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A Strategy of Attrition through Enforcement: The Unmaking of Irregular Migration in Malaysia

Low Choo Chin

Abstract: This article reviews Malaysia’s attempt to achieve zero migration irregularity by focusing on workplace enforcement, and examines how Malaysia’s migration control has become a struggle between the state and employers. Applying the framework of “enforcement through attrition,” this research examines three newly introduced principles governing workplace enforcement: employer sanctions, the Strict Liability Principle, and the Employers’ Mandatory Commitment. The shift to employers in Malaysia’s attrition landscape aims to control illegal employment, thereby frustrating the friendly environment to affect migrants’ behaviour. The Malaysian experience suggests that increasing legal consequences for employers hiring undocumented workers runs parallel with making them accountable for the welfare of their foreign workers, thus ensuring better protection of migrant rights. Drawing upon data from semi-structured interviews, government documents, regulations and online news media, this paper empirically analyses the new policy’s effects and implications. The findings suggest this deterrence model has a positive effect on the existing documented migrants, demonstrating an increase in both legal employment and in wages for the existing legal migrant workforce.

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Keywords: Malaysia, employer sanctions, enforcement through attrition, self-deportation, migration control policy

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Introduction

This paper¹ demonstrates how Malaysia transformed migration control from being migrant-oriented to employer-oriented. Eliminating irregular migration in Malaysia is construed primarily as a struggle between the government and immigrants. The one-sided enforcement measures that criminalise migrants ignore the role of cross-national networks, employers, the public, recruitment agents, market actors and the government in sustaining irregular migration. A growing body of literature has shown the ineptitude of the existing deterrence system and the consequences that unenforced legal standards have on other stakeholders (Garcés-Mascareñas 2012; Jones 2000; Kassim and Mat Zin 2011; Nah 2012). Like other receiving countries, Malaysia is witnessing a policy turn toward “pragmatism.” Internal control is increasingly viewed as a pragmatic approach, with enforcement focusing on non-migrant actors (Bloch and Chimienti 2011: 1275). The harbouring of irregular migration and the positive environment that breeds irregular migrants has called into question the efficacy of stringent border enforcement, deportation, and amnesty, which are ineffective in terms of preventing migrants from flooding the labour market. The literature on managing unauthorised migration has sought to move beyond conventional policy instruments to a more realistic strategy called “attrition through enforcement” (Kobach 2008; Krikorian 2005; Vaughan 2006).

Krikorian first coined the term “attrition through enforcement” in his 2005 seminal writing entitled “Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement,” which was developed within the U.S. political context. Attrition through enforcement works in two ways: firstly, by reducing the number of irregular immigrants through encouraging them to self-deport; and secondly, by deterring the entry of future immigrants through increased enforcement (Krikorian 2005: 1). Illegal employment of unauthorised aliens is an important enforcement area. Eliminating the demand for jobs, or the attraction of irregular migration, encourages irregular migrants to self-deport. Proponents of self-

1 Acknowledgement: The author is grateful to the editorial board of the journal and the anonymous reviewers for their invaluable insights and constructive critiques, without which this paper would not be in its present form. This research is funded by the Ministry of Education, Malaysia under the Fundamental Research Grant Scheme (FRGS 203/PJJAUH/6711446). Ethical clearance was granted by the Human Ethics Committee, Universiti Sains Malaysia (USM/JEPeM/15060222). The author also wishes to thank all the government officers who accepted requests for interviews.

deportation have argued that border control, forced removal, and mass legalisation are unlikely to stem the flow of migrants. They have questioned whether increased resources and enforcement activities could alter the behaviour of individuals who violate the law. Rather than arrest and removal, irregular immigrants could be encouraged to leave the country on their own. Border security has no effect on reducing the size of the existing illegal alien population and does not address the problem of those who have overstayed; it only shrinks the number of new entries. Internal control, particularly workplace enforcement, addresses the size of the existing illegal population (Kobach 2008; Krikorian 2005; Vaughan 2006).

An attrition strategy includes eliminating access to jobs, preventing irregulars from obtaining driver's licenses, integrating enforcement operations between federal immigration authorities with state enforcement bodies, reducing visa overstays, increasing the number of removals and discouraging the settlement of illegal aliens. These actions require the combination of a verification system and conventional enforcement, such as raids, detentions, deportation, seizing the assets of detained illegal aliens, and court convictions. Verifying the legal status of all foreign workers prevents irregular migrants from opening a bank account, applying for a loan or getting a business license, which makes it difficult for them to stay in the country without documentation (Bloch, Kumarappan, and McKay 2015: 133; Vaughan 2006: 3). Michele Waslin, an opponent of self-deportation, argued that such measures have negative consequences on national economies, local citizens and legal immigrants. Waslin has claimed that self-deportation makes life difficult not only for migrants but also for many residents and businesses; however, attrition through enforcement is projected as a better alternative to the strict enforcement of mass deportation (Waslin 2012: 8).

Criminal deterrence theory proposes that imposing sanctions can influence behaviour. The punishment's severity affects the probability of regulations being violated. Deterrence of illegal activity occurs when there is a perception that punishment will take place; the perception of "what has happened to others" may influence an individual's behaviour. Mark Stafford and Mark Warr stated that "While the use of sanctions should discourage illegal activity, the absence of punishment may promote violations" (cited in Rocha et al. 2014: 80). Applying deterrence theory in the immigration context means that migrant decision making could be altered with the threat of enforcement. If migrants were made to believe that the enforcement threat is real, irregular migrants would leave on their own (Kobach 2008: 160). Zero violations could be

achieved with the “credible threat of enforcement” to change the law-breakers’ behaviour (Kobach 2008: 156).

This paper applies the idea of attrition through enforcement in examining how Malaysia transformed its enforcement landscape. Malaysia’s recent moves have illustrated a deterrence model based on the struggle between the state and the employers. Control measures have limited success due to the ineffective enforcement of laws dealing with the employment of undocumented migrants and the harbouring of irregulars. Operational policy narratives emphasise prosecuting the migrants, which many scholars have argued does not address the pull factor. Among the internal control measures, employer sanctions are one of the unenforced aspects of Malaysia’s Immigration Act of 1959/63 due to a lack of evidence and trial delays, signalling that employers could easily escape punishment (Jones 2000; Kanapathy 2008; Kassim 1997; Nah 2012). Beginning in 2016, Malaysia launched massive enforcement campaigns against errant employers through freezing employers’ assets, increasing maximum penalties, public shaming, and introducing corporal punishments (Achariam 2016a; Kong 2016a; Rodzi 2017). Apart from actively exploring new deterrence measures, the Immigration Department is widening its legislative power and enforcement grounds. At the same time, the department shifted the responsibility for migrant surveillance and monitoring to employers by introducing two new principles – the Strict Liability Principle and the Employers’ Mandatory Commitment – into Malaysia’s enforcement landscape.

The remainder of this paper is structured as follows. I start by reviewing how employer sanctions were implemented to achieve the stated objective of “zero illegal migration.” I then analyse the implications of this policy shift, which suggest that attrition through enforcement has a positive effect on the industry’s legal employment, the protection of migrants’ welfare, and the local labour force, despite pressures from the industrial players and the countries of origin. Third, I look at how the government delegated the task of workplace surveillance to non-state actors. Finally, I develop four critiques on why the Malaysian government’s new approaches might not succeed in the way the government anticipated.

Methods

This paper empirically analyses the rationale and effects of attrition through enforcement on various stakeholders in Malaysia, drawing upon the analysis of interviews, parliamentary debates, acts and regulations,

official publications, press releases, and secondary literature. Semi-structured interviews were conducted with two agencies of the Ministry of Home Affairs – the Immigration Affairs Division and the Border Security and Police Division – about the prospects and limitations in Malaysia’s migration control policies. Five officers were interviewed from the Border Security and Police Division in March 2015, including the secretary, principal assistant secretaries, and assistant secretaries. This division referred the researcher to the Immigration Affairs Division. A formal interview was set up with the principal assistant secretary and the assistant secretary of the Immigration Affairs Division in August 2015. The interviews were conducted in Malay at the departments’ headquarters in Putrajaya. Each interview was transcribed and analysed using thematic analysis. Official publications and press releases were analysed using document analysis.

Literature Review

The flow of irregular migrants in Malaysia is unprecedented. There are 6.7 million foreign workers, and the ratio of Malaysian citizens to foreigners is 2.5:1 (Federation of Malaysia 2016a: 154). Out of the 6.7 million foreigners, 2.1 million have a valid permit, and 4.6 million entered the country illegally (Federation of Malaysia 2014: 72). According to statistics from the Immigration Department, the irregular migrant ratio is 3:1, meaning one out of every three foreign workers arrested during the enforcement operations is undocumented (Federation of Malaysia 2016d: 58). Alarmed by the number of irregulars, the Immigration Department pledged to make Malaysia free of irregular immigrants, aiming to achieve “zero irregular migration” by 2020 (*The Malaysian Insider* 2014).

The literature questioned conventional enforcement, such as border enforcement, mass amnesty, and deportation, as the policy instrument to regulate the flow of illegal labour without tackling the pull factor. Repatriation and border surveillance have been ineffective because they do not consider the strong pull factor of the labour market’s demand (Carling and Hernández-Carretero 2011; Castles 2004; Cornelius and Salehyan 2007; LoBreglio 2012; Garcés-Mascareñas 2015). Border control and enforcement do not affect the employers’ demand for a flexible workforce. Without addressing the labour-market pressures, enforcement may not be an effective barrier to reduce irregular migration (Cornelius and Salehyan 2007: 150). Kiera LoBreglio suggested the solution should be based on economy and should involve the elimination of immigration barriers to promote maximum economic efficiency. The abolition of

employer restrictions in hiring labour and in allowing liberal programmes for foreign workers would safeguard the interests of immigrants in the labour market. An economic approach is important, as the labour market is the main pull factor (LoBreglio 2012: 959).

Favell and Hansen suggested that irregular migration can only be controlled through a “market-based rather than a state-enforced mechanism” because “migrants will not stay where the market does not want them” (2002: 585). Enforcing immigration laws in the workplace, conducting raids, and apprehending and convicting errant employers produces the expected deterrence result (Cornelius 2005: 785). Castles noted that migration control policies often fail because employer sanctions are not enforced when such legal measures are available (2004: 854). A strong deterrent that impacts future entry and re-entry is the prevention of illegal employment, which undermines the state’s legal migration channel. Shrinking the black-market economy reduces the pull factor and deters prospective migrants. Nevertheless, the practicalities of enforcement and the conflicting domestic interests often hinder employer sanctions (Carling and Hernández-Carretero 2011: 50, 53).

Among the many strategies for managing unauthorised migration in ASEAN countries, particularly Malaysia and Thailand, workplace inspections and enforcement on errant employers are “not implemented with sufficient resolve” (Battistella 2002: 368). This raises the question of how much the Malaysian state and society benefit from those “underground” workers. Malaysia needs the undocumented workers, who are necessary for performing menial jobs in plantations, factories and the service industry. Due to the high demand for labourers, irregular migration is often tolerated. Gurowitz captured Malaysia’s perception on undocumented migrants, stating: “Malaysia needs these workers, but does not want them” (2000: 863).

The enforcement has been lax or sporadic, and Malaysia has demonstrated a “stop-go” attitude for many decades (Garcés-Mascareñas 2012: 102). The government’s approach has been inconsistent, oscillating between deportation and migration bans, followed by legalisation, return migration and the lifting of bans. “Policy reversal” often takes place within a short period of time, indicating conflicting regulations (Devadasan and Chan 2014: 19–20). Malaysian scholars inferred the policy reversal as the “ad hoc” character of Malaysian migration policies caused by the pressures of employers’ demands (Garcés-Mascareñas 2012: 66). Garcés-Mascareñas suggested reconsidering irregular migration as a “way to create a cheap and flexible labour force” (2013: 32). Under Malaysia’s guest worker programme, foreign workers are required to undergo the

whole process of recruitment with the associated recruitment costs to extend their contracts. As a result, they overstay, and regularisation is utilised as a policy instrument (Kaur 2014: 354).

In the past, frequent amnesty programmes have hindered immigration enforcement against employers. Due to previous government amnesty programmes and other policy U-turns, employers believed illegal hiring was possible by simply paying fines (known as “compounds” in the Malaysian context). The enforcement regime was not functioning when the migrants knew they would be pardoned in the future with safe passage home and the employers knew they would be fined an amount that was lower than what is required under the Immigration Act. Numerous amnesty programmes were conducted in 1989, 1991, 1996, 2004 and 2011, but these did not reduce the number of irregulars. Amnesty programmes are considered attempts to re-regulate the labour system by going against the law, resulting in dysfunctional migration control (Garcés-Masareñas 2012: 84; Devadason and Chan 2014: 20).

Evaluating the effectiveness of any migration policy (including employer sanctions) is impossible without discussing the corruption found within the various government agencies. Employers are not the only stakeholders reaping the benefits from hiring irregulars. Official corruption involving both street-level enforcement officers and the highest levels of the immigration department is more consequential than illegal employment and harbouring.² Systematic corruption has contributed to the internal bordering practices of police raids and roadblocks at various locations in Malaysian cities. When the undocumented migrants confront police officers, they use bribes to navigate the “border”, enabling them to continue to stay illegally (Franck 2014: 10). Franck argued that this border control is set up to make money from migrants, and the practice raises “important questions around where and why the border is protected – and in whose interest” (Franck 2014: 11). The involvement of state officials in benefitting from the employment of foreigners without work permits illustrates that those violating laws are inside state structures (van Schendel 2005: 60).

This paper extends the existing debates to examine how new measures of employer sanctions were introduced to close off access to the job market. This pragmatic approach was drastically different from the past. First, the struggle against irregular migration in Malaysia witnessed not only the systematic enforcement of the Immigration Act but also the introduction of new punitive measures, which were rather ex-

2 This idea is taken directly from a reviewer’s comment.

treme in nature: charging employers in court, caning them, publicly shaming them, freezing their assets and increasing the maximum penalties. This extreme reform has taken place since 2016 under the new director-general of the Immigration Department, Mustafar Ali. In reforming the department, Mustafar imposed stricter law enforcement on criminal activities, such as harbouring irregulars and falsifying documents to act as deterrence. Mustafar, who was also the former deputy chief commissioner of the Malaysia Anti-Corruption Commission (MACC), widened the enforcement grounds to target corrupt officers, as graft is the biggest issue every enforcement agency in Malaysia faces (Raj 2017). Second, employer sanctions were implemented in tandem with anti-corruption drives. Corruption is the most controversial aspect challenging the efficacy of the state's policy and, in the past, the state has failed to adequately address the central problem of corruption. Third, employers were forced to be more responsible and accountable for carrying out migrant surveillance. Prior to 2016, the state conducted migrant surveillance; however, there were signs that the state was shifting the responsibility of migrant surveillance to employers via the two newly introduced principles of the Strict Liability Principle and the Employers' Mandatory Commitment.

The Implementation of Employer Sanctions

The legislation that deals with employer sanctions in Malaysia is the Immigration Act of 1959/63. Employing irregular migrants has been a criminal offence since the Immigration Act's amendment in 2002. Under Section 55B, those guilty of employing or harbouring illegals are subject to a jail term not exceeding 12 months, a fine of between MYR 10,000 and MYR 50,000 per employee, or both. The penalty is increased to whipping, of up to six strokes, and imprisonment, between six months and five years, if the employers hire more than five irregular immigrants (Federation of Malaysia 2006a). While severe, the provision goes unenforced. Two years after the whipping provision was introduced, no errant employers had received such a punishment, despite 112 court cases involving employers harbouring irregular immigrants. Meanwhile, 18,607 irregular migrants were caned for illegal entry in 2004. The Immigration Department believed the errant employers were "more than willing to pay up rather than toe the line and get legal (migrant) workers under their payroll" (Shah 2016b).

A recent report from the parliamentary debates suggests that illegal employment is caused by the under-enforced provisions of the Immigra-

tion Act. Some parliamentarians severely criticised the fact that violations go unpunished, arguing that it undermines the deterrence effect. Under the Immigration Act, violations are severely punished with fines, imprisonment, and whipping. However, errant employers were assured they would only be fined a registration fee of MYR 800 if they admitted hiring foreign workers without a permit under the current legalisation offer called the “Rehiring Programme,” (despite the Immigration Act’s fines of MYR 10,000–50,000 for each undocumented foreign worker employed), thus violating the letter of the law. One parliamentary member lamented that “We are no longer rule of law [but] rule by man” (Ngeh Koo Ham, in Federation of Malaysia 2016b: 68). Under the Rehiring Programme, implemented on 15 February 2016, employers were required to pay MYR 800 (registration fee), MYR 400 (administrative fee), MYR 60 (fee for temporary work permit), MYR 125 (processing fee), MYR 500 (employer’s compound), and MYR 300 (employee’s compound) to legalise each worker, totalling MYR 2,185. An additional MYR 500 in fines would be charged should the authorities find the workers before their employers had surrendered and registered them. The MYR 800 registration fee was a “fair trade-off” rate, taking into consideration the cost of detaining and deporting foreigners; however, employers appealed the high fines (Nik Anis 2016).

Under Section 55 (1), the home minister has discretionary power to exempt any parties from the operation of all or any provision of the Immigration Act (Federation of Malaysia 2006a). The discretionary power granted is threatening the law’s enforcement: “If any parties are pardoned after violating the law, what has happened to Malaysia’s law?” (Ngeh Koo Ham, in Federation of Malaysia 2016b: 69). Amnesty involves a lower penalty, and this is what happened under the series of legalisation programmes, including the Rehiring Programme, in which the Immigration Department “cut a deal with the Attorney-General’s Chambers to relax the execution of the law” (Shah 2016a).

Compounds or fines against errant employers have not functioned as an effective deterrent. The Immigration Department has pushed to prosecute errant employers. Instead of issuing compounds to those employers, the Department wanted them dragged to court to face the brunt of Section 55 of the Immigration Act. Compounds were “taken as a mere slap on the wrist, and not as a deterrent factor” (Mohd 2015). Between January and February 2015, 325 employers were arrested, a figure that seemed small in comparison to the actual number of employers hiring undocumented migrant workers. The issue generated considerable criticism over the weak deterrence effect of fines; the employers were

willing to pay the fines and simply continued committing the offence. Charging employers in court was thought to improve the deterrence effect of the penalty regime (Mohd 2015).

In March 2016, Malaysia pushed for whipping as a deterrent for employers found guilty of harbouring and employing undocumented migrants and encouraged the courts to impose caning sentences for Immigration Act violations. Operation enforcement was widened to hunt errant employers who harboured illegal workers, and convicted employers risked action under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) 2007 (Shah 2016b). However, it is questionable whether whipping can be effectively implemented on employers. In 2012, the government suggested doing away with the whipping of irregular migrants, as it is considered an inhumane punishment. According to the then Minister in the Prime Minister's Department Mohamed Nazri Abdul Aziz, whipping was not an effective deterrent as it did not lessen the problem of irregulars and created a negative perception of Malaysia as some of the irregular migrants were victims of human trafficking (*Free Malaysia Today* 2012). Punitive whipping is now considered a human rights violation and is no longer carried out in Malaysia on irregular migrants.

Freezing the assets and bank accounts of employers who hire irregulars is another new ruling introduced in Malaysia. In September 2016, the Immigration Department's Director-General, Mustafar Ali, announced that the nation-wide policy would begin in October 2016. Employers were given a month to legalise their workers, after which time they were subject to Section 56 (1) of the Immigration Act, which had never previously been enforced. The policy to freeze the assets of businesses received a mostly negative reaction from industry representatives. Freezing a company's assets would affect its business and potentially result in more employees, including Malaysians and legal foreign workers, being laid off. Employers, represented by the Malaysian Employers Federation (MEF), contested the decision, claiming there was no legal basis for the Immigration Department to freeze their assets as the Immigration Act does not have a provision for doing so (*The Star Online* 2016). A court order would be required if the Immigration Department wanted to freeze an employer's assets. According to the critics, the Immigration Act states punishments upon conviction. Any action prior to the conviction would be premature. The Immigration Department clarified that the legal provision allowing the freezing of assets and bank accounts is found under the Anti-Money Laundering, Anti-Terrorism Financing, and Proceeds of Unlawful Activities Act 2001 (AMLA), which is to be read

together with Section 56 (1) of the Immigration Act. Under the AMLA, the Immigration Department could freeze accounts of those involved in human trafficking and in hiring trafficked foreign workers, as the use of such money is “tantamount to money laundering” (*Malay Mail Online* 2016).

The SME Association of Malaysia, the Federation of Malaysian Manufacturers, the Malaysian Malay Businessmen and Industrialists Association, and the Malaysian Associated Indian Chambers of Commerce and Industry classified the policy as “a bad one” and stated it would “dampen the economy”, “affect the cash flow”, and make “life more difficult” for businessmen (Sivanandam and Tan 2016). In 2017, 70–80 per cent of the 650,000 small and medium-sized enterprises nationwide had illegal workers due to the high cost of hiring foreign workers and the associated rigid procedures. Previous legalisation programmes had been costly and stringent. These industry representatives urged the government to create “long-term policies” instead of penalising employers (Sivanandam and Tan 2016). However, the Malaysian Trades Union Congress (MTUC) welcomed the new measures as protecting job opportunities for the local workforce (*The Star Online* 2016).

Between 1 January and 26 December 2016, the Immigration Department recorded a total of 1174 employers involved in hiring, harbouring and helping irregular migrant workers evade arrest. The department urged the courts to impose the maximum sentence, which included fines and whipping, as these bosses had rarely been whipped. The news media depicted the unwavering action as “The Immigration Department is walking the talk” (Kong 2016a). By April 2017, the department froze employers’ assets worth MYR 25 million, fully enforcing provisions under Section 56 (1) of the Immigration Act and the Anti-Money Laundering, Anti-Terrorism Financing, and Proceeds of Unlawful Activities Act 2001 (Rodzi 2017). As Malaysia increased its workplace enforcement, a more drastic plan was announced: the Immigration Department would name and publicly shame the errant business owners. A list of the companies breaking the Immigration Act would be made public at the end of each month (Achariam 2016a).

The year 2017 has witnessed harsher penalties in the form of employer sanctions, and the government proposed to increase the maximum penalty for each undocumented migrant employed. In its latest bid to end illegal employment, the state proposed amending the Employment (Restriction) Act of 1968 to encourage employers to hire foreign migrants through the proper channels and to prevent the exploitation of foreign workers (*The Star Online* 2017). Regulating the entry of foreign

workers was difficult when the proper channels involved a great deal of paperwork and cost, and many employers preferred to hire foreign labourers without papers in order to have greater flexibility and fewer responsibilities and costs, avoiding the need to pay levies and insurance (Kaur 2014). The levy system, introduced in 1992, was the government's attempt to gain income on migrant workers, while also trying to reduce the dependency on foreign workers. Considered a failed policy, the levy system increased the cost of illegality, and employers tried to shift the burden to workers (Devadason and Chan 2014: 20; Jones 2000: 82; Kaur 2014: 351). Several revisions to levy charges, in 1995, 1998, 2005, and 2012, coupled with the introduction of a contribution to the Employees Provident Fund (EPF) in 1998 and the minimum wage policy in 2013 (MYR 900 in Peninsular Malaysia and MYR 800 in Sabah, Sarawak, and Labuan for a full-time worker), have increased the costs of legal employment, leading to the hiring of undocumented migrants (Devadason and Chan 2014: 28, 33).

Under Article 18 of the existing Employment (Restriction) Act 1968, employing migrant workers without an employment permit is liable to a fine not exceeding MYR 5000 and/or imprisonment for a term not exceeding one year (Federation of Malaysia 2006b). In addition, necessary amendments to the Act are long overdue for limiting the entry of foreign workers into certain sectors and for ensuring that foreign workers are only allowed to work in sectors that cannot be fulfilled by local workers; they are not hired because of their competitively lower wages (Federation of Malaysia 2014: 72).

The recent move could be interpreted as considering the pull factor when understanding irregular migration in Malaysia. Personnel interviews revealed that reducing the pull factor is the key to reducing the number of migrants. Even with high and strong walls were built at the border, migrants will find means to enter Malaysia if the pull factors are strong enough (Interview, Border Security and Police Division, 18 March 2015). Therefore, robust conventional enforcement is required, as there must be a perception that laws are enforced. Even if the immigration law is strict, a lack of enforcement reduces the deterrence effect. Workplace enforcement suffers without raids being conducted on individual employers (Krikorian 2005: 3).

Workplace Raids and Ops Mega

Workplace immigration enforcement was implemented via Ops Mega. After giving employers from 15 February to 30 June to participate in the E-Card programme, the Immigration Department pushed for the maximum punishment – fines, whipping, jail – on the “perpetrators” behind the illegality. Mustafar Ali reiterated that “This time we will go all out to push for these stubborn employers to be punished” (*Malaysia Kini* 2017). Beginning 1 July 2017, the Immigration Department launched “Ops Mega” (Special Operations) to weed out irregular migrants and to punish errant employers. Employers and immigrants who failed to apply for the temporary Enforcement Card (E-Card) before the deadline expired on 30 June were tracked down under the nationwide daily operations. Only 161,056 out of 600,000 targeted irregular immigrants registered for the E-Card programme, and a total of 145,571 E-Cards were issued for 28,375 employers (*The Sun Daily* 2017d).

Based on the above statistics, the government failed to achieve its target of getting 600,000 migrants registered under the legalisation programme; this shows that there were still many employers hiring undocumented migrants and refusing to legalise them (Lee 2017). From 1 July to 24 July, 1,066 premises were inspected, 14,585 workers were inspected and 4,576 workers were detained. Due to the Ops Mega raids, undocumented Indonesian workers fled into the jungle. Employers who failed to register such workers were brought to court and charged (Federation of Malaysia 2017b: 10). Through 22 September 2017, the Immigration Department had detained 302 employers, 100 of whom were brought to court for legal action, including freezing their assets and bank accounts. During the same period, 14,000 undocumented foreign workers were detained for failing to register for Enforcement Cards (or E-Cards) (Lee 2017).

Some critics called the E-Card programme a “tricky” option. As part of the surveillance exercise, the E-Card programme obtained biometric data about irregular workers and allowed employers to evade legal action. This is not tantamount to the full legalisation of foreign workers. E-Card holders can be hired for just one year, during which time they must obtain a working permit (Kong 2017a). Enforcement operations were hindered due to 60 per cent of the country’s irregulars being without fixed-term employment. This made E-Card registration a challenge, as workers were required to have a permanent employer in order to participate in the programme. This phenomenon, coupled with self-employment among the irregulars and the misuse of student visas, further complicated the problem (Kong 2017b).

Employers and migrants detested the E-Card programme – implemented in West Malaysia only – due to the use of agents and the costs involved. Registered employers had to obtain documents from the embassy to enable the workers to be legalised through the programme. The E-Card programme allowed undocumented foreign workers to temporarily work in the country until they secure a valid travel document and a work permit from their embassy. The E-Card application had to go through the existing “Rehiring Programme” via the three specified vendors (Federation of Malaysia 2017a: 38–39). Furthermore, the government imposed strict requirements on migrants and employers. Migrants should have an employer, be free from any criminal record, pass health checks, have never been deported, and not included on the suspect list (Federation of Malaysia 2017b: 10). This points to the programme’s limitation because it only targeted those people with valid documentation who overstayed; migrants who had entered the state without documentation left the authorities helpless.

All workplace raids were conducted under the National Blue Ocean Strategy (NBOS) with joint enforcement efforts by the Immigration Department, the police, the People’s Volunteer Corps (RELA), the Civil Defence Force, and the Malaysian Armed Forces (Ministry of Defence 2013). The Immigration Department conducted raids around the clock; however, law enforcement officials were unable to access certain geographical locations. The construction and plantation sectors in the forest involved many foreign workers, making it almost impossible for the officers going into the forest to find the workers. Therefore, the employers were held responsible for registering them (Federation of Malaysia 2017b: 9–10). Furthermore, enforcement measures have been hindered due to foreign workers who have families in Malaysia, making it easier for them to find shelter (Federation of Malaysia 2017a: 41).

Workplace raids are not something new in Malaysia’s migration control regime. On 1 September 2013, to implement the previously unenforced law, the government launched a nationwide crackdown called Ops 6P Bersepadu (6P Integrated Operations), expected to charge 45,000 errant employers and to arrest 400,000 undocumented migrants. The high-profile operations involved 135,000 enforcement officers from various agencies, including the Malaysian Anti-Corruption Commission. The operations were conducted at squatter houses, plantations, entertainment outlets, and massage parlours across the country. The intention was to continue the 6P Integrated Operation until Malaysia was free of irregular migrants and all the country’s foreign workers had a valid document (Rahim et al. 2013). During the first phase of Ops 6P Bersepadu

(conducted until December 2013), 2,278 raids were carried out across the country, 16,800 undocumented workers were arrested and 219 employers were detained. The figures were miniscule in comparison to the actual number targeted. The second phase began on 21 January 2014 with immigration officers conducted raids on workplaces especially factories, companies, and plantations. Houses were also raided in search of domestic maids without permit (Ramendran 2014).

In line with the concept of “attrition through enforcement,” employer sanctions in Malaysia are implemented along with self-deportation under amnesty offers. The benefit of the concept of self-deportation is that it addresses the size of the existing illegal population, thus reducing the demand on the federal government’s enforcement resources. Self-deportation “encourages voluntary compliance with immigration laws” (Vaughan 2006: 2). An attrition strategy through enforcement is more practical, faster, cheaper and less radical than forced deportation (Vaughan 2006: 14). With Ops Mega conducted almost every day, the detention depots were packed with arrested migrants. While speeding up the investigation and prosecution process could avoid depot overcrowding, encouraging self-deportation is crucial to the viability of the workplace raids. Undocumented workers who failed to register for the E-Card were urged to surrender under the three-plus-one amnesty programme. Surrendered migrants must pay a MYR 300 fine plus MYR 100 for a one-way return ticket to their respective countries, after which they are banned from entering Malaysia for five years (*The Sun Daily* 2017e). The amnesty offers are lenient, for the migrants would otherwise be liable for a MYR 10,000 penalty and/or a five-year imprisonment, as well as six strokes of whipping, should the case be brought to court and the migrant convicted under Section 6 of the Immigration Act 1959/63 [Amendment] 2002 (Federation of Malaysia 2006a).

The maximum capacity of all the 13 Immigration Depots in Malaysia is 50,000 immigrants, who cost MYR 1.8 million daily for food alone. Funds are no longer allocated for the deportees’ transportation costs. Since 2014, workers have had to pay for their own return trips home, and if they could not afford the expense, the government sought their families, friends, employers, or home governments to pay the deportation costs (Shah 2016a). In the first half of 2017, more than 30,000 undocumented immigrants were deported to their home countries through forced removal, as well as the three-plus-one programme (*Malaysia Kini* 2017).

The Impact of Employer Sanctions

Malaysia's new policy and enforcement environments had immediate effects on the behaviour of employers and undocumented immigrants. The country's local newspapers reported that attrition through enforcement had led to the increase of legal migrant workers but had unintended spill-over effects on documented migrants. The attrition generated a steady stream of complaints from industrial players and the immigrants' countries of origin.

As in the previous massive deportation operations, Ops Mega caused the economic disruption of the construction, manufacturing, and agricultural sectors. The consequences included operational stoppages, construction project delays, manpower shortages, declining production, and price hikes. Due to the raids, many employers halted their operations and kept their undocumented workers away from their dormitories (Kong 2017c). In the short run, the crackdown delivered a shockwave to the construction and service sectors. In 2017, there were more than 3 million foreign workers in the country, half of whom lacked documentation. The labour shortage led to a higher wage demand among documented foreign workers. This spill-over not only occurred in the traditional sectors (construction and plantation), which are filled with foreign workers, but also affected the retail and restaurant sectors, which are not supposed to employ foreign workers under the immigration law. As these sectors hired foreigners, mainly from Bangladesh, Myanmar, and Indonesia, the Immigration Department's crackdown paralysed the nation's economy (Goh 2017).

The crackdown affected not only irregular workers but also documented foreign workers, as both were "unwilling to work due to fear" (*Asia News Network* 2017). The immigration authorities' constant efforts resulted in some documented workers being detained for investigation and being unable to work for several days. The consequence was mostly felt by the construction sector, which risked affecting the timely delivery of goods and increasing production costs. The Federation of Manufacturers Malaysia (FMM) expected a disruption in the manufacturing sector would have a "chain reaction." Many restaurant owners either downsized their businesses or reduced their operating days due to the labour shortages (*Asia News Network* 2017).

Because of the labour shortages, documented migrant workers were "now worth more based on the law of supply and demand" (Kong 2017d). Legal migrant workers requested higher pay. In some construction projects, wages skyrocketed by more than 100 per cent. For example, in the construction sectors in Johore state, the significant labour demand

resulted in daily wages increasing from MYR 45 to MYR 100 (an increase of 122 per cent) for unskilled workers and from MYR 120 to MYR 320 (an increase of 166 per cent) for skilled workers. Meanwhile, other sectors witnessed a rise from MYR 50 to MYR 70 per day for unskilled workers and from MYR 120 to MYR 140 for skilled workers. Due to price hikes in the market, some employed legal workers left their positions to work for the highest-paying employers. This was a positive sign in some workforces, such as carpentry, as it attracted the local workforce into the industry due to the hike in wages (Kong 2017d). Employer sanctions may create positive effects on the employment of legal foreign workers. Since the launching of Ops Mega in early July 2017, it has been more difficult for undocumented migrants to obtain work. Recruitment agencies in Malaysia resorted to hiring legal workers from source countries, including Nepal. The approval for legal foreign workers from Nepal rose from 1,388 (21 to 27 June) to 1,989 (28 June to 4 July) and to 3,264 (5 to 11 July), although these numbers are tiny compared to the number of Nepalis without papers (Acharya 2017).

Section 60M of the Employment Act of 1955 (Amendment) 2012 prohibits terminating a local employee with the purpose of employing a foreign worker. Meanwhile Section 60N states that when an employer is required to reduce his or her workforce due to redundancy, the employer shall not terminate the employment of a local employee unless all foreign employees in the same occupational category have been terminated (Federation of Malaysia 2012). Securing the local citizens' rights to jobs could reduce the number of undocumented foreign workers. Convincing the employers to reduce their reliance on foreign workers is encouraged (Federation of Malaysia 2016c: 16). The government imposed stringent requirements on employers wishing to hire foreign workers; however, these measures did not work when the employers preferred foreign workers with cheaper wages. The measures included requiring employers to advertise job vacancies in the JobsMalaysia portal before issuing a JobsMalaysia certificate to employers as a prerequisite for hiring foreign workers. There is a designated ratio of local workers and foreign workers for each sector and subsector (Federation of Malaysia 2017c: 19–20).

Sanctions on errant employers protect the rights of legal employers by preventing their legal workers from violating their contracts and escaping to another employer. Sanctions are a means of encouraging irregular migrants to take up the government's amnesty offers; many continue to be in the state illegally as long as their employers continue sheltering them. Removing these workers from underground employment requires vigorous law enforcement that targets employers (Ali Mohamed 2017).

The previous penalty imposed in terms of compounds was relatively weak and did not encourage employers to hire foreign workers through the legal channel. Asking employers to respect the law is futile when employers who comply with the law must pay more than MYR 4,000 to get a legal foreign worker. However, those employing undocumented workers could afford to pay a higher salary with a lower operating cost because they do not spend the legal recruitment fees. The government policy has victimised law-abiding employers, while errant employers are forgiven or rewarded under amnesty programmes. A legislative member questioned the practice:

How can the government ensure the interests of the legal employers when their workers flee to higher-paying jobs? How can the government act effectively so that law-abiders are rewarded and will not be the victims of those hiring undocumented workers? Every time, those who do not follow the law, they get amnesty, are forgiven. That is the problem. It is important to ensure that the law-abider is rewarded rather than those who do not follow the law are rewarded. (Ngeh Koo Ham, in Federation of Malaysia 2017a: 39–40)

Unlike past practices, in which the state yielded to employer and industrial pressure, workplace enforcement under Ops Mega witnessed an indifferent attitude toward employers' complaints. Law enforcers were accused of causing "trouble" whenever raids were carried out. Employers who were short of foreign workers criticised law enforcement, implying that these employers have been employing undocumented workers. The Immigration Department viewed this situation as "deeply regrettable," as irregular migration will never be solved as long as the irresponsible employers continue to hire undocumented workers. Employers cited the high cost of the legalisation programme as the main difficulty encountered, though the compound imposed in the legalisation programme was lower than the cost of legal recruitment (Kong 2017e).

At the same time, the state's unbending attitude, regardless of pressures from neighbouring countries, was in sharp contrast to its willingness to compromise in the past with Indonesia and the Philippines over the question of detention and deportation. In 2002, for example, Malaysia complied with these countries' requests to temporarily halt deportation when there was overcrowding and a humanitarian crisis at the transit centre (Nesadurai 2013: 101–102; Kaur 2014: 358). Under the current Ops Mega, foreign governments were asked to respect Malaysia's efforts in detaining and deporting irregulars (*The Sun Daily* 2017c). Indonesia, Nepal, and Bangladesh are among the most affected countries due to

Malaysia's crackdown. Indonesia raised a critical voice, requesting Malaysia to stop its operation and to resume its E-Card legalisation programme. The Indonesian Manpower Minister, Hanif Dhakiri, urged Malaysia to extend the E-Card programme since the raids forced many Indonesians to flee. Despite pressure from Indonesia, Malaysia decided not to extend the E-Card programme (Mohsen 2017). Nepal was the first country to react and cooperated with Malaysia to ensure the return of its detained nationals. The Nepal Embassy covered the cost for any Nepalis who were unable to buy return tickets. Around 500,000 Nepalis were working in Malaysia, including 40,000 without documentation, which affected the remittance flow to Nepal (*The Sun Daily* 2017b). Given the high number of Bangladeshi working in Malaysia, Bangladesh's government was urged to better protect its arrested citizens and to negotiate with Malaysia (*The Sun Daily* 2017a).

Malaysia's attrition landscape not only witnesses the systematic enforcement of the Immigration Act on employers and workers but also addresses a serious failing in the law enforcement: corruption and the lack of responsibility among employers. The scope of corruption within the agencies responsible for immigration was documented extensively in the media. One news report indicated that a group of immigration officers accepted bribes of MYR 200–2,500 from more than 16,000 migrants, totalling approximately MYR 18 million in bribes. In tandem with the punishment against employers, errant officers were also targeted. In 2016, the Immigration Department's director-general pledged to take a hard line on errant officers and on those offering bribes. In an effort to clean up the department internally, immigration officers taking bribes would face the full brunt of the law (Achariam 2016b).

Thus, the Malaysian Anti-Corruption Commission (MACC) participated in all enforcement operations in line with the National Blue Ocean Strategy (NBOS). While the external operational forces are strengthened under the NBOS, the internal enforcement must be strengthened first. Integrity has been the biggest problem facing all of the enforcement agencies. To enhance integrity in the Immigration Department, an Integrity Division was established and led by the MACC senior assistant commissioner. The Integrity Division placed integrity officers in all state immigration offices (Federation of Malaysia 2015). The Immigration Department pledged to be corruption-free, in line with the MACC and its "zero tolerance toward graft" policy (Majib 2017).

The government also tried to ensure greater responsibility among employers toward their foreign workers. The Immigration Department has been efficient in arresting immigrants – a total of 146,876 migrants

were arrested under 26,870 enforcement operations between 2014 and 2016 – but no one has been made responsible for the workers after their employment ends (Majib 2017). Personal interviews confirmed the current state of affairs:

It is not wise to focus only on arrests. It will become a continuous routine. If you try to wipe away dust every day, there will still be dust accumulating the next day. Why not make investments in order to ensure the “dust” does not accumulate more and more every day by taking wiser actions? (Interview, Border Security and Police Division, 18 March 2015)

A noticeable loophole in the system is that there is no mechanism that triggers when a given permit has expired. Does the government have enforcers or anyone who will find these overstayers once their permits have expired? If this is the second time an immigrant has committed the offence, are the laws and their associated punishments sufficient? When asked about preventive measures, the officer stated, “It is not about total prevention but just finding the loopholes. We are not being creative in thinking of ways to curb this problem” (Interview, Border Security and Police Division, 18 March 2015). The Immigration Department realised the importance of making the employers responsible for monitoring their workers until they are sent back home and of shifting the surveillance duty to the employers. The next section examines two newly introduced principles into Malaysia’s workplace surveillance.

Workplace Surveillance: Strict Liability Principle and Employers’ Mandatory Commitment

One of the most important frameworks to have been debated (with limited success) is the Strict Liability Principle on employers hiring foreign workers. This principle ensures that employers are responsible and accountable for their foreign workers, from the application, hiring, and employment until they return to their home countries. Employers have to provide accommodations as a prerequisite for having foreign worker applications approved. This ensures that foreign workers are housed near their place of work, reducing the risk of social and criminal problems. The Cabinet Committee for Foreign Workers and Illegal Immigrants (JKKPA-PATI) created this principle in its 14th meeting in 2015. As of 30 June 2015, the number of foreign workers with a working permit in Malaysia was 2.2 million (Cabinet Committee for Foreign Workers and Illegal Immigrants 2015).

Parallel with efforts to combat illegal employment, the state also moved to solve illegal settlement, excluding migrants from the housing market. In 2016, the state decided to introduce a strict liability programme, a package that included accommodations, insurance, and medical benefits for foreign workers. This programme was meant to monitor the foreign workers' movement while enhancing security and improving public health. The idea is to make employers accountable even if one worker is missing (Chuah 2016). The programme was necessary because some employers had neglected the welfare of their foreign workers. Without housing facilities, foreign workers are renting houses illegally, creating uneasiness among locals living in the same neighbourhood (Musa 2016). As part of the Strict Liability Principle, the foreign worker accommodation programme (MyHom) was launched in 2016 to cater to the 1.5 million foreign workers in industrial areas nationwide. Either the companies rent housing for their workers or the workers themselves can rent directly from the assigned vendor, MyEG. When the Standard Minimum Housing and Amenities Act 446 (1990) was amended, it became mandatory for employers to provide minimum standard housing for foreign workers by 2018. By July 2017, the first phase was completed in the state of Malacca, which was occupied by 1,400 foreign workers (Yeong 2017).

Another new principle introduced is the Employers' Mandatory Commitment (EMC), which has been subject to extensive political and economic debates. On 31 December 2016, Home Minister Ahmad Zahid Hamidi announced the EMC implementation with the objective of ensuring employers' accountability for their foreign workers during their term of employment, from their appointment to a safe passage home. The new policy would prevent cases caused by overstaying, running away from employers, and changing work sectors illegally. Effective 1 January 2017, employers would be responsible for paying their foreign workers' levy, instead of deducting it from their wages. In addition, employers are responsible for foreign workers' accommodations and must follow the "Guidelines on the Minimum Standard of Foreign Workers Accommodation." This policy is meant to protect against malpractice, unscrupulous employers, and human trafficking (*Malaysia Kini* 2016).

Employers protested the last-minute announcement, pushing for the levy to be scrapped. A total of 159 associations rallied for the decision to be withdrawn, claiming that it would cost industries an additional MYR 5 billion a year and reduce businesses' competitiveness. Under the current system, the levy ranges from MYR 1,500 to MYR 2,500, depending on the industry. The employers believed that the EMC levy would

increase the hiring cost of legal workers, which would further fuel the demand for irregular foreign workers. Furthermore, the official announcement was made just one day before it was set to be implemented, without consulting the employers (Chan 2017). If the employers were forced to bear the levy, the economy would suffer an estimated annual loss of MYR 5 billion; foreign workers may remit this amount to their countries of origin. When the minimum wage policy for foreign workers was implemented, an annual loss of MYR 3 billion was estimated (Kannan 2017).

Due to market pressure, the EMC policy did not launch as planned. In January 2017, the Malaysian Cabinet decided to postpone the implementation of the employers' mandatory levy payment to 2018, when there is a conducive ecosystem to support its implementation (Abas 2017). Furthermore, the policy was drawn up without engaging the industry stakeholders and without giving them sufficient time to adjust to the new ruling, and it was challenging for employers to absorb the new costs. This was considered a desperate act to achieve the goal of zero irregular migrants without considering the possible consequences. The news media called the EMC "medicine that employers have to swallow to avoid getting sicker" (Cheng 2017). According to a survey conducted by the Federation of Malaysian Manufacturers (FMM), 72 per cent of the 370 companies voted against the EMC, 45 per cent of respondents said the levy was paid by their foreign workers, 17 per cent paid for their foreign workers, and 17 per cent shared the cost. The majority (74 per cent) believed that the EMC would increase the cost of doing business. Some opined that the government should address the issue of undocumented migrants, rather than legal foreign workers (*Free Malaysia Today* 2017).

The mistreatment and abuse of undocumented migrants is prevalent; the media has reported extensively on cases of poor working conditions, excessive working hours, low wages, and forced labour. The issue is two-pronged: while the government wants to remove undocumented workers from the underground economy, it must still protect migrant workers' rights. Research shows limited discourse regarding migrant rights in Malaysia and the lack of commitment to the UN standards, such as the United Nations Convention on the Rights of All Migrants and their Families (Elias 2010; Gurowitz 2000). Malaysia has yet to ratify the 1990 UN Convention, which aims to accord equal treatment between documented foreign workers and locals. The EMC signals the state's commitment toward this direction, and a greater commitment to migrant

rights would improve Malaysia's scores regionally.³ On 1 February 2017, under the EMC programme, the Home Affairs Ministry called all Malaysian employers through their associations and reminded them that they must sign a pledge (*Aku Janji* in Malay) as proof that they were complying with national laws (Federation of Malaysia 2017b: 40).

Applying the Strict Liability Principle and the EMC, this paper further suggests that employers should be required to register all their employees. The mechanism for compulsory verification, monitoring, and surveillance already exists. In February 2017, two employers' databases were established: the SPPA (Foreign Worker Application System) and the ePPAx (Integrated Management System of Foreign Workers). The SPPA is an online application process for newly hired Bangladeshi migrant workers, created following the Government-to-Government Agreement between Bangladesh and Malaysia. The Bangladesh Government requested that Malaysia implement the SPPA system to safeguard its workers' interests. The registration system for non-Bangladeshi migrant workers is ePPAx (Federation of Malaysia 2017a: 42–43). The construction of national employer databases solved the problem of foreign worker registration faced by employers. Prior to these databases, obtaining a working permit could only be completed at the Home Affairs Ministry's headquarters in Putrajaya. Employers complained about having to queue at 3 a.m. in Putrajaya since there is a daily quota for the process and only one processing centre in Malaysia (Federation of Malaysia 2017a: 41).

Surveillance and identification are integrated with the employer databases. In a bid to prevent illegal employment in the construction sectors, it was made compulsory for contractors to submit their foreign workers' thumbprints to the Immigration Department. The biometric surveillance database would make it difficult to hire undocumented migrants unknowingly. By 2009, CLAB (Construction Labour Exchange Centre Berhad) submitted 12,000 foreign workers' thumbprints into the database. Since June 2006, it has been compulsory for contractors needing 50 or fewer foreign construction workers to register and deal directly with CLAB (*The Star Online* 2009). The development of this control instrument is significant because it delegates workplace surveillance to non-state actors. Employers can be given the authority to check the validity of work permits and to renew work permits if employees performed satisfactorily. This practice has strong disciplinary effects on the

3 The author is grateful to a reviewer for this suggestion.

migrants, as they will be well-behaved and will be less likely to run away (Frank 2014: 416).

Analysis and Discussion

There are four possible areas for improvement in making attrition through enforcement a reality in Malaysia. First, sanctions should be extended to airlines, shipping companies, health professionals, educational institutions, banks, landlords and the public. Widening the enforcement net would make private individuals and institutions act like “immigration enforcers” (Bloch, Kumarappan, and Mckay 2015: 133–135). Excluding the migrants from the housing market and informal networks is as important as exclusion from the labour market. As irregular migrants are highly dependent on their social networks in their daily lives, it is only rational that a strategy of exclusion would work through the “delegitimization and criminalization of all those employing, housing, and aiding irregular migrants” (Broeders and Engbersen 2007: 1596). Under the enforcement of employer sanctions, individual homeowners have been left out, even though they contributed to the unauthorised immigrant employment in domestic care jobs (Cornelius 2005: 786). The central weakness of any immigration sanction is the failure to adequately address the harbouring of irregulars and a lack of integrity. Thus, sanctions should not only target the migrants but rather “those who profit from illegal movements” (Castles 2004: 875).

Tightening the enforcement net to include sanctions of social networks would contribute to a successful deterrence model. Personal interviews revealed that the harbouring of irregular migrants among the public has reached a crisis point when Malaysian citizens are breaking the immigration law for material gain, facilitating the entry, employment, and prolonged stay of migrants. Disrupting the positive environment in Malaysia is a crucial part of addressing the “problematic mentality in society.” The awareness level in Malaysia is zero, with the public turning a blind eye and a deaf ear to the activities of irregulars. Citizens are hiring maids without a working permit and renting their accommodations, knowing that these practices are illegal. The mentality of cheating the system for monetary gain cannot be changed:

We are sometimes deadlocked to solve this problem. We have no idea how to educate society. The system of enforcement can be enhanced, the assets also can be increased, and manpower can be added. But determining how to educate our people is too difficult. The awareness and the responsibility is like zero. This raises the

question whether information and awareness campaigns are appropriate to be implemented. (Interview, Principal Assistant Secretary, Immigration Affairs Division, 10 August 2015)

The second policy implication in making attrition through enforcement a reality is that legalisation, regularisation, and amnesty programmes should be prohibited, as they encourage more illegal immigration and are “subversive of law enforcement” (Krikorian 2005: 6). An effective strategy for immigration law enforcement requires the “consistent application of ordinary law-enforcement tools” (Krikorian 2005: 6). In Malaysia, the prohibition of amnesty or legalisation programmes for undocumented migrants is noticeable. There have not been many amnesties in recent years, as the government halted legalisation efforts through the “Rehiring” programme (Federation of Malaysia 2016a: 154). The recent semi-legalisation “Rehiring” and “E-Card” programmes have been stricter. Compared to all the previous legalisation programmes, such as the 6P programme, it is costlier and burdensome for employers to legalise their foreign workers. Many employers preferred the 6P legalisation programme, implemented between 2011 and 2014, which was free of registration costs and could be done without any agents. The conditions imposed under the Rehiring Programme were stricter and included a processing fee of MYR 1200 through appointed vendors that was regarded as unreasonable (Ragananthini 2017). This unpromising situation could be interpreted as signalling the end of leniency toward errant employers. Eliminating the promise of amnesty will function as a deterrent and further discourage underground employment.

Third, several existing online systems have been developed to monitor the recruitment and surveillance of foreign workers: the SPPA, ePPAx, and CLAB. These employer database systems provide a solid foundation for the compulsory registration of foreign workers by every employer, and the failure to do so rests on the employer. Going forward, the system should also require all employers to verify the status of employees through the federal government, as is the case in the United States, and failure to do so could cause the suspension of one’s business license (Kobach 2008: 162); however, that may not be a severe penalty, for they can just register a new business.⁴ With the use of the E-verify biometric system (in the US), securitisation takes place within national borders; the workplace has been transformed into a site of immigration enforcement. This would shift the responsibility of enforcement to private sector employers, who will act as immigration police. The logic

4 This point was noted by a reviewer.

behind the E-verification of migrant workers is to create a biometric database, which is an instrument for the digitalisation of the border. Workplace surveillance is considered “soft” immigration enforcement for building an interiorised border, while external border control works as the “hard” enforcement policy tool (Goldstein and Alonso-Bejarano 2017: 1).

Fourth, while employer sanctions are “pragmatic,” one should also consider “preventive” migration control, which addresses the root causes of migration. The preventive approach is a soft approach to influence potential migrants’ decision making, emphasising incentives and decision-making aspects (Carling and Hernández-Carretero 2011: 50). Encouraging safe migration is an area where policy can make a difference. Increasing legal entry opportunities for low-skilled foreign workers and providing adequate employment visas will have a higher probability of success (Cornelius and Salehyan 2007: 150). The absence of regular employment options, despite the need for labourers, does not reflect the market realities. If labour market realities are not reflected in the immigration system, many workers in low-skilled jobs will enter the country illegally (Cornelius 2005: 789). Frustrating the black-market employment opportunities serves as a deterrent, while enhancing the mechanism for legal employment channels serves as an incentive (Vaughan 2006: 14).

Thus far, Malaysia’s geography of migration control has focused on its national territory and has underestimated the real push factors that often compel migrants to seek living outside their homeland. For irregular migrants who are destitute in their home country, the threat of deterrence does not work. There are also structural conditions that might not allow return, such as wars and conflicts (Rocha et al. 2014: 95). This raises the question of whether a more active mode of migration management cooperation with third countries could be achieved on issues like bilateral cooperation, readmission agreements, creating legal channels for migrants, and establishing external processing centres in transit countries. This would require the state to explore the extra-territorialisation of migration control (Funk et al. 2017: 1–2).

Conclusion

A strategy of attrition through enforcement is significant because it consistently enforces the Immigration Act’s employer sanctions, thus tilting the deterrence model toward employers. The Malaysian state is leaving no stone unturned in trying to create a greater deterrence outcome. As the employer-focused approach is relatively new, with measures imple-

mented since only 2016, it may be too early to state its effectiveness with any confidence. However, I argue that the benefits of employer-centred sanctions seem to outweigh the higher transactional costs, the impact on the economy, and the question of the legal consequences infringing personal rights (punishment by canning and asset-freezing).⁵ A strategy of attrition through enforcement not only disrupts the positive environment sustaining irregular migration, but also ensures the improved protection of the migrants' welfare. Sanctions have positive impacts on employment rights. The introduction of a Strict Liability Programme makes employers accountable for the accommodations, insurance, and medical benefits of their foreign workers. Although controversial, the Employers' Mandatory Commitment programme addresses an existing inadequacy in the labour recruitment system by making employers accountable for their foreign workers until they are returned home. Another important potential of the new sanction regime is that it goes together with integrating biometric surveillance into the employers' databases: the SPPA, ePPAx, and CLAB. The next stage in the attrition strategy is to introduce the employers' compulsory verification of all foreign workers' legal statuses. In applying employer sanctions, Malaysia has adhered to a two-pronged policy: reducing undocumented migrants by increasing the legal consequences and supporting the recruitment of legal workers by promoting workers' welfare.

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