

# Chronology of Policies affecting potentially Stateless Persons and Refugees in Malaysia

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# Chronology of Policies affecting potentially Stateless Persons and Refugees in Malaysia

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## **Author biography**

Tamara Joan recently completed her PhD studies in University Kebangsaan Malaysia on Domestic and International Legal Analysis on the protection of Stateless Persons residing in Malaysia. She has taught Constitutional Law, Public International Law, Criminal Law and Business Law in private universities in Malaysia. These areas are also her areas of research interest and in which she has authored and co-authored various research articles.

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## **Key words**

statelessness – nationality – Malaysia – human rights – policy – Rohingya – Orang Asli

## **Abstract**

Since the 1970s, Malaysia has had to grapple with the issue of refugees coming into Peninsular Malaysia and Sabah. More recently, the issue of statelessness has featured in tandem with the refugee issues. This brief paper offers the reader an appreciation of snippets of policies affecting asylum seekers, refugees and stateless persons of Malaysia. The reader is provided a summary account on Asylum policies from the 1970s onwards followed by an understanding of policies affecting certain communities in Malaysia that have *de facto* or *de jure stateless* persons in their midst. This would include the Orang Asli of Peninsular Malaysia, the Indians of predominantly Tamil descent without documentation, and the stateless persons of Sabah and the Rohingya who have habitual residence in Burma but are currently residing in Malaysia.

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<sup>1</sup> The views of the author are her own based on her independent research and not the views of the University where the author is employed.



## 1. Introduction

Malaysia is neither party to the Convention relating to the Status of Refugees of 1951 (the 1951 Refugee Convention) nor the Convention relating to the Status of Stateless Persons of 1954 (the 1954 Convention). Malaysia also has yet to accede to the Convention on the Reduction of Statelessness (the 1961 Convention). As such, refugees, asylum seekers, and stateless persons are not categorised into separate groups of individuals in need of international law protection the way they are categorised by state parties to the conventions. To briefly explain the three categories within the international legal context: under the category of 'stateless person' fall all those who are not recognized as nationals by any state under the operation of its laws. Refugees are those who face persecution for reasons of race, religion, nationality, membership of a social group, or political opinion, among others. Persons with the intention of leaving their State of nationality or State of habitual residence to claim asylum abroad are considered to be asylum seekers until their status as refugee is determined. This article highlights the problems that arise in terms of policy-making and implementation when a state, in this case Malaysia, chooses not to be bound by international treaties designed to protect vulnerable groups.

## 2. Asylum Policy in Malaysia: a general overview

The Malaysian government only saw the need to establish policies concerning asylum seekers in the 1970s, as people from South-East Asia began making their way to Malaysia due to persecution they faced in their respective home States.<sup>2</sup> From the policy initiatives, targeted implementation of policy is apparent whereby the policies seemed to work to the benefit of certain refugees with the end result being the issuance of IMM13 documents to refugees. The IMM13 is a Social Visit Pass issued by the Malaysian Government under Regulation 11 (10) of the Immigration Regulations 1963 and allowed refugees or migrants to reside and work in Malaysia for a period of two years.<sup>3</sup> This targeted approach has generally been employed by Asian States that have yet to accede to pertinent international law on refugees and statelessness such as Thailand and Bangladesh. The Vietnamese, Cambodian, Indochinese Muslim, Filipino, Sri Lankan and Iranian asylum-seekers were all dealt with differently by the Malaysian Government.<sup>4</sup> For instance, the Vietnamese boat people were able to attain temporary refuge, and were allowed to remain in Malaysia until repatriation to Vietnam or resettlement in a third country. This was the measure taken at that point to address the arrival of boat people from the East Coast of Peninsular Malaysia and was done with assistance from UNHCR towards eventual resettlement and repatriation of these people.<sup>5</sup> Local integration, however, was not an option as Malaysia was not prepared to accept refugees as residents of the State. Drastic measures were imposed in 1979 including the 'threat to shoot', in order to ensure that such asylum-seekers did not land in Malaysia.<sup>6</sup> As third countries promised to provide resettlement places to the Vietnamese boat people, the Malaysian government began to relax its policy and allow more Vietnamese refugees to enter its territory.

A converse policy stance was seen in relation to Cambodian asylum-seekers that arrived in 1985

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<sup>2</sup> V. Muntarhorn, *The Status of Refugees in Asia*, Clarendon Press Oxford, England, 1992, p 113.

<sup>3</sup> A. Kaur, 'Refugees and Refugee Policy in Malaysia' (2008) 18 UNEAC Asia Papers, p 88.

<sup>4</sup> V. Muntarhorn, *The Status of Refugees in Asia*, Clarendon Press Oxford, England, 1992, p 113.

<sup>5</sup> Amarjit Kaur, 'Refugees and Refugee Policy in Malaysia', p 83.

<sup>6</sup> *Ibid.* p 114

from Thailand. They were deported to Thailand predominantly because they were unlikely to be accepted for resettlement by third countries.<sup>7</sup> On the other hand, Indochinese Muslims have resettled in Malaysia and have been accorded permanent residence with view of total assimilation in Malaysia.<sup>8</sup> This is due to the fact that the Indochinese Muslims had religious and cultural values similar to the local Malay community. The Acehese from northwest Sumatra began arriving in Malaysia in the late 1970s after war broke out between the Indonesian Government and the Free Aceh Movement (GAM). The Malaysian government acknowledged their persecution and allowed them to stay. The economic crisis of 1997-98, however, forced the Malaysian government to deport the Acehese who were seen as illegal immigrants.<sup>9</sup> The policies enforced against illegal migrants in 2002 saw further deportations of the Acehese back to Aceh and Sumatra. This however did not deter Acehese from fleeing to Malaysia in 2003, due to the military operations conducted by the Indonesian government.<sup>10</sup> Hostilities ceased in 2005 and the Malaysian government issued between 32,000-35,000 IMM13 documents. The policy was seen as a humanitarian gesture on the part of the Malaysian government following the devastation faced by this population due to the Tsunami of 2004 and cessation of hostilities in Aceh.<sup>11</sup> This would be an example of how legal status in Malaysia can be granted to persons who were originally asylum seekers but eventually irregular migrants once hostilities have ended.

Other examples of asylum seekers, such as Sri Lankans, Iranians, Chinese, Poles and South Africans, are dealt with on an *ad hoc* basis.<sup>12</sup> Extensions for visas and/or temporary refugee status were allowed, especially where there was hope for resettlement. In the 1990s, approximately 360 Bosnian refugees were given temporary refuge in Malaysia and were either resettled or repatriated at the end of the conflict in Bosnia and Herzegovina between Serbian forces on one side and Bosniak and Croat forces on the other.<sup>13</sup> Somalis, Iraqis, Afghans, and Palestinians have also been arriving into the country more recently. These populations are also refugee populations with the exception of the Palestinians who are considered to be both *de jure* stateless refugees.

Since there are no specific laws that deal with statelessness in Malaysia, persons classified as stateless by virtue of the 1954 Convention are at risk of arrest and detention under immigration laws if they are in the country without documents such as a birth certificate, identity card, or passport. They are treated in the same way as irregular immigrants, and can be detained for indefinite lengths of time under Malaysian law. In countries such as Malaysia, where refugees and stateless persons are without clear legal status, UNHCR assists in their plight.

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<sup>7</sup> Ibid. p 117

<sup>8</sup> A. Idris, 'Malaysia and Forced Migration' (2012) 20(1) Intellectual Discourse, p 43.

<sup>9</sup> T. Fuller, 'Indonesians in Malaysia Return Home as Suspects,' The New York Times, 28 April 1998 <http://www.nytimes.com/1998/04/28/news/28iht-deport.t.html>

<sup>10</sup> Amarjit Kaur, 'Refugees and Refugee Policy in Malaysia', p 88.

<sup>11</sup> Ibid. p 88

<sup>12</sup> V. Muntarbhorn, The Status of Refugees in Asia, Clarendon Press Oxford, England, 1992, p 116.

<sup>13</sup> A. Khoo, Developing a Comprehensive Policy Framework For Refugees and Asylum Seekers in Malaysia, Refugee Workshop, Kuala Lumpur, 2010, p 1.

### 3. Stateless and populations at risk of stateless in Malaysia

#### 3.1 *The Orang Asli*

The term 'Orang Asli' refers to different aboriginal groups of Peninsular Malaysia, and constitute only 0.6% of the Malaysian population.<sup>14</sup> Three different groups of Orang Asli have been identified: Semang-Negrato, the Senoi, and the Proto-Malay. The Semang-Negrato have existed in Malaysia for over 25,000 years and are believed to originate from the Sunda Landmass (now the South East Asian States) and New Guinea.<sup>15</sup> The Senoi migrated from Mainland South East Asia in approximately 2,000 BCE, while the Proto-Malay migrated from Borneo and Sumatra about the same time as well.<sup>16</sup> The three categories are further divided into nineteen 'aboriginal ethnic groups',<sup>17</sup> which are scattered in all parts of Peninsula Malaysia except for the States of Perlis and Penang.<sup>18</sup> The Aboriginal people are a recognised people under the Federal Constitution of Malaysia and the Aboriginal Peoples Act of 1954.

The experience of communities that have been in Malaysia from time immemorial is the opposite of that of the asylum seeker. British colonial policy created before the independence of Malaysia aimed at winning the Orang Asli over to the side of the British against nationalistic Malaysian communists. A federal-level Department of Aborigines was set up in 1953 which is today the Department of Orang Asli Development (JAKOA). As such the approach by the British towards the Orang Asli has been paternalistic. The paternalistic approach was emulated by the Malaysian government post-independence. The Orang Asli are treated as a population that is unable to fend for itself and requires the assistance of a particular department to oversee their welfare and activities. The '10<sup>th</sup> Malaysia plan of the Economic Planning Unit within the Prime Minister's Department' stipulates the strengthening of capabilities of the Orang Asli communities through integrated development programmes and specific enhancement assistance.<sup>19</sup> Although there was no mention of the JAKOA within the '10<sup>th</sup> Malaysian Plan', nevertheless the Orang Asli remain heavily dependent on the department. The Orang Asli suffer the brunt of the consequences of being at risk of statelessness particularly when births of their children are not registered. If the JAKOA within the vicinity is inactive, there may be cases of Orang Asli children without birth registration certificates.

#### 3.2 *The Invisible Malaysians*

The Indian community on the other hand only began to settle in Malaysia in the late 18<sup>th</sup> century. For this group of people, the efforts of the government have been centred on poverty eradication. In fact, the efforts of the Malaysian government, in eradicating poverty were meant to reach all segments of Malaysian society. The government's rural development programmes in the 1970s and 1980s however never reached out to persons of Indian origin in plantations, including the workers living in estate quarters as plantations were classified as private property. As such Indians continued to be marginalised and some lived without documents since they were unable to leave

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<sup>14</sup> Datuk Abu Jabar Che Nai, 'Empowering the Orang Asli' 26 May 2010, Star Online, <http://thestar.com.my/news/story.asp?file=/2010/5/26/focus/6335356&sec=focus> 18 June 2012.

<sup>15</sup> W. Howells, *Getting Here: The Story of Human Evolution*, Compass Press, Washington D.C, 1997, p 203.

<sup>16</sup> I. Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia*, Oxford University Press, 1976, 13-18.

<sup>17</sup> C. Nicholas, 'The Orang Asli: Origins and Classification' Vol 12 *Peoples and Traditions*, Encyclopaedia Malaysiana, p 20.

<sup>18</sup> Yahya Awang, *Kajian Mengenai Masalah Ketiadaan Dokumen Pengenalan Diri Di Kalangan Masyarakat Orang Asli Semenanjung Malaysia*, p 1.

<sup>19</sup> 10<sup>th</sup> Malaysian Plan 2011 - 2015, Economic Planning Unit, Prime Ministers Department, Putarjaya p 163.

the estates to apply for their citizenship. Their plight was highlighted predominantly in the 1990s when over 300,000 Indians were displaced after plantations were acquired for property and township development.<sup>20</sup> These individuals are *de facto* stateless as they fulfil the nationality requirements under the Federal Constitution of Malaysia but unfortunately have not gone through the documentation process of acquiring nationality. The turn of the century saw the media highlighting the plight of the *de facto* stateless Indians residing in Malaysia. The government acknowledges their plight and the fact that they are principally Malaysian citizens. Efforts were made to open up special National Registration Department counters under the national registration campaign known in the Malay language as the 'My Daftar Campaign', first held between 19 to the 26 of February 2011. Through this campaign, 4,023 applications for citizenship were approved by the government within one year.<sup>21</sup>

### 3.3 The Sabah Stateless

The asylum policies of the Malaysian government are also relevant to the situation faced by Sabah's stateless. Sabah is part of Borneo Island located east of Peninsular Malaysia. Migration is not a new phenomenon in Sabah, since the Spanish conquest of the Philippines resulted in migration from the Philippines to Sabah. Nomadic ethnic groups originating from the territory and waters between Philippines and Borneo such as the Bajau, who are also known as 'sea gypsies', have settled at the boundaries of Sabah.<sup>22</sup> Another group that has settled at the Sabah shores are the Suluk people that originate from the Sulu Sultanate of the Philippines. By the 16<sup>th</sup> century, the Brunei Sultanate had extended its powers to as far as Luzon, Sulu and South West Borneo. The expansion of the Brunei Sultanate, coupled the geographical landscape of Sabah with its 250 mile coastline and more than 200 islands, provided easy access into Sabah for Philippine and Indonesian citizens.<sup>23</sup> Easy access into Sabah has given rise to the problems faced by stateless persons residing in Sabah.

During the Mindanao insurgency in the Philippines under the authoritarian rule of President Marcos, migration took place from the Philippines to Sabah between 1970 and 1977. At that point in time, the migrants were considered refugees of Suluk and Bajau origin, settling in the towns of Sandakan, Tawau and Lahad Datu.<sup>24</sup> By 1974, over 54,000 IMM13 documents were issued under Regulation 11 (10), Immigration Regulations 1963.<sup>25</sup> This status is distinct from the refugee status provided under the 1951 Refugee Convention, but was nevertheless a step in the right direction for persons who were in fact refugees of Filipino descent. Between 1977 and 1987, UNHCR stepped in to assist with the situation in Sabah. Following the change of ruling party of Sabah's state government in 1985, laws against illegal immigration were enforced to curb the numbers of irregular migrants coming into the country despite the fact that humanitarian obligations towards refugees who were recognized by the State government.

<sup>20</sup> 'Ensuring Effective Targeting of Ethnic Minorities: The Case of Low Income Malaysian Indians', Centre for Public Policy Studies, p 7 [http://www.cpps.org.my/resource\\_centre/Low\\_Income\\_Malaysian\\_Indians.pdf](http://www.cpps.org.my/resource_centre/Low_Income_Malaysian_Indians.pdf)

<sup>21</sup> 'Najib Says My Daftar Campaign Organised By MIC Is Unique And Special', [http://www.1Malaysia.com.my/news\\_archive/najib-says-mydaftar-campaign-organised-by-mic-is-unique-and-sepcial/](http://www.1Malaysia.com.my/news_archive/najib-says-mydaftar-campaign-organised-by-mic-is-unique-and-sepcial/) 27 Aug 2013.

<sup>22</sup> K. Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia' (2005) 49 *International Studies Quarterly*, p 106.

<sup>23</sup> TENAGANITA, *Acting Today for Tomorrow's Generation, Regional Conference on Stateless / Undocumented Children In Sabah*, Kota Kinabalu, Malaysia, 2005.

<sup>24</sup> K. Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia', p 106.

<sup>25</sup> Immigration Regulations 1963, L.N. 228/1963.



During the economic crisis of 1997-98, in order to curb illegal immigration, the State government instituted a 'legalization drive' and made Filipinos re-register as refugees by virtue of their earlier entry into Sabah from the Philippines in the 1970s under President Marcos rule in the Philippines. In 2001, due to the strained relationship between the Malaysian and Philippine government,<sup>26</sup> the refugee status of Filipinos was revoked and further stay was conditional only upon receiving work permits.<sup>27</sup> The IMM13 documents were again sought after to gain access to lawful employment, education and healthcare. The erratic policies of the Sabah State government have contributed to the next generation of Filipinos in Sabah being at risk of statelessness. Their recourse would be to acquire nationality in Malaysia through naturalisation which is a discretionary grant of nationality.

As Malaysia is not bound by the 1951 Refugee Convention, the 1954 Convention, or the 1961 Convention, there is no obligation to create laws or specific procedures that allow for the granting of asylum or registering of refugees within the State. Nor is there an obligation to repatriate those who are no longer or not considered to be refugees. This coupled with the difficulties in accessing nationality via naturalisation in Malaysia has led to the increase in the number of stateless persons in Sabah.

### *3.4 Malaysian policy and the Rohingya*

In recent years, the Burmese have been arriving in Malaysia in vast numbers. The Burmese began arriving in Malaysia in the 1980s and predominantly consist of Christian Chins and the Muslim Rohingya.<sup>28</sup> While in Malaysia, the Burmese Chins were promised resettlement by the United States of America through the intervention of UNHCR. At the same time, the stateless Rohingya were promised IMM13 status in the year 2004.<sup>29</sup> The process was initiated in 2006, but was halted as the registration exercise was being abused by those with the responsibility of registering the Rohingya whereby the wrong people were getting the privilege.<sup>30</sup> Other asylum seekers coming from Burma include Myanmar Muslims, Mon, Kachins and other ethnic minorities.<sup>31</sup>

The Rohingya are both stateless and have strong claims to recognition as refugees when abroad as they are not considered to be one of the official races of Myanmar<sup>32</sup> and have suffered various forms of persecution in Myanmar. Due to their predicament, they have the increased opportunity of being granted asylum. Nevertheless various inconsistencies in governmental practice have been noted in relation to asylum seekers and refugees as stipulated above. Vas Dev is of the view that government statements about asylum seekers have been varied and the fluctuations reflect the absence of a consistent policy pertaining to asylum seekers and refugees.<sup>33</sup> As stipulated in the earlier sub-topic, Malaysia, as with various other South East Asian countries (apart from

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<sup>26</sup> In 2000, the terrorist group known as the Abu Sayyaf, kidnapped foreign tourists and Malaysian from a resort on the island of Sipadan. This caused a strain the relationship between the two countries.

<sup>27</sup> Asian Migration News, 30 April 2001 as cited in A. Kaur, 'Refugees and Refugee Policy in Malaysia', p 87.

<sup>28</sup> A. Kaur, 'Refugees and Refugee Policy in Malaysia', p 87.

<sup>29</sup> M.H. Adnan, 'Refugee issues in Malaysia: The need for a proactive, human rights based solution' (2007) 12 UN EAC Asia Papers, p 5.

<sup>30</sup> TENAGANITA, *Stop Trafficking People; The Revolving Door; Modern Day Slavery Refugees*, TENAGANITA Sdn Bhd, Kuala Lumpur, Malaysia, 2008, p 21.

<sup>31</sup> UNHCR Fact Sheet, May 2011, UNHCR Kuala Lumpur.

<sup>32</sup> C. Lewa, 'North Arakan: an open prison for the Rohingya in Burma' (April 2009) 32 *Forced Migration Review*, p 11.

<sup>33</sup> S.V Dev, 'Accounting for State Approaches to Asylum Seekers in Australia and Malaysia: The Significance of "National" Identity and "Exclusive" Citizenship in the Struggle against "Irregular" Mobility' (2009) 16 *Identities: Global Studies in Culture and Power*, p 46.

Philippines, Cambodia and East Timor), is neither a party to the 1951 Refugee Convention, the 1954 Convention nor the 1961 Convention. As such, the inconsistency of asylum policy is not highlighted by the international community at treaty bodies or at the Universal Periodic Review.

#### 4. The flip side of the coin

There is no doubt that the burden of hosting refugees and stateless persons within the South East Asian region falls primarily in the hands of certain countries such as Thailand and Malaysia, due to their geographical location. Prior to the massive exodus of refugees from the Middle East to Europe, the former High Commissioner of the UN Refugee Agency, Antonio Guterres, stated that “Overall, it’s still the developing world that is carrying the lion’s share of responsibility for hosting refugees.”<sup>34</sup>

Although the quote above may not reflect the current situation of refugee influx into Europe, one cannot deny that countries such as Malaysia and Thailand host large numbers of refugees and stateless persons and these numbers only seem to be growing. As there is no policy for the integration of refugees or stateless persons in Malaysia, refugees and stateless persons, such as the Rohingya, arrive in this country only to be housed temporarily. However, based on the various *ad hoc* policies that seem to favour Muslim refugees, there is a glimmer of hope for some refugees—such as the Rohingya—that they may be able to attain some status in the country. The lack of accession to the relevant treaties by Malaysia has only created a situation whereby some refugees and stateless persons are protected whilst in Malaysia, while others are not similarly protected. With the lack of accession to the relevant treaties, the issue of protection becomes discretionary and not obligatory. Ensuring that the authorities exercise this discretion in a manner that benefits refugees and stateless persons is of utmost importance.

#### 5. Conclusion

As existing policy in Malaysia relating to refugees and stateless persons is created and applied on an *ad hoc* basis, the argument can be made that a policy vacuum exists in the country.<sup>35</sup> There is uncertainty within the governmental authorities as to how to deal with refugees and stateless persons. This, in turn, leads to partiality among groups or communities that arrive in the country seeking asylum or hope to be recognized stateless. Without the assistance of UNHCR, Human Rights Commissions such as SUHAKAM, and non-governmental organisations such as the Malaysian Social Research Institute (MSRI) or Asylum Access, among others, refugees and stateless persons could possibly spend months or even years in detention.<sup>36</sup> Executive departments have broad and discretionary powers to place persons in (indefinite) detention. Such inconsistencies are not aligned with international human rights standards and need to be addressed by the executive who ultimately have the prerogative to accede to the 1951 Refugee Convention, the 1954 Convention and the 1961 Convention. Accessions to these conventions would steer the course for greater consistency in policy-making, and creating awareness of the

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<sup>34</sup> Anon, ‘What now for boat people’, The Star, 22 May 2011, p 23.

<sup>35</sup> S.V. Dev, ‘Accounting for State Approaches to Asylum Seekers in Australia and Malaysia: The Significance of “National” Identity and “Exclusive” Citizenship in the Struggle against “Irregular” Mobility’ p 52.

<sup>36</sup> Anon, ‘What now for boat people’, The Star, 22 May 2011, p 23.

need to comply with international human rights standards. The task is herculean for a State so small and lacking resources to provide for the many refugees and stateless persons within the State but nevertheless is one that the State can no longer shy away from.