

Labour Law and the Labour Market: A Case Study of Malaysia

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Introduction

According to the International Labour Organization (ILO):¹ "...global economic integration has caused many countries and sectors to face major challenges of...continuing high levels of unemployment and poverty...and the growth of both unprotected work and the informal economy..."

But the level of unemployment and size of informal sectors vary across countries over time. For instance, the unemployment rate is around three per cent² and non-agricultural employment in the informal sector is about 11 per cent³ in Malaysia. On the other hand, the unemployment rate is close to six per cent⁴ while the "informal sector employs between 61% and 70% of the total labour force"⁵ in neighbouring Indonesia.

By and large, labour laws developed in "both the common and civilian law systems" in the twentieth century.⁶ In the case of Malaysia, might the outcomes described in the preceding paragraph, among others, be explained through the ways its labour law and regulation have been framed and/or revised over time? Generally, is there a close relationship between the country's labour law and economy or variety of capitalism? Specifically, does its labour law contribute to labour market formation,⁷ including relatively low levels of unemployment overall, and employment in the informal sector in particular? Owing to its pre-colonial, colonial and post-colonial histories, might the ways by which Malaysia's labour law and regulation have been framed and/or revised show legal pluralism, exogenous (e.g., common law and civil law) and endogenous (e.g., "ethnic distribution"⁸) origins?

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¹ *International Labour Organization Declaration on Social Justice for a Fair Globalization* General Conference, 97th Sess (2008) 5 <www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf>.

² Yves Boquet *The Philippine Archipelago* (Springer International Publishing AG, Cham (Switzerland), 2017) at 204. See Table 8.3 Unemployment in Southeast Asian countries, 2005–2014.

³ Department of Statistics Malaysia, Official Portal "Informal Sector Work Force Survey Report, Malaysia, 2015" (29 July 2016)

<www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=158&bul_id=UUFsUEJnNGFhcDE1TndNUIg4OEZCQT09&menu_id=U3VPMldoYUxzVzFaYmNkWXZteGduZz09>.

⁴ Boquet, above n 2.

⁵ Alexander Rothenberg, Arya Gaduh, Nicholas Burger, Charina Chazali, Indrasari Tjandraningsih, Rini Radikun, Cole Sutera and Sarah Weiland "Rethinking Indonesia's Informal Sector" (2016) 80 *World Development* 96 at 96 <<http://dx.doi.org/10.1016/j.worlddev.2015.11.005>>.

⁶ Thomas Kohler "Comparative Labor Law: Some Reflections on the Way Ahead" (2003) 25(1) *Comparative Labor Law & Policy Journal* 87 at 90-91.

⁷ See Sean Cooney and Richard Mitchell "What is labour law doing in East Asia?" in Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu (eds) *Law and Labour Market Regulation in East Asia* (Routledge, London, 2002) 246 at 259.

⁸ Anil Verma, Thomas Kochan and Russel Lansbury "Lessons from the Asian experience: A summary" in Anil Verma, Thomas Kochan and Russel Lansbury (eds) *Employment Relations in the Growing Asian Economies* (Routledge, London, 1995) 336 at 345.

This paper aims to provide some plausible answers to these questions through systems analysis and case study of labour law and regulation in Malaysia and their links to the economy, including the variety or varieties of capitalism, labour market formation and outcomes.

The paper is divided into six parts. The first section reviews some relevant literature and develops a systems framework for the case study. In the second section, the history and development of Malaysian labour law is briefly traced and some key provisions of the Employment Act are discussed. From this historical account, the third section teases out aspects of the context and political economy of the country's labour law. The fourth section delves into varieties of capitalism. Outcomes in terms of employment and gross domestic product are tackled in the fifth section. In the last section, the paper concludes with an examination of the links among labour law and regulation, varieties of capitalism, labour market formation, and work creation, as well as some implications and challenges.

1. Literature review and framework for case study

There is a body of literature that seems to view *laws as dichotomous variables*. It tends to recognise a bifurcation between the two Western legal traditions of civil law and common law in terms of mode of legal thinking or reasoning (deductive or inductive), sources of law (legislature or judiciary) and main actors (professors or judges).⁹ It argues that laws are transplanted via colonisation and, therefore, legal origins are key to understanding varieties of capitalism; such that civil law, which favours allocations desired by the state, is likely to correspond to coordinated market economies that involve strategic interaction among actors, while common law, which supports private market outcomes, is apt to be compatible to liberal market economies that are driven by competitive markets.¹⁰ It points out that the distinctions between coordinated market economies and liberal market economies more or less match the distinctions between civil law and common law.¹¹

On the other hand, another body of literature seems to view *laws as continuous variables*. For instance, Kohler (1998) juxtaposes “state-help” and “self-help” aspects of labour law.¹² “State-help” conditions pertain to individual labour laws (protecting individual workers, “the weaker party in the employment relationship”) while “self-help” terms refer to collective labour laws (involving organised workers and “collective bargaining”).¹³ Across the common law-civil law continuum of labour law systems, he distinguishes between the American common law-labour law model that has strong “self-help” features and the German civil law-labour law type

⁹ Martin Vranken *Western Legal Traditions: A Comparison of Civil Law & Common Law* (The Federation Press, Sydney, 2015) at 12-14, 27-28.

¹⁰ Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer “The Economic Consequences of Legal Origins” (2007) <http://ccl.yale.edu/sites/default/files/files/Shleifer_Economic_Consequences_nov.pdf>; and Peter Hall and David Soskice “An Introduction to Varieties of Capitalism” (2001) <<http://www.people.fas.harvard.edu/~phall/VofCIntro.pdf>>

¹¹ Simon Deakin “The Evidence-Based Case for Labour Regulation” (paper presented to Regulating Decent Work Conference, Geneva, 8 July 2009) <http://www.ilo.org/legacy/english/protection/travail/pdf/rdwpaper_pl1a.pdf>

¹² Thomas Kohler “The disintegration of labor law: some notes for a comparative study of legal transformation” (1998) 73(5) *Notre Dame Law Review* 1311 at 1318-1319, 1324; and Jonathan Sale “Harmonisation of ASEAN labour laws for employment growth: The Philippines and Malaysia as case studies” (PhD Thesis, The University of Newcastle, ongoing) at ch 4.

¹³ *Ibid.*

with its robust “state-help” characteristics.¹⁴

Within common law-labour law systems, Whelan (1982) differentiates the United Kingdom’s quite thorough regulations concerning individual labour law and essentially laissez-faire, voluntarist approach to collective labour law from the American style that is somewhat sparse in terms of federal individual labour laws but fairly detailed as to auxiliary rules in collective labour law.¹⁵

Duve (2014) explains entanglements in legal history and frames the problem in this manner: how to “stop projecting...categories and concepts on to realities different from the ones these categories and concepts have emerged from?”¹⁶ He bemoans the excessive focus on Western models (Eurocentrism) and posits that “...entangled situations do not offer the luxury of a single point of departure.”¹⁷ He defines “entangled legal histories” as “complex intertwined networks, with no beginning and no end, and a difficulty to fix their own point of departure”.¹⁸ Palmer (2007) posits the significance of the “factual approach” to mixed legal systems which means verifying their “existence factually.”¹⁹ A mixed legal system involves “two or more legal traditions, or parts thereof, operating within a single system.”²⁰ “Mixed systems and legal pluralism are closely associated with... colonial rule.”²¹ Is this the “norm rather than exception”?²² Is this the “general pattern of legal development rather than historical accident”?²³

In this sense, laws and their origins, as well as varieties of capitalism, are variables occupying loci or points along a continuum. At one end of the continuum might be civil law systems that have coordinated market economies while at the opposite end could be common law systems that are liberal market economies. In between these types are likely to be a whole gamut of systems that are endogenous in their origins, hybrids (having both common law and civil law roots)²⁴, Asian market economies (entailing networks and personal relationships²⁵ and involving identification and solidarity among actors²⁶) and trichotomies having “indigenous

¹⁴ Ibid.

¹⁵ Christopher Whelan “On Uses and Misuses of Comparative Labour Law: A Case Study” (1982) 45(3) *The Modern Law Review* 285 at 297-300; and Sale, above n 12.

¹⁶ Thomas Duve “Entanglements in Legal History. Introductory Remarks” in Thomas Duve (ed) *Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History* (Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main, <http://dx.doi.org/10.12946/gplh1>; Max Planck Institute for European Legal History Research Paper Series No. 2014-08, 2014) 3 at 7 <<https://ssrn.com/abstract=2532916>>.

¹⁷ Ibid 6-7.

¹⁸ Ibid 3, 6, 8.

¹⁹ Vernon Valentine Palmer “Mixed Legal Systems... and the Myth of Pure Laws” (2007) 67(4) *Louisiana Law Review* 1205 at 1206-1207.

²⁰ Ibid 1206-1207.

²¹ Ibid 1216.

²² Ibid 1218.

²³ Ibid.

²⁴ See Pacifico Agabin *Mestizo: The Story of the Philippine Legal System* (University of the Philippines College of Law, Quezon City (Philippines), 2011) at 1.

²⁵ See Nick Wailes, Jim Kitay and Russell Lansbury “Varieties of Capitalism, Corporate Governance and Employment Relations Under Globalisation” in Shelley Marshall, Richard Mitchell and Ian Ramsay (eds) *Varieties of Capitalism, Corporate Governance and Employees* (Melbourne University Press, Carlton (VIC), 2008) 19 at 33.

²⁶ See Nobuyuki Yasuda “Law and Development from the Southeast Asian Perspective: Methodology, History and Paradigm Change” in Christoph Antons (ed) *Law and Development in East and Southeast Asia* (RoutledgeCurzon, London, 2003) 19 at 22, 37.

law,” “imported law” and “development law” elements (including their “operational concepts” “community,” “market” and “command,” respectively).²⁷ After all, the “legal” and “non-legal” spheres are not “entirely discrete ontological” spaces.²⁸ Their boundaries, if any, are permeable.

In this case study, “documents and records” are examined and the “actual” “words and language” used in them are expressed where possible for “adherence to evidence” and writers’ “meanings”, which means themes/subthemes are developed “from the ‘bottom-up’” via “inductive data analysis”.²⁹ Systems analysis is also used to arrive at an understanding of inputs to, processes and outputs/outcomes of the system, as well as the relationship of outputs/outcomes to inputs and that of the system to its larger environment/context (Figure 1). Labour law “constitutes a *system*” with its “vocabulary”, “concepts”, “rules”, “categories”, and “techniques” that are “linked to a view of the social order”.³⁰ Relatedly, labour law systems “...reproduce ‘their own elements, structures, processes and boundaries...’ and “...construct their own environment, and define their own identity.”³¹

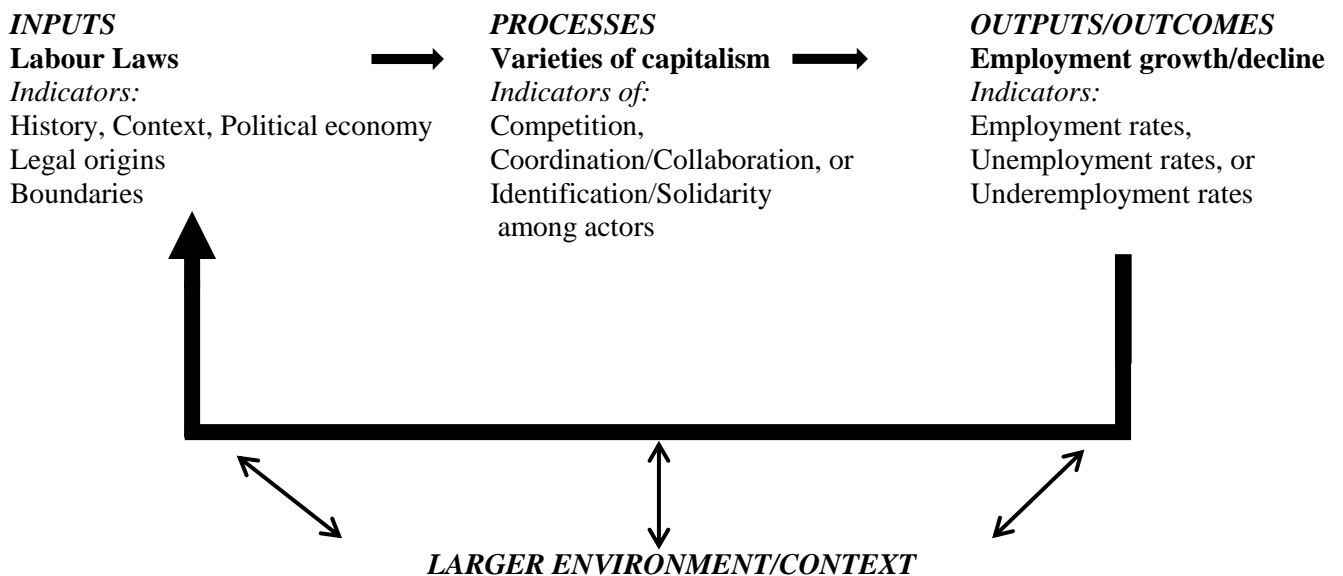


Figure 1: Systems Analysis³²

This research *explores* the relationship between labour laws (as indicated by their history, context and political economy [as laws are products of human interaction³³], legal origins, and boundaries) and employment growth or decline (as indicated by employment, unemployment or underemployment rates), through the case of Malaysia.³⁴ Varieties of capitalism (as indicated by modes of competition, coordination/collaboration, or identification/solidarity

²⁷ Ibid 19, 20, 22-4, 42.

²⁸ Pierre Legrand “European Legal Systems are not converging” (1996) 45(1) *The International and Comparative Law Quarterly* 52 at 58.

²⁹ See John Creswell *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, Inc., California, 2007) at 38, 39, 73-76, 121; and see also Robert Yin *Qualitative Research from Start to Finish* (Guilford Press, New York, 2011) at 15, 16-17, 18, 20, 21.

³⁰ See Vranken, above n 9, at 9. Vranken cites David, R and Brierley, J.

³¹ See Cooney and Mitchell, above n 7, at 249. Cooney and Mitchell cite Gunther Teubner.

³² Sale, above n 12, at ch 1.

³³ See Curtis Milhaupt and Katharina Pistor *Law and Capitalism* (The University of Chicago Press, Chicago, 2008) at 6-8.

³⁴ Sale, above n 12, at ch 1.

among actors in Malaysia) are intervening processes.³⁵ There are likely to be supranational elements in the larger environment or context which might be influencing, and/or be influenced by, the labour law system.³⁶ In Malaysia, what has or have been the approach or approaches over time? What has or have been the impact or impacts on work creation?

2. History and Development of Labour Law: A Brief Discussion

“From very early in the Christian era there were trading ships plying between India and China, some of which touched at river mouths in the Malay Peninsula.”³⁷ These traders’ reports indicated “ample evidence of the existence of Malay Kingdoms in the north, notably in Kedah and Singgora and Ligor from a very early date” before “the 15th century”.³⁸ Indeed, significant interactions among these peoples had been going on even prior to Malaysia’s colonisation. Therefore, it does not come as a surprise, for instance, that the “history of English law” in Malaysia “was one of accommodating the law to fit local circumstances and the so-called ‘Mahometans, Hindoos, and Buddhists’, which loosely connoted the Malay, Indian and Chinese populations, their religious communities and customs.”³⁹ This suggests that plurality in Malaysia’s legal system is linked to ethnic diversity within that system. And the “ethnic distribution in Malaysian society...has influenced industrialization and human resource development strategies.”⁴⁰ The state’s role has been pervasive in this distribution. Moreover, there are “state-help” and “self-help” provisions in Malaysian labour law. Colonised/controlled initially through Malacca (“the Malay Empire which had united the whole of the Peninsula and the East Sumatran Kingdoms under a single overlord”) by the Portuguese (in 1511), the Dutch (in 1641) and later the British (first in 1795, next in 1808 and then in 1825), though the British took control of Penang early on as well under the “Straits Settlements”, the “Federation of Malaya” in 1956 was promised formal independence by “August 1957”.⁴¹ These foreign influences are discernible in the country’s labour law. But the Malaysian state’s involvement has been ubiquitous, functioning in ways that have tended to favour managerial prerogatives. While these might suggest “entangled legal histories”,⁴² there is legal endemism as well in the form of labour rules having endogenous origins. And there has been a range of market economies – Asian (implying networks and personal relationships),⁴³ coordinated (involving strategic interaction of actors) and liberal (entailing market competition).⁴⁴

³⁵ Ibid.

³⁶ Ibid.

³⁷ M.C. ff Sheppard *Historic Malaya: An Outline History* (Malayan Historical Society, n.d.) at 2.

³⁸ Ibid 2-3.

³⁹ Stephanie Po-yin Chung “Understanding ‘Chinese customs’: *Sinchew* rulings in the Straits Settlements, 1830s – 1870s” in Shaunnagh Dorsett and John McLaren (eds) *Legal Histories of the British Empire: Laws, engagements and legacies* (Routledge, London, 2014) 141 at 142.

⁴⁰ Verma, Kochan and Lansbury, above n 8.

⁴¹ Sheppard, above n 37, at 6-16. In page 15 Sheppard notes that “the Federation of Malaya Agreement was signed in Kuala Lumpur on 21st January 1948, and came into force on 1st February of that year.” The “Federation of Malaya” is to be distinguished from the much earlier “Federated Malay States” that consisted of Perak, Selangor, Negri Sembilan, and Pahang (see Sheppard, pages 14-15).

⁴² See Duve, above n 16.

⁴³ See Wailes, Kitay and Lansbury, above n 25.

⁴⁴ Ibid 32; and see also Hall and Soskice, above n 10.

2.1. *Pre-1940s up to 1980*

The British had implemented “divide and rule policies” and relied on “Chinese and Indian labour” in the course of “the colonial period.”⁴⁵ Crinis and Parasuraman (2016) explain that the:⁴⁶ “Chinese, Indian and Malay communities were corralled in certain sectors of the economy...The Malays remained in the subsistence economy, and the Chinese and Indian population were employed in tin mining and rubber plantations, respectively.”

According to Ayadurai (1993), labour legislation in Malaysia:⁴⁷

...was first enacted over 120 years ago to regulate the employment of immigrant Chinese and Indian labour in the mines and on the plantations. It was not until 1940 that laws were introduced to regulate trade unions and trade disputes. By this time the immigrant labour force had formed the first trade unions.

In 1948, the British colonial government declared a “State of Emergency” in Malaya following the Malayan Communist Party’s reversion to armed struggle to attain political aims.⁴⁸ This paved the way for the compulsory registration of trade unions.⁴⁹ Those unregistered were outlawed.⁵⁰ This also effectively broke communist control over the labour movement, crippling the latter in the process.⁵¹

In 1950, the Malayan Trades Union Congress was established.⁵² Five years later, the Employment Act was enacted, but its implementation was held in abeyance until 1957 when Malaya gained independence from the British.⁵³ “Since independence..., Malaysia” had “been ruled by Barisan National, an inter-ethnic coalition dominated by the United Malays National Organisation (UMNO)”,⁵⁴ until the May 2018 general election in which this ruling coalition lost the majority of seats in the parliament.

⁴⁵ Vicki Crinis and Balakrishnan Parasuraman “Employment Relations and the state in Malaysia” (2016) 58(2) *The Journal of Industrial Relations* 215 at 217.

⁴⁶ *Ibid.*

⁴⁷ Dunston Ayadurai “Malaysia” in Stephen Deery and Richard Mitchell (eds) *Labour Law and Industrial Relations in Asia: Eight Country Studies* (Longman Cheshire, Melbourne, 1993) 61 at 63. Compare The Labour Code, 1912 of the Federated Malay States (Enactment No. 6 of 1912, as amended) in Federated Malay States and A.B. Voules “The laws of the Federated Malay States 1877-1920” Vol. II (1921) California Digital Library <<https://archive.org/details/cdl?and%5B%5D=laws+of+the+federated+malay+states&sin=&sort=titleSorter>> 332-401. The Labour Code, 1912 contained eleven Parts, including Part II on Provisions Relating to Immigration, Part III on General Provisions Relating to Labour, Part IV on Provisions Relating to Special Classes of Labour, Part V on Provisions Relating to Priority of Wages and the Truck System, Part VI on Provisions Relating to Assisted Migration, Part VII on Special Provisions Relating to Labourers Employed in Mines, Part VIII on Provisions Relating to the Health of Assistants and Labourers, Part IX on Provisions Relating to Places Unfit for the Employment of Labour, Part X on Special Offences, and Part XI on Provisions Relating to Procedure, Actions and Rules.

⁴⁸ Ayadurai, above n 47, at 92.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Crinis and Parasuraman, above n 45, at 217.

“At the time of independence, the non-Malay Chinese owned most of the country’s economic assets and the numbers of non-Malays almost outnumbered the Malays...” and these “...ethnic divisions shaped the politics of industrial relations in Malaysia.”⁵⁵

Thereafter, the Trade Unions Act was passed in 1959.⁵⁶ This legitimised unions, but required registration of unions and regulation of their affairs.⁵⁷ Then, the “Great Railway Strike” occurred in Malaya which resulted “in railway workers being recognised as government employees.”⁵⁸

Malaysia was formed in 1963, consisting of Malaya, Sabah, Sarawak, as well as Singapore.⁵⁹ But in 1965, Singapore seceded from Malaysia.⁶⁰ In 1967, the Industrial Relations Act became law, “entrenching the system of compulsory arbitration first introduced under emergency legislation in 1965, and establishing the Industrial Court to arbitrate disputes.”⁶¹

In 1969, racial riots took place in Kuala Lumpur “after the results of the general election” showed “that the opposition parties together polled more votes but won fewer seats than the ruling coalition party.”⁶² “Chinese-dominated parties won a considerable number of seats in the parliament...” while the “...government invoked the Internal Security Act,” which was “a relic of colonial times...”⁶³

Two years later, the New Economic Policy was launched – aimed at eradicating poverty and restructuring society in 20 years, it has helped improve the lot of the disadvantaged Malays.⁶⁴ “The State...set employment quotas for Malays under the New Economic Policy (NEP)” that firms must meet “to qualify for import protection, tax holidays and direct state investment.”⁶⁵ “Malays were given preferential treatment in business, employment and education to allow them to ‘catch-up’ to the non-Malay population, but especially to the Chinese.”⁶⁶ The 1971 NEP was also a way “to manage racial tensions.”⁶⁷ In the same year, the Employment Act, Trade Unions Act and Industrial Relations Act were substantially amended.⁶⁸ A further revision was made to the Industrial Relations Act in 1976.⁶⁹

In 1978, the Malaysian Employers’ Federation was established.⁷⁰ The following year, the “Airlines Employees’ Union dispute over terms and conditions of employment with the national carrier, Malaysian Airlines System”, resulted in “unionists being interned under the Internal Security Act and the union...being deregistered and subsequently replaced by an

⁵⁵ Ibid.

⁵⁶ Ayadurai, above n 47, at 93.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Crinis and Parasuraman, above n 45, at 217.

⁶⁴ Ayadurai, above n 47, at 62-63, 93.

⁶⁵ Verma, Kochan and Lansbury, above n 8.

⁶⁶ Crinis and Parasuraman, above n 45, at 217.

⁶⁷ Ibid.

⁶⁸ Ayadurai, above n 47, at 93.

⁶⁹ Ibid.

⁷⁰ Ibid.

enterprise union.”⁷¹ The Employment Act, Trade Unions Act and Industrial Relations Act were again substantially amended in 1980.⁷²

2.2. 1980s to present

The Private Employment Agencies Act (Act 246) became law in 1981,⁷³ to regulate private employment agencies that supply workers to employers. Thereafter, the tripartite “National Labour Advisory Council (NLAC)” was reconstituted in 1983.⁷⁴ The government announced in 1986 its intention to create “a National Labour Policy” based on “industrial harmony”.⁷⁵ Four years later, the “Malayan Communist Party” renounced its armed struggle and surrendered, formally ending the insurgency in 1990.⁷⁶ That same year, the “National Economic Consultative Council” was appointed to help the government shape a “National Development Policy” to replace the NEP⁷⁷ although still anchored to its underlying philosophy of societal reordering.

Thus, in the 1990s, the “government’s emphasis shifted...towards the development” of “a high-value economy, through a strategy known as Vision 2020, which emphasised the importance of a knowledge economy built on education and industrial upgrading in the domestic sector as well” as “the export sector.”⁷⁸

From the mid-1990s, however, the courts exhibited a measure of “judicial activism” in deciding some labour cases in favour of employees, though these were “largely restricted to the field of the law of personal employment where the courts” seemed “more willing to step in” to moderate employer discretion.⁷⁹ Still, these decisions had the effect of expanding somewhat “the scope of judicial review” and were significant in that sense, too.⁸⁰ But the courts could not make broader changes, particularly as to collective labour law considering “the strong and clear legislative intention to restrict trade union power.”⁸¹

The legislative intention to weaken unions continued as changes were made in 2010 to the Trade Unions Act, Employment Act and Industrial Relations Act to permit “greater use of contract labour”, which was later “strengthened” by further amendments “to the Employment Act” in 2012.⁸² These changes had the effect of enhancing employer discretion⁸³ “to substitute contract workers, many of them temporary labour migrants, for core workers or to change the

⁷¹ Ibid 93-94.

⁷² Ibid 94.

⁷³ See Crinis and Parasuraman, above n 45, at 218.

⁷⁴ Ayadurai, above n 47, at 94.

⁷⁵ Ibid; and see Peter Wad “Enterprise Unions: Panacea for Industrial Harmony in Malaysia?” (1997) 12 *Copenhagen Journal of Asian Studies* 89 at 90 <<https://rauli.cbs.dk/index.php/cjas/article/view/2177/2172>>.

⁷⁶ Ayadurai, above n 47, at 94.

⁷⁷ Ibid.

⁷⁸ Crinis and Parasuraman, above n 45, at 218.

⁷⁹ Suhanah Sharifah Syed Ahmad “Law and labour market regulation in Malaysia” in Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu (eds) *Law and Labour Market Regulation in East Asia* (Routledge, London, 2002) 55 at 83, 84.

⁸⁰ Ibid.

⁸¹ Ibid 84.

⁸² Crinis and Parasuraman, above n 45, at 219.

⁸³ See Chris Howell “Trajectories of Neoliberal Transformation: European Industrial Relations since the 1970s” (Lecture, Newcastle Business School, The University of Newcastle, Australia, 29 September 2017). According to Howell, employer discretion means “freedom to hire and fire”, “freedom to assign workers to tasks” and “freedom to set the amount, type and distribution of wages.”

status of core to contract workers.”⁸⁴ Whether this expansionary logic of employer discretion will intensify or abate following the results of the 2018 general election that put in place a new government led by the Pakatan Harapan remains to be seen. Indeed, before its rise to power, the nascent ruling coalition’s campaign hinged on a raft of reforms which was aimed at putting some distance between itself and its predecessor.

2.2.1. *Some Key Provisions of the Employment Act*

Based on the foregoing brief historical account, the oldest labour legislation in Malaysia that became effective upon the country’s independence is the Employment Act as amended. This section looks into some of its key provisions. While the British common law has strongly influenced the legal system of Malaysia, and the Employment Act was enacted during British rule, i.e., prior to independence, a closer look suggests many civilian law elements exist as well, owing possibly to the Portuguese and the Dutch influences (which seeming link requires deeper study). The Employment Act itself contains robust “state-help” rules⁸⁵ that articulate more “principles” and “rights” than “remedies” and, thus, tend to correspond to provisions of “The Labour Code, 1912” enacted then by the Federated Malay States of Perak, Selangor, Negri Sembilan, and Pahang.⁸⁶ They are quite detailed and specific, apparently employing “deductive”⁸⁷ reasoning as they begin with concepts (Part I) before going into particular situations (Part II, et seq.). For instance, the Employment Act defines “contract of service”, “contractor”, “employee”, “employer”, “domestic servant”, and “apprenticeship contract”.

More “principles” and “rights” are detailed in subsequent “prescriptive”⁸⁸ rules regarding contract of service and termination thereof, payment of and deductions from wages, contractors and principals, employment of women, domestic servants, rest days and hours of work, termination, lay-off and retirement benefits, employment of foreign employees, among others. In the civil law tradition, too, the Employment Act seems to recognise “administrative action” as “inherent power”⁸⁹ given its very specific rules on inspection, complaints and inquiries, general penalty, and regulations, and appears to require “statutory grant of power” for “judicial action”⁹⁰ considering aspects of its rules of procedure. However, “the open-ended, discretionary nature of”⁹¹ the legislation can be seen, too, in the provisions on regulation which suggest that it is developmentalist. At the same time, the complaints/inquiries provisions and

⁸⁴ Crinis and Parasuraman, above n 45, at 219.

⁸⁵ See Kohler, above n 12.

⁸⁶ See Legrand, above n 28, at 64-74; see also Denis Baranger “Boundaries of Public Law” (Miegunyah Distinguished Visiting Fellowship Public Lecture, Melbourne Law School, The University of Melbourne, Australia, 26 July 2017) <<http://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/2017-miegunyah-distinguished-visiting-fellowship-public-lecture-26.7.17>>; and see also The Labour Code, 1912, above n 47. Notably, Part I, Chapter I of The Labour Code, 1912 had stated explicitly “Saving of Netherlands Indian Labourers’ Protection Enactments, 1909”, which is evidence of Dutch influence on labour law. See also J.R. Innes “Some Notes on the Constitution and Legislation of the Federated Malay States” (1916) 16(1) *Journal of the Society of Comparative Legislation* 24 at 25, 27 <<https://www.jstor.org/stable/752660>>. Innes also points out in page 27 that the “local Labour Code” was a good example “of codification... found suitable to local requirements” which was not a mere transplant from India.

⁸⁷ See Legrand, above n 28, at 64.

⁸⁸ *Ibid* 68.

⁸⁹ *Ibid* 52, 75.

⁹⁰ *Ibid*.

⁹¹ See Christoph Antons “Law reform in the ‘developmental states’ of East and Southeast Asia: from the Asian Crisis to September 11, 2001 and beyond” in Christoph Antons and Volkmar Gessner (eds) *Globalisation and Resistance: Law Reform in Asia since the Crisis* (Hart Publishing, Oxford, 2007) 81 at 81, 90.

rules of procedure in the statute are in the nature of “remedies”⁹² that allow for redress of “wrong”;⁹³ albeit they constitute little evidence of common law features.

3. Context and Political Economy of Labour Laws

3.1. State regulation through labour rights

The Employment Act makes use of the *lingua franca* of principles and rights. For instance, there is also a provision that seems to set forth an equality of rights between employers and employees in the matter of terminating a contract of service:⁹⁴

Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given..., without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice. Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

But in the next breath, it appears “to regulate – and repress – labor”.⁹⁵ The following provision indicates that the employer may, upon grounds of misconduct, after inquiry dismiss *sans notice* the employee:⁹⁶

An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry

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- (a) dismiss without notice the employee;
- (b) downgrade the employee; or
- (c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks. For the purposes of an inquiry...the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period: Provided that if the inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.

And in the matter of terminating employment by reason of redundancy, which is beyond the control of the employee, the employer seems to have a very wide discretion. The following

⁹² See Baranger, above n 86.

⁹³ See Legrand, above n 28, at 71.

⁹⁴ Employment Act 1955, Part II

<<http://www.ilo.org/dyn/travail/docs/1496/Employment%20Act%201955.pdf>>.

⁹⁵ See Stanley Aronowitz *The Death and Life of American Labor: Toward a New Workers' Movement* (Verso, London, 2014) at 54. Aronowitz cites Karl Polanyi.

⁹⁶ Employment Act 1955, Part II

<<http://www.ilo.org/dyn/travail/docs/1496/Employment%20Act%201955.pdf>>.

provision appears to indicate the only limitation, i.e., that foreign employees, *if any*, be “let go” first before local employees:⁹⁷

Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

Thus, Malaysian “employers continue to exercise their traditional, legally entrenched, prerogatives, in particular the right to retrench or dismiss”⁹⁸ through labour law.

In this sense, labour law is a regulatory tool to achieve workplace harmony or at least a semblance of it. As noted by Aronowitz in relation to American labour law:⁹⁹ “Labor law is, in brief, an invocation to class collaboration, or at least class peace. It has above all a regulatory function, which is hidden under its apparent declaration of the rights of labor.”

Under the Employment Act, labour regulation uses the language of labour rights.

3.2. *“Sporadic” and “peripheral” role of common law*

“Industrial relations in Malaysia are characterised by tight government supervision.”¹⁰⁰ “Individual employer-employee relations are regulated by the” Employment Act.¹⁰¹ “Collective relationships are governed by the” Industrial Relations Act.¹⁰² “The labour laws of the post-colonial era have served the purpose of giving effect to government objectives of industrialisation and social re-structuring.”¹⁰³ The “system is largely the creation of the legislative process” and “owes little to common law...”¹⁰⁴ Albeit, the courts have apparently played “an important role in softening the effect of repressive legislation through statutory interpretation and the application of principles of justice and equity” as may be gleaned from the “rise in judicial activism in labour cases” from the mid-1990s.¹⁰⁵ But these have been largely “sporadic” and “peripheral”, to borrow the metaphor of Baranger (2017) in his discourse on public law (in common law jurisdictions).¹⁰⁶ These have been “sporadic” because judicial review of government and/or employer actions happens only when a labour case reaches the courts which is not very frequent; these have been “peripheral” because “common law fastens, not upon principles, but upon remedies”,¹⁰⁷ and they have been mainly limited “to the field of the law of personal employment”¹⁰⁸ or the Employment Act.

3.3. *Labour law as public law/development law and expansion of employer discretion*

⁹⁷ Ibid Part XIIB.

⁹⁸ Ahmad, above n 79, at 82.

⁹⁹ Aronowitz, above n 95.

¹⁰⁰ Ayadurai, above n 47, at 90.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ahmad, above n 79, at 85.

¹⁰⁴ Ayadurai, above n 47, at 90.

¹⁰⁵ Ahmad, above n 79, at 82, 83.

¹⁰⁶ See Baranger, above n 86.

¹⁰⁷ Ibid.

¹⁰⁸ Ahmad, above n 79, at 83, 84.

Malaysian labour law is public law in that it is being used by the government to regulate the relations of capital and labour, though favouring the former over the latter, to achieve state objectives. Its “external boundaries” are determined through a “process of differentiation from private law”¹⁰⁹, e.g., the Civil Law Act 1956 which is the civil law administered in Malaysia.¹¹⁰ For example, the Civil Law Act “regulates the relations between...private persons”¹¹¹ while the Employment Act’s special rules govern individual employment relations based on “requirements of the public interest”¹¹², i.e., attainment of state objectives of “industrialisation and social re-structuring.”¹¹³ Labour law is also development law as it provides “administrative guidance” via “bureaucratic competence” to attain the state’s developmental goals.¹¹⁴ The “internal boundaries”¹¹⁵ of Malaysian labour law are individual employer-employee relations under the Employment Act (“state-help”¹¹⁶ rules) and collective labour relations under the Industrial Relations Act (“self-help”¹¹⁷ rules).

As Crinis and Parasuraman point out:¹¹⁸

In practice, the system operates as a combination of state-employer bipartism in the policy arena and management unilateralism at the workplace...Close ties between industry and government have stifled the capacity of workers to organise into effective trade unions...there is little likelihood of detection of employer’s failure to comply with regulatory requirements...

“The industrial relations strategy in Malaysia is to focus on cost containment to facilitate the competitive strategy of low cost exports, and on the need to attract foreign investment.”¹¹⁹ “The repressive labour and industrial laws inherited from the colonial period and enhanced by successive post-independence Malaysian governments are still largely in force...”¹²⁰ In short, “state-help” and “self-help” rules created by the state through the legislative process, though many, function in ways that expand employer discretion.

3.4. Individualisation, de-collectivisation and decentralisation of employment relations through state regulation

“Malaysian employers prefer to deal with employees on an individual rather than collective basis and they are supported in this strategy by the state”¹²¹ through labour law, too. Thus, the union density in Malaysia “is still very low” at “less than 10 per cent of the workforce.”¹²² “The change”, pursuant to the “Look East Policy”, in 1983 “from an industrial to an enterprise

¹⁰⁹ See Baranger, above n 86.

¹¹⁰ See Civil Law Act 1956 (Act 67)

<http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%2067.pdf>.

¹¹¹ See Baranger, above n 86.

¹¹² Ibid.

¹¹³ See Ahmad, above n 79, at 85.

¹¹⁴ See Antons, above n 91, at 90.

¹¹⁵ See Baranger, above n 86.

¹¹⁶ See Kohler, above n 12.

¹¹⁷ Ibid.

¹¹⁸ Crinis and Parasuraman, above n 45, at 218.

¹¹⁹ Verma, Kochan and Lansbury, above n 8, at 346.

¹²⁰ Ahmad, above n 79, at 81.

¹²¹ Ibid.

¹²² Ibid; and see also Dzuzalani Eden “Transformasi Kesatuan Sekerja Dalam Pembangunan Negara” (paper presented to Konvensyen Kesatuan Sekerja, Riverside Majestic, Kuching, 30 April 2015)

<https://ir.unimas.my/10295/>.

model fragmented the already weak national unions” that contracted further “with the new emphasis on enterprise (in-house) unions.”¹²³ The amendments to the Trade Unions Act, Employment Act and Industrial Relations Act in 2010, and to the Employment Act in 2012, contributed as well to the individualisation, de-collectivisation and decentralisation of employment relations in Malaysia. There has been “greater recourse to individual bargaining between employee and employer or unilateral employer decision-making” (individualisation), “a shrinking in the collective organisation and capacity” of employees (de-collectivisation) and “a shift from higher levels of collective bargaining to lower ones, closer to the firm or workplace” (decentralisation).¹²⁴ What is peculiar, however, with this “neoliberal trajectory” in Malaysia is there has been *no concomitant deregulation*, i.e., “greater reliance upon market mechanisms in the organization of the labor market.”¹²⁵ On the contrary, there has always been state regulation through labour law as public law and development law, i.e., labour law as having a strong “regulatory function, which is hidden under its apparent declaration of the rights of labor.”¹²⁶

3.5. *Work creation, ethnicity and trichotomy*

The 1971 NEP has been a key “work creation programme” introduced by the Malaysian government “to encourage new employment opportunities”¹²⁷ especially for Malays. This work or labour rule aimed at reordering societal structure has endogenous origins. As aptly explained by Milner (2008):¹²⁸

When we look at transformations in detail, some have been intended, some not. Seeking a specific economic or political advantage, for instance, can entail top-down ideological leadership – a frequently encountered theme in ‘Malay’ societies – that radically and unintentionally transforms the social order. Some strategies employed by Archipelago sultanates and later by colonial regimes turned out to be cases of this, virtually creating or legitimizing new and rival elites. A modern example is the unpredicted rise in 1970s Malaysia of a powerful and radical Islamic movement that followed the implementation of programmes designed to address ‘Malay’ economic disadvantage. But there are also clear instances of deliberate, top-down implementation of social change – some dating back to the kingdom of Melaka and earlier.

The kingdom of Melaka (Malacca) had been well-known even before the Portuguese invasion.¹²⁹ Malaysia’s NEP, together with its labour laws as exemplified by the Employment Act, make up the trichotomy of indigenous law, imported law and development law.¹³⁰ As noted, the NEP is an endogenous development. The Employment Act is imported law in that it has both civil law and common law elements, though, seemingly, there is more of the former than the latter. At the same time, the Employment Act is development law as explained above.

¹²³ Crinis and Parasuraman, above n 45, at 218.

¹²⁴ See Howell, above n 83.

¹²⁵ Ibid.

¹²⁶ See Aronowitz, above n 95.

¹²⁷ See Michael Jackson and Victor Hanby *Work Creation: International Experiences* (Saxon House, Farnborough (Eng), 1979) at 6.

¹²⁸ Anthony Milner *The Malays* (Wiley-Blackwell, West Sussex (UK), 2008) at 15.

¹²⁹ See Sheppard, above n 37, at 4-8.

¹³⁰ See Yasuda, above n 26, at 19, 20, 22-4, 42.

The confluence of work creation, ethnicity and trichotomy has been realised largely through state regulation.

The extensive role of the state can be clearly discerned, too, from the varieties of capitalism extant in Malaysia.

4. Varieties of Capitalism

Malaysia has embarked on mixed approaches to industrialisation, often led or driven by the state.

4.1. Coordinated market economy through ISI

Initially, the country's import substitution industrialisation (ISI) was market-led.¹³¹ From "...1957 to 1970..." the state was involved "in the development of infrastructure and the rural sector...while" the private sector took care of "industrialization" with the "state" facilitating "the creation of a favourable climate for foreign investment in import substitution industries..."¹³²

The World Bank also influenced this policy approach, which had mixed results.¹³³ "On the one hand, by 1969, the economy was growing at above 5 per cent per annum...On the other hand, ethnic Malay participation in this economic growth was limited."¹³⁴

In 1971, state-led ISI was commenced with the NEP which was "promulgated in response to Malay nationalism."¹³⁵ "Its first objective was to restructure society to increase the economic standing of Malays by bringing them into the modern economy."¹³⁶ Kuruvilla and Arudsothy (1995) indicate that the NEP:¹³⁷

...was designed to increase the ethnic distribution of the workforce in proportion to the ethnic distribution of the population, and to increase *bhumiputra* (sons of the soil, i.e. Malay) share of corporate ownership from 2.4 per cent in 1970 to 30 per cent by 1990. The strategy emphasized redistribution via growth in output and employment. In operational terms, an employment quota of 30 per cent for Malays was a prerequisite to qualify firms for import protection and tax holidays. Government contracts were reserved for Malay-owned firms, and all firms had to keep aside 30 per cent of shares of Malays.

Thus, "the Malaysian state exerted increasing control over the private sector via both *regulation* and *direct investment* in furtherance of NEP goals."¹³⁸ "Consequently, private sector investment fell" and the "shortfall" as well as "the utilization of government funds to buy shares

¹³¹ Sarosh Kuruvilla and Ponniah Arudsothy "Economic development strategy, government labour policy and firm-level industrial relations practices in Malaysia" in Anil Verma, Thomas Kochan and Russel Lansbury (eds) *Employment Relations in the Growing Asian Economies* (Routledge, London, 1995) 158 at 159-161.

¹³² *Ibid* 159-160.

¹³³ *Ibid* 161.

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ Crinis and Parasuraman, above n 45, at 217.

¹³⁷ Kuruvilla and Arudsothy, above n 131, at 161.

¹³⁸ *Ibid* 162.

(undersubscribed by the Malay business community for which they were reserved) resulted in a major resource crunch that led to increased borrowing from international banks.”¹³⁹ This influenced the transition to export-oriented industrialization (EOI).¹⁴⁰

4.2. *Liberal market economy via EOI*

According to Kuruvilla and Arudsothy:¹⁴¹

The resource crunch drove the government to articulate a mixed policy. On the one hand, the government launched a massive campaign to encourage private and foreign investment during the 1977-80 period...On the other hand, the state also increased its involvement in the development of heavy import substitution industries.

As already noted, there was really no deregulation or total “freedom of the market from government regulation, that is, laissez-faire economics”.¹⁴² “The outpouring of government revenues...combined with the recessions of 1982 and 1985, and the draining of revenues by the heavy industrialization programme drove Malaysia’s external debt to unprecedented levels.”¹⁴³ In order “to meet its interest payments on foreign debts, the state re-emphasized export-oriented industries, simplifying bureaucratic controls, increasing investment allowances and incentives, and reducing corporate and development taxes”.¹⁴⁴

This “EOI strategy has made Malaysia dependent on low-cost labour-intensive foreign-dominated manufacturing for export to meet interest payments, and for continued industrial growth.”¹⁴⁵ This also “forced the government to enact policies that kept costs low to preserve Malaysia’s competitive advantage of cheap and disciplined labour in order to continue to attract foreign investment.”¹⁴⁶ The “state also increased its involvement in the industrial relations sphere to a considerable extent, moving from controlled pluralism to greater state control.”¹⁴⁷

Commenting on Malaysia’s economic transformation, Bhopal and Todd (2000) note that:¹⁴⁸

Within the two decades following 1976 the Malaysian economy transformed from an agricultural to a predominantly manufacturing one. By 1996, manufacturing accounted for 80.6 per cent of commodity exports, contributed 34.3 per cent of gross domestic product (GDP) and employed 25.5 per cent of the workforce. However, development has occurred on a narrow, primarily electronics, base...

¹³⁹ Ibid 162-163.

¹⁴⁰ Ibid 163-166.

¹⁴¹ Ibid 163.

¹⁴² See Aronowitz, above n 95, at 53.

¹⁴³ Kuruvilla and Arudsothy, above n 131, at 164.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 166.

¹⁴⁶ Ibid 168.

¹⁴⁷ Ibid.

¹⁴⁸ Mhinder Bhopal and Patricia Todd “Multinational Corporations and Trade Union Development in Malaysia” in Chris Rowley and John Benson (eds) *Globalization and Labour in the Asia Pacific Region* (Frank Cass, London, 2000) 193 at 193.

“The proportion of Malays, Chinese and Indians in the labour movement has reflected the changing political economy of Malaysia.”¹⁴⁹ “This economic development has expanded the Malay waged class such that Malays comprise the majority of trade union members.”¹⁵⁰ Then, the Asian financial crisis struck.

4.3. *Asian market economy as typified by work in informal economy*

“Malaysia’s economic crisis started in July 1997...Economic growth rate declined.”¹⁵¹ It raised inflation, unemployment and poverty rates.¹⁵² Thus, informal sector activities – “petty trading, carpentry, direct selling and home-based production” – grew.¹⁵³

“This growth”, according to Shahadan (2007), was:¹⁵⁴

...illustrated in the expansion of communities of informal street traders (hawkers), as well as in the surge of home-based production and a small number of increasingly formalized ventures located at fixed business premises such as small-scale manufacturers. The slow expansion rate posted by the formal economy reduced labor absorption of new work seekers. During the crisis, many were forced to seek employment in the informal sector...out of necessity rather than choice.

Work in the informal economy entails networks and personal relationships¹⁵⁵ and involves identification and solidarity among actors,¹⁵⁶ which are elements of a “third variety of capitalism” as defined by Wailes, Kitay and Lansbury (2008).¹⁵⁷ As Shahadan explains:¹⁵⁸

...new entrants who participate in informal sector activities due to an economic crisis continue to engage in these activities even after the crisis. This is a reflection of the continuous demand for informal businesses which provide cheaper goods and services. As the country’s economy improves, the participants receive higher income from the informal sector compared to their previous jobs before the crisis. This motivates them to remain in the sector.

Income from work in the informal economy is hardly taxed directly. “Own account workers” had “the highest proportion of employment in the informal sector in non-agricultural sector” at “55.1 per cent in 2015, down 7.1 percentage points compared to 2013.”¹⁵⁹

¹⁴⁹ Ibid 194.

¹⁵⁰ Ibid.

¹⁵¹ Faridah Shahadan “Impacts of the Malaysian Economic Crisis on the Livelihood of Informal Sector Participants” (2007) 27(1&2) Philippine Journal of Labor and Industrial Relations 56 at 56.

¹⁵² Ibid.

¹⁵³ Ibid 57, 75.

¹⁵⁴ Ibid 75.

¹⁵⁵ See Wailes, Kitay and Lansbury, above n 25, at 33.

¹⁵⁶ See Yasuda, above n 26, 22, at 37.

¹⁵⁷ Wailes, Kitay and Lansbury, above n 25, at 33.

¹⁵⁸ Shahadan, above n 151, at 76.

¹⁵⁹ Department of Statistics Malaysia, above n 3.

5. Employment and GDP

During the transition to EOI in the 1980s, “job security” was “not well entrenched in Malaysia.”¹⁶⁰ “The dominant strategy” was “to downsize the core labour force” in times of “economic downturns.”¹⁶¹ “Continuous improvement of production technologies...resulted in workforce reductions.”¹⁶² “Other labour shedding methods” included “retrenchment, re-contracting, contracting out, temporary shutdowns and use of temporary or casual employment.”¹⁶³ Contracting out or outsourcing arrangements came about notwithstanding Act 246 (1981). These are reflected in Figure 2 which shows that unemployment started to go up in 1982 and reached a peak of 7.4 per cent in 1986, and hovered between 7.3 per cent and 7.2 per cent in 1987 and 1988, respectively. The unemployment rate began to go down in 1989 after government’s announcement about the National Labour Policy and appointment of the National Economic Consultative Council¹⁶⁴ in line with the NEP’s philosophical underpinning of societal reordering. The unemployment rate started to increase again, from its lowest point of 2.4 per cent in 1997, during the Asian financial crisis. The global financial crisis also saw the rise in unemployment to a peak level (since 1995) of 3.7 per cent in 2009.

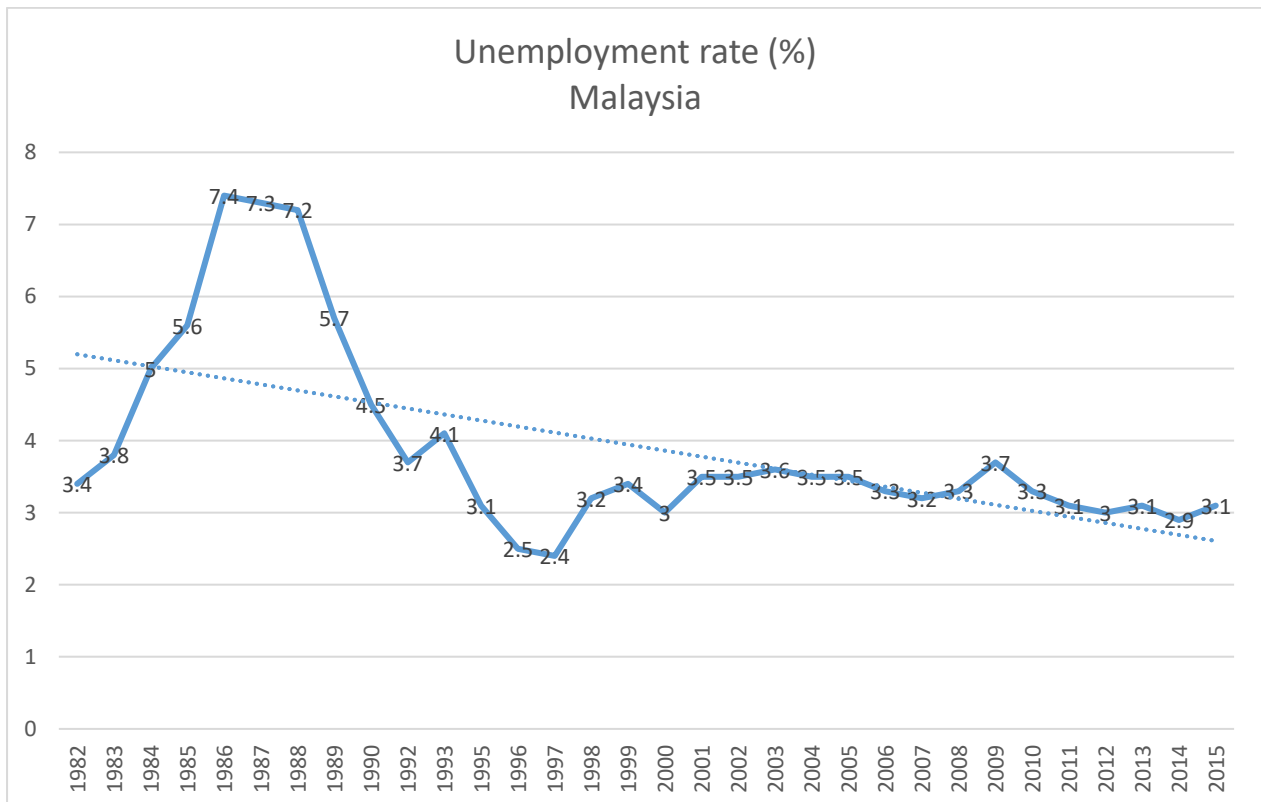


Figure 2: Unemployment rate in Malaysia
Source: Department of Statistics Malaysia¹⁶⁵

¹⁶⁰ Verma, Kochan and Lansbury, above n 8, at 346.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ See Ayadurai, above n 47, at 94.

¹⁶⁵ The line graph and trend line are based on data obtained from the Department of Statistics Malaysia, Official Portal
<https://www.dosm.gov.my/v1/index.php?r=column/ctimeseries&menu_id=NHJlaGc2Rlg4ZXlGTjh1SU1kaWY5UT09>.

While the policies discussed above have “resulted in increasing the economic participation of Malays”, i.e., “Malay share of *total* manufacturing employment increased to 32 per cent, while Malays in managerial positions rose to 17 per cent, and Malay share ownership increased to about 8 per cent...,” they did not meet “Malay nationalist expectations...”¹⁶⁶

Crinis and Parasuraman maintain that the shift:¹⁶⁷

...from import substitution to export-oriented production...generated employment for the large numbers of workers in the manufacturing and construction sectors and on palm oil estates. Although these jobs solved Malaysia’s unemployment problem, they did not meet the promises of the government to provide Malays with quality employment and a fair share of capital accumulation.

That is also why the strategy Vision 2020 has been adopted.¹⁶⁸ But instead of “...displacing labour-intensive manufacturing, this push towards higher-end production” has been “pursued in parallel, meeting demand for low-paid employment in low-end labour intensive industries” via “the importation of labour migrants and continuing to maintain social order through state repression.”¹⁶⁹ Overall, “foreign workers...have no legislative protections for the governance of their employment” and their “working conditions and wages are much lower than” those of “Malaysian workers.”¹⁷⁰

These notwithstanding, the trend line in Figure 2 suggests a general decline in unemployment which stood at 3.1 per cent by 2015. This is very close to Sir William Beveridge’s (1944) full employment definition of 3 per cent.¹⁷¹ And it is worth noting that services and industry have expanded over time. Table 1 shows the employment and GDP structures in Malaysia. While the services sector has the highest proportions in terms of employment and GDP, the industry sector has sizeable shares as well.

Malaysia	Agriculture (%)	Industry (%)	Services (%)
Employment	13	36	51
GDP	11	41	48

Table 1: Employment and GDP structures in Malaysia, 2010.

Source: Boquet (2017)¹⁷²

Changes to the Private Employment Agencies Act have been reported recently.¹⁷³ Notably, too, the Pakatan Harapan promised during the election campaign to achieve Vision 2020 along with controlling/reducing inflow of foreign workers, creating quality employment, increasing minimum wage, enhancing worker rights (including unionisation and collective bargaining),

¹⁶⁶ Kuruvilla and Arudsothy, above n 131, at 162.

¹⁶⁷ Crinis and Parasuraman, above n 45, at 218.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Verma, Kochan and Lansbury, above n 8, at 346.

¹⁷¹ William Beveridge *Full Employment in a Free Society: A Summary* (The New Statesman and Nation and Reynolds News, London, 1944) at 12

<https://library.lse.ac.uk/archives/beveridge/9A_79_Full_employment_in_a_free_society.pdf>.

¹⁷² Boquet, above n 2. See Table 8.2 Employment structure and GDP structure in selected Asian countries.

¹⁷³ “Government to enforce Private Employment Agencies (Amendment) Act 2017” *Malay Mail* (online ed, Kuala Lumpur, Malaysia, 6 January 2018).

and setting up an Equal Employment Opportunity Commission.¹⁷⁴ If the new government is able to follow through, these could bring about a paradigm shift in state regulation towards worker rights and voice. Of late, however, there have been proposals from the new government's advisers to review the "affirmative action measures" in the NEP,¹⁷⁵ the basic principles of which have been maintained in Vision 2020.¹⁷⁶ The proposed review purportedly aims to stimulate competitiveness.¹⁷⁷ Such review must remain consistent though with Malaysia's Federal Constitution that prescribes "reservation of quotas" for the Malays "to safeguard" their "special position".¹⁷⁸

Conclusion

Malaysian labour laws and varieties of capitalism are not necessarily "dichotomous variables that fill separate ontological vacuums."¹⁷⁹ While this exploratory research suggests that "entangled legal histories"¹⁸⁰ exist, there is also endogeneity that is largely state-led or -driven. The "trichotomy" of "indigenous law", "imported law" and "development law"¹⁸¹ is extant in the country's labour law system. The NEP might be deemed an aspect of "indigenous law", a "modern example"¹⁸² which has pre-colonial antecedents. It developed endogenously, persists over time and seems unique to Malaysia (legal endemism).¹⁸³ Being part of "top-down implementation of social change",¹⁸⁴ in many ways it involves "state help"¹⁸⁵ regulation. The imported traits of Malaysian labour law, as exemplified by the "state-help"¹⁸⁶ rules in the Employment Act, seem to have more civil law than common law elements. But the Employment Act is also developmentalist.

Facets of Asian, coordinated and liberal market economies have been present. The Asian style involving identity, solidarity and communitarianism is recognisable through work in the informal economy. Workers tend to "seek employment in the informal sector... 'out of necessity rather than choice'" via "home-based production," among others.¹⁸⁷ The coordinated approach is demonstrated by import substitution industrialisation while the liberal strategy is represented by export oriented industrialisation.

¹⁷⁴ "Buku Harapan Rebuilding our Nation Fulfilling our Hopes" <http://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf> at 11, 14, 69, 75, 76, 77, 78, 92, 112, 133, 134, 136, 137.

¹⁷⁵ C.K. Tan "Mahathir advisers propose review of Malay privileges to spur economy" *Nikkei Asian Review* (online ed, Japan, 20 August 2018).

¹⁷⁶ See Economic Planning Unit, Prime Minister's Department, Malaysia "Vision 2020, 1991-2020" <<http://www.epu.gov.my/en/development-policies/vision-2020>>.

¹⁷⁷ Tan, above n 175.

¹⁷⁸ Federal Constitution of Malaysia, Part XII <<http://www.wipo.int/edocs/lexdocs/laws/en/my/my063en.pdf>>.

¹⁷⁹ See Sale, above n 12, at ch 3; and see also Jonathan Sale "Exploring the possibility of harmonising ASEAN labour laws for employment growth through evidence-based mixed methods" (paper presented to Symposium on Evidence-Based Law and Practice, The University of Newcastle, 22 May 2017).

¹⁸⁰ See Duve, above n 16.

¹⁸¹ See Yasuda, above n 26, at 19, 20, 22-4, 42.

¹⁸² See Milner, above n 128.

¹⁸³ Sale, above n 12, at ch 2, 3.

¹⁸⁴ See Milner, above n 128.

¹⁸⁵ See Kohler, above n 12.

¹⁸⁶ Ibid.

¹⁸⁷ Shahadan, above n 151, at 57, 75.

These suggest as well that the Malaysian system's legal/economic pluralism and unemployment situation have a relationship which is influenced "by extensive State control guaranteeing a high level of managerial prerogative within the workplace".¹⁸⁸ The election win of the Pakatan Harapan might bear some repercussions to this in the light of its campaign promises. Will labour regulations swing in the opposite direction this time favouring worker rights and voice? While such a paradigm shift remains uncertain, still labour law changes by the State seem to be among the significant "external influences" to "labour market organisation"¹⁸⁹ and work creation in the case of Malaysia. To that extent, change and continuity can be plausibly anticipated.

In order to gain a more holistic perspective about the "internal boundaries"¹⁹⁰ of Malaysian labour laws, however, a closer look at the "self-help"¹⁹¹ rules in the Trade Unions Act and Industrial Relations Act, including their outcomes, is proper. Underemployment rates over time need to be examined, too. Moreover, Malaysian labour laws' epistemological assumptions, mode of legal thinking, sources, purpose, scope, organisation, function, residual law-making and enforcement are among the expanses demanding deeper study.

¹⁸⁸ See Patricia Todd and David Peetz "Malaysian Industrial Relations at Century's Turn: Vision 2020 or a Spectre of the Past?" (paper presented to Conference on Research on work, employment and Industrial Relations 2000, Association of Industrial Relations Academics Australia & New Zealand (AIRAANZ)) <<https://research-repository.griffith.edu.au/bitstream/handle/10072/1136/13951.pdf>>.

¹⁸⁹ See David Marsden *The End of Economic Man? Custom and Competition in Labour Markets* (Wheatsheaf Books Ltd, Great Britain, 1986) at 2-5.

¹⁹⁰ See Baranger, above n 86.

¹⁹¹ See Kohler, above n 12.