

Legal Reforms in Protecting Migrant Workers' Welfare in Malaysia: Labor Law and Social Security

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This article examines how Malaysia has sought to improve migrant workers' welfare through the revision of its labor laws. Migrant workers' welfare in Malaysia has been hindered by the absence of social security frameworks, outdated labor laws, multiple dependence on labor intermediaries, and employers' lack of accountability. In 2019, two labor laws were amended based on International Labor Organization standards: the Workers' Minimum Standard of Housing and Amenities Act (1990) and the Employees' Social Security Act (1969). The amendments have equalized the statutory protection between national and migrant workers, increased employers' accountability for their migrant workers' welfare, and addressed forced labor. With this legal framework, Malaysia's migration management has been associated with better social security protection for migrant workers, which was previously absent from foreign worker policies. The legal reforms indicate the government's attempt in solving the tension in Malaysia's migration management, by ensuring balance between migrants' welfare, labor market needs, and immigration control. These observations and analysis draw upon legislations, federal government gazettes, Hansard records, official reports of intergovernmental organizations, press statements of civil society actors, online newspapers, and secondary literature.

Keywords: Forced Labor; Labor Law; Migrant Worker; Social Security; Worker Accommodation



INTRODUCTION

This paper examines two legal reforms implemented by Malaysia since 2019 to improve social security protection of migrant workers, ensure employers' accountability, increase workplace enforcement, and address forced labor practices. Amendments to the Workers' Minimum Standard of Housing and Amenities Act (Act 446) and the Employees' Social Security Act (Act 4) are important because the inadequate regulatory framework has been considered the main barrier to migrant workers' protection. Prior to the amendment, the standards for housing conditions provided by employers varied due to ineffective enforcement, resulting in overcrowding and a lack of basic amenities (World Bank, 2013, p. 106). The poor living conditions in workers' accommodation affected migrant workers' health, well-being, and safety. Sub-standard living conditions are one of the 11 indicators of forced labor identified by the International Labor Organization (ILO, 2012; ILO, 2018a). In terms of social

security protection, migrant workers' insurance coverage was limited and much lower compared to Malaysian workers, despite the fact that the country recorded a high number of migrant fatalities and occupational injuries (ILO, 2016; Rasiah, 2019). The overcrowded living conditions and limited social security coverage are closely associated with unhealthy business practices – the “race to the bottom” – in order to decrease labor costs (Ang, Murugasu, & Chai, 2018, p. 8).

This research attempts to answer three research questions: What are the major factors underpinning migrants' welfare negligence in present-day Malaysia? What is the role of legal reform in protecting migrant workers' welfare? What are the impacts of the reform? Legal and institutional labor reforms are much needed as there are inadequate national legal frameworks for safeguarding foreign workers' rights and the existing labor laws are outdated. Without a comprehensive national foreign worker policy overhaul, labor exploitation and human trafficking would continue to flourish. Workers' rights groups and non-governmental organizations urged the Malaysian government for a comprehensive labor migration reform based on the ILO conventions and fundamental human rights principles (Civil Society Organizations, 2018). According to Tenaganita, a human rights group, foreign workers are trafficked and placed in forced labor conditions because the country has not sufficiently addressed workers' protection and living conditions. The foreign worker policy, according to Tenaganita, “has been driven by the corporate world, and that is the commodification of migrant workers” (Pillai, 2018).

A comprehensive reform of labor laws in Malaysia has been long overdue. Labor laws in Malaysia introduced in the 1950s and 1960s are archaic, and have been outdated for 60 years. They are no longer appropriate for the current employment landscape in terms of recognition of human dignity, human values, and workers' rights. In 2018, the Ministry of Human Resources (MOHR) proposed a series of labor law reforms to ensure that employers provide secure accommodations for their migrant workers. This was followed by another announcement in September 2018, which provided social security protection to migrant workers through an amendment to the Employees' Social Security Act 1969 (Annuar, 2019; Varughese, 2018). There was an urgent need to update domestic legislation in line with international treaties on labor standards for the benefit of workers, employers, and foreign investors. During the National Labor Advisory Council meeting in January 2019, Human Resources Minister M. Kulasegaran recognized that “many labor laws are terribly outdated with the changing employment situation around the world. We need to be abreast with the situation” (Ramasamy, 2019). The labor law reforms in 2019 provided the legal framework to bring about positive changes in Malaysia in three aspects. They addressed the inequality in treatment between national and foreign workers in terms of social security protection, increased employers' accountability for their migrant workers' welfare, and protected fundamental labor rights.

This paper suggests that the recent labor law reforms could be regarded as an attempt to balance security and labor market needs with better workers' welfare protection. It should be noted that Malaysia's migration policies in the past had not been situated within the context of migrants' welfare. The foreign worker management, prior to the reform, was aimed to regulate the inflow of foreign workers, to reduce irregular immigration, and to protect Malaysian workers in the local labor market,

without sufficient attention to foreign workers' conditions of labor, their welfare, or their role to the nation's development (Harkins, 2016, p. 24; Nesadurai, 2013, p. 103; World Bank, 2013, p. 114). Since 2015, there has been a fundamental shift in Malaysia's foreign worker policies, which witnessed new initiatives taken to address labor rights. The 11th Malaysia Plan (2016–2020) envisaged a comprehensive migration reform that takes into account migrants' welfare and the industrial needs. The MOHR is tasked with policy-making for foreign worker management, including monitoring migrant workers' welfare. As for the employers, a strict liability principle was introduced, making them directly responsible for the recruitment and welfare of their foreign workers (Malaysia, Economic Planning Unit, 2015, chap. 5). In addition, the government obliged employers to sign a pledge called the Employers' Undertaking (previously known as Employer Mandatory Commitment) effective since 1 February 2017. The pledge outlined 11 mandatory commitments of employers, including providing accommodation and basic amenities in accordance with the Workers' Minimum Standard of Housing and Amenities Act 1990, settling all medical bills if their foreign workers are unable to do so, and abiding by all the government requirements on the employment of migrant workers. Failure to comply with the requirements of the pledge would subject the employers to legal actions and to administrative sanctions, including being blacklisted from hiring foreign workers (Federation of Malaysian Manufacturers, 2017; ILO, 2018a). These initiatives of ensuring employers' accountability were further enhanced with labor law reforms, which improved social security protection and the living conditions for foreign workers.

This article examines how Malaysia has reformed and implemented the amended labor laws to address the limitations in its migration policy. First, it examines the social security framework at international, regional, and national levels. Then, it surveys migrant rights and forced labor in the Malaysian context. This is followed by a discussion of two labor law reforms: the Workers' Minimum Standard of Housing and Amenities Act (1990) and the Employees' Social Security Act (1969). Next, it looks at the enforcement of the amended acts in ensuring employers' compliance. Finally, it analyzes the impacts of the reforms. This paper is based on an analysis of legislations, federal government gazettes, parliamentary debates, official reports of intergovernmental organizations, press statements of civil society actors, online newspapers, and secondary literature.

CONCEPTUAL FRAMEWORK

The importance of building social security systems is reflected in the 2030 Agenda for Sustainable Development. The United Nations General Assembly adopted the Sustainable Development Goals (SDGs) in 2015. SDG 1.3 highlights the importance of social protection for sustainable development in reducing and preventing poverty. It calls for the implementation of nationally appropriate social protection floors that guarantee a basic level of social security to all. Social protection (also known as social security) is a human right. The United Nations' efforts reaffirmed the ILO Social Protection Floors Recommendation of 2012 (also known as ILO Recommendation No. 202) (ILO, 2017a, p. 1). Migrant workers have limited access to social security benefits in the receiving states because access is unequally distributed between national

workers and migrant workers. Some social security schemes are only available to citizens or permanent residents, excluding the majority of migrant workers who often lack proper documentation. Undocumented workers are excluded from social security because of their immigration status (Cuddy et al., 2006, pp. 17-18; Nguyen & Simoes da Cunha, 2019, pp. 49-50).

The social protection of migrant workers and their families among ASEAN member states is generally poor due to weak provisions in national legal frameworks on immigration, labor, and social security, and the absence of bilateral arrangements. This is the case from both a labor and especially a social security rights perspective. Compared to the national workers in a state, migrant workers “enjoy much less protection in social security law and in practice than their national counterparts” (Olivier, 2018, p. 1). Legal reforms are important because legal barriers are the main barrier faced by migrant workers. Restrictive national legislations and nationality discrimination provisions in social security have undermined migrant workers' rights. Migrant workers are either not covered for social security coverage and entitlements or covered with lower benefits compared with national workers. The barriers to the extension of coverage to migrant workers are greater in precarious employment in the informal economy when workers are not covered by labor laws and social protection schemes (ILO, 2017a, pp. 63, 65).

ASEAN countries have stepped up their efforts in safeguarding the rights of migrant workers. Member States of ASEAN adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers during the 12th ASEAN Summit in 2007 in Cebu, Philippines. The Cebu Declaration outlined the receiving states' obligations, such as promoting fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers (ASEAN, 2007). In 2018, ASEAN Member States adopted a framework for cooperation on migrant workers through the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, while recognizing the contributions of migrant workers in both receiving and sending states of ASEAN. The ASEAN Consensus outlined migrant workers' specific rights, such as the right to access employment-related information, to be issued an employment contract, to fair treatment in the workplace, to adequate accommodation, to fair and appropriate remuneration and benefits, to retain benefits from their employment upon leaving the receiving states, to transfer their savings, to file a complaint relating to labor dispute, and to join trade unions (ASEAN, 2018, chap. 4). In the area of social protection, ASEAN collaborative efforts are visible through the ASEAN Declaration on Strengthening Social Protection adopted during the 23rd ASEAN Summit in Brunei Darussalam in 2013. Member States recognized that social protection is a human right and everyone, especially vulnerable groups, is entitled to have equitable access to social protection based on a rights-based or needs-based approach (Art. 1, ASEAN, 2013). In 2015, ASEAN Member States developed the Regional Framework and Action Plan to Implement the ASEAN Declaration on Strengthening Social Protection. The framework served as a move towards the equitable and sustainable development of the target groups, which included poor, at-risk, and vulnerable groups (ASEAN, 2015).

Migrant workers in Malaysia were excluded from social security schemes due to (1) inadequate regulatory instruments in terms of workplace protection, (2) multiple

dependence on labor intermediaries, and (3) employers' lack of accountability (Devadason & Chan, 2014; World Bank, 2013, 2015). Prior to Malaysia's social security reform in 2019, migrant workers were administered under separate and less advantageous schemes for health services and workplace compensation, compared to the national scheme enjoyed by local workers. The two categories of workers were covered under different schemes beginning in 1993. Malaysian workers were protected under the Employees' Social Security Act 1969 scheme provided under the Social Security Organization (SOCSO), while migrant workers were covered under an insurance scheme called the Workmen's Compensation Act (WCA). The Foreign Workers Compensation Scheme (FWCS) provided under the WCA offered lower protection in case of permanent disability or death. This differentiated treatment resulted in many foreign workers being uninsured or under-insured and led to unpaid medical bills by employers (World Bank, 2013, pp. 107-108). Between January and October 2017, the Department of Occupational Safety and Health recorded 1,645 workplace accidents resulting in permanent or temporary disability. Though migrant workers contributed to the country's economic growth, they were denied equal treatment in workplace compensation. According to a five-year simulation done by the ILO (1 January 2010 – 31 December 2014), in the case of a permanent injury, a national worker was entitled to periodic payments of MYR 425,000 under the SOCSO scheme, while a migrant worker was entitled to a lump sum payment of MYR 23,000 under the WCA. The entitlement gap in workplace compensation was very wide, as migrant workers were only entitled to 5.4% of the entitlement granted to national workers (ILO, 2018b; ILO, 2017b, p. 84).

Second, multiple dependence on labor brokers and intermediaries under the outsourcing system has negatively affected foreign workers' welfare. In principle, the outsourcing company is responsible for overseeing the welfare of workers, including providing accommodations, transportation, and medical benefits. In practice, the welfare of the workers is not adequately protected due to ineffective monitoring by the Department of Labor and various malpractices by agents causing working and living conditions to be substandard, workers not being paid the minimum wage, and not having secure employment. Under this so-called labor contract system, the management and accountability of foreign workers is transferred from the employer to the outsourcing company, leading to labor abuse by recruiting agents. Employers are not held accountable for the legal status of employees, working conditions, or workplace violations (Abella & Martin, 2016, pp. 108-110; Verité, 2014, p. 93; World Bank, 2015, p. 56). Outsourcing practices have thus negatively affected the occupational safety and health of both local and foreign workers. Many cases occur in factories or workplaces in which workers who are disabled cannot be cared for because there is no insurance coverage and no benefits can be claimed through SOCSO. The reason for this is because the employers did not contribute to SOCSO (see the following section on Employees' Social Security Act 1969 for more detail). The situation is aggravated when factories hire workers through outsourcing companies, and these workers are not considered factory workers. As a result, they have no SOCSO coverage through the factory in the event of workplace accidents (Malaysia, 2018, p. 39).

Third, employers' lack of accountability has resulted in the negligence of the welfare and interests of migrant workers. Foreign- and locally-owned companies

have outsourced their work in order to avoid paying SOCSO or any other insurance scheme. Sometimes, in the event of an accident, there is no party willing to admit that they are the employer of the worker involved in the accident. Some employers change workers' working status from permanent to contract work in order to avoid contributing to SOCSO. Unfortunately, the country has no law that prevents employers from operating in this manner (Malaysia, 2004, p. 71). Workplace accidents happen to foreign workers who no longer have legal documents (even when they entered with documents all in order). When employers fail to renew workers' temporary work permits upon expiry and allow them to continue working, the employers compromise their workers' safety and welfare in Malaysia. These workers are afraid of enforcement operations, living in fear or searching for places to hide. The Department of Labor's inaction against employers who do not protect the welfare and safety of their workers has resulted in major labor exploitations (Malaysia, 2019a, p. 149), which will be presented in the following.

MIGRANT RIGHTS AND PROTECTION IN MALAYSIA

Malaysia is a destination country for low-skilled migrant workers, and the migrant labor workforce is a crucial contributor to Malaysia's economic development. The majority of migrant workers fill important workforce gaps in low-skilled jobs, as educated Malaysians work in high-skilled jobs. Low-skilled workers are mostly involved in labor-intensive sectors and in 3D occupations (dirty, dangerous, and difficult) (World Bank, 2015, p. 29). Out of the total workforce in Malaysia, migrant workers comprised 14.1% (2010), 13.8% (2011), 14.2% (2012), 15.7% (2013), 15.2% (2014), 15.1% (2015), 15.6% (2016) and 15.5% (2017) (Khazanah Research Institute, 2018, p. 120). In 2017, migrant workers constituted 51% of the workforce in low-skilled jobs, 17.3% in semi-skilled jobs, and 2.7% in skilled jobs. Thus, migrant workers complement rather than compete with local workers. In 2017, the migrant worker workforce was 2.3 million compared to the Malaysian workforce at 12.7 million (Khazanah Research Institute, 2018, pp. 124-125). The majority of migrant workers fill in the employment gaps in the agricultural, construction, and manufacturing sectors, which have inherently higher risks of workplace injury and accidents. The nature of the work is hazardous due to poor working conditions, occupational stress, lack of adequate medical care, and the inequitable social security scheme for migrant workers. While migrant workers face higher risks of workplace injury, there is unequal access to the social security scheme that would provide insurance coverage and compensation for workplace accidents (Harkins, 2016, pp. 20-21).

Migrant workers also experience disparities under the labor regulations, such as the absence of employment contracts, denial of collective bargaining under the outsourcing system, prohibition of joining trade unions, discouragement from contributing to the national social security, inferior insurance benefits for workplace accidents, non-payment of wages, unfair dismissal, wrongful deductions from wages, and substandard living conditions (Devadason & Chan, 2014, pp. 29-30). They work in uncondusive working conditions under long, overtime hours and are paid under the minimum wage. Disparity in protection between migrant workers and Malaysian workers still exists, when poor migrant workers, trapped in situations of

debt bondage, are at “the mercy of their employers” (Suhakam, 2018, pp. 128-129). Human rights and labor rights violations are closely related to forced labor. There are 11 indicators of forced labor identified by the ILO: abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime. In some cases, a single indicator may suggest the existence of forced labor, while in other cases, there are several indicators of a forced labor situation (ILO, 2012). A joint report prepared by the Malaysian Employers Federation and the International Labor Organization identified the factors that contributed to forced labor practices in Malaysia among employers and workers. Among the factors related to employers are the lack of awareness of forced labor, lack of knowledge about policies, fear of workers’ abscondment, acceptance of forced labor practices as being the industrial norm, and deliberate acts by errant employers. For workers, the factors included misleading information provided to them, misguiding by recruitment agents, isolated location of employment, lack of enforcement, limited number of prosecutions of forced labor offences, and limited access to grievance mechanisms (MEF & ILO, 2019, p. 8).

One of the major causes of rights violations is the power imbalance between the employers and workers. Migrant workers are often faced with various exploitation in terms of forced labor, when employers control the renewal of their work permit. If the employer fails or refuses to renew their permits, migrant workers become undocumented (ILO, 2018a, p. 2). Malaysian visa and work permit policies tie the legal status of migrant workers to their employers. This situation results in their “multiple vulnerability” to dismissal, denunciation, and deportation if they question a work arrangement, fail to satisfy the work expectations, or do not follow instructions (Verité, 2014, pp. 163, 181). Malaysia’s sponsorship-based immigration system makes foreign workers dependent on the continued support of their employers to have their immigration passes renewed. Employers exercise delegated state power over migrant workers’ legal status and non-compliance resulting in the cancellation of immigration passes (Nah, 2012, pp. 498-499). Due to their precarious legal position, any conflicts with their employers or outsourcing agents could cause the workers to become undocumented. A study conducted by the Centre for Research on Multinational Corporations (SOMO, 2013) found that: “Migrant workers have a weak rights position in Malaysia and are often faced with repressive anti-migrant policies and practices” (p. 6).

Malaysia recorded a high number of migrant fatalities due to weak migrant protection. Between 2003 and 2017, there were 3,800 Nepali migrant workers’ deaths, the major reasons being cardiac arrest and heart attack. Other causes included workplace accidents, road accidents, suicide, physical assaults, and chronic disease. Nepali rights groups questioned the reliability of reports released by Malaysian hospitals. They believed that heart attack and cardiac arrest were reported as the major causes of death because Malaysian employers are not obligated to pay compensation and insurance claims if the death is not caused by a workplace accident. According to Amnesty International and Human Rights Watch, many Nepali workers worked in hazardous conditions (“After 3,800 Deaths in Malaysia”, 2017). Human rights and migrant rights groups doubted the actual cause of death; they believed

that employers and agents were avoiding insurance claims. Poor working conditions, workplace safety, stress, overwork, and dehydration may have contributed to these deaths. Official statistics recorded the number of Nepali worker deaths as follows: 361 (2014), 425 (2015), and 386 (2016), indicating a statistical average of one Nepali worker death per day (“Report: 386 Nepalese Migrant Workers”, 2017). A report by ILO (2016, p. 11) on Nepali migrant workers’ occupational safety in Gulf Cooperation Council countries and Malaysia recorded a total of 1,562 deaths in seven years (2008–2015) out of 908,156 Nepali workers in Malaysia, revealing a death rate of 1.72 per 1,000 migrant workers. Fatalities from cardiac arrest were listed as the major cause of death followed by heart attack, natural causes, unidentified cause, traffic accidents, suicide, workplace accidents, and murder (ILO, 2016, p. 13).

Bangladeshi migrant workers have a higher fatality rate in the country – two deaths per day and 96 deaths in January 2019. This high rate made Malaysia the ‘killing fields’ for many young workers ranging between 18 and 32 years of age, who had been certified as medically fit prior to their employment. The government was called upon to investigate the actual cause, as the major reasons being strokes and heart attacks was highly suspicious. Other contributing factors, such as poor living conditions, led to infections and delays in seeking medical treatment because of the high costs. Debt bondage and modern-day slavery are directly linked to these deaths. Bangladeshi workers incurred heavy debt in order to pay MYR 20,000 recruitment costs to migrate to Malaysia. Exploitation by agents, such as contract substitution, unexplained salary deductions, and short-changing overtime payments make it difficult to settle the debt incurred in their home country (Rasiah, 2019).

The Embassy of Nepal in Malaysia recorded 2,945 deaths of Nepalese workers between 2005 and 2014. In 2015 alone, there were 461 deaths reported. About 70% of Nepalese workers’ fatalities were attributed to massive heart attack or sudden cardiac arrest, while 30% were due to workplace accidents, alcohol consumption, and suicide for monetary reasons. Sudden cardiac arrest was attributed to working long hours in hot conditions, causing fatigue and eventual death while sleeping. Many Nepalese workers worked more than 12 hours per day to settle debts owed to their agents in Nepal. The Employment Act 1955 stipulated that workers are allowed to work only eight hours daily. In fact, migrant workers often asked for overtime work as the only solution to repaying their debt (“Most Deaths of Nepalese Workers”, 2016). As for Indonesian migrant workers, there were about 120 deaths of Indonesians in Malaysia from 2016 to 2018. Partly due to the high cost and complexity of legal migration, Indonesians were vulnerable to human trafficking syndicates and worked in the country without documents. Rights groups such as Migrant Care advocated for cheaper and safer migration processes to prevent modern-day slavery and workers’ exploitation (Barker, 2018).

Since 2019, the Malaysian government has taken positive measures to ensure employers’ accountability for their workers’ welfare. The government required employers to 1) contribute to the Employment Injury Scheme for their migrant workers under the Employees’ Social Security Act 1969 and 2) to guarantee their basic rights to decent living conditions under the Workers’ Minimum Standards of Housing and Amenities (Amendment) Act 2019.

WORKERS' MINIMUM STANDARDS OF HOUSING AND AMENITIES (AMENDMENT) ACT 2019

A major reform in the Malaysian state's labor law is the amendment to the Workers' Minimum Standard of Housing and Amenities Act (1990). Amendments to Act 466 widened the coverage of the existing Act to all industrial sectors, such as plantation, construction, and manufacturing. The amendments aimed to ensure compliance with international standards for developing countries, while promoting sustainable economic growth and attracting foreign investment. Amendments to Act 466 came into force on 1 June 2020. Worker accommodations had to fulfil basic aspects: a minimum space requirement, basic facilities, safety, comfort, and cleanliness standards. Employers were given a three-month grace period to improve the living conditions of their workers and the enforcement of Act 446 came on 1 September 2020. Companies that failed to provide proper housing could be fined MYR 50,000 per worker. Employers are considered responsible for taking measures to contain the spread of any infectious disease and to segregate workers suffering from an infectious disease. Under the amended Act, penalties for the failure to provide the necessary medical arrangement and treatment for workers suffering from an infectious disease increased from a maximum fine of MYR 2,000 to MYR 50,000 (Carvalho & Tan, 2019; Thomas, 2020).

Prior to the amendment, the statutory regulation on accommodation facilities was not standardized for all industries. The Act was only applicable to workers in the estate, plantation, and mining industries. For those in other industries, employers had to provide minimum housing benefits according to the standards set by the local authorities, and local councils were responsible for overseeing the implementation (World Bank, 2013, p. 106). As there was no standard housing regulation for workers employed in urban areas, such as in service sectors, the accommodations provided were unhygienic and overcrowded, affecting migrant workers' health, well-being, safety, and right to privacy (ILO, 2018a, pp. 19-20). A survey among migrant workers in the Malaysian electronics industry by Verité (2014) indicated that the major issues faced by foreign workers were bad living conditions, lack of a secure place to store their belongings, crowded living quarters with more than eight people sharing a room, and unsafe neighborhoods. The study found that 92% of the respondents stayed in housing provided by employers or brokers. They had no bargaining power regarding living conditions, as foreign workers were highly dependent on their employers or brokers for housing (Verité, 2014, pp. 131-132).

The Workers' Minimum Standards of Housing and Amenities (Amendment) Bill 2019 was passed by the lower house on 15 July 2019. During the second and third reading of the bill, the government recognized that it was time to amend Act 446 to enhance and extend the protection of working-class welfare in terms of housing and related facilities. The amendment would also make Act 446 consistent with the development of international labor standards, and, in particular, in compliance with international standards R115 ILO – Workers' Housing Recommendations of 1961. In general, the bill to amend Act 446 was aimed to achieve several purposes – first, to bolster the statutory benefits in Act 446 to ensure that workers in all sectors enjoy better housing, basic amenities, and secure health and safety. Employers were

given the choice of building, renting, or relocating their employees in centralized accommodations. The second purpose was to adhere to international labor standards regarding the provision of housing to workers, which would facilitate trade between Malaysia and other countries. This monitoring also allows Malaysia to enter into free trade agreements and prevents Malaysian companies from being subject to trade restrictions. Third, the amendment purposed to fulfil the Pakatan Harapan government's promise to ensure the protection of workers' rights, to improve the dignity of the working class, and to guarantee their rights in accordance with international standards. Another purpose was to uphold the speech pronounced by Yang di-Per-tuan Agong (Malaysia's constitutional monarch) during the opening of Parliament on 11 March 2019. The monarch stated that the government would reform its labor laws to ensure that they comply with international standards while improving aspects of protection for workers (Malaysia, 2019a, pp. 139-140).

The Workers' Minimum Standards of Housing and Amenities (Amendment) Bill 2019 is significant in several ways. The Act applies to employees who are working at places other than on an estate (Malaysia, 2019b, Section 24a).¹ Accommodation provided to an employee must possess a Certificate for Accommodation, failure of which will result in the employer or the centralized accommodation provider being charged with an offence. The employer is liable for a fine not exceeding MYR 50,000, while the centralized accommodation provider is liable for the same fine or imprisonment for a term not exceeding one year or both (Malaysia, 2019b, Section 24d). It is the obligation of an employer and a centralized accommodation provider to ensure that all accommodations provided are in compliance with the minimum standards specified under Act 446 (Malaysia, 2019b, Section 24f). The increased penalties imposed on employers who fail to comply with Act 446 serve as a precautionary measure to demonstrate the government's decisiveness in addressing the issue of housing that does not meet the minimum standards set. This is taken seriously by the international community, as workers' housing is often associated with forced labor and human rights violations (Malaysia, 2019a, p. 193).

In drafting the amendment to Act 446, the MOHR convened a comprehensive governance session with stakeholders, especially trade unions, employers' associations, and relevant government agencies (Malaysia, 2019a, p. 139). Nevertheless, there are several weaknesses in the amended Act, the most obvious being the provision stating that it is not compulsory for employers to provide workers' accommodations. If an employer agrees to provide housing, it must comply with the minimum standards set out under this Act. However, the government does not intend to compel employers to provide accommodations. A parliamentarian questioned the strength of the law, as this provision may be abused by irresponsible parties in order to save their operating costs (Malaysia, 2019a, p. 163). It is also questionable with regard to implementation. Although the Penang State Government initiated its workers' dormitory project, there are problems with the implementation, as there are no specific laws – state or federal – requiring workers to stay in the hostel. There is no legal provision requiring local or foreign workers to stay in the dormitory. Therefore, foreign

1 The bill is applicable in Peninsular Malaysia and Labuan only. Equivalent provisions were later included in the Sabah Labor Ordinance and the Sarawak Labor Ordinance, subject to approval of their respective state governments (see section on Law Enforcement).

workers continue to live in low-cost housing meant for the locals (Malaysia, 2019a, pp. 160-161).

Another weakness lies in the lack of civic awareness among Malaysian employers of their workers' rights. In the case of workers' welfare, the international standardized Act may not be meaningful when employers and others still discriminate against foreign workers and treat them as second- or third-class citizens. The government's efforts to create a sense of respect for the rights of both foreign and local workers were queried. Complaints from employers are anticipated as they now have to spend money to protect workers' welfare. One example shows that housing is misused by putting more than 10 to 20 foreign workers in a space with the capacity to accommodate only five or six people (Malaysia, 2019a, p. 154). Workplace inspections were inadequately carried out by the Labor Department and the Occupational Safety and Health Department as stipulated under ILO's Labor Inspection Convention, 1947 (No. 81). The living conditions were deplorable, with foreign workers staying in cramped and dirty conditions at workers' quarters at construction sites or rented apartments (Ram, 2020). Foreign workers in restaurants and construction sites are commonly housed in shop lots. In Cyberjaya, many shop lots were used by employers as worker dormitories. The Sepang Municipal Council disallowed shop lots being used as dormitories after receiving public complaints on workers' living conditions and rubbish disposal. The Council found that shop lots housed around 30 workers without partitions to separate sleeping accommodations from living areas (Chen, 2019).

Effective 1 July 2021, the government made the Certificate of Accommodation as a pre-requisite in hiring new foreign workers in its effort to enforce Act 446. Employers must obtain the certificate from the MOHR prior to the issuance of a visa by the Immigration Department. Without fulfilling the pre-requisite, their foreign workers would be regarded as irregular migrants ("Accommodation for More", 2020). In order to facilitate the implementation of the amended Act, the Ministry of Human Resources set two new regulations titled: 1) Employees' Minimum Standards of Housing, Accommodations and Amenities (Accommodation and Centralized Accommodation) Regulations 2020, and 2) Employees' Minimum Standards of Housing, Accommodations and Amenities (Maximum Rental or Charges for Accommodation) Regulations 2020. The first regulations required all employers and centralized accommodation providers to offer basic items that shall not be shared: a single bed with a measurement of no less than 1.7 m² (the space between the two beds shall not be less than 0.7 m if a double decker bed is provided), a mattress of not less than 4 inches (including a pillow and a blanket), and a locked cupboard (of not less than 0.35 m length, 0.35 m width, and 0.9 m height) (Malaysia, 2020a, Section 4 of the Regulations). The size of sleeping area in a dormitory shall not be less than 3.0 m² for each worker and the size of a bedroom in a non-dormitory shall not be less than 3.6 m² for each worker (Malaysia, 2020a, Section 5 of the Regulations). The second regulations set MYR 100 as the maximum rental charges that may be collected by an employer from a worker in respect of any accommodation provided by the employer or any centralized accommodation provider under section 24g of Act 446. Act 446 allowed employers to make deductions from the workers' wages for accommodation charges (Malaysia, 2020b, Section 2 of the Regulations). Both regulations, which took effect from 1 September 2020, were important because the congested

living conditions increased the risk of COVID-19 among foreign workers, identified as one of the high-risk groups (Lim, 2020).

EMPLOYEES' SOCIAL SECURITY ACT 1969 AND EMPLOYMENT INJURY SCHEME

The next reform in foreign workers' welfare is the extension of national social security protection to foreign workers. Beginning 1 January 2019, employers hiring foreign workers (excluding domestic maids) must register their workers with Malaysia's Social Security Organization (SOCSO). The new ruling makes it compulsory for employers to contribute to the Employment Injury Scheme (EI) for their foreign workers under the Employees' Social Security Act 1969. The contribution rate of 1.25% of the insured monthly wages is payable by the employers. This policy of registering with SOCSO is applicable to new foreign workers entering Malaysia on or after 1 January 2019. For existing foreign workers who were still covered under the previous Foreign Workers Compensation Scheme (FWCS), their employers have to register them with SOCSO after expiration of the FWCS on 31 December 2019 (SOCSO, 2020).

Prior to the reform in 2019, foreign workers' insurance coverage under the FWCS was limited. Since the establishment of SOCSO in 1971, the organization provided insurance coverage for foreign workers in the event of workplace accidents. The SOCSO scheme provided periodic payments to workers of industrial accidents and the issuing periodic payments to foreign workers after their return was administratively burdensome. Beginning 1 April 1993, foreign workers' insurance coverage was transferred to the FWCS under the Workmen's Compensation Act (WCA). The FWCS scheme offered only a lump sum payment at lower amounts for cases of permanent disability or death. The transfer of foreign workers' protection from the SOCSO scheme to the WCA in 1993 created inequalities of treatment between national and non-national workers (Harkins, 2016, p. 21).

With the new policy in place, it is mandatory for employers to register all foreign workers with the SOCSO scheme beginning 1 January 2019. The equal protection policy came about after the ILO sent a direct contact mission in 2018 to ascertain Malaysia's adherence to Convention 19 (C19), following complaints received by the ILO regarding the plight of millions of migrant workers with limited workplace compensation coverage. The three-day mission examined the access to healthcare in case of occupational injuries and assisted the government in implementing C19 – equality of treatment in accident compensation for national and foreign workers (“Migrant Workers to be Fully Socso-Insured”, 2019). Consequently, SOCSO took over the accident compensations for foreign workers (SOCSO, 2018). The move was in line with ILO standards: The Equality of Treatment (Accident Compensation) Convention, 1925 (No.19), and the Conference Committee on the Application of Standards under the ILO (Abas, 2018). Under the new policy, the government has an efficient protection control system with better data for tracking the numbers and profiles of foreign workers, including their employers' information. Employers' failure to contribute to SOCSO would lead to necessary enforcement action. Foreign workers are eligible to be registered with SOCSO if they possess valid working permits. Their existing insurance coverage under the FWCS would continue to be valid until the expiry date in 2019 (Dermawan, 2018; “Kula: Workmen's Compensation Act”, 2018).

The scheme would also benefit employers in reducing the medical costs of their foreign workers involved in workplace accidents (“Deputy Minister: Foreign Workers”, 2019).² From 1 October 2019, employers are eligible to claim repatriation costs for the remains of their foreign workers in non-workplace death cases if they registered with SOCSO. The maximum payment claimable by employers is MYR 4,500. The employers must comply with the following conditions: a) the foreign worker is a legal foreign worker and is registered with SOCSO; b) the death of the foreign worker occurred in Malaysia and was confirmed through a death certificate issued by the authorities; c) there is information related to the death of the foreign worker by the employer if the foreign worker is still working with the employer; and d) the death of the foreign worker occurred on or after 1 October 2019. This benefit is not applicable if the foreign worker is already covered under the existing social security scheme of the country of origin for the repatriation of remains (SOCSO, 2019).

In 2020, SOCSO also provided subsidized screening tests for registered foreign workers when the government implemented the compulsory COVID-19 screening test for foreign workers. Beginning 1 December 2020, all foreign workers in all sectors were required to take COVID-19 screening following increased positive cases at factories and construction sites. The first phase of COVID-19 screening involved six red zone states (Selangor, Kuala Lumpur, Penang, Labuan, Sabah, and Negeri Sembilan). Only foreign workers registered with SOCSO were eligible for the subsidized COVID-19 test. The cost of the COVID-19 test kit (MYR 60) was borne by SOCSO, while the screening costs were borne by their employers (Chan, 2020; Perimbanayagam & Arumugam, 2020). The MOHR then extended the scope of the COVID-19 Screening Program for Foreign Workers to the rest of the country beginning 2 February 2021. With the additional allocation of MYR 54 million, SOCSO bore the cost of the test kit and employers paid the service charge imposed by the clinic. Employers must bear the total screening cost for foreign workers who are not SOCSO contributors (Ministry of Human Resources, 2021).

Domestic workers had been excluded from the social security reform under the Employees’ Social Security Act 1969 (Act 4). In April 2021, the government announced the extension of a similar social security protection to domestic workers, expected to be implemented on 1 June 2021. A total of 89,400 foreign domestic workers, as well as 15,000 local domestic workers, would be protected by the Employment Injury Scheme under Act 4. The extension is meant to benefit those working in the informal economy, such as maids, drivers, gardeners, and babysitters (Tang, 2021).

LAW ENFORCEMENT AND EMPLOYERS’ COMPLIANCE

The legal reforms on the Workers’ Minimum Standards of Housing and Amenities (Amendment) Act 2019 (Act 446) and the Employees’ Social Security Act 1969 (Act 4) were followed with stricter enforcement operations. Swift enforcement of Act 446 was necessary because many employers did not take the issue of accommodation

2 Though the government announced its implementation in January 2019, the new policy only took effect in 2020 due to the existing insurance policies under the FWCS. As of September 2019, only 1.01 million of the 2.1 million documented foreign workers were registered under the Employment Injury Scheme – a rather unsatisfactory rate.

seriously. The crowded and unsanitary living conditions of migrant workers in Malaysia are a violation of the ILO standards. Many countries use the ILO indicators as a benchmark to prevent forced labor. Failure to address the issue of the treatment of migrant workers, including their living conditions, would have negative consequences for Malaysian companies in international trade. The US authorities blocked the products of two Malaysian companies – Top Glove and WRP Asia – to prevent forced labor (MEF & ILO, 2019, pp. 20-21; Ram, 2020). In July 2020, US Customs and Border Protection (CBP) barred imports from two of Top Glove's subsidiaries due to the presence of forced labor practices. The ban was extended to all disposable gloves produced by Top Glove factories in Malaysia in March 2021. The CBP took enforcement actions and directed the seizure of products from the company (“US Customs Determines Forced Labour”, 2021).

The MOHR stepped up its enforcement operations nationwide to ensure employers' compliance with Act 446 following the rising number of COVID-19 cases involving foreign workers in workplaces, such as construction sites and factories (Dermawan, 2021). Since the enforcement of the Act on 1 September 2020 until 31 October 2020, the government only received applications for Certificate of Accommodation for 8.89% out of the 1.6 million foreign workers in the country. This indicated that the accommodation for 91.1% or 1.4 million foreign workers in the country did not comply with Act 446. Although Act 446 is applicable to both local and foreign workers, the emphasis during the COVID-19 pandemic was on foreign workers (“Accommodation for More”, 2020). During raids conducted at foreign workers' dormitories, the Department of Labor Peninsular Malaysia opened investigation papers under Act 447 against companies that failed to provide proper accommodation. The offenses included failure to obtain an accommodation certificate, to ensure the beds are spaced 0.7 meters apart, to provide lockers for the workers, to provide 4-inch thick mattresses to each worker, and to provide sanitary living conditions (Mat Arif, 2021). In March 2021, the glove manufacturer Top Glove was charged by the Sessions Court in the state of Perak for not meeting the minimum housing and amenities standards. Ten of their worker accommodations in Perak did not receive accommodation certification (“Malaysia's Top Glove Charged”, 2021).

In order to increase compliance during the COVID-19 pandemic, Act 446 was gazetted as part of the Emergency Ordinance on 17 February 2021. The Emergency Ordinance (Workers' Minimum Standards of Housing and Amenities) 2021 widened the scope of the Act and the power of the Labor Department. The application of Act 446 was extended to Sabah and Sarawak. The director-general of the Labor Department had the authority to order the owners to replace, alter, or upgrade the facilities. The penalty for non-compliance was increased to MYR 200,000 or imprisonment of three years or both (Nik Anis, 2021). The director-general had the power to immediately transfer the workers from “overcrowded and uninhabitable” accommodation to temporary accommodation (Thomas, 2021). Employers must bear all the cost associated with the temporary stay and transport (Thomas, 2021). Under the Emergency Ordinance, employers must report their undocumented foreign workers so that they are also included under the COVID-19 vaccination program. The amendments, which were effective throughout the emergency period until August 2021, empowered the MOHR to direct any department or agency to enforce Act 446 (Perimbanayagam, 2021).

At the same time, the Employees' Social Security Act 1969 (Act 4) was also enforced on employers hiring foreign workers. To track down errant employers who failed to register their companies and workers with SOCSO, an enforcement operation called *Ops Kesan* has been initiated since 2009. The 11th *Ops Kesan* (launched in April 2019) extended to legal foreign workers in the country, following the new mandatory ruling for employers to make SOCSO contributions for foreign workers beginning 1 January 2019 (Yong, 2019). The operations conducted in 2019 concentrated on industrial areas where most of the companies employed foreign workers, such as Nilai 3 Industrial Area in the state of Negeri Sembilan. Errant employers violating the Act were liable to a fine of up to MYR 10,000 or imprisonment of up to two years or both. *Ops Kesan* operations focused on Sections 4 and 5 of the Act ("No Excuse for Employers", 2019).

Employers who failed to register their companies with SOCSO violated Section 4, which stated that every industry shall be registered with SOCSO. Employers who failed to register their workers with SOCSO violated Section 5 of the Act, which stated that all employees in industries to which the Act applies shall be insured in the manner provided by the Act.³ As of March 2020, only 1.42 million of 2.7 million foreign workers in the country were registered by employers, while the rest failed to be registered with SOCSO. Enforcement operations were further carried out through the 12th *Ops Kesan* (launched in March 2020) to track down employers who failed to register their businesses and workers. However, many employers caught claimed that they were not aware of the new ruling of registering foreign workers, or of small businesses having to be registered, or of the need to register contract workers or new workers. Despite *Ops Kesan* being carried out for 12 continuous years, there is still an unacceptable lack of compliance by employers (Landau, 2020; Nawawi, 2020).

DISCUSSION AND ANALYSIS: THE IMPACTS OF THE LEGAL REFORMS

Reforming Malaysia's legal system on foreign workers' welfare has three implications. First, the set of welfare policy changes indicates the government's attempts in solving the tension in Malaysia's migration policy, by ensuring a balance between migrants' welfare, labor market needs, and immigration control. Since the 1980s, the implementation of a consistent policy on foreign workers has been undermined by the tension between fulfilling the labor market demands and imposing immigration control on undocumented migrants. Immigration enforcement exercises were governed by the national security framework; yet, Malaysia's economic dependency on foreign workers frustrated any enforcement operations (Nesadurai, 2013, p. 103). The state creates and sustains the temporariness of migrant workers through immigration control, which deports them during economic crises and welcomes them during economic development. Their temporary status contributes to reducing social security costs while preventing their incorporation into Malaysian society (Garcés-Masareñas, 2012, pp. 81-82). With the labor law amendments in 2019, the government is more committed to incorporating migrants' welfare in its policy reform, rather than viewing labor migration solely as an economic issue and a security concern.

Second, labor law reforms witnessed a shift in migration control from intensified

3 The Act is applicable to all industries having one or more employees (Section 3).

raid operations to a legal-institutional reform approach. The new approach demonstrates a change from criminalizing migrants to protecting them. By instituting a legal framework for equal social security protection and standardized accommodation facilities, the government implemented a rights-based approach in protecting migrants' welfare. This can certainly be seen as a positive step, considering that Malaysia's immigration control strategy since the 1980s had been centered on a hardline approach, including raids, detention, and deportation. On-going operation campaigns called Ops Nyah I (Get Rid Operation I) and Ops Nyah II (Get Rid Operation II) had been carried out since 1992 to reduce the number of undocumented migrants. Ops Nyah I was initiated to curb illegal entry at the borders, while Ops Nyah II aimed to arrest and deport the undocumented migrants in the country. Migrants arrested under both enforcement operations were sent to a detention center and subsequently deported once the sentences were served, which included fines, imprisonment, and, in some circumstances, whipping (Kassim & Mat Zin, 2011, p. 22). Over the years, the government's large-scale crackdowns on undocumented migrants have been intensified through Ops Tegas (2005), Ops 6P Bersepadu (2013), Ops Mega (July 2017), Ops Mega 2.0 (February 2018), and Ops Mega 3.0 (July 2018). The conducted raid operations often involved human rights violations as in the case of large-scale public arrests on city streets and of warrantless raids on private dwellings (Amnesty International Malaysia, 2018; Loh et al. 2019, pp. 23-24; Low, 2017, pp. 113-114). Past crackdowns have not addressed the problem of why migrant workers become undocumented in Malaysia. Migrant rights groups criticized the government for its failure to provide redress mechanisms for human rights violations resulting from human trafficking, debt bondage, contract violations, and labor exploitation. For migrant rights groups, the crackdowns have been "definitely a step-back and violation of any human right" (Tenaganita, 2018).

Third, while the labor law reforms address the welfare of legal migrant workers, they still leave undocumented workers behind. As the SOCSO coverage is only extended to documented migrants, there were concerns about the fate of millions of undocumented migrants in Malaysia. The Malaysian Trades Union Congress urged the government to legalize these undocumented migrants and to include them in national social protection. Without legal status, undocumented workers are vulnerable and excluded from any healthcare and workplace accident coverage ("Socso Must Cover All", 2019). Recognition of the rights of undocumented workers employed in Malaysia was deliberated in the independent committee on migrant workers set up in August 2018. NGOs participating in dialogues with the committee reiterated that recognition of undocumented workers under the law is important for these workers to be eligible for protection and legal redress mechanisms (Syed Jaymal Zahiid, 2018). The Malaysian Bar called for human rights protection of migrants regardless of their immigration status, in line with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the 2030 Agenda for Sustainable Development. Together, they underline that all migrant workers, regardless of their migration status, have contributed to the development of Malaysia and their home countries (Abdul Gafoor, 2019).

CONCLUSION

This final section provides possible answers to the research questions: What are the major factors underpinning migrants' welfare negligence? What is the role of legal reform in protecting migrant workers' welfare? What are the impacts of the reform? The discussions above showed that legal barriers, outdated labor laws, dependence on labor intermediaries, and employers' lack of accountability are the major factors that create conditions of vulnerability among migrant workers. Legal barriers are the most important barrier that prevents workers from accessing similar social security benefits as local workers. The two legal reforms implemented in 2019, the Workers' Minimum Standards of Housing and Amenities Act 1990 (Act 446) and the Employees' Social Security Act 1969 (Act 4), have attempted to lift legal barriers. Both amendments were made to ensure equality between local and foreign workers in terms of living conditions and employment injury coverage. These reforms, together with the swift enforcement of the amended laws, have targeted the accountability of employers in upholding migrant workers' welfare. Both amendments are aligned with ILO standards: Workers' Housing Recommendations of 1961 (No.115) and the Equality of Treatment (Accident Compensation) Convention of 1925 (No.19) and United Nations' Sustainable Development Goals, particularly SDG 1.3 of Universal Social Protection.

These reforms are significant as Malaysia's foreign worker policy is now situated within the context of welfare protection. Migrant labor management in the past was conceptualized in terms of security and economic concerns. Since 2015, there has been a major shift in the government's policymaking, which has included the protection of migrants' welfare and the commitments of employers. The shift has been gradually implemented through the 11th Malaysia Plan, the strict liability principle, and the Employers' Undertaking, acknowledging employers' business responsibility in preventing forced labor. The reform of labor laws can be seen as an affirmation of the state's attempt in solving the tension in Malaysia's migration policy, by ensuring balance between migrants' welfare, labor market needs, and immigration control. However, the legislative frameworks for Malaysia's labor law protection would only serve their purposes under the premise of documented migration. Undocumented migrants still lack legal protection due to their immigration status. Without formal immigration status, migrant workers are subject to labor exploitations by their employers and to raids, detention, and deportation by the authorities. With the legal frameworks in place, preventing migrants from becoming undocumented and from losing their documented status is important in strengthening labor protection.



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