





CONSTITUTIONAL PRINCIPLES IN RELATION TO THE RIGHTS OF MIGRANT WORKERS TO SOCIAL SECURITY IN MALAYSIA: ADOPTING THE HUMAN RIGHTS APPROACH



 **Noor Shuhadawati Mohamad Amin^{1*}**

¹Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia.

Email: shuhadaamin@iiu.edu.my

 **Norjihjan Abdul Aziz²**

²Legal Practice Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia.

 **Zuraini Ab Hamid³**



(+ Corresponding author)

ABSTRACT

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Enactment of the social security laws in Malaysia does not take into consideration the Malaysian Constitution's constitutional principles. Likewise, the Constitution itself does not specify the provisioning of social security rights. Nevertheless, two provisions are particularly relevant for the recognition of fundamental rights to the migrant workers in Malaysia: firstly, equality of treatment and secondly, prohibition of slavery and forced labour. The concept of equality as enshrined in Article 8 of the Malaysian Federal Constitution states that all persons are equal before the law. Furthermore, Article 6 of the Constitution prohibits any form of slavery and forced labour. Hence, any form of discrimination, slavery, and forced labour to migrant workers cannot be tolerated. First, this paper aims to examine the basic principles of human rights framework in relation to migrant workers. Next, this paper seeks to analyse these constitutional principles in the light of Malaysian social security laws. Due to the lack of constitutional provisioning on social security in Malaysian Constitution, this paper also examines the experience from the South African Constitution because social security in the country has been constitutionally protected. Lastly, the possibility of implementing the same constitutional principles in Malaysian Constitution will be observed by adopting the human rights approach.

Contribution/ Originality: This study contributes to the existing by examining the basic principles of human rights framework in relation to migrant workers.

1. INTRODUCTION

Social security refers to a system established by the government for the purpose of providing the essential protection to the society, especially to employees in the event of retirement via pension, and work-related accidents or occupational diseases via compensation. They are provided to support and improve the living quality and to compensate for the lack of earning ability after employment accident, invalidity, or retirement. Over time, the objective has expanded to a wider security coverage; it does not merely provide relief to the needy and alleviate poverty as it was used to under the notion of welfare, but it has been extended to cover maternity, housing loan, and education benefit, conforming to the current trend of globalisation. Like any other country in the world, Malaysia's social security system has also undergone various changes since its first introduction during the colonial period. At

present, the social security systems provide coverage to the formal sector that consists of the registered economic activities operating within the legal framework (Ragayah *et al.*, 2002). The employers from the formal sector must conform to the requirements established by the legal social security institutions in Malaysia, particularly the schemes offering benefits for employment injury, invalidity, retirement saving, sickness, and maternity. Like any other developing countries in the world, Malaysia has become home to thousands of migrant workers. The country relies heavily on them to work in various sectors, especially in the last three decades (Abdul *et al.*, 2011). Under the notion of human rights, all human regardless of their citizenship, ethnicity, or gender are entitled to essential human rights and labour protections. As such, migrant workers are also entitled to basic human rights and protections especially due to their vulnerable status. In Malaysian Federal Constitution, there are two fundamental principles deal with migrant workers namely equality of treatment and prohibition against slavery and forced labour. Both provisions used the term “person” instead of “citizen,” guaranteeing that the rights are also extended to all persons including a migrant worker. This paper attempts to explore the concepts of equality of treatment and prohibition of slavery and forced labour as embedded in the Constitution vis-à-vis migrant workers.

2. MALAYSIAN SOCIAL SECURITY LAWS AND MIGRANT WORKERS

2.1. *Migrant Worker in Malaysian Law Context*

Principally, a “migrant worker” is defined as a person who migrates from one country to another to be employed. These terms signify that migrant workers are aliens or non-nationals. Nonetheless, this does not mean that migrant workers should in principle enjoy lesser rights under international law. Migrant workers are also sometimes referred to as the “blue-collar workers” as they are associated with manual labour. This is contrary to the “white-collar workers” which refer to professional jobs performed in the office.

In the Malaysian context, the term “migrant worker” is replaced with “foreign employee” to refer to a non-national employee in the Employment Act 1955 (EA). In the Act, the term “foreign employee” refers to an employee who is not a citizen. Although the statute neglects to use the term “migrant worker” which is more internationally accepted, the terms do not have a significant difference except for the matter of terminology. The definition of both terms still denotes a migrant worker as a non-national. Therefore, the adoption of a different term has no major adverse effect to the rights of this category of people in the country. At present, migrant workers in Malaysia are protected under various laws; the principle holds a law is applicable to migrant workers if the law does not expressly prohibit its application to them.

2.2. *Social Security Protections to Migrant Workers in Malaysia*

Briefly, there are few general employment statutes that govern migrant workers in Malaysia. Firstly, the EA provides basic benefit through minimum terms and conditions to certain group of workers. It offers basic protection such as sickness and maternity benefit to the employees in the country, regardless of their nationality. Secondly, the Industrial Relations Act 1967 provides rules in solving disputes that arise between two parties. Finally, the Trade Unions Act 1959 allows the formation of employees’ unions and monitors the unions’ activities through its provisions. In general, these legislations govern the relationship between the employer and the employee.

Social security law provides protection in the form of benefits against various contingencies such as employment injury, invalidity, retirement, medical care, sickness, and maternity. The essential statutes that provide social security benefits for employment injury are the WCA, which governs the migrant workers, and the ESSA, which governs the local workers. Additionally, EPFA manages the old-age benefit applicable to both national workers and non-national workers.

Under WCA, migrant worker who suffers employment injury in the course of employment is entitled to the benefits provided therein. Unlike the schemes under ESSA for the local workers which are based on insurance program, WCA schemes are employer-liability scheme, an employer is responsible to provide benefits to the

migrant workers. Section 26 of the Act made it obligatory for an employer to insured himself against his liability for employment injury of his worker. There are two significant schemes under WCA namely the Foreign Worker Compensation Scheme (FWCS) and the Foreign Worker Hospitalisation and Surgical Insurance Scheme (FWHSS). The first scheme aim to provide benefits for injuries sustained from an injury that occurred in the course of employment to migrant worker. If the injury results to death, the compensation is handed to the worker’s dependents. The second scheme which was introduced in 2011 provides hospitalisation and medical coverage for diseases and injuries that necessitate admission into government hospitals with total coverage up to RM10, 000 per annum. Invalidity benefit is absence in the WCA as opposed it its counterpart, ESSA which offers the same benefits to the local workers.

EPFA on the other hand regulates the retirement benefits through establishment of a provident fund to the private sector workers including the migrant workers. Although contribution is made compulsory for the local workers earning RM3, 000 and below, the migrant workers may contribute voluntarily. Under specific section in the EPFA, a migrant worker who choose to contribute to the fund may withdraw all amount standing to his credit in a few situations, firstly when the worker passed away, when the worker is mentally or physically incapacitated as a result of his engagement in his employment, or when the worker is leaving the country with no plan of returning. It is statutorily provided that the contribution of the employer for the migrant workers is capped at only RM5 per month although the migrant workers’ contribution is based on percentages.

Table-1. Social security legislations governing migrant workers in Malaysia.

Social security contingencies	Migrant workers
Sickness	EA, Sabah Labour Ordinance 1950, and Sarawak Labour Ordinance 1959
Maternity	EA, Sabah Labour Ordinance 1950, and Sarawak Labour Ordinance 1959
Medical care	WCA
Employment injury	WCA
Invalidity	Not applicable
Survivors' benefits	WCA
Old age	EPFA (Voluntary contribution)

3. HUMAN RIGHTS PRINCIPLES IN MALAYSIAN FEDERAL CONSTITUTION IN RELATION TO MIGRANT WORKERS

3.1. Principle of Equality of Treatment

The notion of equality as embedded in the Federal Constitution (the Constitution) serves as a common basis for the foreign workers’ right to fair employment in Malaysia. This principle is also regarded as the most fundamental human right and described as the “starting point of all liberties” (Salbiah, 2005). Workers, regardless whether they are local or migrant, should enjoy working in an environment of fairness and equality. The migrant workers must also be entitled to various employment rights and benefits which are currently enjoyed by the local workers. Nonetheless, such right in the principle is not absolute, but merely qualified.

In general, the dismissal of a female employee or the subjecting of a female employee to unreasonable detrimental treatment is discriminatory in nature, violating Article 8 (2) of the Constitution (Ashgar and Farheen, 2015). For cases related to pregnant employees, the extent of the equality principle that prohibits gender discrimination is evident. In the case of Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors (2012) 1 MLJ 832, the defendants refused to allow a pregnant woman to be employed as a “Guru Sandaran Tidak Terlatih.” (temporary school teacher.)The decision holds that the discrimination on the basis of pregnancy is a form of gender discrimination.

Conversely, in the private sector, the court approaches cases involving employees differently. For example, the case of *Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681 [2005] 2 has raised legal concerns because the courts adopted a narrow and literal approach to the constitutional issue on gender

discrimination that was dealt with and the provisioning of maternity-related rights in the EA. The appellant in this case was employed as a flight attendant by the respondent under a collective agreement which governed the terms and conditions of her service. Article 2 (3) in the agreement requires the flight attendant to resign upon pregnancy and alternatively, failure to resign gives the respondent the right to terminate the appellant's service. When the appellant resigned, she was terminated by the respondent. She filed a claim in the High Court and appealed to the Court of Appeal, stating that the agreement was void *inter alia*; it is *ultra vires* to Article 8 of the Federal Constitution because it was discriminatory in nature and it is in contravention of Section 37 and 40 of the EA. The claim was dismissed because these sections were considered as irrelevant and they had no application in respect thereof. The Federal Court, in reaffirming the Court of Appeal's decision stated that:

“Unless and until the Employment Act 1955 is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to our Contracts Act 1950 and continue to be valid and enforceable.”

The appellant must prove that the discrimination was done by the State as opposed to another individual or a private entity to successfully invoke Article 8 of the Federal Constitution. In the event the contravention is done by the latter, the remedies should be sought under the private law. In this regard, the interpretation by the courts is regarded to have a “vertical effect” where constitutional law provides remedies only when individual's rights are contravened by a public authority. Nonetheless, Maizatul and Rohaidah opined that the court limits the decision to the dichotomy of private law and public law. The perception is that the right to equality is enforceable only if such contravention of individual rights is caused by the public authority (Maizatul *et al.*, 2011).

The case laws clearly illustrate that the principle of equality of treatment is subject to constitutional limitation. Application of the equality principle in relation to the migrant worker remains unanswered because to date, no case involving migrant workers that invoke Article 8 of the Federal Constitution is reported.

3.2. Prohibition against Slavery and Forced Labour

Another significant principle under the Constitution is the prohibition against slavery and forced labour that are enunciated in Article 6. This is in line with the nation's stance to value human rights and to share its sentiment on condoning any malevolent act involving workers with the global community (Arifin, 2012). ILO states that forced labour, the contemporary form of slavery, happens when “people are compelled to work through the use of violence, pressure, or by more elusive means such as accumulated debt, retaining of identity papers, or threats of denunciation to immigration authorities.”

One main concern involving migrant workers in Malaysia is the current practice of outsourcing the foreign workers through licensed companies. Consequently, the principal employers hold no responsibility over the migrant workers. This practice results from the recent amendments to the EA which institutionalised outsourcing by recognising labour contractors as employers. This amendment also legalised the labour outsourcing agents to remain as the employer of a migrant worker even after the recruited worker started working (Rohani *et al.*, 2014). A report by the Malaysian Trade Union Congress showed complaints by the migrant workers on *inter alia*, contract fraud and debt bondage by their employment agencies which are tantamount to forced labour. In several instances, the migrant workers were treated as commodity, sold from one agent to another (Mahalingam, 2016).

Outsourcing companies are appointed by the government to facilitate the recruitment and management of migrant workers in this country. They should abide by the conditions stipulated by the Ministry of Human Affairs. In the event of failure to comply with the recruitment guidelines, stricter punishment should be given to these outsourcing companies. This is particularly important when the issue of migrant workers' forced labour is involved.

4. CONSTITUTIONALISING SOCIAL SECURITY RIGHTS: THE SOUTH AFRICAN EXPERIENCE

Despite acknowledging other essential rights and freedoms, Malaysia's supreme law does not currently recognise the social security rights. Furthermore, the government has not domesticated the standards of international instruments on the right to social security, making it impossible for such rights to be invoked in the domestic courts. To that end, experience from the South African Constitution serves as a benchmark in this study because social security in the country has been constitutionally protected.

South Africa is a nation traditionally built upon apartheid system (Welsh, 2009). The system has significantly affected the economic and social growth of the country's population. Both internal and external migration are regarded as long-standing features in the employment market of the country. As such, it is crucial to emphasise on the provisioning of social security rights in the South African Constitution. The implementation of social security rights in the Republic of South Africa is evident by virtue of Section 27 of the Republic's Constitution. Three fundamental rights to be accessed by everyone are outlined, namely (i) health care including reproductive health care, (ii) sufficient food and water, and (iii) the right to social security including appropriate social assistance in the event they are unable to support themselves and their dependents. Additionally, the Constitution also expressly stated that no one may be refused emergency medical treatment. To ensure that all of these rights are attainable, the government holds the responsibility to take reasonable legislative measure and other measures within its available resources.

The provisioning of these rights generally serves to circumvent destitutions. As discussed earlier, social security is evidently different from social assistance. The provision clearly mentioned that the access to such right is granted to everyone; in reality this is not necessarily the case. An example can be drawn from the case of *Khosa & others v. the Minister of Social Development CCT 12/03 and other* which involved Mozambican nationals who were granted with the permanent resident status in South Africa. The court distinguished permanent residents from temporary and illegal nationals as social insurance and social assistance are only rendered to the former.

At this juncture, the paramount issue in dealing with such case is regarding the costs of extending social security to all. The court remarked that social benefits are not made available to all, regardless of their immigration status, due to compelling reasons (Adila *et al.*, 2007). Although financial conditions may impede the right to be granted to all, the inclusion of such right in the constitution itself marks the recognition of social security as a basic human right. The Court held that *inter alia*, the Constitution gave the right to access social security not merely for the nationals, but to everyone including those residing legally in the country.

5. MIGRANT WORKER'S RIGHTS TO SOCIAL SECURITY IN MALAYSIA: ADOPTING BASIC PRINCIPLE OF HUMAN RIGHTS

5.1. Right to Social Protection

The right to social security is one of the utmost human rights propounded in the Universal Declaration of Human Rights 1948 (UDHR). In Article 2 of the UDHR, it provides:

"Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality."

In simple explanation, the signatories agree that a society holds the responsibility to assist a person within that society not only to develop but also use the advantages of the given benefits to the utmost in terms of culture, work, and social welfare offered to them in their state.

Social protection bears a resemblance to social security; these two terms are sometimes used interchangeably even though they are different in nature. In general, social protection is related to protecting and helping a group of people who are poor and vulnerable. They consist of (i) children, (ii) women, (iii) old people, (iv) disabled people, (v)

the displaced, (vi) the unemployed, (vii) people with illness, (viii) people who are affected by general poverty, and (ix) people who suffer from social exclusion. Social protection measures can include (i) cash transfer schemes, (ii) public work programmes, (iii) school stipends and lunches, (iv) social care services, (v) unemployment or disability benefits, (vi) social pensions, (vii) food vouchers and food transfers, (viii) user fee exemptions for healthcare or education, and (ix) subsidised services.

Dekker et al. confirms that the social security is a smaller concept than social protection. These two concepts are different because social protection represents a common system of basic social support that has no relation to the regular employment relationship propagated by the concept of social security. Plus, social protection is based on the principle that society as a whole must provide help for its weaker members (Dekker *et al.*, 2000). Hence, social protection is defined to include not only the statutory social security schemes, but also private or non-statutory schemes that have similar objectives such as mutual benefit societies and occupational pension schemes.

Social protection is described by the United Nations as preventing, managing, and overcoming situations that adversely affect people's wellbeing. This definition however is very general in nature as it fails to include the responsibility of state to provide the protection and it does not specify the group of people that is entitled to such protection. The right of social protection has not been specifically addressed in the international instruments. This is because the reference of this right has to be made in the light of the right to social security, expressed in article 22 of UDHR and article 9 of the International Covenant on Economic, Social, and Cultural Rights 1976 (ICESCR). Article 9 of ICESCR briefly stated its acknowledgement of social security in its provision which reads as follow:

"The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance."

The provision above signifies the intention of the ICESCR to include social insurance as part of social security. Normally social insurance takes in the form of contribution made to the employment injury scheme or retirement benefits scheme.

At this juncture, it should be noted that the right to social security is interrelated and interdependent with the abovementioned constitutional principles - right to equality of treatment and prohibition against servitude and forced labour, giving rise to other human rights specifically linked to migrant workers. These two principles represent the fundamental human rights principles which conceptually, should guarantee the migrant workers various benefits under social security laws in particular equal benefits to employment injury scheme currently enjoyed by the local workers, invalidity benefit, old-age benefit and right to protection of the family.

5.2. Constitutional Principles and Migrant Worker's Right to Social Security

However, in reality, this is not the case. Although right to equality and prohibition against servitude and forced labour are entrenched in the Malaysian Constitution, their implementations are limited in nature. This is because in reality, the migrant workers enjoy less protection with regard to social security particularly under WCA and EPFA. WCA provides low benefit protection to the migrant workers while the local workers enjoy better protection under the ESSA. The discrepancy between the two laws is apparent as WCA excludes a number of benefits which are available to the local workers under ESSA to the migrant workers. The contribution for retirement benefit under EPFA is not mandatory for migrant worker.

Firstly, the employment injury schemes are observed to be fragmented into two different legislations, namely WCA and ESSA. The former covers migrant workers and other manual labourers while the latter is specifically designed to protect local workers. The fragmentation of the employment injury schemes available under ESSA and WCA is subjected to three differences, namely the mechanism used in the payment of employment injury compensation to the employees concerned, the administrative body or institution responsible to affect the payment of such compensation, and the schemes available under both legislations. The glaring difference between the two schemes would be the low amount of benefits offered to the migrant workers compared to the schemes offered to

the local workers. The WCA failed to respond to the current economic challenges because it has not undergone any amendment for almost two decades. Further, the invalidity scheme offered to the local workers under ESSA was not included in the WCA. This scheme is designed to cater to the needs of an invalid person and it provides a number of significant benefits – invalidity pension, invalidity grant, and survivor’s pension – upon a person, having satisfied the qualifying conditions.

Secondly, the old-age benefit is not made mandatory to the migrant workers. Several parties may argue that through the insertion of the provisions, particularly in Part VIIA in EPFA, the position of the migrant workers in Malaysia is still acknowledged by the country. Nonetheless, it should be noted that such position does not stand on an equal footing with the local employees because the migrant worker is not obligated to contribute to the scheme because this is optional upon them. Even if they choose to contribute, the share of the employer will be capped at RM5 only. In the event the migrant worker chooses to contribute, the low contribution on the part of employer discourage the migrant worker from contributing to the said scheme. This is significantly different to the local employees where the share of employer’s contribution based on the employee’s salary is 12% while the local employee’s share is 11%. Moreover, the contribution made by the migrant worker is subject to certain limitations such as the non-payment of dividend and migrant worker can only withdraw the money standing to his or her credit before he or she leaves the country. This means that no option is given to the migrant worker who wishes to withdraw the money for medical financing purpose.

6. CONCLUSION

The right to equality, as guaranteed under Article 8 of the Constitution, is not absolute from the social security law perspective. The law differentiates between the national and non-national employees in the case of employment injury benefits. In fact, few other benefits such as invalidity under ESSA and compulsory contribution for provident fund under EPFA are not made available to the migrant workers. While financial conditions may serve as a major hindrance for the inclusion of social security in Malaysia’s Constitution, emulating the same constitutional principle in Malaysia may be possible to a certain extent. For example, such rights could be granted to the group of workers governed under EA, WCA, ESSA, and EPFA. Nevertheless, social assistance to all should be limited to providing basic amenities only. Such assistance can be very costly and it incurs high expenditure, unsuitable for a developing country like Malaysia.

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