.

The fourth phase, since 1997, saw major policy developments for the regulation of migration following the financial and economic crisis of 1997-98. New measures to control unauthorised migration and periodic amnesty programs that allowed undocumented migrants to leave the country without penalty were introduced. These policy developments are briefly summarised below. The first was the implementation of a work-permit system, based solely on offshore recruitment, that resulted in workers being categorised more rigidly than ever before. The work-permit system drew its inspiration from Mode 4 provisions of the General Agreement on Trade in Services (GATS), devised for the movement of skilled personnel on short-term contracts. The government adapted this provision for the recruitment of less-skilled workers and employment permits became both location- and employer-specific. Breach of the regulations became punishable by detention, physical punishment and a penalty.

The government also signed memoranda of agreement (MoU) with labour-exporting countries. These MoU regulate the recruitment of less-skilled workers and set out wage and working conditions. In May 2004, for example, the Malaysian government signed a MoU with Indonesia for the recruitment of Indonesian migrant workers (MoU 2004). Interestingly, while the MoU are used for less-skilled migrant workers, the trend now is to regulate the movement of professionals and highly-skilled workers through Free Trade Agreements (Kaur 2008). A third change was the introduction of new legislation that formalised a diversified recruitment policy, designed to reduce dependence on any one racial group (Kaur 2005; Wong 2006). This has also enabled the government to designate certain employment sectors for specific groups.

Differing rules for different “talents”: Employment Passes and Labour contracts

The Malaysian state's regulatory legislation and governance of the foreign workforce underlies a policy of distinguishing between migrants conceptualised as “workers” on the one hand and “expatriates” on the other. This distinction is based on workers' skills and differentiates between highly- and less-skilled workers. The former are categorised as *pegawai dagang* or *expatriates* (the professional, technical and kindred group), whilst the latter are classified as *pekerja asing* or *foreign contract workers*. There are correspondingly two types of employment-related work permits or work visas, namely an employment or work pass (*Pas Penggajian*) for expatriates; and a work permit or contract worker pass (*Pas Lawatan Kerja Sementara*) or visit pass for the temporary (contract) employment of less-skilled workers, including domestic workers. This system of categorisation also accentuates Malaysia's preoccupation with ethnicity, nationality and gender.

*Pas Penggajian/*Employment or work pass

Professionals and highly-skilled workers include those who earn more than RM2,500 a month. No limitations are imposed on source countries (with the exception of Israel and some African states) for such workers. The job contract was originally confined to two years (with a maximum term of five years). The workers may be employees or self-employed and their dependents are permitted to accompany them to Malaysia. Expatriates are normally employed in multinational enterprises, although increasing numbers are employed in the computing, medical and engineering fields and also in the higher education and sports sectors (Kassim 2005, 267). Although expatriates are treated

“somewhat better” than less-skilled migrant workers, they are nevertheless regarded as temporary workers and there is no fast track to citizenship. They have to be sponsored by their employers, their employment tenure is limited and they are not allowed to marry nationals.

Policy regarding expatriate recruitment falls under the jurisdiction of the Committee for Expatriate Workers, which comprises government representatives from nine Ministries, and approval for recruitment can come from a variety of agencies. The Immigration Department has made some recent changes that stem from overall economic and employment policy directions. The age requirement has been amended and the state currently allows entry to individuals who are twenty-one years in “IT and Related Positions”, while in “Other Management Position[s]” applicants are denied entry unless they are twenty seven years old. Moreover, in the case of working spouses, the fee schedule is appropriately skewed toward expatriates working in specific sectors, with Employment Pass fees for “Important Position (MIDA’s Approval)” and “Management/High Level/Professional/Technical Position” set at RM 300 and RM 200 per annum respectively (in contrast to, for example, restaurant work, which attracts RM1, 800 for Peninsular Malaysia and RM1, 440 for Sabah and Sarawak respectively [*Star*, 6 July 2005]). Also, in April 2008 the Malaysian government announced that highly-skilled migrants would be allowed to stay in Malaysia for a maximum of ten years (*New Straits Times*, 16 April 2008).

Pas Lawatan Kerja Sementara/Visit pass for temporary employment

The Visit Pass for Temporary employment covers less-skilled migrant workers whose earnings fall below RM 2,500 a month and who are employed in the manufacturing, construction, plantation, services and domestic worker sectors (Kanapathy 2006). Less-skilled workers are employed on one-year work permits, which are renewable up to five years (six years in total). There are age restrictions associated with these permits too, and workers are disallowed from bringing their dependents into the country. Consequently, no resettlement of dependents is allowed (Kaur 2007a).

The number of permits granted to employers is determined by several criteria: the type of industry; export/non-export orientation; paid-up capital; sales value; and the ratio of local workers to foreign workers. There is thus implicit a dependency ceiling, which is defined as the maximum share of foreign workers in a firm’s total employment. These ceilings are higher for sectors where less-skilled workers are employed, as shown in Table 2 below.

The migrant workers’ country of origin is also taken into account and the government has placed restrictions on the origin and number of workers from any one individual sending country in specified occupational sectors, as listed below in Table 3.

On this note, the government reinstated the recruitment of Bangladeshi workers in November 2003 (recruitment was banned in 1996) following the signing of a Memorandum of Agreement with Bangladesh (*Migration News*, January 2004, Volume 10 Number 1).

Table 2 Malaysia: Criteria for Employment of Foreign Workers in Selected Sectors (as determined by the Immigration Department)

MANUFACTURING SECTOR
1. Export Oriented Companies
Eligibility Criteria:
– Minimum export Value: RM50 million
*Eligibility ratio of local workers vis-a vis foreign workers 1:3
2. Non-Export Oriented Companies
Eligibility Criteria:
– Min. paid-up capital RM 100,000
– Sales value RM 2 million
*Eligibility ratio of local workers vis-à-vis foreign workers 1:1
3. Company in the Electrical and Electronic Sectors
Eligibility Criteria: None
– Ratio of local workers to foreign workers is 1:2 irrespective of whether the company is designated ‘export oriented’ or ‘non export oriented’
PLANTATION SECTOR
Eligibility: Owner of plantation or lessee
Type of cultivation or nursery: oil palm, rubber, cocoa, teak and other species of forest
Approval criteria - depends on two factors: land area and number of existing workers (local and foreign)
For example : For every 8 hectares of oil palm : 1 foreign worker
For every 4 hectares of rubber : 1 foreign worker
CONSTRUCTION SECTOR
For construction workers < 50
– Employer needs to get approval from the Construction Labour Exchange Centre
For construction workers > 50
– Employer needs to get approval from Ministry of Home Affairs

Note: A foreign worker is initially allowed to work for three years only and the worker’s application may be extended on a year to year basis until the fifth year. Further extensions are allowed only upon application to relevant certifying authorities after the fifth year, and on the worker’s status being upgraded to that of a skilled worker.

Source: Based on Hj. Shamsuddin Barden, ‘Terms and Conditions of Employment (Foreign Workers)/Unionism’, paper presented at the Lawasia Labour Law Conference, Kuala Lumpur, 10-11 August 2006.

Women workers form a major migration stream in Malaysia. Women domestic workers have generally more possibilities of legal employment in Malaysia compared to men (Lycklama a Nijeholt 1994; Yamanaka and Piper 2005, Kaur 2007). While migration by men has usually been in response to labour shortages in sectors viewed as “undesirable” by the local Malaysian populations, women’s migration has been specifically promoted to facilitate the transfer of reproductive tasks such as domestic work in private households from more affluent women to poorer migrant women. Thus the feminisation of the migrant labour force has coincided with Malaysia’s gender-selective policies and the emergence of gender-specific employment niches. This in turn has resulted not only in the self-sustaining feature of this migratory stream, but also the emergence of particular female migratory linkages between groups of countries.

Table 3 Malaysia: Country of Origin of Foreign Workers for Recruitment in Designated Sectors (as of August 2006)

SECTOR	COUNTRY
Construction	Philippines (male), Indonesia, Cambodia, Kazakhstan, Laos, Myanmar, Nepal, Thailand, Turkmenistan, Uzbekistan and Vietnam, Bangladesh
Manufacturing	Philippines (male), Indonesia (female), Cambodia, Kazakhstan, Laos, Myanmar, Nepal, Thailand, Turkmenistan, Uzbekistan and Vietnam, Bangladesh
Plantation/ Agriculture	Philippines (male), Indonesia, India, Cambodia, Kazakhstan, Laos, Myanmar, Nepal, Thailand, Turkmenistan, Uzbekistan and Vietnam, Bangladesh
Service	
– Restaurant	All source countries for general worker posts (except India - cooks only). Restaurants in major towns in Peninsular Malaysia
– Laundry	All source countries except India
– Cleaning/Sanitation	All source countries except India
– Caddy	All source countries except India
– Resort Islands	All source countries except India
– Welfare Homes	All source countries except India
– Cargo	All source countries except India
– High Tension Cable	India only
Domestic Workers	Sri Lanka, Indonesia, Thailand, Philippines and Cambodia
Foreign Nurses	Albania, India, Bangladesh, Philippines, Pakistan, Indonesia and Myanmar

Source: Malaysian Immigration Department.

Levies and revenue for the state, but new burdens for workers

Although the government acknowledges that Malaysia is heavily reliant on migrant labour, it imposed a levy on the employment of foreign workers in the 1991/92 national budget, ostensibly to “offset social costs and encourage restructuring” by firms, and at the same time to reduce the country’s reliance on migrants. The levy was revised upwards in 2005, and since August 2005 levies (previously payable at the Immigration Department) were made payable at the Home Ministry, with approval letters issued “within a day” (*Star*, 6 July 2005). Thus the levy mechanism has also become inextricably linked to labour contracts and government revenue and the Malaysian government collects a considerable income from the levies on foreign workers, as shown below in Table 4.

Table 4 Malaysia: Revenue from Foreign Workers, 1995-2003 (RM million)

Source	1995	1997	2000	2001	2002	2003
Annual Levy	218.6	1,321.8	614.1	637.1	783.9	1,109.4
Visa Fees	26.7	51.7	53.5	68.4	84.4	109.4
Total	245.3	1,373.5	667.6	705.5	868.3	1,218.8

Source: Malaysia: Immigration Department.

Moreover, unlike Singapore, in Malaysia the state imposes a lower levy on sectors that have critical labour shortages, while a higher levy is imposed on sectors “where the problem of excess labour demand has been perceived to be less serious” (Kanapathy 2006, 8).

Most migrant workers in Malaysia obtain their jobs through private employment agencies or labour hire firms that operate both in the source and destination countries. Domestic workers are largely recruited through labour agencies in their respective countries, working closely with private

employment agencies in Malaysia. It has been widely reported that exploitation and abuse occurs at every stage of the migration cycle, including in recruitment, training and transit. Unfortunately, regulation and monitoring of the private employment agencies that supply labour and supervise training and eventual placement in Malaysia is woefully inadequate. Essentially, there is no mechanism whereby such agencies could be held responsible, not only for the abuse or exploitation of migrant workers, but even for their basic welfare (Kaur 2007a).

In 2004, new regulations on hiring foreign workers were introduced, following complaints that Malaysian nationals were being discriminated against in the labour market. These included the following stipulations: approval to hire foreign workers was to be based on a needs basis; employers were required to advertise vacancies for at least two consecutive days in the major local dailies to enable Malaysians to learn about job vacancies; and employers were advised to offer flexible employment pathways to foster greater participation in the workforce by Malaysian housewives (homemakers) (*Star* 6 May 2004).

Governance Structures

The usage and governance of foreign labour is regulated through three major legislative instruments: the Immigration Act, the Employment Act 1955/1998, and the Penal Code. The Immigration Department oversees, and the *Immigration Act* 1959/1963 provides the basis for, immigration regulations and procedures in the country. The Department falls under the jurisdiction of the Ministry of Home Affairs. Initially, this Ministry established new structures to regulate the entry of migrant workers and introduced forms of permission to enter and stay in the country. In July 2005, following lobbying by employers' groups, the Home Ministry allowed employers to recruit migrant workers through recruitment agencies and 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 scrutinise 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. Recruitment agents and labour hire companies now dominate the recruitment process and the Immigration Department's role has consequently been revised to that of granting visas only (*The Star*, 6 July 2005).

The *Immigration Act* was further amended in 1997 and 2002, resulting in harsher penalties 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, was introduced. 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 physical punishment.

In 1998, the Employment Act was amended and a new Part XII B– "Employment of Foreign Employees" – added. This amendment contains five provisions that, for the most part, are designed to protect *local* Malaysian employees from being discriminated against in favour of foreign employees. For example, under section 60M, no employer may terminate the contract of service of a local employee for the purpose of employing a foreign worker. Section 60N states that where an employer is required to reduce his workforce "by reason of redundancy necessitating the retrenchment of any number of employees", the employer may not terminate the services of a local employee unless he has first terminated the services of *all* foreign employees employed by him in a capacity similar to that of the local employee (Sreenevasan 2006).

The only provision under this particular section that could be regarded as providing a measure of protection to migrant workers is section 60L(1), which empowers the Director General to inquire into any complaint forwarded by a local employee that he is being discriminated against in relation to a foreign employee; or from a foreign employee that he is being discriminated against in relation to a local employee by his employer in respect of the terms and conditions of his employment. The Director General is empowered to issue to the employer such directives "as may be necessary or

expedient to resolve the matter”. However, it is to be noted that this is not, strictly speaking, an anti-discrimination clause (Employment [Amendment] Act, 1998, Act A1026).

Migration Gains and ...Pains

In making it easier to enter Malaysia legally, the government has made, and continues to make, it harder to enter Malaysia “illegally”. This is being done through several policy instruments and internal enforcement measures. These include increasing the number and frequency of border patrols, punishing employers who employ irregular migrants, fining and punishing irregular migrants, detaining them under abusive conditions in detention camps and deporting them. Crucially, the government has come to increasingly rely on volunteers and neighbourhood watch groups to flush out irregular migrants. In the process, victims of forced migration such as refugees and trafficked victims, face a fate similar to or worse than that experienced by irregular economic migrants.

In the enforcement of the Immigration Act, two particular articles, Section 6 and Section 51 are used to detain and charge migrant workers. Article 6 of the Act states the grounds for legal entry. Consequently, any person who enters the country illegally is subject to severe punishment. Article 15 defines the offence as “Unlawful entry or presence in the country” or overstaying in the country. Briefly, therefore, the legal status of a migrant worker has also become dependent on the employer (Sreenevasan 2006).

Punishment, Detention and Deportation

Currently, there are three main bodies entrusted with enforcing Malaysia’s immigration legislation, namely the Immigration Department, the Police Force, and the *Ikatan Relawan Rakyat Malaysia* (People’s Volunteer Corps or Rela)

The Malaysian Immigration Department, together with the police, regularly carries out mass deportation exercises to expel/deport irregular migrants and Indonesian migrants have been the worst affected. The first irregular worker regularisation drives and amnesties were undertaken between 1989 and 1992. Subsequently, in August 2002 Malaysia expelled hundreds of thousands of undocumented Indonesian workers after announcing an amended, stricter immigration law, which included provisions for the fining, whipping, and imprisonment of illegal immigrants and their employers. In 2003, 42,935 foreigners were arrested under these laws, and almost half were Indonesian. Nine thousand of those sentenced were physically punished. The expulsions initially decreased after calls by human rights defenders in Indonesia for retaliatory measures by the Indonesian government.

Altogether, between 2000 and 2004, the Malaysian police arrested 465,878 irregular immigrants, of whom 64 per cent were from Indonesia, followed by 10 per cent from the Philippines and 7.5 per cent from Burma (Othman Talib 2005). The government launched another crackdown in 2005, resulting in arrests, imprisonment, whipping and deportation of irregular migrants. And the cycle continues. In February 2007 the government estimated that there were ‘between 500,000 to 800,000 undocumented workers’ in the country and that new crackdowns would be carried out (*Malaysiakini*, 12 February 2007). In 2008, the ruling party’s poor showing in the March 2008 general elections promises further crackdowns demanded especially by politicians in Sabah (*Malaysiakini*, 6 June 2008).

As stated earlier, indefinite detention of illegal migrants pending deportation is also used by the state to restrict migration. Thus undocumented persons in Malaysia, irrespective of whether they are alleged economic migrants or asylum seekers, face up to a five-year jail sentence, a RM 10, 000 (US\$ 2,600) fine and six strokes of the cane under the Immigration Act (Kaur 2006b). Errant employers who employed more than five illegal workers are also liable to punishment and have to pay fines, face imprisonment and physical punishment. According to the NGO Suaram, in practice the number of employers charged in court “has been comparatively small” (Suaram 2006, 117).

Further, in 2005, following allegations of inhumane treatment by Immigration Department officials, management of the detention centres was transferred to the Prisons Department by the Immigration Department (US State Department, *Malaysia Country Report on Human Rights Practices* 2006). There are now about fifteen dedicated detention centres in Malaysia for irregular migrants. These are overcrowded, migrants are given poor quality food, sanitation is unsatisfactory, and medical attention inadequate (Suaram 2006, 121; *New Straits Times*, 28 September 2006; *New Straits Times*, 30 September 2006).

Amidst growing reports of overcrowding in prisons, the government has established immigration courts at detention centres to speed up the process of charging irregular migrants and also reducing their chances of escaping. This initiative has been widely criticised and, according to the Labour Resource Centre, the new courts and “fast track prosecutions” have actually resulted in the transfer of irregular migrants from detention camps to prisons (*Malaysiakini*, 7 March 2007).

The state has thus moved away from the conventional geographical vision of the border as a dividing line between one national territory and the next, to a more complex sense of the border as a social reality. The border may now be experienced in a variety of places, including conventionally defined international boundaries, at seaports and airports, at the perimeters of migrant-processing hubs and detention centres (Kaur 2006a). This is especially so in view of the growing powers of Rela.

Rela, *Ikatan Relawan Rakyat Malaysia*, now known as *Ikatan Relawan Nasional*, represents one of the most important initiatives of the state in its efforts to regulate migration. It was initially launched in 1972 to assist, maintain and safeguard peace and security in the country and undertake community projects. In late 1975 its membership (almost all Malay) stood at about 200,000. Rela members were given training and were “expected to act against virtually all types of anti-government activity”, and promote government objectives (Funston 1980, 270). An amendment to the Essential (*Ikatan Relawan Rakyat*) Regulations in 2005 expanded Rela members’ powers and authorised them to “bear and use” weapons to “stop, search and demand documents, arrest without a warrant, and enter houses or premises believed to house irregular migrants” (Suaram 2006:120-21). Thus Rela has become an all-powerful instrument to curb irregular migration. It has been alleged that Rela officers also “destroy the ID [identification cards] of legal migrants to justify the raids” (Human Rights Watch 2007). They are also “immune from prosecution in relation to their conduct” (FIDH-Suaram: 12).

Rela civilians receive minimal training and are given cash rewards (MYR 80 or US\$21) for each illegal immigrant apprehended. Rela personnel move around as a group (accompanied by immigration officials) at night or in the early hours of the morning when the illegal migrants/refugees are at home (in the squatter areas, or in makeshift living quarters in the jungle), acting on information provided by the Immigration Department. They are empowered to break down doors to make citizen arrests. The undocumented migrants/refugees are then transported to the many detention centres in the country. In the 2005 crackdown on irregular migrants, an estimated “500,000 officials and civilians” were deployed to round up irregular migrants, including involuntary migrants (*Migrant Watch* 2005, 2). Moreover, further plans are afoot to strengthen Rela members’ powers and transfer jurisdiction of detention camps to Rela.

Part of the problem lies in the fact that the different departments do not communicate with one other, since changes in recruitment policy that give employers the right to directly hire foreign workers to recruitment by labour hire firms – has exacerbated the situation. The labour-hire firms bring in large groups of workers without definite employment contracts and “excess” workers who cannot find jobs are rendered “illegal” through no fault of their own. According to the Malaysian Trades Union Congress, the activities of these labour hire firms/agents “has worsened the problem of human trafficking” in Malaysia since they ‘bring in as many as 500 workers each’ who are then ‘sold or outsourced’ (humantrafficking.org, News and Updates, 17 May 2007). The victimisation of migrant workers thus takes many forms in Malaysia.

Refugees and victims of human traffickers

Malaysia does not have legislation that provides for the granting of asylum or refugee status in accordance with the 1951 UN Convention relating to the Status of Refugees and its 1967 protocol; nor has it established a system for providing protection to refugees. The government does not provide protection against refoulement but generally does not deport individuals recognised as persons of concern by the UNHCR. Moreover, while the government cooperates (and has cooperated) with the UNHCR and normally does not impede other humanitarian organisations from assisting refugees and asylum seekers, human rights concerns are not central to the politics and policies of the state's refugee policy (Kaur 2007b).

Malaysia also consistently performs poorly in the Annual World Refugee Survey. It regularly deports refugees and asylum seekers from Burma to Thailand who are then kidnapped by traffickers. Rela personnel also injure refugees during raids and manhandle them. Moreover, despite having ratified the Convention on the Rights of the Child, Malaysia does not provide primary education or free health services to most refugee children or asylum seekers—including those born in Malaysia (USCRI 2008).

Finally, as the impact of global migration experienced in the country continues to be debated and contested in the national arena, the human rights of both documented and irregular migrants have increasingly come to depend on employment contracts and labour protections enshrined in these contracts, or on the goodwill of the state. Indeed, Malaysia's migration goals and policy have become centred on numbers rather than the country's need for migrant workers, and humanitarian concerns have become secondary issues.

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