

# The enabling environment for organizing migrant workers in five countries in the Asia Pacific

## Introduction

The General Conference of the International Labour Organization (ILO) in 1948 adopted Convention 087 or the Freedom of Association and Protection of Right to Organize Convention and it came into force by July 4, 1950.<sup>1</sup> By 2022, there were 157 ratifications, with 30 remaining countries still to ratify the convention. Between Hong Kong Special Administrative Region (HKSAR), Japan, Indonesia, Malaysia, and the Philippines, the HKSAR and Malaysia are yet to ratify ILO C087.<sup>2</sup> The ILO C087 came into force for the Philippines on December 29, 1953, and June 14, 1965, for Japan and the latest among the group was Indonesia, with them ratifying on June 09, 1998.<sup>3</sup>

The HKSAR, Japan, and Malaysia are mainly migrant worker-receiving countries, while Indonesia and the Philippines as migrant worker-sending countries. Indonesia only recently, during the late 1990s started to send migrant workers, while for the Philippines, workers have been going to other countries and seeking work even before World War 2, and during the 1970s, it has become institutionalized. For the HKSAR, most of the migrant workers are women and in domestic work, while Japan started receiving factory workers, health workers, and entertainers during the 1980s. Malaysia, which shares a common border with Indonesia and the Philippines have seen an increase in factory workers, workers in the construction sector, workers in the palm oil plantations, and women domestic workers.

## Background

The right to organize, or Freedom of Association (FoA), is one of the core labor standards of the ILO and is upheld by ILO Convention 087. The FOA has been enforced in Indonesia, Japan, and the Philippines, and has been enshrined in their laws. When exercising this freedom, workers form their unions and organizations to be able to protect and promote their rights and interest, oftentimes against the overwhelming power of business and transnational corporations.

Migrants workers, including migrant domestic workers, are spread across Asia-Pacific, with the highest concentration in more developed economies of the region, namely HKSAR, Japan, and Malaysia. Most of the origin countries of migrant domestic workers are the developing economies of Indonesia and the Philippines.

Labor laws, including rights and privileges for workers, in receiving countries, are nuanced according to citizenship, with host workers enjoying a different set of rights compared to migrant workers.

## Research problem

Three out of five countries and jurisdictions of attention, namely Indonesia, Japan, and the Philippines have ratified ILO C087, while HKSAR and Malaysia have not. HKSAR, Japan, and Malaysia are migrant worker-receiving countries, while Indonesia and the Philippines are migrant worker-sending countries.

There are around 400,000 migrant workers in Hong Kong (2019), 1.8 million migrant workers in Japan (2021), and 4.8 million migrant workers in Malaysia (2019). Indonesia in 2019 were sending around 9

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<sup>1</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C087](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087)

<sup>2</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312232:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312232:NO)

<sup>3</sup> [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312232](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232)

million migrant workers, while the Philippines has around 10 million migrant workers during the same year.

In the receiving countries of HKSAR, Japan, and Malaysia, where Indonesian and Philippine migrant workers are located, some migrant workers have formed their unions and organizations, as well as those who have joined trade unions of host workers, but the majority of the migrant workers, specifically migrant domestic workers, remains unorganized for various reasons. Exploring the mixture of external and internal factors that motivate or discouraged migrant workers to exercise their freedom under ILO C087 can help us better understand how as promoters of the rights of migrant domestic workers, civil society organizations (CSOs) and other supporters of migrant workers can help and assist in the building of migrant organizations.

## **Objectives**

Looking into the internal and external factors that enable or discourage migrant domestic workers from exercising ILO C087 in HKSAR, Japan, and Malaysia will help civil society organizations (CSOs) and migrant workers concerned groups in addressing policy gaps in the full exercise and enjoyment of migrant workers if ILO C087 in the following areas of attention.

The understanding can also be adopted by migrant workers who are already organized or for those who are planning to build their organizations. With a high level of precarity for their member (e.g. contract terminations), existing migrant organizations need a steady flow of new members to their organizations to replenish those they have lost, or else their organizations face dissolution.

Those who are returning migrants to Indonesia and the Philippines can also be guided in understanding the existing policy environment regarding FoA in their home countries and can assist them in their efforts to build organizations for returned migrant workers.

## **Thesis statement**

Migrant workers have been building their organizations for many decades. Various reasons have been cited for the impulsion of workers to form their organizations, including the need for cooperation, to socialize, and empowerment, as well as to close their ranks during times of need and protection from abuses.

By proactive implementation of labor laws pursuant to ILO C087, host governments can encourage more migrant workers to organize themselves, without fear of unlawful actions if they congregate, and if FoA is violated, there are known legal remedies available, ensuring the labor rights of migrant workers.

## **Findings**

### *Legal Environment in migrant worker-receiving countries*

The Hong Kong Special Administrative Region (HKSAR) caters to almost 400,000 migrant workers, almost all of whom are in domestic work. Most of the migrant workers are from Indonesia and the Philippines. The HKSAR is not a signatory to ILO C087, but enshrined in its constitution, the Basic Law, is the right to form a trade union. Article 27 of the Basic Law guarantees that “Hong Kong residents have

the freedom of association, including the right and freedom to form.. and join trade unions”.<sup>4</sup> Another important piece of legislation that covers the rights of workers is the Employment Ordinance, which reiterates that “every employee has the right to be a member or an officer of a trade union registered under the Trade Unions Ordinance”.<sup>5</sup> An employee is “any person who has entered into or works under, or, in the case of a contract which has been terminated, worked under, a contract with an employer, whether the contract is by way of manual labor, clerical work or otherwise, is express or implied, oral or in writing, and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labor”.<sup>6</sup> Migrant workers, particularly migrant domestic workers are under the Contract of Employment, and thus fall under the category defined in the provision mentioned above. Thus in HKSAR, despite being a non-signatory to the ILO C087, freedom of association, and the right to form trade unions is guaranteed for all employees, including migrant domestic workers.

Japan has around 1.8 million migrant workers in 2021, with more than a quarter of the migrant workers located in the manufacturing sector (27%), followed by those in the Hospitality and Service (16.3%). The foreign migrant workers in Japan are mostly coming from China, Brazil, Vietnam, Korea, the Philippines, Thailand, Indonesia, and other Asian countries. Japan belongs to the founders of the ILO in 1919 and has ratified a total of 49 ILO Conventions, including ILO C087, which was signed in 1965. Local legislation which guarantees the right to organize was promulgated in the Japanese post-war Constitution of 1947. Under Article 28 of the 1947 Constitution, “[t]he right of workers to organize and to bargain and act collectively is guaranteed”. Concurrent to the 1947 Constitution is the Labor Union Law of 1949, and the Japan Labor Standards Act of 2018, formerly Act No. 49 of April 7, 1949.

Migrant workers are, in principle, not disallowed to join trade unions, and based on the feedback from the Kafin Migrant Center, Japanese trade unions are more than willing to organize the migrant workers, especially if the migrant worker is involved in labor disputes. But most of the migrant workers entering Japan are under the Technical Intern Trainee program and Specified Skills Work visa, as well as Student Visas, making up to 30% of the total foreign migrant workforce. Foreign migrant workers considered technical interns are not covered nor governed by the Labor Standards Act and are not treated as (common) workers.

Malaysia shares a common border with Indonesia and the Philippines have seen an increase in factory workers, workers in the construction sector, workers in the palm oil plantations, and women domestic workers and has 4.8 million migrant workers. Malaysia is yet to ratify ILO C087, although the Employment Act of 1955 states and restricts employers to include any provision in a contract of service restricting the rights of any employee, including forming, joining a union, and engaging in its activities. The Industrial Relations Act of 1967 governs the relationship between employers, employees, and their trade unions including setting collective bargaining rules, and procedures for handling trade disputes and guaranteeing the freedom of association, while the Trade Union Act of 1959 governs the management of trade unions.

Article 8 of the Federal Constitution provides that “All persons are equal before the law and entitled to equal protection of the law”. This guarantee of equality extends to all persons whether citizens or not; and, accordingly, to all migrant workers whether documented or undocumented.<sup>7</sup> The right to form unions is further articulated under Article 10(1)(c) of the Federal Constitution, which it clarifies that only

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<sup>4</sup> <https://www.labour.gov.hk/eng/public/pdf/rtu/rights.pdf>

<sup>5</sup> Ibid.

<sup>6</sup> [https://www.elegislation.gov.hk/hk/cap332?xpid=ID\\_1438403018316\\_001](https://www.elegislation.gov.hk/hk/cap332?xpid=ID_1438403018316_001)

<sup>7</sup> Dato’ Seri Mohd Hishamudin Yunus, Migrants and the Law, Legal Herald, June 2019, p.22

citizens have the right to form associations. This means that migrant workers are not allowed to form associations but may freely join associations and bargain collectively in association with unions that have been formed by citizens.<sup>8</sup> Moreover, under the Employment Act of 1955, the informal sector such as those engaged in domestic work is not recognized as a form of work, thus excluding many migrant workers who are employed as domestic workers from being covered by the Employment Act of 1955.<sup>9</sup>

### *Enabling environment in migrant-sending countries*

In this paper, we have identified Indonesia and the Philippines as among the migrant-sending countries and the countries where we will observe the environment which allows returned migrants to form their organizations.

Indonesia ratified ILO C087 in 1998 and Article 24 of Law No. 29 of 1999, paragraph 2 stipulates “Every citizen or group has the right to found a political party, non-government organization, or other organization to take part in the government or administration of the state and nation to protect and promote human rights, according to prevailing law.”

This ratification of ILO C087 was adopted in Laws No.21 of 2000 concerning Trade Unions or Labor Unions providing the principles of the rights of workers/laborers to organize or associate and protect in laborers/workers organization or association. Laws No.21 of 2000 Article 1 recognizes Trade Union or Labor union as an organization that is established to fight for, defend and protect the rights and interests of workers/laborers and improve the welfare of workers/laborers and their families.

The principle of rights to freedom of organization is also embodied in Law No 16 of 2017 concerning Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang or Perppu) No 2/2017 amending the Law No. 17 of 2013 on Mass Organization (Undang-Undang Organisasi Kemasyarakatan). It sets out that the form and establishment of the mass organization should be done by the community voluntarily based on aspirations, needs, interests, activities, and objectives to participate in development to achieve the goal of Unity of the Republic of Indonesia based on Pancasila and the Constitution.

Particular for migrant workers, the right to organize is recognized in Laws on Protection of Migrant Workers (Law No. 18 of 2017) Article 6 Paragraph 1(k) which set out that every prospective Indonesian Migrant Worker or Indonesian has rights to (k) associate and socialize in destination country accordance with the legislation in the destination country.

The Philippines became a signatory to ILO C087 on December 29, 1953, and has enshrined in its 1987 Constitution under Article III BILL OF RIGHTS. Section 8. the provision “The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.” Another section under Article XIII Social Justice and Human Rights reads “[t]he State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with the law. They shall be

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<sup>8</sup> International Labor Organization, Situation and Gap Analysis on Malaysian Legislation, Policies and Programmes, and the ILO Forced Labour Convention and Protocol, 2018, p.18

<sup>9</sup> Ibid, p.18

entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.”

Furthermore, the Labor Code of the Philippines as Amended, under Article 243 states “[a]mbulant, intermittent and itinerant workers, self-employed people, rural workers and those without any definite employers may form labor organizations for their mutual aid and protection. (As amended by Batas Pambansa Bilang 70, May 1, 1980)”

Under the said article, even workers like migrant workers or seafarers with no fixed employer may organize labor organizations for their mutual aid and protection. Unlike employees with fixed employers, who have the right to collective bargaining, the members of a said labor organization may organize for their mutual aid and protection.

They have to register their organization under the same agency, the Bureau of Labor Relations of the Department of Labor and Employment.

### **Challenges to FoA**

Aside from the existing labor legislation that covers the operations and registrations of a trade union, workers in Hong Kong have also considered the National Security Law and ensured they do not violate its provision. In 2021, Secretary for Labour and Welfare Law Chi-Kwong said that trade unions registered under the Trade Unions Ordinance have been classified as social organizations under the National Security Law, and thus have to abide by its regulations.<sup>10</sup> In a recent news article, the HKSAR government added a new declaration for workers wanting to register their unions, and that they must declare that will not "endanger national security".<sup>11</sup>

In Japan, most migrant workers are hired through the ‘dispatch work’ scheme, and a separate governing law was to be observed in relation to their employment and welfare such as the Act on Securing the Proper Operation of Worker Dispatching Businesses and Protecting Dispatched Worker (Act No. 88 of 1985). Another point to take is that technical interns or trainees are not recognized as (common) workers, making the Labor Standards Act inapplicable to them. A separate monitoring body was created by the Japan Ministry of Health, Labor, and Welfare (MHLW) to oversee and monitor the implementation of the system. The Organization for Technical Intern Trainees (OTIT) was the one responsible to promote and investigate the implementation of pertinent occupational standards concerning technical intern trainees, among other tasks.

Malaysia has seen the implementation of the Trade Union Act of 1959 challenged as discriminatory against migrant workers. In 2008, the Malaysia Trade Union Congress (MTUC) complained to the ILO Governing Body alleging that Malaysia had refused migrant domestic workers the right to organize. The ILO Committee found the allegation to be true and recommended that Malaysia “ensure the immediate registration of the association of migrant domestic workers.” To date, Malaysia has taken no steps to implement the recommendation.<sup>12</sup>

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<sup>10</sup> <https://www.thestandard.com.hk/breaking-news/section/4/172337/Trade-unions-may-be-revoked-if-violated-the-national-security-law>

<sup>11</sup> <https://hongkongfp.com/2022/09/16/trade-unions-must-now-declare-they-will-not-endanger-national-security-to-register-in-hong-kong/>

<sup>12</sup> International Labor Organization, Situation and Gap Analysis on Malaysian Legislation, Policies and Programmes, and the ILO Forced Labour Convention and Protocol, 2018, p.21-22

In Indonesia Serikat Buruh Migran Indonesia (SBMI) is a grassroots migrant workers organization founded on February 25, 2003. It was initiated by the Consortium for the Defenders of Migrant Workers Organization (KOPBUMI) in 2000 through the forerunner of an organization called the National Network for Migrant Workers. Formerly named the Federation of Indonesian Migrant Workers Organization (FOBMI), SBMI was later recognized as a labor union in 2006 in their second congress in 2005.

The establishment of SBMI as a union is based on Law No. 21 of 2000 concerning Trade Unions or Labor Unions. Before SBMI was recognized as a union under Law 21, the Ministry of Manpower interpreted Law No. 21 of 2000 as being only applicable to workers who work in factories in Indonesia.<sup>13</sup> However, SBMI pointed out a clause of the Law that stated “A trade union or labor union is an organization formed from, by, and for workers or laborers both within the company and outside the company...” where it is not restricted to factory workers only but workers from other sectors, including migrant workers. This is then used by SBMI to obtain legal recognition as a union.

Migrant workers who are working abroad can also form a union based on this provision, which is then registered with the labor attaché at the representative of the Republic of Indonesia in the country of placement.<sup>14</sup> This is based on the experience of the SBMI in Saudi Arabia, in that country, SBMI can associate and assemble using the existing legality in Indonesia, which is then conveyed to the labor attaché at the representative of the Republic of Indonesia in Saudi Arabia.

The Philippines have been regularly included in the International Trade Union Confederation’s list of ten worst countries for working people, including the year 2022.<sup>15</sup> It is also described in the same report as having “No Guarantee of Rights” and “...trade unionists and workers lived in fear of violent attacks and arbitrary arrests.” with “[o]ver 50 trade unionists have been killed since President Duterte came to power in 2016.”<sup>16</sup>

The European Parliament has also raised concern on human rights development in the Philippines by filing a “JOINT MOTION FOR A RESOLUTION on the recent human rights developments in the Philippines” last February 16, 2022, stating in section E “whereas the attacks on the exercise of the right to freedom of association have been systematic; whereas 50 extrajudicial killings of trade unionists have been committed under President Duterte’s administration; whereas the government has been using the pandemic to justify inaction and has postponed an International Labour Organization (ILO) high-level tripartite mission to the country;”. The ILO Committee on the Application of Standards during the 108th Session of the International Labor Conference in June 2019 have proposed high-level tripartite mission after noting “with concern the numerous allegations of murders of trade unionists and anti-union violence as well as the allegation regarding the lack of investigation in relation to these allegations.”<sup>17</sup>

## Survey results

A series of surveys were conducted among migrant workers in HKSAR, Japan, and Malaysia to further appreciate the level of knowledge of migrant workers on ILO C087, as well as existing legislation that promotes and protects freedom of association and possible implications on their impulsion to form and or join workers organizations and trade unions. The researchers employed non-probability, purposive

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<sup>13</sup> Interview with Anwar Ma’arif, Secretary General of SBMI. 2022

<sup>14</sup> Ibid.

<sup>15</sup> [https://files.mutualcdn.com/ituc/files/2022-ITUC-Rights-Index-Exec-Summ-EN\\_2022-08-10-062736.pdf](https://files.mutualcdn.com/ituc/files/2022-ITUC-Rights-Index-Exec-Summ-EN_2022-08-10-062736.pdf)

<sup>16</sup> Ibid.

<sup>17</sup> [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_711293.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711293.pdf)

sampling methods, with respondents coming from the organized and unorganized sections of the migrant workers. A combination of face-to-face interviews and an online survey were conducted.

In HKSAR, 2 sets of respondents were surveyed, from Indonesia and the Philippines, with each set having respondents from the ranks of organized and from those who do not have organizations. From the ranks of organized, 75% of the respondents from the Philippines mentioned that they are familiar with ILO C087, and 100% of them are also aware of the labor laws of the host country, while from the Indonesian respondents, none of them knew of ILO C087 but 75% of them knew of the labor laws of the host country. Most of those from Indonesia and the Philippines have received information, with 75% of them receiving the information from the host authorities, while 88% from the Philippines received information from their consulate, and only 50% of the Indonesians mentioned they received information from their consulate.

Among those respondents who do not belong to organizations, almost all of them did not know ILO C087, with just 20% of the respondents from Indonesia stating they learned about ILO C087 through the campaigns of organizations. From the Philippines, 66% knew the local labor laws, while from Indonesia, 80% stated they knew the laws, mostly from reading their contracts and social media. The consulates were the main source of information for the Indonesians, and those from the Philippines, with 100% and 80% respectively.

Those surveyed from Japan who belongs to organizations noted that 80% of them did not know of ILO C087, while 80% know the labor laws of the host country. Most of them have received information from the host authorities, as well as from their consulate, with 80% and 100% respectively. Unlike HKSAR, only migrants from the Philippines were surveyed.

The respondents who are unorganized in Japan said that all of them did not know of ILO C087, but 80% have knowledge about local labor laws, mostly from employee training. They received information about the laws before going to Japan, but 100% of them said they did not receive any information from the consulate.

The survey done in Malaysia was a combination of face-to-face interviews and online methodology and was only from the Philippines. Those respondents coming from the organized and unorganized had equal representations. Of the respondents, 14% of them knew of ILO C087, with 71% saying they did not know and 14% skipping the question. Knowledge about host country labor law was split between those who know (42%) and those who do not (42%), with the rest skipping the question, while a majority (42%) said they did not receive any information from their consulate, while only 36% said they received information, with the rest deciding not to answer the question.

### **Analysis of the survey results**

Most of the respondents were not aware of the ILO C087, with them learning only about the convention through their organizations, and also through campaigns being done by organizations of migrants, with a few learning about it from social media. The ILO does not actively promote the convention among the migrants except through their partner unions and thus has limited reach. The local labor laws are known to the migrants, as these are stated in their contracts, including details on pay and wages, working hours, holidays, and other provisions stated in their contract. Indonesia and the Philippines have also institutionalized pre-departure seminars where some information on host labor laws is briefed to the migrant worker.

The information limitation from the employment contract and the pre-departure orientation is obvious. For the employment contract, wages, working hours, and other related information are made available in black and white. During pre-departure orientation, basic do's-and-dont are mentioned, including cultural taboos. Both channels of information fail to mention the right to organize and freedom of association, more so ILO C087. Although for the 3 countries and jurisdictions, the information is readily available online, the information is passively available and requires the migrant worker to seek the information. In HKSAR, the official language of the legislation is English and Chinese, while in Japan it is Nihongo, and in Malaysia, it is in Malay and English. All of them are not the native tongue of migrant workers, except in Malaysia where there are close similarities between Bahasa Melayu and Bahasa Indonesia. These are clear challenges to an individual migrant who wants to further their understanding of their contract and the general labor laws in the host country.

Many of the respondents learned further about the local labor laws, including the right to organize and freedom of association through their involvement in their organizations. Employment contracts are often compared to one another during conversations in their organization, including other labor concerns. Abuses from employers are often discussed first among peers and organizations before paralegals and lawyers. Counseling is common among members of organizations, with those who have long experience as migrant workers becoming a source of institutional knowledge and informally becoming peer counsel.

## **Recommendations**

The ILO can conduct an annual Freedom of Association Day, actively promoting the right to organize and the provisions of ILO C087, especially among those countries who have signed up for the convention. The information and activity must consider the migrant workers and their specific needs, breaking down language and cultural barriers, and bringing together both the host and migrant workers.

All the countries included in this research respect the right to organize and freedom of association, as enshrined in their constitution and labor legislation. They can do the same as the ILO and actively promote these rights, again, considering the migrant workers and their specific needs. The employment contract should explicitly contain provisions clarifying the right to organize and freedom of association for workers, including the migrant worker. Indonesia and the Philippines, both signatories to ILO C087, should include in their pre-departure orientation discussion the right to organize and freedom of association.

Organizations of migrants should be supported and capacitated to act as conveyors of information on labor laws, including those that guarantee the right to organize and freedom of association. Consulates and embassies of migrant worker-sending countries like Indonesia and the Philippines should coordinate with migrant organizations and support them with resources to ensure they can deliver the information to their members, as well as to the general migrant worker population.

Civil society organizations (CSOs) should provide capacitating activities for migrant workers organizations (MWOs) in both receiving and sending countries to utilize the enabling environments available in both receiving and sending countries to strengthen existing and develop new MWOs.