Limitations of Social Security Laws and Policies *Vis-A-Vis* Migrant Workers in Malaysia

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Abstract

On the basis of the standards established by the international legal regimes and the principle of equality of treatment which is enshrined in the Federal Constitution, it is argued that the social security laws enforced in Malaysia are discriminatory vis-a-vis migrant workers. This is because the country has two different laws governing national workers and migrant workers in the case of employment injury. Under these laws, the benefits provided to migrant workers are inadequate and inequitable because they are inferior to the benefits offered to national workers. Furthermore, the invalidity benefit which is received by national workers is not made available to migrant workers. The old-age benefit introduced by the national provident fund is unfair to migrant workers because their contribution is not made compulsory and their employer's contribution is very low as compared to the benefit enjoyed by national workers. Additionally, the portability of the social security rights from Malaysia to migrant workers' home country fail to be enforced due to lack of coordination through bilateral and multilateral agreements between countries. Hence, this research seeks to analyse the employment injury schemes under the Employees' Social Security Act 1969 (ESSA) available to national workers and workmen compensation scheme under the Workmen's Compensation Act 1952 (WCA) available to migrant workers. Further, this research also attempts to investigate the savings for retirement age provisions under the Employees' Provident Fund Act 1991 (EPFA) specifically for migrant workers and other policy issues such as portability of social security rights and overlapping of ministerial responsibilities. These shortcomings make a strong case for extending social security rights to migrant workers in Malaysia on the basis of equality.

Keywords: Social security, limitations, migrant workers

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I. INTRODUCTION

To earn a living, every person must work. A person may go to the extent of searching for employment outside his or her home country. This is evident from the International Labour Organisation (ILO), migrant workers account for 150.3 million of the nearly 232 million international migrants worldwide.[1] The number is inclusive of their families who make up approximately 90% of the total international migrants. Migrant workers often receive a lukewarm reception from the society of the country they migrate to and sometimes, they are treated differently from the locals mainly because of their discernible status.[2] Migrant workers are normally excluded from enjoying various rights granted to the national society and to a certain extent they suffer from abuse and exploitation.[3] A minority group in the society, migrant workers in most countries normally work in hazardous and dangerous environments that locals shun. With such risky conditions that migrants face on a daily basis, certain types of protections are required to safeguard them from events such as occupational accidents, diseases, or death. Retirement savings is also equally important to avoid poverty in old age. Thus, apart from addressing the needs of national employees, a social security system should also be able to respond to the needs of migrant workers.

The definition of migrant workers varies between different international instruments. The most authoritative definition of a migrant worker can be found in the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as "a person who is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national"[4] 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.[5] 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.[6] In the Malaysian context, the term 'migrant worker' is replaced with 'foreign employee' to refer to a non-national employee under the Employment Act

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1 ILO, ILO Global Estimates on Migrant Workers: Results and Methodology (2015), p. 5.

2 Hamzah Abdul Rahman, Chen Wang, Lincoln C. Wood, Shu Fung Low, "Negative impact induced by foreign workers: Evidence in Malaysian construction sector", *Habitat International,* 2012, Vol. , pp 433-443· October 2012

3 Leela Chelvarajah, March 2004, "*Perspective of Foreign Workers and Their Rights and Employment in Malaysia,"* The Malaysian Bar, http://www.malaysianbar.org.my/human_rights/perspective_of_foreign_workers_and_their_rights_and_employment_in_malaysia.html. Site accessed on 1 September 2017.

4 ILO Convention No. 143 Migrant Workers (Supplementary Provisions) Article 11 (1) states - For the purpose of this Part of this Convention, a the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.

5 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Art 2 (1) reads - For the purposes of the present Convention, the term 'migrant worker' refers to a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national.

6 The expatriate is excluded from the discussion as they are normally not subject to discrimination and exploitation by the countries they choose to live in.

1955 (EA).[7] In the EA, the term 'foreign employee' refers to an employee who is not a citizen.[8] Although the statute neglects to use the term 'migrant worker' which is more internationally accepted, these terms are not significantly different. 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.[9]

Abraham Epstein is believed to be the first person who introduced the term 'social security to the world. Before the term was introduced, the term 'social insurance' and 'economic security' are used to refer to social security. Epstein explained that social insurance relates to actuarial insurance; it involves compulsory savings without government contributions. Conversely, economic security which is also known as social protection is only concerned with promoting the society's welfare, neglecting the improvement in labour's condition. Based on the above explanations, he insisted on using the term 'social security' because he could differentiate between social insurance as worked out by Bismarck in Germany and the larger concept of social protection which was introduced in England with the aim to alleviate poverty and the vulnerability of certain groups of people.[10] In his perspective, social security refers to a concept of security which includes not only the welfare of the society, but also the circumstances surrounding labour. Social security is one of the few rights offered to national workers. Despite the large number of global migrant workers, the current labour law and social security framework in many parts of the world are incapable of responding decently to the present multifaceted challenges involving migrant workers. The lack of a holistic and integrated approach has contributed to numerous legal issues associated with social protection even though the issue of social security to migrant workers is governed by well-established international standards. Article 8 of the Federal Constitution guarantees the equality of treatment to everyone.

Furthermore, social security is one of the vital human rights as enumerated in the Universal Declaration of Human Rights of 1948 (UDHR). Article 22 of the UDHR expressly states that every person has the right to social security. The key focus in the provision is that such a right is guaranteed to every person regardless whether the person is a citizen or not. Thus, social security is a right to be enjoyed by migrants as well. Although Malaysia is not a signatory to the UDHR, the country has ratified a few of the ILO's conventions related to social security. Concern arises because Malaysia is still providing inferior protection to migrant workers; they are only protected minimally in terms of employment injury and old-age benefit, whereas invalidity benefit is only

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7 Employment Act 1955 (Act 265 of 1955) aims at protecting workers from exploitation by providing basic benefit such as maternity benefit, termination benefit, entitlement to weekly rest day, sick and annual leave. Most of the benefits however do not apply to foreign domestic workers except in terms of payment of wages and termination notice. In Sabah, the corresponding statute is Sabah Labour Ordinance 1950 (Cap 67) and for Sarawak is Sarawak Labour Ordinance 1959 (Cap 76).

8 See Interpretation in S 2 of EA, which provides the definition of 'foreign employer'.

9 Madanjit Singh a/l Madanjit Singh a/l Jeswant Singh, Interview by Author, Putrajaya, Federal Territory of Putrajaya, 2 October 2015.

10 S. Mini, "Social Security of Labour in the New Indian Economy", (Ph.D Thesis, Cochin University of Science and Technology, 2010), 40.

provided to national workers. Another obstacle impeding the development of social security laws in Malaysia is related to the non-transferability of social security benefits across borders. On a different note, various labour matters concerning migrant workers are handled by different ministries, which serve as a hindrance to providing decent social security protection to migrant workers. Hence, in order to align the country's social security legislations to the international legal framework, several fundamental issues need to first be addressed.

The World Bank has developed a three pillar framework of social security protection. The first pillar is social assistance, non-contributory scheme financed from tax revenues. The scheme is basically targeted at the needy and poor. The second pillar is social insurance, a contributory scheme by individuals for future income security. This scheme normally applies within the employment sector involving employer-employee contribution to a certain fund. The third pillar is individual private insurance, a voluntary contribution by individual which offers additional coverage to the existing contributory scheme. Generally, Malaysia has a three- pillar framework. The first pillar is a limited social welfare programme providing social assistance to the needy and disabled, administered by the Department of Social Welfare. The second pillar caters for the private sector employees offering various types of benefits for selected contingencies. The third pillar also known as the individual private insurance is showing positive development in Malaysia making medical insurance the fastest growing segment in general insurance market. Although it is voluntary in nature, many employees are keen to purchase premiums for additional healthcare coverage on top of the contribution made through the second pillar social security schemes. The following table briefly explained the types of contingencies and the governing statutes covering national and migrant workers.

Table 1 Social Security Legislations for National Workers and Migrant Workers in Malaysia

Social Security Contingencies	**National Workers**	**Migrant Workers**
Sickness	EA, Sabah Labour Ordinance 1950, and Sarawak Labour Ordinance 1959.	EA, Sabah Labour Ordinance 1950, and Sarawak Labour Ordinance 1959.
Maternity	EA, Sabah Labour Ordinance 1950, and Sarawak Labour Ordinance 1959.	EA, Sabah Labour Ordinance 1950, and Sarawak Labour Ordinance 1959.
Medical care	ESSA	WCA
Employment injury	ESSA	WCA
Invalidity	ESSA	Not applicable
Survivors' benefits	ESSA	WCA
Old age	EPFA	EPFA (voluntary contribution)

II. AN OVERVIEW OF SOCIAL SECURITY LAWS AND POLICIES IN MALAYSIA

Historically, the earliest social security system in Malaysia was introduced through the workmen's compensation scheme. The scheme was established in 1929 by the British during the colonial era. Four years later, in 1933, sickness and maternity schemes under employer's liability were introduced exclusively for the plantation workers.[11] From thereon, the workmen's compensation scheme has developed gradually, providing benefits and coverage to a larger population. The workmen's compensation was later legislated after F.M. Ordinance No. 85 was passed in 1952. Through several revisions, it was subsequently published as an Act of Parliament on 11 May 1982; the Act is known today as WCA.[12] Sabah and Sarawak are governed by the same statute as of 1 June 1981. Due to the rapid economic growth in Malaysia in the 1970s, the government realised that there was a need to develop a mechanism to provide social security protection to national workers. ESSA was initially implemented in different phases throughout the country. A pilot project was first conducted in Johor Bahru on 1 October 1971, two years after the law was passed.[13] Both schemes were progressively extended to the whole of Peninsular Malaysia and to certain areas in Sabah and Sarawak. Later, on 1 January 1987, these schemes were implemented to the whole Sabah and Sarawak.[14] These schemes were administered under the Social Security Organisation (SOCSO) which was established in 1971 by virtue of the Act.[15] SOCSO was initially under the direct control of Ministry of Human Resource (MoHR). In 1979, SOCSO was vested with a statutory status by virtue of the amendment to ESSA. It became a statutory body in 1985.[16] The organisation was mandated to administer and enforce the law and the attached regulations. Prior to 1993, migrant workers in Malaysia enjoyed the same protection for employment injury

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11 Midgley, J, *Social Security, Equality and Third World*, John Wiley & Son, 1984, pp. 144.

12 The Ordinance has gone through a number of amendments in the past; Workmen's Compensation (Amendment) Ordinance 1956 (Ord. 31/1956), Workmen's Compensation (Amendment) Act 1960 (Act 25/1960), Workmen's Compensation (Amendment) Act 1964 (Act 33/1964), Workmen's Compensation (Amendment) 1976 (Act A361) and Workmen's Compensation (Amendment) Act 1996 (Act A947). It should be noted that prior to the enactment of the Act, different Ordinances exist in different states. Section 44 of WCA repealed all of these Ordinances.

13 In Chapter XXIV Community Services and General Administration, p. 421, it states that - 1439. Social security The Social Security Organisation (SOCSO) was established in January, 1971 to implement and administer the Employees' Social Security Act, 1969. The first employment injury insurance scheme was introduced in Johor Bahru in 1971 as a pilot project. An invalidity pension scheme was introduced in 1974. By the end of 1975, these schemes covered 646,000 employees in Peninsular Malaysia. In Sabah and Sarawak, the two schemes were in operation in Kota Kinabalu and Kuching covering only 27,000 employees. 1440. About 112,000 people benefitted from the schemes during the period. Cash and medical benefits which were provided amounted to $2.8 million and $1.6 million respectively. Medical care was provided through a network of government hospitals and approved private hospitals and clinics.

14 Row, F, *Law and Practice of Social Security (SOCSO) in Malaysia*, ILBS, 1988, p. 7.

15 S. 8 (1) and (2) of ESSA reads - (1) The Scheme of Social Security embodied under the Act shall be administered by the Social Security Organisation in accordance with this Act; (2) The general direction and superintendence of the Organisation shall vest in the Board which shall be established in accordance with this Act.

16 In the beginning, SOCSO was a department within the Ministry of Human Resource. Through amendment to ESSA, the Employees Social Security (Amendment) Act 1979 bestowed statutory status to SOCSO making it a statutory body. SOCSO however is still functioning as a unit under the Ministry of Human Resource.

and invalidity under the schemes offered by ESSA. Starting from 1993, policymakers excluded the migrant workers from these schemes due to a huge influx of documented and undocumented migrant workers into Malaysia.[17] The authority introduced several policies with the aim of reducing the number of migrant workers in the country because illegal migration to Malaysia is seen as a national security issue.

ESSA, a form of social insurance programme was introduced to provide social security protection to national employees employed under a contract of service or apprenticeship against the contingencies of industrial accident, occupational disease, and invalidity. These benefits were offered under two schemes, namely the employment injury scheme and the invalidity pension scheme. To receive benefits under these schemes, an employee must be registered with SOCSO. Registration is imposed upon employers and employees as long as they fall within the ambit of ESSA's definition.

WCA, on the other hand, provides coverage to migrant workers for employment injury suffered in the course of employment provided that their monthly wage is not higher than RM500. Migrant manual workers are an exception, in that they will still be covered under the law regardless of their wage level. It should be noted that in the First Schedule to the EPFA, several categories of migrant workers are excluded either directly or indirectly.[18] Under the employer-liability scheme, an employer is obliged to provide benefits to its employees in the event of the occurrence of particular contingencies such as employment injury or termination of employment. This scheme is contrary to the insurance programmes that pool the risks of all contributing employers. In this employer-liability scheme, individual employers are fully responsible for their employees and purchase insurance to cover their liability. Under section 26, the employer is compelled to insure against his liability for employment injury of his worker. The Foreign Worker Compensation Scheme (FWCS) was established by the MoHR for this purpose with the aim to primarily protect the migrant workers' welfare and social security rights. The scheme offers benefits for injuries sustained from accidents and occupational diseases that occurred in the course of employment to migrant workers with valid employment status. If the accident results in death, the compensation is passed on to the dependents. Another significant milestone is the Foreign Worker Hospitalisation and Surgical Insurance Scheme (FWHSS) for migrant workers which was introduced and is enforced by the Ministry of Health (MOH). This mandatory scheme which came into effect in January 2011 provides hospitalisation and medical coverage of up to RM10,000 per annum for all illnesses and injuries that require admission into the government hospitals.

The stark contrast between ESSA and WCA can be seen from the wordings of section 31 of ESSA and section 41 of WCA. Section 31 of ESSA clearly states that an insured person or his dependents shall not be entitled to receive any compensation or damages under any other law for any employment injury suffered by the insured employee. From the wording of the section, the word 'any other law' also refers to common law. Once a

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[17] Ragayah Haji Mat Zin, Lee, Hwok Aun and Saaidah Abdul Rahman, "Social Protection in Malaysia", Social protection in Southeast & South Asia, edited by Erfried Adam, Michael von Hauff, & Marei John, Friedrich Ebert Stiftung, 2002, p. 133.

[18] See the First Schedule to the Act, read with the definition of "employee" in section 2.

person is an insured person under ESSA, section 31 and section 42[19] constitutes a complete bar to any claim against his employer under common law.[20] In the case of *Ramli Samad v Pacific & Orient Insurance Co Sdn Bhd,*[21] the court held that section 31 of ESSA has retrospective effect. In this sense, the employee is barred from suing his employer or his co-employee although at the time when the accident occurred, the prevailing section 31 was the version prior to the relevant amendment. Although section 31 of ESSA clearly states the limit of liability for the employer and his servant, it should be noted that the proviso to this Act allows for claims arising from motor vehicle accidents where the employer or his servant is required to be insured against third party risks[22] as stated in Part IV of the Road Transport Act 1987.[23]

On the contrary, section 41 of WCA states that a workman has the privilege to either claim for compensation for any injury arising out of or in the course of employment or damages under common law. The law explicitly states that the workman does not have the right to compensation for the injury should he wish to institute a civil law suit for damages concerning the injury in any court against his employer. Similarly, the law does not confer him the right to compensation once he has recovered damages for that injury from his employer in any court. Nevertheless, the court has adopted a liberal approach in interpreting the provision. The common law claims for compensation are provided in the Civil Law Act 1956 (CLA). In the case of *Tai Siat Fah*,[24] the widow of a deceased employee who received compensation under WCA was not barred from making a dependency claim under CLA by virtue of section 20(a) of WCA.[25] In relation to employment injury, the claims in CLA are important to the migrant workers by virtue of section 4 (b) of the WCA. It states that injury arising out of or in the course of employment also includes accidents that takes place while a workman is travelling as a passenger by any vehicle to or from his workplace with the express or implied permission by his employer although he is not obligated to travel by such means.[26] It is safe to conclude that WCA provides an alternative avenue for migrant workers to be compensated for employment injury or occupational disease under common law.

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19 S. 42 was repealed by Act A981. Before the repeal, this section states that when a person is entitled to any of the benefits provided under the Act, he shall not be entitled to receive any similar benefits admissible under the provisions of any other written law.

20 As per Hashim Yeop Sani J.

21 (2010) 1 CLJ 970. The amendment to section 31 preventing a claim to be made under common law came into effect in 1985 via Employees' Social Security (Amendment) Act 1979 (Act A450).

22 Under s. 90 (1) of the Road Transport Act 1987, it provides for motor vehicle users to be insured against third party risks and reads as follows - Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle, unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complied with the requirements of this Part.

23 S. 31 of the principal Act was amended in 1997 by substituting for the full stop a colon and inserting thereafter the following proviso - Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks - under Part IV of the Road Transport Act 1987 (Act 333).

24 *Tan Siat Fiah (The Lawful widow and dependants of Chang Keng Looly, deceased) & 4 Ors v The Lawful Personal Representatives of Badrul Hisham bin Hashim* [1995] 2 CLJ 649.

25 See also the case of *Chai Koi v Wong Yit Chen* [1964] MLJ 441.

26 See s. 4 (b) of WCA.

A Provident fund is another type of social security protection. It is a compulsory collective-savings scheme that is publicly administered. It is financed by the contributions made by the employees and the employers and from the investment made using the fund, the Employees Provident Fund (EPF) scheme provides retirement benefits to the private sector employees and the non-pensionable public sector employees. The framework of the fund is frequently amended and developed. Contribution to the fund is not made mandatory for migrant workers since the revocation of migrant workers' mandatory contribution takes effect beginning 2001.[27] A migrant worker who is a member of the fund or his or her dependant may withdraw all amounts standing to his credit in several situations: when the member of the fund passed away, when the member of the fund is incapacitated either physically or mentally as a result of engaging in employment, or when the member of the fund is about to leave the country with no intention of returning.

III. SHORTCOMINGS OF SOCIAL SECURITY LAWS AND POLICIES *VIS-À-VIS* MIGRANT WORKERS IN MALAYSIA

In June 2011, the Committee on the Application Standards of ILO (ILO Committee)[28] made a follow up with the Malaysian government regarding the equal treatment of migrant workers for industrial accident compensation.[29] As discussed above, both Peninsular Malaysia and the state of Sarawak (in 1957 and 1964 respectively) are signatories to the Equality of Treatment (Accident Compensation) Convention 1925[30]. ILO Committee claimed that the current Malaysian social security system has not conformed with the standards provided in the Convention as the system provides inequality of treatment to the migrant workers. Article 1 (2) of the Convention states that:

> This equality of treatment shall be guaranteed to foreign workers and their dependents without any condition as to residence. With regard to the payments

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27 Prema-Chandra Athukorala and Evelyn S. Devadason, "Foreign Labour in Malaysian Manufacturing: Trends, Patterns and Implications for Domestic Wages," Trade and Employment in Asia, edited by Nina Khor and Devashish Mitra, Routledge, 2013, p. 251.

28 Committee of Experts will prepare an annual report and submit it to International Labour Conference in June which is later examined by the Conference Committee on the Application of Standards. This Conference is made up of government, employer, and worker delegates who will discuss a number of observations selected in a tripartite meeting. The governments are invited to respond to the observations addressed to in the tripartite meeting and provide information on the issues in concern. In many occasions, the Conference Committee will derive at a conclusion recommending the relevant governments to take measures to solve the issues or invite ILO technical assistance to rectify the problems. The discussions and conclusions examined are published in the report. Conference Committee on the Application of Standards, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm viewed on 30 June 2015.

29 In 2008 observation, the Committee called for special efforts from the Malaysian government to resolve administrative and practical difficulties hindering equality of treatment to the migrant workers who suffer from the employment injury. However, the response received was shocking as the government reiterated its position that the WCA is suitable and practical for managing issues on compensation for industrial accidents involving the migrant workers in Malaysia. See the Observation (CEACR) - adopted 2010, published 100th ILC session (2011) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:2327314,en viewed on 1 July 2015.

30 Convention No. 19, 1925.

> which a Member or its nationals would have to make outside that Member's territory in the application of this principle, the measures to be adopted shall be regulated, if necessary, by special arrangements between the Members concerned.[31]

This inequality arises from the fact that the existing national legislation transferred the migrant workers who are employed in Malaysia for up to or less than five years from the scheme specified under ESSA to the scheme under WCA. Notably, the scheme under ESSA provides for periodical payments to the employees as a result of industrial accidents, whereas the scheme under WCA offers a lump sum payment of an expressively lower amount. Thus, with the observation made by the ILO Committee in its 100th session which took place in June 2011, the ILO Committee urged the Malaysian government to take action to bring national law and practice into conformity with Article 1 of the Convention.

It is fundamental for Malaysia to honour the automatic system of reciprocity established by the Convention between the ratifying countries. To date, the country benefits from the technical assistance rendered by the ILO in order to resolve various administrative problems through the special arrangements made with the labour-supplying countries. This is in accordance with Article 4 of the Convention which reads:

> The Members which ratify this Convention further undertake to afford each other mutual assistance with a view to facilitating the application of the Convention and the execution of their respective laws and regulations on workmen's compensation and to inform the International Labour Office, which shall inform the other Members concerned, of any modifications in the laws and regulations in force on workmen's compensation.[32]

Replying to the follow-up two months later, the Malaysian government highlighted that the MoHR has set up a technical committee which includes all stakeholders to formulate the right mechanism and system to respond to this issue. Three options were suggested: extending ESSA coverage to migrant workers, creating a special scheme for migrant workers under ESSA, or reviewing the level of benefits provided by WCA so that the benefits are equivalent to those offered under ESSA.

Following from this, the ILO Committee insisted that migrant workers should benefit from similar protections accorded to the local workers. Thereafter, the Malaysian government informed the ILO Committee that the MoHR was presently steering an actuarial study on the three options suggested. The stakeholders will be continuously engaged for consultations before choosing the most appropriate option. In response to this reply by the Malaysian government, the ILO Committee hoped that the study will be completed soon and the choice made by the government through the ongoing consultations with all stakeholders will embody the standards laid down in the Convention. The Malaysian government has to ensure that the choice made is consistent

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31 Art 1 (2) of Convention No. 19, 1925.

32 Art 4 of Convention No. 19, 1925.

with the Convention before its implementation.[33] Although the Malaysian government was requested to reply in detail to the comments made, the ILO Committee has yet to receive any report from the government, a report that was due in 2013. Therefore, the ILO Committee reiterates its prior observation, urging Malaysia to take necessary steps in addressing the issue.[34]

A. Fragmentation of the Employment Injury Schemes

Fragmentation of social security schemes refer to the presence of multiple social security schemes providing coverage to a similar or diverse groups of people and providing the same or different kinds of benefit for similar occurrences or contingencies. Fragmentation also refers to different heights of contributions, different eligibility requirements for social security benefits, different methods for collecting contributions from the members of the schemes, and different investment strategies.[35] The fragmentation of social security laws can be seen in a number of statutes in Malaysia. One apparent example of such fragmentation is seen in the pension system which lacks a unified structure applicable to public and private sectors; the two sectors are covered by two different laws. Furthermore, several schemes with different designs are targeted to different group of workers.[36] 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 national workers. For the purpose of this research, 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 effect the payment of such compensation, and the absence of an invalidity scheme for migrant workers under WCA.

Firstly, the workmen's compensation scheme governing migrant workers is a system based on the employer's liability; the employer is held solely responsible for the employment injury suffered by a migrant worker. In fact, the law makes it mandatory for an employer to insure himself against the liability that he may incur under WCA to any workman employed by him. Conversely, a different mechanism is employed in relation to national employees in which compulsory contributions of both employer and employee are required. ESSA explains that the contributions payable with regards to an employee

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[33] Report of the Committee of Experts on the Application of Conventions and Recommendations, (Articles 19, 22, and 35 of the Constitution). Third item on the agenda: information and reports on the application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Office, Geneva, 2013 at 774 – 775. Please note that MOHR is still in the midst of preparing the actuarial study and details of such has yet to be revealed to the public.

[34] Application of International Labour Standards 2014 (I), International Labour Conference, 103rd Session, Report of the Committee of Experts on the Application of Conventions and Recommendation Report III (Part 1A) (Articles 19, 22, and 35 of the Constitution). Third item on the agenda: information and reports on the application of Conventions and Recommendations 2014 at 522.

[35] Tulia Ackson, "Social Security Law and Policy Reform in Tanzania with Reflection on South African Experience," (Ph.D thesis, University of Cape Town, 2007) at 52.

[36] Mukul G. Asher, "Malaysia: Pension System Overview and Reform Directions," in Pension System and Old-Age Income Support in East and Southeast Asia, Overview and Reform Directions, Asian Development Bank, 2011.

refers to the contribution comprising both the parts of the employer and the employee that must be paid to SOCSO.[37] The contributions are divided into two categories: the first category consists of invalidity and employment injury, whereas the second category comprises of employment injury only.[38] The amount of contributions payable by both the employer and employee for each category is different. Contributions for the first category are shared by the employer and the employee in a ratio determined by the Act, whereas the contributions under the second category depend solely on the employer.[39] Under the second category, the contributions payable by or on behalf of the employees insure only against the contingency of employment injury. The rate of contribution is 1.25% of the employee's monthly wage and this is borne solely by the employer. All employees who have attained the age of 60 years old are required to contribute under this category. The recent amendment to the Act edicts that an employee who has attained the age of 55 years old but has made no contribution before attaining the age is required to contribute under this category as well. In this sense, the contribution refers to the sum of money payable to SOCSO by the principal employer in respect of the insured employee. Although an employer is liable for the injury suffered by a migrant worker under WCA, the employer must insure his liability first before a migrant worker can receive medical treatment for such injury. Moreover, the migrant worker must insure himself for any hospitalisation and surgical treatment under FWHSS. The situation is different for an injured national worker who can automatically receive medical treatment at any SOCSO panel clinic, regardless whether the worker is insured or not.

Secondly, a glaring difference can be seen from the administrative structure of the compensation. WCA is administered by the employers and the payment of such compensation is normally done through the appointed insurance companies within the meaning of the Insurance Act 1963. Unlike WCA, the similar scheme governing the national workers as specified under ESSA is administered by SOCSO as provided under section 58 of the Act. For the purposes of this Act, the social security fund is held and administered by SOCSO. To ensure the smooth running of the administrative process, a Board is established by virtue of section 59B to perform the functions in accordance with the Act. Based on this provision, the Board comprises of representatives from different ministries. They are Ministry of Human Resource, Ministry of Finance, representatives of the employers and experts of social security. The Board must always act in the best interest of the employees. On the contrary, since different method was adopted for

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37 S. 6 (1) of ESSA reads as follow – The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Organisation.

The deduction from the employee's salary for the purpose of contribution to SOCSO is in line with s 24 of EA which is lawful for employers to make deductions which are authorized by any other written law. See s 24 (2) (d) of EA.

38 S. 6 (2) of ESSA states the two types of contributions as follows - (a) the contributions of the first category, being the contributions payable by or on behalf of the employees insured against the contingencies of invalidity and employment injury; and (b) the contributions of the second category, being the contributions payable by or on behalf of employees insured only against the contingency of employment injury.

39 See ss. 6 (4) and 6 (5) of ESSA. The rate and amount are tabulated in the Third Schedule of the Act according to a scale comprising of 34 wage groups beginning with wage up to RM30 until wages exceeding RM4000.

migrant workers' employment injury scheme, the establishment of a Board is deemed unnecessary. Thus, migrant workers depend on their employers to claim for compensation in case employment injury arises. Administrative aspect of the scheme is handled by the MoHR who is also burdened with various functions such as enforcement of labour policies and legislations, providing employment services to job-seekers and performing administrative functions. As SOCSO is a more organised structure, the national workers may easily channel any issues concerning the employment injury scheme to SOCSO. On the contrary, if the migrant workers face any issue, they are at the mercy of their employer or the labour department that they may not even be aware of.

Finally, the compensation scheme established for employment injury under WCA – the FWCS scheme – comprises of three types of benefit, namely disablement benefit, dependent's benefit, and funeral benefit. Apart from this scheme, another scheme – the FWHSS scheme – is also established for the purpose of hospitalisation and surgical matters of migrant worker in the non-corporatised government hospitals.

Two schemes are available under ESSA, namely the employment injury scheme and the invalidity scheme catering for non-employment injury. The latter is offered when a person suffers a specific morbid condition of permanent nature which makes him incapable to engage in any substantially-gainful activity. The employment injury scheme offers disablement benefit, constant-attendance allowance, facilities for physical or vocational rehabilitation, dependent's benefit, funeral benefit, and education benefit. Meanwhile, the invalidity scheme offers invalidity pension, invalidity grant, and survivor's pension. The availability of invalidity pension provides a form of income security for an insured person although such injury or disease may not necessarily be related to an employment. While an invalid may not possibly resume employment, an employee who suffers employment injury or disease has the possibility of returning to work. Hence, the payment is made in a pension form to an invalid on a monthly basis while an employee suffering employment injury or disease will receive the payment periodically.

The fragmentation of these two schemes (both with the same purpose, to provide social security protection against employment injury) shows the lack of a uniform mechanism in managing the contingency of employment injury for employees. The employment of two different methods aids the identification of each scheme's weaknesses, especially the WCA. Notably, ESSA was introduced to replace the old WCA for national employees in order to respond to the changing needs of employment injury matters, particularly in providing benefits to the employees. Sadly, the old WCA was not totally abolished; it is instead used to cater for the employment injury cases involving migrant workers.

The lack of a uniform mechanism for payment of compensation, different administrative structure, and different types of benefit under different schemes offered by both legislations apparently discriminate against migrant workers. The notion of equality of treatment between national and migrant workers has been greatly denied. Apart from that, some of the provisions under the First Schedule to the EPFA exclude major categories of migrant workers either directly or indirectly.[40]

[40] See the First Schedule to the Act, read with the definition of "employee" in section 2.

B. Inadequacy of Employment Injury Schemes' Benefits

Besides the fragmentation of the employment injury schemes, another significant weakness of the system is regarding the benefits provided by both schemes. A close scrutiny of the benefits provided by the schemes under both legislations reveals that the employment injury benefits provided under WCA are inferior to their counterparts in ESSA. A summary of the comparison of benefits offered by ESSA and WCA is presented below, highlighting that the benefits provided by the latter are lower than the former.

This shortcoming is in stark contrast with the provisions envisaged in the Equality of Treatment (Accident Compensation) Convention 1925 (No. 19) ratified by Peninsular Malaysia and Sarawak. The notion of equality of treatment assured such treatment to migrant workers of other countries that have ratified the Convention and their dependents without any conditions including residency status. The equality of treatment is guaranteed through adopting relevant measures including making special arrangements with the sending countries, if necessary, for the payment of compensation to be affected.

Table 2 Comparison of Benefits between ESSA and WCA

No	Benefit	ESSA	WCA
1	Temporary Disablement Benefit (note that this benefit is limited to at least four days incapability to perform his/her work).	(a) 80% of his daily wage subject to a minimum of RM10 and a maximum of RM78.67 per day (Fourth Schedule of ESSA). (b) No limitation on duration of payment (section 22 [a] of ESSA, Para 1 [1] [a] of the Fourth Schedule of ESSA). (c) No deduction of the Temporary Disablement Benefit received if permanent disablement follows a period of temporary disablement.	(a) A half-monthly payment of 1/3 of his monthly wages or RM165, whichever is lower (section 8 [e] of WCA). (b) Duration is restricted to five years (section 8 [e] of WCA). (c) Deduction from the Permanent Disablement Benefit of the paid Temporary Disablement Benefit if the permanent disablement follows a period exceeding twelve months of the temporary disablement (section 8 [e] [ii]).
2	Total Permanent Disablement	90% of his daily wages, subject to a minimum of RM10 and a maximum of RM88.50 per day (section 22 [b] of ESSA, Para 1 [1] [b] of the Fourth Schedule of ESSA).	The compensation is capped at RM23,000 and this varies according to the age of the worker (section 8 [b] of WCA). (i) in the case of an adult who completed the eighteenth year of his age, a lump sum equal to five years of earnings or RM23,000, whichever is less; (ii) in the case of any other adult, a lump sum equal to seven years of earnings or RM23,000, whichever is less; or (iii) in the case of a minor, a lump sum equal to fifteen years of earnings or RM23,000, whichever is less.

Table 2 Comparison of Benefits between ESSA and WCA (continue)

No	Benefit	ESSA	WCA
3	Partial Permanent Disablement	Such percentage of the daily rate of permanent total disablement as specified in the Second Schedule as being the percentage of the loss of earning capacity caused by such permanent partial disablement. If it is not specified in the Second Schedule, such percentage of the rate of permanent total disablement benefit as is proportionate to the loss of earning capacity permanently caused by such permanent partial disablement (para 7 of the Fourth Schedule of ESSA).	Such percentage of the compensation which would have been payable in the case of permanent total disablement as is proportionate to the permanent loss of earning capacity caused by the injury (section 8 [c] of WCA).
4	Dependent's Benefit	(i) For the widow or widower, an amount of three-fifths of the daily rate of permanent total disablement benefit of the deceased insured person if he had sustained such disablement from the employment injury that resulted in his death; and (ii) For each child, two-fifths of the daily rate of permanent total disablement benefit stated (section 26 of ESSA, para 8 of the Fourth Schedule).	A lump sum equals to years of earnings or RM18,000, whichever is less. (section 8 [a] of WCA).
5	Constant-Attendance Allowance	40% of the rate of the permanent total disablement benefit or at any higher rate as prescribed by the Minister (section 30 of ESSA).	Not applicable.
6	Funeral Benefit	RM1,500 (section 29 of ESSA, section 3 of Employees' Social Security [Amount of Funeral Benefit] Regulations 1998).	RM1,000 (Proviso to section 8 [a]).
7	Education Benefit	Each child is entitled to the dependent's benefit until he or she gets married or until he or she attains the age of 21 years old, whichever occurs earlier. If the child is still pursuing his or her first degree in any institution of higher learning, SOCSO may continue to provide such benefit until he or she completes or ceases to receive such education or until he or she gets married, whichever occurs earlier (section 26 [1] [b] of ESSA).	Not applicable.

Table 2 Comparison of Benefits between ESSA and WCA (continue)

No	Benefit	ESSA	WCA
8	Facilities for Physical or Vocational Rehabilitation	Free-of-charge facilities (section 57 of ESSA).	Abstention from work for the treatment in a hospital or outpatient medical treatment shall be regarded as total temporary disablement for the purpose of payment of compensation (section 8 [e] [iii] of WCA).

C. Absence of Invalidity Scheme

Another apparent feature of ESSA which is not included in the WCA is the invalidity scheme. A person is said to be invalid when he is no longer able to engage in a remunerative activity because of the state of his or her illness. Moreover, the illness is incurable or unlikely to be cured. This scheme is designed to cater to the needs of an invalid and it provides a number of significant benefits – invalidity pension, invalidity grant, and survivor's pension – upon a person, having satisfied the qualifying conditions as prescribed in the ESSA. The absence of these benefits in WCA means that a migrant worker would not enjoy them if he becomes invalid.

One may argue that the invalidity benefit is only applicable to national employees due to the method employed for the payment of such benefit, which is through the contributions of both employer and employee, an element which is lacking in the WCA, and the duration of years migrant workers will be working in this country. Again, the principle of equality plays a major role for such scheme to be implemented in respect of migrant workers as well. This is because once a person becomes invalid, that person will not be able to work. Subsequently, the person will be incapable to earn any wages, making income benefit vital in order for an invalid to support his life and those dependent on him financially.

D. Migrant Worker's Optional and Employer's Low Contribution for Old-Age Benefit

From 1998 until 2001, it was mandatory for migrant workers to contribute to the EPF scheme to help them save for their retirement. Nevertheless, this was revoked in 2001 when contribution to the EPF by migrant workers was made voluntary. Several parties may argue that through the insertion of the provisions, particularly in Part VIIA in EPFA, the position of 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 national employees and for several reasons.

Firstly, the migrant worker is not obligated to contribute to the scheme because this is optional. Secondly, even if they choose to contribute, the share of the employer will be capped at RM5 only. This is significantly different from national employees where the share of employer's contribution based on the employee's salary is 12% while national employee's share is 11%. Thirdly, the contribution made by a migrant worker is subject to certain limitations: he or she is not entitled to payment of dividend, he or she is not

entitled to nominate any person who can receive the benefit from the outstanding amount in the migrant worker's EPF account upon his or her death and no additional payment will be made by the EPF as a gratuity payment in the case of death or disablement of a migrant worker. Furthermore, no option is available for a migrant worker who wishes to withdraw the money standing to his or her credit, especially for the purpose of medical financing[41] except if he or she has no intention to return. Conversely, national workers can enjoy withdrawal of money from the scheme even before reaching the retirement age.

With the limitations imposed on migrant workers, contributing to the scheme may not serve as a good retirement plan for them. As such, migrant workers in this country select to remit a portion of their earnings to their countries of origin for the purpose of meeting certain economic and financial obligations as well as for their own retirement savings.[42] Recently, the government has reportedly been considering employing a mechanism to reduce the remittances by migrant workers in Malaysia to their home countries in a bid to curtail the outflow of the ringgit. The severe currency outflows eventually diminished the national currency.

Through the proposed mechanism which is set up in a manner similar to the EPF, migrant workers' salaries would be deducted as remittances to the proposed fund. The details for the payment of the percentage of migrant workers' salary and the withdrawal from the proposed fund are still being studied before the proposed scheme can be implemented. Interestingly, this new scheme is currently developed by MoHR although in general, MoHR is in-charge of social security matters concerning migrant workers.[43]

E. Non-transferability of Social Security Rights across Borders

Under the current social security system, cross-border portability and transferability of social security benefits are almost non-existent, except in very limited situations as stated in few statutes. EPF does not contain any provision for the purpose of transferring social security entitlements– the retirement benefit – to another scheme in another country. Under section 54 (1) (e) of EPFA, the non-national member of the fund who is about to leave Malaysia with no intention of returning to Malaysia may withdraw all sums of money standing to his credit. On the contrary, WCA has a provision allowing for the transfer of the employment injury benefit of a workman to the beneficiaries in another Commonwealth country. This is evident in section 42 of WCA which states that

> Where an arrangement has been made between the Government of Malaysia and the Government of any part of the Commonwealth, whereby sums awarded under the law relating to workmen's compensation in Malaysia to beneficiaries resident or becoming resident in the territory administered by any such Government, and sums awarded under the law relating to workmen's compensation in any such territory

[41] Please refer to s. 54 (6) (f) of EPFA which allows for the local worker to make withdrawal from the EPF scheme.

[42] Asian Development Bank, *Workers' Remittance Flows in Southeast Asia*, Asian Development Bank, 2006, pp. 18.

[43] "EPF-like fund for foreigners?" Sin Chew Daily, 19 October 2015, http://www.mysinchew.com/node/111659 viewed on 13 November 2015.

> to beneficiaries resident or becoming resident in Malaysia, may at the request of the authority by which the award is made be transferred to and administered by a competent authority in any such territory or by the Commissioner in Malaysia, as the case may be, money in the hands of the Commissioner shall be transferred, and money received by him shall be administered, in the manner prescribed.

Theoretically, although the portability of workmen's compensation is possible by virtue of the above provision, it should be noted that the compensation is in the form of a lump sum payment. As such, residency is not required for the beneficiaries to access the benefits and for the transfer of the periods of contribution of the migrant workers to another country. Currently, no specific bilateral or multilateral agreement is in force with any country for this purpose; most of the Memorandum of Understanding (MOUs) and agreements entered into focuses on the general subject of labour migration. To date, Malaysia had only signed MOUs with Bangladesh, China, Sri Lanka, Thailand, Pakistan, Vietnam, and Indonesia for the purpose of regulating recruitment processes and procedures. Further, the provisions in WCA are restricted to Commonwealth countries making it difficult to create an agreement with non-Commonwealth labour-sending countries. Nonetheless, with strong negotiation between governments, social security protection for migrant workers could be improved. Taking the Filipino domestic workers for example, they are considered to receive the highest pay as a result of the continuous effort from the Philippines' Government in entering into agreements with labour-receiving countries.[44]

F. Overlapping of Ministerial Power

At present, no one single ministry is entrusted to handle the affairs of the migrant workers. Robertson stated that the chaos of ministerial power in relation to the migrant workers is apparent. The oversight of the matters is divided among ministries and between various departments within ministries. To begin with, MoHR is in charge of approving applications to bring in migrant workers and monitoring manpower firms, while the tasks of receiving complaints by migrant workers and acting upon the complaints are entrusted to the Industrial Relations Department and the Labour Department.

MoHR is also responsible for regulating the entry of migrant workers into the country under different industries and the regulatory framework to supervise these workers. Conversely, the Police and Immigration Departments are responsible for the enforcement of immigration policy in respect of migrant workers' arrival to this country.[45] Kaur criticised the empowerment of the people volunteer corps, known as RELA, by MoHR to curb irregular migration including refugees and involuntary migrant workers[46]. It was also argued that the policies introduced by MoHR encourage small employers to use private recruiters to obtain migrant workers. This is in terms of the theory that it is

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44 Harkins, B Review of *Labour Migration Policy in Malaysia*, ILO, 2016, pp. 13-14.

45 Robertson.P.S, *Migrant Workers in Malaysia – Issues, Concerns, and Points for Action*, Fair Labor Association, 2008, p. 3.

46 Kaur, A. (2008). "International Migration and Governance in Malaysia: Policy and Performance," *Journal of the UNE Asia Centre*, Vol. 21-28 (Special Issue: Migration and Security), pp. 4-18.

easier to regulate several hundred large recruiters than several thousand small employers because the latter presents various threats including labour-trafficking victims.[47]

From the perspective of social security laws, the recent curtailment of migrant workers' social security protection can be seen in the establishment of a private health insurance known as FWHSS under the MOH as discussed earlier and the proposed new EPF-like scheme for migrant workers under MoHR as explained above. The empowerment of several ministries to manage migrant workers in this country is feared to cause problems concerning the accountability of power. This is because the management of migrant workers is generally handled by the Labour Department under MoHR.

IV. CONCLUSION

In a nutshell, migrant workers' retirement savings, sickness, and maternity benefits are covered in the various legislations, namely the WCA, EPFA, and EA. Unfortunately, the invalidity benefit is excluded from coverage. Despite all of the statutes above, it is worthy to note that certain impediments of the laws in relation to migrant workers exist, largely caused by their 'migrant' status. Some of the benefits enjoyed by national employees are not made available to migrant workers. Even if the benefits are provided to migrant workers, the level of benefits provided is minimal compared to those enjoyed by national employees. Moreover, the management of migrant workers in this country is divided between various ministries. This may potentially contribute to a disorganised administration of these workers. Lastly, the social security benefits provided to these workers are not transferable to their home countries because no bilateral or multilateral agreements have been made between Malaysia and migrant workers' home countries to execute the matter.

[47] Leong Weng Kam, 16 March 2011, "Don't Bank on Low Cost Foreign Labor", The Straits Times.