# IMPLICATIONS OF THE CONCEPT OF 'JUSTICE' TOWARDS THE EMPLOYEES AND ELDERLY IN MALAYSIA: A DISCUSSION

## (Implikasi-implikasi Konsep "Keadilan" Terhadap Pekerja dan Golongan Berusia di Malaysia: Satu Perbincangan)

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## ABSTRACT

Nobody can deny the close relationship between law and justice. As such, the law seems to be the recognised mechanism or tool in implementing justice in a society. Thus, justice to some is an inherent component of the law and not separate or distinct from it. Law as the legal rules which justice is administered are themselves the product of the state, and in Malaysia, they will be the product of the government of the day. These rules would have gone through the necessary procedures, which include drafting, debating in both Houses of the Parliament and given the Royal Assent by the Yang Di Pertuan Agong before being gazetted. In this context, based on existing literature, this article will be looking at whether the law in its approach and drafting has successfully implemented justice in society, especially on the employees and elderly in Malaysia.

**Keywords**: *Elderly, employees, justice, social inclusion, social exclusion*

## Introduction

Justice is a concept of equality. Every individual is free to do whatever he or she wants to as long as their actions do not interfere with the rights of other individuals. If a right is denied, it may cause injustice. Justice in its liberal sense is part of fundamental rights. There will be justice if the fundamental rights of people are guaranteed and protected. The law will be their protector to ensure that they receive equal treatment and protection.

Ensuring equal treatment and protection is critical towards comparatively the disadvantaged sections of the society such as

employees as well as elders. In Malaysia, the government has adopted laws and policies to ensure the rights of employees and elders. This article thus tries to examine whether justice has been administered in adopting and implementing these laws and policies.

This article comprises six parts including the introduction and conclusion. Section Two discusses the meaning of justice whereas the discussion of justice in the context of Malaysia gets its place in Part Three. Part Four highlights justice for the employees covering the terms and conditions of employment, minimum wages, minimum age of retirement, and occupational safety and health. Part Five analyses the justice for the elderly. It also focuses the rights of elders against abuses, right to work, and right to continue to contribute to a community. Part Six, the concluding section, examines how the laws in drafting and application exclude some groups of people of society from the realm of justice. It argues that when the disadvantaged groups do not receive legal protection, it means they are socially excluded and, as such, there is no justice.

## The Meaning of Justice

The issue that is often debated is the meaning of justice. Historically, the word justice is derived from the word dike in Greek, which means behaving in accordance with nature or how they normally are and usually act (Guthrie, 1975: 5-7). Therefore, what is meant by justice?

To conclude and define the word 'justice' is not an easy task. It is simply because the society views the meaning of justice differently. Their view is based on their understanding of justice, and this view may differ from one to another. At one point in time, Aristotle believed that justice consists of giving people what they deserve (Sandel, 2007: 263). But to Plato, justice can be achieved if each person does his or her work and not meddle with another's. He also stressed that the concept of justice overlaps with the question of what is good or bad. On the other hand, John Rawls states that justice is equivalent to the idea of equality. Thus, this shows that the meaning of 'justice' has been defined differently by philosophers.

The differences in opinions on the meaning of 'justice' might be caused by various factors such as geographic, economic, social, religious and knowledge. Therefore, it is challenging to give a precise meaning to the phrase of 'justice'.

Although the concept of justice has been debated among philosophers for centuries, none of these theories prevails over the other. Sad but true, although there are conflicting views on the concept of justice amongst the philosophers, most of them agree with some of the basic ideas of justice such as conferring rights to individuals. Various approaches have been taken by the Western philosophers to give meaning to the concept of justice, but to date, no theory can be said better than the other.

Plato was the earliest philosopher who wrote on the concept of "justice" (Plato, 1999: 15). He believed that justice is putting things in its place naturally. Plato further elaborated that justice is "doing one's work" which means, each person has to do his or her work and not to meddle with another's (Plato, 1999: 15). He also stressed that every individual should be treated equally without any discrimination. In his opinion on justice, Plato thinks that when there is a conflict in the community, it should be resolved by a court of law.

However, Plato's view on the concept of justice was not in line with what Aristotle had in mind on the meaning of justice. For Aristotle, he believed that justice would only exist in law. He stressed that an individual is entitled to exercise his rights as long as he does not interfere with others. He also emphasised that if the balance is disrupted, then the individuals involved should be compensated (Scanlon, 1977).

Looking at other views on the theory of justice, one of the modern philosophers of justice, David Hume highlights his notion of justice based on material factors. He believes that justice would be met if the property was distributed equally amongst the community. He also stresses that any property acquired illegally must be returned to its rightful owner. According to him, if this can be done, then it would appear that justice is enforced fairly in a society (Cairns, 1969: 362).

On the other hand, John Hobbes argues that justice is a social contract that exists in society (Cairns, 1969: 362). Therefore, when a social contract is breached it will cause injustice. Thus, he asserts that justice is conformity to the laws that have been enacted to bind the life of a society.

A well-known philosopher on justice, John Rawls, in his book, *A Theory of Justice* (1971), has given a profound influence on the theory of justice. He believes that the concept of justice is more or less similar to what is called equality. In this regard, he stressed on two types of principles which are:

1) Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all; and
2) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.

According to Rawls, both principles apply in different scenarios, and they (the principles) do not only apply to human rights, freedom and opportunity, but also to the concept of equality. The fundamental rights set out by John Rawls is such as the right to political participation, freedom of speech and assembly, the right to express opinions, the right to acquire property and ownership, and also freedom from wrongful arrest.

What is meant by Rawls when he refers to the meaning of human freedom as 'basic liberties', is among others, the right of every individual to be involved in the process of forming a constitutional law that they will obey (Brian, 1973: 52). In the context of the second principle, Rawls emphasises a fair distribution among communities in areas such as economic and social. In this regard, he says that when an individual gets economic wealth in a social system, it would only be fair if it brings benefit to the less successful in that society. Rawls also thinks that the first principle is more important. He argues that individual freedom is the basis of the principle of justice. Freedom can only be restricted to protect the freedom of others (Brian, 1973: 52).

Therefore, according to the western philosophers, the meaning of justice has been expressed in various forms and concepts. But most of them agree that justice is a concept of equality, and because of that, every individual is free to do whatever he or she wants to as long as their actions do not interfere with the rights of other individuals. In this regard, a leading philosopher states as follows:

> Philosophers and theorist of the law would do better service to humanity if they tried to persuade people not only that their moral ideas require improvement, but that their laws, so far as possible ought to come up to the improved standards, that they do by wasting their ingenuity in sophisms about the sovereignty of law and its independence of the realm of justice.
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> (Mohd Akram, 2006: 38)

Greek philosophers such as Aristotle and Plato believed that the human soul has three elements, namely, desire, anger, and knowledge. However, a renowned Islamic scholar Al-Ghazali said that there is also a fourth element in the human soul, which is justice. The fourth element controls the other components according to the needs and feelings of anger according to Shari'a. The aspect of justice is vital in managing the other three elements of the soul to make sure that it is in the proper place. However, other philosophers are of the opinion that justice is not one of the elements present in a person's life but exists in the combination of these three (Mohd Akram, 2006).

The concept of justice in Islam does not differ much when compared with the western theory of justice. Islam is a religion that commands its followers to uphold justice and prevent Muslims from doing injustice (Mohamad, 1993: 38). Islamic law is based on the *Al-Quran* and *Sunnah* (Yaakob, 1993), followed by *Ijmak*, *Qias* and *Istihsan* (public interest). The Islamic concept of justice is obtained from the above sources. Muslims have a firm principle of justice. Many texts on the principle of justice can be found either in the *Al-Quran* or *Hadith*.

Justice in Islam means putting something in its proper place (Din, 2007: 23). It can also be described as equality or equal treatment of all individuals regardless of their background (Kamali, 2002). In Islam, every man is the same and will get similar treatment except their piety to Allah (SWT). Therefore, Islam calls on its followers to be fair to other people (Muzaffar, 1993: 159). There are many texts that could be derived from the *Qur'an* or *Hadith* that reminds people to be fair and to avoid wicked deeds. In Islam, justice is an obligation placed by Allah (SWT) on humanity as a vicegerent on earth. Therefore, trust or responsibility is a task that must be followed and carried out by all Muslims.

Justice is something that is demanded in Islam. Hence, in the *Al-Quran*, the word justice is mentioned and repeated 20 times, and there are 299 sentences condemning tyrannies and injustice. For example, in Surah An-Nisa in verse 135 and Surah An-Nahl in verse 90. Therefore, justice in Islam is not only the obligations that need to be carried out by the Muslims but also involves the issues of trust and responsibility. Thus, in Islam, Muslims are required to be fair and always advance justice in their actions.

If we look at the concept of justice pioneered by the Western philosophers, there is much more emphasis on a range of questions about

the importance of community and the importance of a fair distribution of material. In this case, the interest of society is more dominant than the interest of an individual. However, the Western theory of justice does not relate to religious factors and as such may lead to the formation of a secular concept of justice without applying any religious elements. Thus, the theory of justice used also depends on the nature and structure of the existing society. It is in contrast to the concept of justice in Islam. In Islam, justice should be practised in all activities, and more importantly, Islam incorporates the idea of justice through religion. Therefore, implementation of the concept of justice in Islam is stronger and more efficient because it not only needs to be carried out in every activity of the Muslims but is also embedded in their soul and spirit. Besides, the concept of justice in Islam is more straightforward to practice and understand because the idea can easily be obtained from the *Al-Quran* and *Hadith*.

From the above theory of justice, we can see that one of the fundamental principles of justice is the rights of the people or human rights. Thus, the concept of human rights is essential. It is because the notion of justice, whether it is from the Western or Islamic theoretical concept, guarantees human rights. Thus, a right that has been conferred on an individual in any legal system must be preserved without discrimination. If a right is denied, then it may cause injustice. Justice in its literal sense is part of fundamental rights. In today's modern world, human rights or fundamental liberties usually can be found in the constitution as the constitution is always regarded as the supreme law of the land.

## Justice in the Context of Malaysia

In Malaysia, the fundamental rights of the people are guaranteed in Part II of the Federal Constitution, which is the supreme law of Malaysia (Article 4 of the Federal Constitution). Article 5(1) provides that no person shall be deprived of his life or personal liberty save in accordance with law. Article 8(1) on the other hand guaranteed that all persons are equal before the law and are entitled to the equal protection of the law. These fundamental rights are not only protected by the Federal Constitution but also have been upheld by Malaysian Courts. Former Chief Justice, Raja Azlan Shah had laid down the duties and responsibilities of a judge, which among others, are (Shah, 1987):

> It is, after all, to them that the citizen turns to, to ensure that his rights are upheld. For this reason, the judges should always maintain their independence, to ensure that the rights of the individual are upheld. They should be bold enough to strike at and to declare unlawful any interference on the freedom of the press or of the right to know which is not accordance with the law, except where they

> themselves are clearly satisfied that a particular act of the executive which restricts these rights is necessary for the maintenance of the security and peace of the nation, they should always aim to protect these rights. It should not be overlooked that the right to know and the right to free expression are as basic and important as any other fundamental right enshrined in the Federal Constitution. It should further be pointed out that neither the executive nor even the Parliament should attempt to curb the course of Justice. Judicial Independence in any democratic country is an existing fact as every lawyer and politician knows. The judges are independent of all, - the executive, Parliament and from within themselves, - and are free to act independent and unbiased manner, - No member of the Government, no Member of Parliament, and no official of any Government department has any right whatever to direct or in influence the decision of any of the judges. It is the sure knowledge of this that gives the public their confidence in the judges. The judges are not beholden politically to any government. They own no loyalty to ministers. They have longer professional lives than most ministers. They, like a civil servant, see the government come and go. They are "lions under the throne" but that seat is occupied in their eyes not by the Kings, Presidents or Prime Ministers but by the law and their conception of the public interest. It is to that law and to that conception that they owe their allegiance. In that lies their strength.
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> (Shah, 1987)

Thus, there will be justice if the fundamental rights of the people are guaranteed and protected. Nevertheless, it does not mean that those rights can be enforced without any restrictions. However, any restrictions on these rights have to be evaluated with strict scrutiny. As such, any restrictions on the fundamental rights of the people should be imposed in accordance with fair and equal procedure. Hence, every individual should be given equal protection when exercising their rights which are guaranteed under the law. The government has to make sure that these fundamental rights cannot easily be amended for whatever reason. It does not pay for any legal system to sow the seeds of injustice because we will inevitably reap what we have sown.

## Justice for the Employees

In Malaysia, the law allows discrimination in terms of the treatment and protection if it was done for legitimate purposes on fair and reasonable grounds (R Rethana v Govt of Malaysia [1988] 1 MLJ 133). As such the approach opted by the government in providing treatment and protection

for the employees, have always been discriminatory. The law will only protect those employees who have been identified by the specific Act or Statute and leaving those who are not to fend for themselves. The basis of this discrimination lies in the view that the law is duty bound to protect the employees who do not have equal bargaining power when dealing with their employers. For this group of employees, the law will be their protector to ensure that they receive equal treatment and protection. The practice has resulted in injustice to some when the equal treatment and protection is not extended to them. These injustices can be seen in the following situations:

## Terms and conditions of employment

The Statutes that deals with terms and conditions of employment in Malaysia can be found in the Employment Act 1955 (Act 265) for Peninsular Malaysia, Sabah Labour Ordinance 1950 (Chapter 67) for Sabah and Sarawak Labour Ordinance 1952 (Act A1237 Chapter 76) for Sarawak. All these Statutes opted to confine their applications to those who are earning less than RM2,000.00 for Peninsular Malaysia, less than RM2,500.00 for Sarawak and Sabah or if they work in specific jobs as stated in the Schedule of all the Statues. Manual labour, engaged in the operation or maintenance of any mechanically propelled vehicle, supervises or oversee other employees involved in manual work, employed in any capacity other than an officer in any vessel registered in Malaysia and domestic servant. The wage bracket is the determining factor, and in Peninsular Malaysia, it is stated that the Employment Act 1955 applies to 70% of the workers (Seman, 2011: 15).

If an employee is not covered by the Act, then he will have to rely on the terms and conditions of his contract to accord him equal treatment and protection. The wage bracket that all the statutes opted to discriminate its application is low, as such resulting in many employees not falling within the ambit of the protection of the statutes or if they fall within the implementation of the statues it will only be for a short time before they earn more to disqualify them from the application. The situation will worsen when Malaysia becomes a high-income nation in 2020.

This approach in protecting a specific group of employees had created an injustice to the rest, and this can be seen in the following instances:

*The power of the director general of labour to inquire into complaints*

Section 69 of the Employment Act 1955 allows the Director General of Labour to inquire and decide the disputes between the employer and his employee in respect of wages and any other payments in cash due to an employee under the contract or the Act or its regulations. It is only applicable to those who are covered by the Act. For those who are not covered by the Act, they would not have any recourse for complaint. The only avenue open will be to bring the case to court. This situation creates an injustice to them. This injustice was evident in 1998 during the economic crisis (Ariff & Abu Bakar, 1999: 418) whereby employees who did not fall within the ambit of the Employment Act 1955 were not able to complain to the Labour Department regarding the failure of their employers to pay them termination benefits.

As a result, an amendment was made to the Employment Act 1955 in 1998 (The Employment (Amendment) Act 1998 (Act A 1026), which came into force on August 1, 1998) to empower the Director General of Labour to inquire into and decide any dispute between the employer and his employee in respect of wages or any other payments in cash due to an employee under his contract of service even though his earning is more than RM2,000 but less than RM5,000 (The Employment (Amendment) Act 1998 (Act A 1026), which came into force on August 1, 1998; section 69B of the Employment Act 1955). Although the amendment addressed the said injustice, it did not correct the injustice suffered by others whose wage bracket is beyond RM5,000.

1. Domestic inquiry

For those who are covered by the Employment Act 1955, an internal inquiry is mandatory before an employee can be dismissed on the ground of misconduct (Section 14 of the Employment Act 1955). The failure to comply with this requirement will render the dismissal to be invalid (Milan Auto Sdn Bhd v Wong She Yen [1994] 2 MLJ 135, Yeo Hiap Seng Trading Sdn Bhd v Lim Lee Choon [2004] 1 CLJ 634). The same protection is not given to employees who are not governed by the Act. For these employees, the employers have a choice whether or not to conduct a domestic inquiry before the dismissal (Dreamland Corporation Sdn Bhd v Choong Chiu Sooi [1998] 1 MLJ 111). As such, most of the employers prefer not to hold a domestic inquiry before dismissal. If the employees are unhappy, then they would have to bring the case further to be adjudicated by claiming that the termination was done without just cause or excuse (Section 20 of the Industrial Relations Act 1967).

Since the right to livelihood has been considered as guaranteed by the Constitution, therefore this protection concerning misconduct must be accorded to all employees and not just the employees who are protected by the Act.

2. Minimum wages

The Minimum Wages Order 2012 ((P.U.(A) 214 ), read together with the National Wages Consultative Council Act 201 (Act 732) had introduced the minimum wages to apply to employees working in specific sectors in Malaysia. The minimum wage of RM900 for Peninsular Malaysia and RM800 for Sabah and Sarawak was introduced on the 1st January 2013. The Order applies to an employer who employs more than six employees and those employers regardless of the numbers of employees who are involved in professional business activities such as medical and dental clinics, legal firms, architectural and consulting firms. For the small time employers or micro-enterprises with at least six employees, the date of implementation was extended to 1st July 2013 to ensure they have enough time to make the necessary adjustments. They can still apply to the Council to postpone the implementation of the new minimum wages to another date. Once again, the application of the Order excluded employers who have less than six employees. For those employees who do not fall within the Order, the employers are not duty bound to comply with the said Order. To avoid this, the employer may not hire more full-time employees but will opt for part-time employees instead. In 2016, a new minimum wage order was introduced to increase the wage to RM1,000 for Peninsular Malaysia and RM920 for Sabah and Sarawak, effective from 1st July 2016 (P.U.(A) 116).

The meaning of wages in the Order was not that clear even though it refers to the definition of wages in the Employment Act 1955. The minimum wages must apply to the basic wages. As such, any other payments in cash paid to the employee under his contract of employment should not be considered as wages but extra payment payable on top of his wages (Asia Motors Co (KL) Sdn Bhd v Ram Raj & Anor [1985] 2 MLJ 202, Petaling Rubber Estate v Nandarajah [1988] 1 MLJ 22). However, the Order allows the employer to restructure the wage system before the implementation of this Order to convert some of the allowances paid in cash as part of the basic wages. Enabling the employer to convert the allowances into wages will defeat the purpose of having the minimum wages because the situation is the same but is labelled differently. Instead of receiving an increase in his basic wages under the Order and

allowances, the employee only receives his minimum wages without any additional payment for a benefit. As such, the Order does not do justice to the employees at the implementation stage.

3. Minimum retirement age

The Minimum Retirement Age Act 2012 (Act 735) came into force on 1st July 2013. It extends the retirement age from 55 to 60 years due to the longer lifespan and the rising living costs. However, the Act is not applicable to a probationer, an apprentice, a non-citizen employee, a domestic servant, part-time employee, temporary employee, and a person who is employed on a fixed-term contract of not more than 24 months (Act 735; Schedule of the Minimum Retirement Age Act, 2012).

Excluding temporary, part-time workers, probationer and apprentice are understandable because for the first group they could not be regarded as employees while for the second group, they will not be probationers or apprentices for the rest of their lives. However, by excluding those who are employed on fixed-term contracts would encourage employers to opt for this group of employees more as compared to hiring more permanent staff. This group of employees do not have the security of tenure because their expertise is needed for a short period. The employers could continue to employ them under this circumstance even though they are required permanently to avoid the application of the said Act. The employers may disguise the contract as a fixed-term contract to hide the permanent aspect of it in order to avoid the application of the Act and other similar protections to the employee (Han Chiang School/Penang Han Chiang Associated Chinese School Association v National of Union of Teachers In Independent Schools, W. Malaysia & Industrial Court [1990] 1 ILR 473).

The Minister has the power to further exempt any categories of employees from the coverage of the Act vide an Order (Act 735, Section 18). This power must be exercised sparingly so that all the employees should be given this protection. Although in some categories of works which involve heavy physical work, the employees may not be able to do the same job until he reaches the age of 60, it does not mean that he could not work. He can still contribute but in a different capacity as what he did when he was young. Allowing exceptions to be made would further deny these employees from receiving the same treatment and protection as the other employees. As such, not everyone will retire at the age of 60 or 62 years as stipulated by the statute. Again justice is not applicable to all employees.

## *Occupational safety and health*

Occupational safety and health is an increasingly important area of protection in employment law. This particular area offers protection not only to the employees but also extends it to the public. As such, it is essential for the Act to be applicable to all employers and employees. In Malaysia, this area is governed by two statutes, the Occupational Safety and Health Act 1994 and the Factories and Machineries Act 1967. Even though both laws are for general applications, their applications are not comprehensive due to the exception created by the statutes themselves. These exceptions have created an injustice to the employees which would affect their safety and health at their workplace. These exceptions can be seen in the following examples:

*Safety and health policy*

From the inception, the Occupational Safety and Health Act 1994 had excluded employers who have less than 5 workers from the obligation to prepare a safety and health statement (Section 16 of the Occupational Safety and Health Act 1994 and the Occupational Safety and Health (Employers' Safety and Health General Policy Statements) (Exception) Regulations 1995). The small and medium enterprises (SMEs) frequently have less than five employees. As such, these enterprises are exempted from complying with this requirement. In Malaysia, the definition of SMEs is based either on the number of employees or the annual sales turnover in a specific sector (SMECorp., 2010).

One of the critical elements for a successful health and safety management requires the company to formulate a policy on safety and health (Cox et al., 1998: 35-36). The policy must set up the organisation's general approach, intentions and objectives towards health and safety issues. It can only be achieved if the employers evaluate their operations, understand the risks and find ways to minimise or to eradicate the risks. Given that the employers are not obliged by law to formulate the policy, no serious thought is given to safety and health issues. The employees who are working with this group of employers will be working in an unsafe place of work since the employers are not duty bound to assess the risks and take preventive measures to overcome the threat. Working in a safe place of work is an implied term in the contract of employment. However, as an express provision in the statute has taken that protection away from the employees, these employees could be described as not being treated justly.

*The code of practice*

The Occupational Safety and Health Act 1994 emphasises on self-regulation as one of its philosophy, which is reflected in the provision which allows the Minister to approve A Code of Practice as a guideline to the employer in those industries (Section 37 of the Occupational Safety and Health Act 1994). The industry can also initiate the formulation of the Code of Practice, and it must be reviewed from time to time. However, the Act does not make it compulsory for the employer in the said industry to comply with the Code of Practice but at the same time the Code of Practice shall be admissible as evidence in any proceedings for non-compliance with the provisions of the Act (section 38 of the Occupational Safety and Health Act 1994).

The Code of Practice is essential because it contains best practices in the said industry and should be considered as the minimum standard that the employer in the said industry must comply. By having a minimum measure, the safety and health of the employees will be better safeguarded. However, the flip-flop approach to the Code of Practice by the Act had reduced its significance to nothing at all. It is ridiculous to allow the employer not to comply with the Code but at the same time, the Code can be used as evidence in any proceeding concerning the said employer. Both the employers and the employees are not justly treated by the Act on this issue.

*Safety and health committee*

The Occupational Safety and Health Act 1994 requires an employer with 40 employees or more to form a safety and health committee. This committee is expected to meet at least once in every three months, with the functions to identify hazards at the workplace, institute control measures and investigate the incident of risks and conducting an audit. The establishment of such committee must be applauded. However, again the law excludes the employer with less than 40 employees from doing so. These employees will not have an avenue to raise issues on safety and health at their workplace without being considered as challenging the employer's authority or rights. They will not have the chance to participate in ensuring their place of work is safe. Once again, the exclusion in the statute creates an unjust situation for these employees. Justice must not only be done but be felt by the recipient. It is not the case here since they are denied of the said right from the start by the statute.

*Right to be compensated for employment injuries*

Before the introduction of the Employees' Social Security Act, 1969 (Act 4) and the Workmen's Compensation Act 1952 (Act 273), an employee who is injured would be able to obtain compensation from his employer under common law. However now, both statutes have shifted the economic burden of paying compensation for injury suffered by the employee from the employer to a third party which is an insurance company for Workmen's Compensation Act 1952 and Social Security Organisation or SOCSO for Employees' Social Security Act 1969. Both statutes do not require fault to be proven for compensation to be meted out. Since the compensation is not based on fault principle, the employee had to surrender his right to sue his employer for compensation (Section 31 of the Employees' Social Security Act 1969 and section 41 of the Workmen's Compensation Act 1952).

This approach had benefitted the employers because regardless of whether they had breached any of the legislation on occupational safety and health, the injuries suffered by their employees will not cause them any extra expenditure. Everything will be taken care of by a third party. They will not be willing to invest in the safety and health because even if accidents happened, their employees could not bring an action against them.

The employees are at the losing end because the fact that their employers had breached the statutory provisions will not be factored in the calculation of compensation. The authority could prosecute their employers, but any payment of the fine will be for the benefit of the government, not the employees.

Based on the discussion above, the approach of excluding a particular group of employees from the application of the statutes has resulted in injustice because they do not have any other mechanism to bring their grievances against their employers except through a civil claim. To do this, it requires money as such if the employee has the means then he would be able to bring forward his grievances. Justice becomes very elitist and available to those who have the means. It can be seen in relation to terms and conditions of employment, minimum wages and minimum retirement age.

The fundamental right to equal treatment and protection will not be fulfilled when the employer is exempted by the statutes from complying with its provisions from its inception or is permitted to be excluded after

the inception. Justice for the employees must not only be seen to be done, but it must also be felt to be done. By opting to discriminate employees by the wage bracket, or the number of employees or type of industries, the law has denied justice to them, and this is something that must be addressed soon.

**Justice for the Elderly**

Malaysia's older population of 60 years and more increased from 1.5 million in 2000 to 2.0 million in 2009 (10th Malaysia Plan, 2011-2015). By 2020 it is estimated that the number of older persons will be 3.4 million and by 2035, Malaysia will be in the category of ageing nations as defined by the United Nations, with older persons constituting more than 15 percent of the population (10th Malaysia Plan, 2011). This fact now has put the older people in the spotlight, whereas previously they are left on their own to live their lives before meeting their makers.

The lifespan was short then, whatever savings that they had were enough to see them through their old age. Further, during that time, the concept of retirement was not part of their lifestyles. Most of them were self-employed. Therefore, they continued to work until they died. However now the life expectancy has increased to 71.28 years for male and 79.99 years for female (The World Fact Book by Central Intelligence Agency (CIA) (CIA, 2012). The savings that were accumulated during their working lives are no longer adequate to sustain their lifestyles. It is because economic status is a significant dimension of the elderly's well-being, determining a large part of their level of comfort and the resources they can command for maintaining health and achieving a variety of personal and familial goals (Chan et al., 2003: 265).

**Right to work**

In Malaysia, every individual must be responsible for himself in planning for his golden years or retirement. The plan for retirement is closely related to employment. For those who work in the private sector or self-employed, their retirement plan is governed by the Employees' Provident Fund Act 1991 (Act 452), while, their counterparts in the public sector are governed by the Pensions Act 1980 (Act 227). Once they retire at the age of 60, they will have to rely on their savings for their needs. Those who find that their savings are not adequate will have to secure jobs. Malaysia does not have any policy or laws about post-retirement employment for its elderly. Without any such policy or legislation to recognise the right of the old to continue working even after they had reached the age of retirement, this

group find themselves in a challenging situation. The employers are reluctant to employ them because of their age. When a person reached the age of retirement, they will be labelled as being unproductive, useless, and burdensome and so on. The positive perceptions such as wisdom, experienced, skilled are not associated with the retirees.

The National Policy for the Elderly 2011 further recognises the right of the elderly to be given opportunities to continue to be of service and to contribute to the nation. It also states that the old are assured of fair and just treatment. For these rights to have any meaning, the perception that they are no longer relevant to the society and the nation must be changed. A clear law must be introduced to make this policy a reality, to enable infrastructure and opportunities be created to cater for this. Re-employing the elderly will help the nation reduce the dependency on foreign workers, will maintain the number of workforce in the country and will create a comprehensive workforce through the combination of multi-generational workforce (United Kingdom Government, 2013). The effort to allow a worker to retire at a higher age instead of 55 years was made in the Minimum Retirement Age Act 2012 Section 4(2) and (3). However, this provision is only applicable to those who have yet to retire as compared to those who have already retired but want to be re-employed. Since Malaysia will be an ageing nation in the near future, it is pertinent that she introduces a post-retirement employment policy to uphold the right of the retirees to continue to be employed in a favourable and just environment without any discrimination.

**Rights against abuse**

The National Policy for the Elderly 2011, through its strategies for care and protection, states that the facilities for care and protection within the family and society are appropriated to the system and values of the society will be created as such. The policy requires that the family and the society be involved in caring and protecting the elderly. Malaysia, being an Asian country, respect and care for the elderly arise out of the filial obligation of the children towards the elderly. This filial piety is motivated by affection, love, repayment, reciprocity and filial responsibility (Sung, 1994: 195). This tradition of treating the elderly with respect and care are repeatedly reaffirmed through the teaching of religions or customs. As such it is not surprising that 85.3 percent of the elderly in Malaysia live with their children while 7.3 percent live with their spouses and 7.4 percent live on their own (National Family Population and Development, 2004).

Since the elderly are staying with their children, it is expected that they are well cared for and not abused. Thus, there should not be any incident reported on elder abuse in Malaysia (Muneeza, 2010: 63). However, this is not so. Elder abuse is often ignored or undetected due to various reasons such as poor public awareness, lack of knowledge among healthcare personnel (Esther et al., 2006: 1) and absent of mandatory reporting (Mohd Yusoff, 2009). The situation is made worse with no precise definition of elder abuse. However, it has been accepted that certain conducts such as physical, sexual, verbal, psychological, social and spousal abuse, financial exploitation and neglect including self-neglect are considered as elder abuse.

In Malaysia, the Domestic Violence Act 1994 applies to elder abuse by the definition of an "incapacitated adult". Section 2 of the Domestic Violence Act 1994 defines "incapacitated adult" as a person who is wholly or partially incapacitated or infirm, by reason of permanent or temporary physical or mental disability or ill-health or old age, who is living as a member of the family of the person alleged to have committed the domestic violence, and includes any person who was confined or detained by the person alleged to have committed the domestic violence.The provisions of the Act must be read together with the Penal Code and any other written law involving offences relating to domestic violence. The Act defines domestic violence as physical injury, fear of physical injury, emotional injury, delusion by intoxication, unlawful detention and mischief or destruction to property knowing that it is likely to cause distress to the victim (Section 2 of the Domestic Violence Act 1994). These acts must be a crime under the Penal Code before any action can be taken against the perpetrator.

In the context of abuse, scientific literature suggests that the abusers are family members and caretakers of the elderly (Hardin & Hudson, 2005: 91-94). Since the elderly are dependent on the children or caretaker for their needs, they are not willing to lodge a report against their abusers. They suffer in silence and accept it as part of their fate. The issue of elder abuse must be recognised as necessary as child abuse or spousal abuse. Therefore, it must be given more emphasis by the law and not lump it together with spousal abuse. The Domestic Violence Act 1994 was historically introduced to fight spousal abuse and not elder abuse. Extending its application to the elderly does not give justice to them. The time has come for elder abuse to be given the same recognition to ensure that the aspiration of the National Policy for Elderly 2011 to care and protect the elderly will be achieved.

**Right to continue to contribute to community**

Growing old does not mean that the elderly are useless or become a burden to the society. The concept of retirement should not be viewed as an indication that a person's life is over. Reaching a certain age which is known as a retirement age is only useful to determine the benefits the person is entitled to concerning his employment. For example, if he is a public servant, then when he reaches the age of 60 years, he is entitled to receive his gratuity and pensions (Pensions Act 1980) while for those who are serving the private sector, he will be entitled to withdraw all his savings from his account with the Employees' Provident Fund (Employees' Provident Fund Act 1991). The age of retirement is a recognition that the retiree had completed his working life and is now ready to move on to other things which he may not have had the time to do so previously. It does not mean that he is no longer relevant to the society.

As a retiree with time in his hands, he can continue to contribute to the family and the community. To the family, he can still carry out his traditional role as the custodian of his grandchildren when their parents are at work. They will be the spiritual and moral influence on the grandchildren, imparting wisdom and knowledge through customs and traditions. In the community, they can still play a part as religious activists by being involved in the religious aspects of their community. They can be volunteers at mosques and temples; they can also become resource person whom the community could refer to on matters pertaining to religion, customs and traditions. Besides that, they can also become social activists in the community, involving themselves in schools or other social events and organisations.

However, the opportunity to continue to contribute to the society is limited to those who are considered to be successful and not to any 'Tom, Dick and Harry.' More dialogues and discussions must be initiated by the various agencies with the elderly so that the benefits and mode of delivery will be more aligned with what the elderly need. The critical thing to remember is that the elderly must not be treated like children because they may be frail but they can think and make their own decisions.

From the above discussion, it is clear that when it comes to protecting the elderly, Malaysia does not have a clear policy on post-retirement employment or a legal framework to support and protect the elderly. As such the elderly will have to fend for themselves in finding the

opportunity to continue working, face with discrimination for being old, and suffer in silence. The fundamental right to equal treatment and protection will not be fulfilled when there is no clear policy or a legal framework that support and protect the elderly. Perhaps the time has come for us to rectify the situation by introducing a specific statute to govern the needs, rights and privileges of the elderly. After all, Malaysia will be an ageing nation soon, in 2030.

**Discussion and Conclusion**

The laws in Malaysia are divided into laws of general application and laws that apply to specific groups. This approach has caused a disadvantage to the group that does not receive its protection. For example, as long as a person is working, the various laws or statutes will apply to him. He will receive all kinds of benefits and protection. However, when he retires, there is no other specific statute that will cater to his needs. He becomes invisible. He is someone who is living under the radar of the legal framework. He will be visible again, once he falls into the group that needs assistance from the state.

This approach is more in line with social exclusion. Social exclusion has been defined as "the process through which individuals or groups are wholly or partially excluded from full participation in the society within which they live" (Rawal, 2008: 164). It is a dynamic process through which disadvantaged individuals are excluded from essential resources like employment, health, education, social or political life, which ultimately perpetuates greater disadvantage and exclusion (International Federation on Ageing, 2010). The disadvantaged individuals cannot participate in the regular activities of the society or in activities that he or she would like to participate (International Federation on Ageing, 2010). Therefore social exclusion may be viewed as a process caused by intersecting socioeconomic and political agents that prevent certain groups from accessing resources and acquiring the skills necessary to fully participate within the society (International Federation on Ageing, 2010).

Perhaps the time has come for Malaysia to try a new approach which is known as social inclusion. Social inclusion invokes more significant action than the removal of obstacles or risk factors to bring low access populations from the periphery to the centre of society (International Federation on Ageing, 2010). It required investment and organised participatory action to create conditions for inclusion that validate and recognise all persons.

This approach will allow everyone to be involved or to receive protections afforded by the relevant statutes. There will no longer be marginalised groups who have to fend for themselves, as the way it is now because the statutes from the off-set had excluded them from participating. However, it is recognised that even though the statute is encompassing all, there will be provisions enacted to allow the individuals to opt out if they want to do so. Opting out will be more natural as compared to if they were excluded from the beginning, to include them, exceptions must be created to justify the inclusion. Hopefully, with this approach, justice will not only be seen to be done but also be felt to have been done.

The concept of justice and its implementation through law has always been debated, discussed and dissected. Thus it is essential to understand the meaning of justice before drafting and implementing any policy or law. Ultimately whether justice was achieved or otherwise would depend very much on what the recipient of the policy or law feels or experience. Only then the true meaning of justice would be achieved.

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