



The Rights Illusion:

Access to Justice and the Rights of Non-Citizens in Malaysia

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Introduction¹

The modern articulation of the rights of all has its roots in the formation of the United Nations (UN) in 1945 and in the adoption of the Universal Declaration of Human Rights in 1948. According to this framework, all non-citizens have certain rights, including those with irregular legal status. They have the right to be free from arbitrary killing, torture, inhumane treatment, arbitrary arrest and detention, slavery, and forced labour (Office of the United Nations High Commissioner for Human Rights, 2006). They also have the right to marry, to protection as minors, to equality, non-discrimination, freedom of religion and belief, freedom of political opinion, and the protection of their labour rights. However, in reality, many non-citizens do not enjoy these rights.

In this paper, I analyse the protection of the rights of non-citizens through social and legal institutions and practices. I argue that in addition to the challenges faced by citizens in obtaining redress for grievances, non-citizens are systematically disadvantaged because of the limits placed on their residence and right to work, which have bearing on their capacity to pursue claims through formal adjudication mechanisms. This disadvantage is particularly marked in states with immigration regimes designed to keep non-citizen populations temporary rather than promote their integration in society, and which does not facilitate their right to residence and work while they pursue redress for grievances. Migrant workers on em-

ployer-sponsored immigration passes are at a particular disadvantage in seeking redress for labour violations.

The extent to which individuals are able to obtain redress through formal mechanisms depends largely on the resources they are able to mobilise. The better their financial standing, their access to sound legal advice, their social connections, as well as the more time they can afford in seeing their cases through the courts, the stronger their likelihood of obtaining a favourable outcome through formal adjudication mechanisms. Non-citizens who have temporary status, limited social contact and who are poor, find it difficult to gain redress. The most vulnerable of all are those with irregular status.

A rights illusion occurs when human rights analysis focuses on the content of existing laws and legal procedures without looking at the efficacy of social and legal institutions and practices in protecting these rights. Human rights analysis that starts with the experiences of individuals allows us to interrogate the disjuncture between their rights as codified in international and domestic law and their actual enjoyment of rights. It also allows us to examine the efficacy of social and legal institutions and practices in mediating the protection of these rights.

In this paper, I examine the situation of non-citizens in Malaysia, a foreign labour dependent upper-middle income country in Southeast Asia with an immigration regime that gives only temporary status to most non-citizens. I take an access-to-justice

approach, which Mauro Cappelletti describes as follows:

In the access-to-justice approach, the principal elements are the *people* (with all their cultural, economic and social peculiarities), the *institutions*, the *processes*... which represent the elements from which the law originates, lives and evolves. Moreover, the legal system is not seen as a separate, autonomous, 'autopoietic' (self-generating) system, but as an inseparable and integrative part of the more complex social system, a part which cannot be artificially isolated from economics, ethics and politics (Cappelletti 1992: 25).

The access-to-justice approach is concerned with whether 'legal and judicial outcomes are just and equitable' with justice referring 'to both fairness of process and fairness of outcome in addressing justiciable issues' (United Nations Development Programme 2004: 6). Justiciable issues are 'those problems for which there is a potential legal remedy within a civil and/or criminal justice framework' (Mason *et al.* 2009: i).

In the next section of this paper, I provide an introduction to Malaysia and the significance of non-citizens in Malaysian society. I then outline the status and rights of non-citizens in domestic legislation and review the grievances they have experienced in their time in Malaysia, paying particular attention to migrant workers who constitute the largest category of non-citizens. This is followed by a review of the challenges non-citizens face in having their rights protected. I then conclude with some observations about access to justice and the rights of non-citizens.

Non-citizens in Malaysia

Malaysia hosts the largest number of non-citizens in Southeast Asia. It is a destination for work, tourism, education, and asylum as well as a place of transit to other regions in the world. Millions of non-citizens travel in and through Malaysia every year. In 2010 alone, it received 24,577,000 tourists (See 2011). It also hosts around 3-4 million migrant workers, over 100,000 asylum seekers and refugees, an estimated 88,000 foreign spouses, 86,000 international students, and over 370,000 permanent residents. It is

amongst the top 15 percent of countries with the highest numbers of international migrants in the world (Ratha & Xu 2008).

Contemporary policies concerning international labour migration in Malaysia can be traced back to the 1970s when demand for labour grew significantly as a result of government efforts to restructure the economy by promoting export-oriented industrialisation and agricultural expansion. The government welcomed foreign direct investment, creating export-processing free zones and provided financial incentives, tax exemptions and infrastructure facilities (Lim 1988). It permitted companies to hire expatriates to fill key managerial and technical positions. In the 1980s, recognising the need to boost the supply of cheap labour, it began authorising the large-scale recruitment of workers from surrounding countries (Jomo 1988; Jones 2000).

Migrant workers, both documented and with irregular status, constitute up to a third of Malaysia's work force (Robertson 2008). Malaysian's immigration regime distinguishes clearly between 'skilled workers' called 'expatriates', and 'unskilled/ semi-skilled' workers referred to as 'foreign workers' and 'foreign domestic workers'. The government regulates their recruitment, entry, placement and exit through a system of employer-sponsored time-limited immigration passes. All three categories of migrant workers cannot change employers without the permission of the Immigration Department.

Employers of foreign workers and foreign domestic workers are required to pay a yearly 'foreign levy' per person hired, ranging between RM360 and RM1,800 depending on their sector.² They are responsible for providing housing and medical treatment for their workers, for renewing their immigration passes on a yearly basis, as well as arranging for their repatriation at the end of their contract. If their worker absconds, they are responsible for reporting this to the Immigration Department who then cancels their immigration pass.

Each type of migrant worker is allowed different rights and privileges. While expatriates are allowed to bring families, foreign workers and foreign domestic workers are not. Foreign workers and foreign

domestic workers are also prohibited from marrying while they are in Malaysia. Furthermore, unlike expatriates, they are subject to medical screening for communicable and chronic diseases – and for women, pregnancy – before and after their arrival. Those who fail these are liable for deportation.

In 2008, there were around 42,000 expatriate workers, constituting 0.4 percent of the total workforce (Khamis 2008) and over 2.1 million authorised foreign workers, employed in manufacturing (36 percent), plantations (17 percent), construction (15 percent), domestic work (14 percent), services (10 percent) and agriculture (9 percent) (Dewan Rakyat 2008). Foreign workers originate from a number of surrounding countries including Indonesia, Philippines, Cambodia, Burma (Myanmar), Thailand, Vietnam, India, Nepal, Pakistan, and Sri Lanka. In 2009, there were an estimated 300,000 foreign domestic workers in Malaysia, with more than 90 percent originating from Indonesia and around 5 percent from Philippines (Hariati 2009).

Concomitant with the growth of authorised migrant workers has been the rise in numbers of migrants with irregular status, estimated at 2 million in 2011 (Allard 2011; Palani 2011). Over the years, the government has taken an increasingly punitive approach to reducing irregular migration, conducting large-scale national crackdowns (often preceded with time-limited amnesty exercises) aimed at arresting, detaining, punishing and deporting migrants. From 2005-2008, the Immigration Department arrested 216,373 persons (Lee 2009). The crackdowns have resulted in severe overcrowding in detention facilities and deaths during mass deportation.

Just before the national crackdown in 2002, the Immigration Act 1959/63 was amended to include whipping as a form of punishment for illegal entry. Between 2002 and 2008, 34,923 men were whipped as a result of committing immigration offences (Dewan Rakyat 2009). The European Parliament has denounced this brutal punishment as a 'practice that amounts to torture and is clearly illegal under international law'.³

In spite of its reliance on foreign labour, Malaysia has had an enigmatic and incoherent approach to

non-citizens. Its management of labour migration has been referred to as a 'stop-go approach'⁴ with 'schizophrenic policy moves' (Gurowitz 2000: 867). Malaysia also does not see itself as an immigration country. It provides only temporary status to most non-citizen groups, and does not have structured programmes to integrate international migrants. Aside from skilled workers, Malaysia has not encouraged non-citizens to obtain permanent residence and to naturalise as citizens. In fact, Malaysia's laws, policies and practices have made it almost impossible for most non-citizens to acquire citizenship in spite of years of residence in Malaysia.

The Status and Rights of Non-Citizens in Malaysian Law

The Malaysian legal system employs a framework of laws and institutions based on the English judicial system. An impressive array of laws can be applied for the protection of the rights of non-citizens. The Federal Constitution guarantees fundamental liberties to *all persons*, including the right to life and liberty, the right to freedom from slavery and forced labour, the right to protection against retrospective criminal laws and repeated trials, the right to equality before the law and to equal protection of the law, the right to profess and practice his/her religion, and the right to property.

However, in relation to the right to liberty, the Constitution differentiates between citizens and non-citizens, allowing the latter to be detained for a longer period of time if they are arrested under immigration law. While citizens have to be brought before a magistrate 'without reasonable delay, and in any case within twenty-four hours...', non-citizens have to be brought 'within fourteen days' (Article 5(4)).

Malaysian legislation protecting labour rights applies to non-citizens.⁵ The Employment Act 1955 (Act 265) sets out the minimum benefits due to an employee, including provisions for contracts of service, payment of wages, maternity protection, rest days, hours of work, holidays, termination, lay-offs, and retirement benefits.⁶ However, the Act does not extend the same level of protection to domestic workers

(referred to in the Act as ‘domestic servants’). Specifically, it allows their contracts to be terminated with a shorter period of notice and does not protect some of their rights, such as those related to maternity benefits, rest days, hours of work, and holidays. Employers are not allowed to discriminate against a foreign employee in relation to a local employee and *vice versa* in relation to the terms and conditions of employment (Article 60L(1)). However, employers are prohibited from terminating the contract of a local employee for the purpose of hiring a foreign employee (Article 60M). Also, when reducing their workforce in response to redundancy, employers must first terminate the services of all foreign employees before terminating the employment of local employees (Article 60N).

The Trade Unions Act 1959 (Act 262) protects the rights of migrant workers to join a trade union and to participate in its activities.⁷ The Industrial Relations Act 1967 (Act 177) covers all workmen employed under a contract of employment in any industry, including non-citizen professionals.⁸ In terms of social security schemes, foreign workers are covered under the Workmen’s Compensation Act 1952 and in its subsidiary legislation, the Workmen’s Compensation (Foreign Workers Compensation Scheme) (Insurance) Order 1998, which requires employers to insure their foreign workers under the Foreign Workers Compensation Insurance Scheme.⁹

The Immigration Act 1959/63 (Act 155) is the key statute relating to immigration control. The Act states that no person other than a citizen shall enter Malaysia without a valid Entry Permit (Section 6(1)). Those who contravene this are guilty of an offence punishable by a fine not exceeding RM10,000 and/or imprisonment of up to five years, and ‘shall also be liable to whipping of not more than six strokes’ (Section 6(3)). The Immigration Act places the burden of proof on each individual to show that he/she has entered Malaysia without contravening Section 6(1) (Section 6(3)). Any police officer, immigration officer, or customs officer ‘may arrest without warrant any person who he (*sic*) reasonably believes has committed an offence against this Act’ (Act 51(3)).

The holder of a cancelled or expired permit/ pass

has no right to remain in Malaysia; he/she is liable for removal and is prohibited from entering Malaysia afterward (Section 9(4)). Anyone who remains in Malaysia is guilty of an offence, punishable by a fine of not less than RM10,000 and/or imprisonment of up to five years Section (15(1,4)). The Act also states that it is an offence to employ a person other than a citizen or an Entry Permit holder (i.e. a permanent resident) without a valid Pass (Section 55B(1)).¹⁰ This is punishable by a fine of at least RM10,000 but not more than RM50,000 and/or to imprisonment of up to twelve months for each employee.

In terms of mechanisms of redress, in addition to the civil courts, non-citizens can seek remedies through two formal alternative dispute resolution (ADR) processes, one managed by the Department of Labour and the other by the Department of Industrial Relations.¹¹ The former inquires into and decide on disputes between employees and employers with respect to wages and other provisions due to employees under the Employment Act while the latter provides services for resolving trade disputes and processing representations for reinstatement under the Industrial Relations Act. Where conciliation proceedings are unsuccessful, cases in the former are referred to the Labour Court (with subsequent appeals made to the High Court) while cases in the latter are referred to the Minister for Human Resources who may refer it to the Industrial Court for adjudication.¹²

Types of Grievances Faced by Non-Citizens

Table 1 lists the main categories of grievances that non-citizens have faced for which they have sought remedies, as well as the associated mechanisms for adjudication and relevant legislation. The first nine categories highlight problems faced by non-citizens in relation to their work, living conditions and legal status, with the main actors responsible being their employers and/or agents, while the next two categories list problems related to violence as well as wrongful arrest, detention, punishment for immigration offences, and deportation.

Table 1: Types of Grievances, Mechanisms for Action/ Redress and Relevant Legislation

No.	Category	Examples of Grievances	Mechanisms for Action/ Redress	Relevant Legislation
Employment-Related				
1	Wages, payments, earnings	<ul style="list-style-type: none"> • Unpaid wages • Unlawful deductions of wages (including those made for foreign levies and insurance premiums which are to be paid by employers) • Delays in the payment of wages • Partial payment of wages • Non-payment for overtime work at overtime rates 	<p>Department of Labour, with possible referral to the Labour Court, and subsequent appeal to the High Court, <i>or</i></p> <p>The Industrial Court, where there is non-compliance to a collective agreement already given cognisance by the Court (see Note 1).</p>	<p>Employment Act 1955</p> <p>Industrial Relations Act 1967</p>
2	Dismissal	<ul style="list-style-type: none"> • Unfair dismissal or dismissal without just cause (i.e. dismissal based on the reasons for dismissal; includes constructive dismissal, in which an employee walks out because of a fundamental breach of contract) • Wrongful dismissal (i.e. dismissal that breaches terms of the contract, e.g. dismissal without notice) 	<p>Department of Industrial Relations, with possible referral to the Industrial Court, <i>and/or</i>,</p> <p>Civil Courts, for damages only, not reinstatement (see Note 2).</p> <p>Department of Labour, with possible referral to the Labour Court, and subsequent appeal to the High Court.</p>	<p>Industrial Relations Act 1967</p> <p>Employment Act 1955</p>
3	Working conditions	<ul style="list-style-type: none"> • Long work hours • Refusal to provide the full allocation of annual or sick leave • Refusal to recognise and observe all gazetted public holidays • Refusal to provide rest days <p>Refusal to provide safety equipment and protective gear for dangerous work</p>	<p>Department of Labour, with possible referral to the Labour Court, and subsequent appeal to the High Court.</p> <p>Department of Occupational Safety and Health</p>	<p>Employment Act 1955</p> <p>Occupational Safety and Health Act 1994</p>
4	Living conditions provided by the employer	<ul style="list-style-type: none"> • Decrepit, dirty accommodation • Overcrowding • Insufficient food and water • Insufficient electricity • Poor sanitation 	<p>Make an official complaint to the Local Council.</p> <p>Make an official complaint to the Department of Labour to trigger an inspection and investigation.</p>	<p>Bylaws of the Local Council</p> <p>Workers Minimum Standards of Housing and Amenities Act 1990</p>
5	Agents	<ul style="list-style-type: none"> • High fees • Contract substitution • Deception concerning working and living conditions • Use of forged documents • Use of violence and threats against migrant workers • Illegally sub-contracting migrant workers to other employers 	<p>Make an official report to the Police and take civil action through the courts (see Note 3).</p>	<p>Penal Code, for criminal acts</p> <p>Private Employment Agencies Act 1981 (for domestic workers)</p>
6	Validity of Immigration passes for work	<ul style="list-style-type: none"> • Delays in the renewal of immigration passes (with workers having to work without legal status) • Termination of immigration passes 	<p>Apply for a Special Pass with the Immigration Department (See Note 4).</p>	<p>Employment (Restriction) Act 1968;</p> <p>Immigration Act 1959/63;</p> <p>Immigration Regulations 1963</p>

(Table 1 continued)

No.	Category	Examples of Grievances	Mechanisms for Action/ Redress	Relevant Legislation
Employment-Related				
7	Withholding of passports	<ul style="list-style-type: none"> • Passports withheld by agents or employers 	Make an official report to Immigration and/or Police (see Note 3).	Passports Act 1966
8	Threat of deportation	<ul style="list-style-type: none"> • Threat of forced deportation against their will by their agent or employer 	Make an official report to the Police.	
9	Personal injury or death (at work and outside of work)	<ul style="list-style-type: none"> • Accidents in the workplace and outside working hours • Insufficient medical attention for sicknesses or injuries • Lack of insurance (in spite of the statutory requirement) • Substandard insurance • Difficulties claiming compensation • Insufficient compensation to cover health care costs 	<p>Department of Labour, for calculating the amount of compensation due through the Foreign Workers Compensation Scheme.</p> <p>Civil action through the courts, to make a claim against negligence.</p>	<p>Workmen's Compensation (Foreign Workers Compensation Scheme) (Insurance) Order 1998</p> <p>The Workers Minimum Standards of Housing and Amenities Act 1990</p>
Others				
10	Violence	<ul style="list-style-type: none"> • Robbery • Physical violence • Sexual harassment • Rape 	Report to the Police and civil action through the courts (see Note 3).	Penal Code
11	Wrongful arrest, detention, punishment for immigration offences, and deportation	<ul style="list-style-type: none"> • Arbitrary arrest despite having legal status • Imprisonment and/or whipping despite having legal status or having been cheated or traffi cked • Indefinite detention as witnesses in court proceedings against others • Forced deportation, instigated by employers • Forced deportation from immigration detention depots 	<p>Civil action through the courts.</p> <p>For unlawful detention or procedural errors in the detention order, filing for <i>habeas corpus</i>.</p>	Article 5(2), Federal Constitution

Note 1: See *Chong Wah Plastics Sdn Bhd & Ors vs. Idris Ali & Ors* [2001] 1 ILR 598.

Note 2: See *Shamsulbahri Shaffie v. Titan Petchem (M) Sdn Bhd* [2010] 4 CLJ 242.

Note 3: These practices may also lead to criminal prosecution by the Attorney General's Chambers.

Note 4: No judicial review of an Immigration Department decision is permitted (Section 59A, Immigration Act 1959/63). For termination of immigration passes for work, in practice, there is no effective mechanism for redress as it is deemed the right of the employer, although this power is not provided for in labour laws.

Access to Justice for Non-Citizens

In many cases, the awareness of non-citizens of their rights and remedies in the Malaysian legal system is weak. Many are not aware of the difference between justiciable and non-justiciable issues and do not know which mechanism of adjudication to use in order to pursue redress. As a lawyer who has provided *pro bono* legal aid to foreign workers and refugees states,

Respective Acts specify the remedies that the courts can provide. Often, claimants don't know what they can and cannot complain about and what remedy to seek.... Making the wrong claim through the wrong court can permanently defeat the claim if the error is not highlighted at an early stage. If officers in the respective departments do not assist pro-actively, or cannot assist due to language difficulties, claimants may have no redress. (RB 2008, pers. comm., 21 April)

In some cases, depending on the facts and grievances raised, there may be more than one possible course of action. For example, a matter concerning the terms of employment covered by a collective agreement can be brought before the Department of Labour as well as the Department of Industrial Relations. However, the Employment Act clearly prohibits the former from hearing matters already considered by the latter. Complainants need to be clear of the consequences when deciding to seek remedies through one avenue rather than the other.

Another challenge that non-citizens face is gathering documentary evidence to support their claims. Often, they are not given copies of the contracts they sign, or their wage slips showing proof of wage deductions. They also need to provide addresses for court documents to be served when they lodge complaints, which can be particularly difficult if they have been evicted from their housing or are living in temporary accommodation.

In order to access the judicial system and ADR processes, non-citizens need to comply with their respective rules of procedure. However, they are not easy to understand, and they – as with other persons – often need help and guidance from lawyers in order to file a case, draw up a statement of claim or defence, file affidavits, understand legal terminology, and argue

the case (Sharifah & George 2002). However, many cannot afford to pay for legal advice and are thus very dependent on legal aid.

Non-citizens are able to seek assistance from their embassies, although their requests are met with different levels of responsiveness. The embassies of the Philippines, Indonesia, Cambodia and Nepal, amongst others, have dedicated labour attachés mandated to look after the welfare of their nationals. The Indonesian embassy established a Taskforce in 2006 to assist Indonesian foreign workers with their grievances. In its first year, it assisted 763 workers, but numbers rose to 900-1000 cases a year (Kurniawati 2009; Malay Mail Online 2009).

Aside from their embassies, non-citizens are able to receive legal aid on a *pro bono* basis from a few Malaysian civil society organisations. These organisations counsel on their options, trying to mediate and negotiate settlements with employers, which may not be the full amount owed to the workers. For many migrant workers – especially those with irregular status – this is the only stage at which some form of success is possible.

If this is unsuccessful, they assist documented workers in accessing ADR processes, in making police reports in order to trigger criminal investigations, or in taking civil action through the judicial system. However, such pursuits are often long and costly, sometimes lasting years. There are often delays in cases brought through the civil courts and the Industrial Court, due to postponements by employers and the backlog of cases because of the limited resources of the courts.¹³ Cases can drag on for months, if not years.

When non-citizens pursue these courses of action, there may be negative consequences that they must be prepared to bear. As a case manager of a faith-based group who has assisted numerous foreign workers in obtaining redress for grievances explains,

Sometimes the workers don't want to pursue the case; they feel it is not worth the trouble. They make a complaint, and then they realize the possible repercussions, such as deportation. So, they just decide to continue working under the exploitative conditions (JX 2010, pers. comm., 4 March).

The Federal Constitution states that “(w)here a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice” (Article 5(3)). Section 28A of the Criminal Procedure Code states that when a person is arrested, the police shall allow him/her to communicate with a legal practitioner of his/her choice. However, in practice, when non-citizens are arrested, in particular foreign workers and those suspected of having irregular status, many are not allowed to contact anyone during the remand period (up to 14 days for non-citizens), which hampers their ability to seek legal assistance.

Some non-citizens who are arrested are not told when they will be brought to court to be charged. When they are charged, some do not understand the charges read to them because they do not possess any knowledge of the Malay language. Some have pleaded guilty under pressure, either accidentally or because they have been held in remand for months and see no other option for getting released.

Foreign workers who decide to take legal action against their employers often have their contract of service terminated and their immigration pass cancelled, thereby rendering them an irregular status. Thus, they lose not only their current and future income but also the food and accommodation provided by their employers. As stated earlier, pursuing a case through official adjudication mechanisms can take months, if not years, and most are unable to sustain themselves for long periods without an income.

If the person is unable to afford a lawyer or to obtain the services of one on a *pro bono* basis, he/she is not assigned a legal practitioner by the government.¹⁴ Contingency fee arrangements (or, ‘no win no fee’), wherein lawyers receive a percentage of the amount successfully recovered or awarded but do not charge legal fees, are prohibited in Malaysia (Section 112, Legal Profession Act 1976). Furthermore, plaintiffs seeking civil action run the risk of legal costs being awarded against them. These are further hindrances to the access to justice for those who are poor.

The legal status of a non-citizen has direct impact on his/her access to justice. Those who are not regu-

larised at the time their cases are brought for conciliation or adjudication are vulnerable to arrest, detention, punishment for immigration offences and deportation. There have been a number of cases where Immigration officers have arrested claimants when they made their appearance at the Industrial court or at subordinate courts.¹⁵ There have also been a number of times when claimants have been deported against their will, before the conclusion of their court cases.

When non-citizens are arrested, it is possible to continue the pursuit of their claim for redress. However, many cannot bear the burden of indefinite detention, the poor conditions of detention, and the loss of income, and thus give up. Secondly, they can be released on bail depending on the type of offence.¹⁶ However, if they are perceived to be a flight risk, courts often impose additional conditions such as requiring their travel documents to be deposited and their surety to be a Malaysian citizen (Hector 2006). Thirdly, they may opt for voluntary deportation and then continue with the pursuit of their cases while they are abroad, travelling back to Malaysia to attend court hearings. However, if they fail to appear in court, their cases may be struck-off (Susila 2010). It can also be difficult for legal aid providers to communicate with them while they are abroad, which leads to delays in the settlement of their cases.

The main way of reducing a claimant’s vulnerability to arrest is to apply for a Special Pass from the Immigration Department. These passes are typically issued for one month for a fee of RM100 per month and are renewable. However, the Special Passes are issued and renewed at the discretion of Immigration officers. In practice, Immigration officers have refused to issue these passes, even when proof is provided that applicants have claims pending in the civil courts or in ADR processes. A conundrum emerges when the Department of Labour refuses to file a case without proof that a foreign worker has legal status (e.g. with the possession of a Special Pass) and the Immigration Department requires proof that a case is filed before they issue a Special Pass.

Secondly, in many cases, the passes are renewed only twice, allowing the holder to stay in Malaysia for

a total of three months, a time too short to obtain remedies for grievances.¹⁷ Thirdly, the Special Passes cost RM100 a month per person, which is a high cost for someone without an income.¹⁸ Fourthly, the Special Passes do not confer the right to work. Thus, the holders of the Pass are unable to earn an income while in Malaysia and unable to provide for themselves in terms of food, shelter and basic necessities. Immigration officers have expressed concerns that allowing non-citizens to work on a Special Pass leads to abuse of the system.

Some Labour Officers have asserted in public forums that migrant workers with irregular status are not eligible for protection under the law, as their contracts are deemed 'void' (Khamis 2008) – even though this is contrary to international customary law (*jus cogens*).¹⁹ As the case manager of a faith-based group mentioned earlier states, cases involving the labour rights of irregular foreign workers are very challenging to argue. 'Often, the cases get turn down [by the Department of Labour] because they don't have a written contract. It is hard to prove a verbal contract.' (JX 2010, pers. comm., 4 March). In some cases, Labour officers have insisted that foreign workers produce proof of their legal status or present their passports before acting on their complaints.

In practice, many law enforcement officers consider non-citizens with irregular status to have 'no rights' in Malaysia, including rights to the protection of the law. Non-citizens are afraid to report having been cheated, exploited, or subject to forced labour or trafficking to law enforcement officers. Even when measures to provide redress are pursued, the inevitable outcome is their removal from Malaysia. Because of this, non-citizens with irregular status prefer to put such events behind them and to move on with their lives rather than be forced to go home.

Finally, the judiciary itself is limited. Chan (2007) suggests that access to justice is not a fundamental right enshrined in the Constitution of Malaysia. The judiciary recognises *ouster* clauses, which limits the appeal options of individuals with respect to administrative decisions. In relation to immigration decisions, the Immigration Act states:

There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General... under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations government that act or decision (Section 59A(1)).²⁰

The Federal Court has also expressed that access to justice is not a fundamental right but a common law right that can be modified by written law. In *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 2 MLJ 257, the court stated that 'access to justice shall be available only to the extent that the courts are empowered to administer justice' (p. 257) and affirming the powers of Parliament to 'enact a federal law pursuant to the authority conferred by article 121(1) [of the Federal Constitution] to remove or restrict the jurisdiction and power of the court'. These decisions highlight the limited willingness of the judiciary to check the powers of the executive and legislature.

Conclusion

A rights illusion occurs when rights are codified in legislation but individuals are not able to gain redress for rights violations through social and legal institutions and practices. In Malaysia, an array of laws exists that covers the rights of non-citizens. When presenting the situation of migrant workers in Malaysia, government officials often list the labour laws that apply to them as evidence that they have rights (see Ministry of Human Resources Malaysia 2008; Khamis 2008). In practice however, migrant workers face great difficulties in bringing their cases through formal adjudication mechanisms and their claims for redress are often frustrated.

A significant cause of these difficulties is the temporal nature of the right of non-citizens to reside and work in Malaysia, particularly when avenues are not created for them to retain these rights while they pursue redress for grievances. Migrant workers in Malaysia, whose legal status depends on the goodwill of their employers, find it particularly difficult to obtain redress for labour rights violations. Employers are able to arrange for their immigration passes to be cancelled easily, rendering them with irregular status and subject to arrest and deportation. Unable or unwilling

to bear the heavy cost of obtaining justice, many give up pursuing redress.

Access to justice depends on the resources that individuals are able to mobilise – in particular, specialist legal knowledge, finances and time. For those with limited resources – such as foreign workers and foreign domestic workers – the practical challenges involved in seeking redress make it almost impossible for them to gain justice. Those with irregular status are worse off, as they have limited standing before conciliators and adjudicators and are under the threat of arrest and deportation. *Pro bono* legal aid has become crucial for vulnerable non-citizens, but the provision of it remains insufficient to meet existing demand. As such, many vulnerable non-citizens live without access to justice in Malaysia. The rights illusion obfuscates the need for legal reform to ensure that their rights are properly protected.

Notes

¹ This paper is based on a chapter submitted for a doctoral thesis to the National University of Singapore in 2011. The issues raised in this paper were identified through discussions with members of the Migration Working Group, a network of non-governmental organisations (NGOs) and individuals working to protect the rights of non-citizens. More detailed information was obtained through interviews conducted with migrant workers, case managers for NGOs, and lawyers between 2008 and 2011 and through a survey of existing literature.

² Foreign levies are a significant source of revenue for the government. In 2008, it collected RM2.13 billion in foreign levies.

³ 'European Parliament resolution on the practice of caning in Malaysia', available on <http://www.europarl.europa.eu/sides/getDoc.do?type=MO-TION&reference=B7-2010-0717&language=ES> accessed 27 July 2011. See also, Amnesty International (2010) for a description on the practice of whipping.

⁴ See for example, <http://www.scalabrini.asn.au/atlas/malaysia98.htm> accessed 18 May 2011.

⁵ Other statutes regulating labour and employment are the Occupational Health and Safety Act 1994, the Factories and Machinery Act 1967, the Employees Provident Fund Act 1991, the Pensions Act 1980, the Statutory and Local Authorities Pensions Act 1980, the Children and Young Persons (Employment) Act

1966, the Employment (Restriction) Act 1968, the Employment (Information) Act 1953, the Sabah Labour Ordinance 1949, the Sarawak Labour Ordinance 1952, the Wages Councils Act 1947, the Human Resource Development Act 1992 and the Workers' Minimum Standards of Housing and Amenities Act 1990 (Sharifah & George 2002).

⁶ The Act defines an 'employee' as any person with a contract of service with monthly wages of less than RM1,500 a month, or any person engaged in manual labour or domestic work regardless of what they are paid (see the First Schedule for the full definition).

⁷ The right to participate in trade unions activities is further protected by the Employment Act and the Industrial Relations Act.

⁸ This was deliberated in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304.

⁹ Malaysian workers have not been covered under this Act since 1 July 1992. Expatriates (as non-manual workers earning more than RM500 a month) and foreign domestic workers are also not covered by this Act (Section 2(a,c)).

¹⁰ The Employment (Restriction) Act 1968 clearly prohibits the employment of a 'person not being a citizen' without a valid employment permit (Section 5).

¹¹ These are departments under the Ministry of Human Resources.

¹² Alternatively, the Minister may reject the case, thus bringing it to a close.

¹³ In 2008, there were around 900,000 unresolved cases in the subordinate courts and 91,000 in the High Courts (New Straits Times 2009).

¹⁴ Around 500,000 persons every year, an estimated 94 percent of those held under remand, appear in court without representation (Ramachandran & Vijandren 2008).

¹⁵ Susila (2010) reports that this occurred in *Sathiyamoorthy s/o Karunthappan v TG Medical Sdn Bhd* [2009] 1 ILR 453.

¹⁶ The Penal Code specifies the type of offences that permit release on bail.

¹⁷ In some cases, however, such as in *Sampath Kumar Vellingiri & 78 ors v. Chin Well Fasteners Co. Sdn Bhd* [2003] 1 LNS 260, Special Passes were renewed for 2-3 years while foreign workers pursued their case in court (JX 2010, pers. comm., 5 March).

¹⁸ In some cases, however, the Immigration Department has waived these costs with the appeal of an NGO.

¹⁹ Nevertheless, there have been occasions where Labour Officers have urged employers to pay their undocumented workers (JX 2010, pers. comm., 4 March).

²⁰ The Act also excludes a person's right to be heard

before the Minister of Home Affairs or the Director General of Immigration when an order is made against him/her (Section 59).

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