

## A NEED FOR REMEDIAL PROVISION TO PROTECT PERSONS WITH DISABILITIES IN MALAYSIA

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### ABSTRACT

*Persons with Disabilities have always been ignored and manipulated especially on their rights and full participation within society including education, health and accessibility. Over the last decade, there has been increasing engagement by the United Nations, developed countries, civil society non-governmental organizations (NGOs) for advancement of their rights by putting into legislative forms. United Nations has created a very significant convention called Convention on the Rights of Persons with Disabilities (CRPD) in 2006 as comprehensive legislative review for each State Members' to ratify. Meanwhile, Malaysia which ratified the CRPD in April 2008 and enacted the Persons with Disabilities Act 2008 in July the same year has shown the commitment and progress to follow other countries in protecting this minority group. The act which contains 46 sections and being divided into five parts has covered many areas that promoting and protecting the rights of disabled people including education, employment, health and accessibility. Despite of these rights, this paper argued that this protection is merely rhetoric without effective enforcement mechanism. For example, there is no remedial provision under the act for any breach made by government and private entities. They may escape from any liabilities and been considered by certain people as 'toothless tiger' legislation. It has been suggested in this paper that the provision shall be include for the advancement on protection given such as providing penalties for breach occurred under the act and establishment of conciliatory process when complaint being launched regarding disability discrimination. Therefore, a comparative approach by looking to the legislations in United States, Great Britain and Australia protecting persons with disabilities are essential for improvement of the laws in this country.*

**Keywords:** *Persons with Disabilities, rights, remedial provision.*

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### INTRODUCTION

Persons with Disabilities (PWD) have always being subject of discrimination and exclusion by the society. They are systematically discriminate and been excluded in many human activities including education, employment, accessibility, sport and cultural activities; considered as sub-humans without being recognized equally as human being (Rehman, 2009). According to the statistics under World Report on Disability 2011, this group which consists of 15% of population in a country, needs legal protection to ensure their rights and dignity will be protected accordingly ("World Report on Disability," 2011). There have been many efforts taking by international organizations especially United Nations, non-governmental organisations and civil society to create new treaty that enable the rights to be promoted. On 13 December 2006, the first human rights treaty for 21 century, UNCRPD was adopted and received reputable outcome and enthusiasm by international community. Since its opening for signature on 30 March 2007 until today, this treaty has been ratified by almost 133 countries with 156 signatories (until 5 September 2013) which been considered as 'highest number of opening signatures recorded for any human rights treaty.' (Kayess & French, 2011; "UN Enable - Development and Human Rights for All," 2011).

### THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND OPTIONAL PROTOCOL

The United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol has been considered as great milestone to achieve equal protection and participation of disabled people in legal terms. The Convention highlights the importance of persons with disabilities in the preamble to be treated equally and not being discriminated by society. The Optional Protocol, on the other point, provided with mechanism to stop discrimination through individual complaints made to the Committee established with agreement from State Parties. Before this, no convention specifically addressed the needs to protect them as the existing human rights mechanism applied to everyone (MacKay, 2007) (Kanter, 2003). Mégret suggested the specific convention is needed to protect certain group of people including disabled. This convention will holistically addressed specific needs to cater this group (Mégret, 2008). Historically, before the existence of the charter, persons with disabilities were being treated as physically and mentally retarded where they are considered as 'patient' needed to be cured. The medical model of disability studies suggested that disabled people become the object of charity not rights (Rehman, 2009; Stein, 2007).

With the existence of UNCRPD, the study of disability is now being shifted towards right-based model. This model suggested that persons with disabilities must be treated on equal basis within society without being discriminated under the law (Kayess & French, 2011; Lawson, 2007; Stein, 2007). Therefore, the needs to discuss the relationship between law and disability are being centralized and hotly debated as new academic course. Kanter suggested the idea of disability legal studies to look into the relationship and how it would influence legislators to create new laws protecting the group especially at the international and domestic level (Kanter, 2011).

In the preamble, there is the necessity to promote and protect human rights for disabled by emphasized much on the related disability perspectives covering gender, age, civil, political, economic, social and cultural (Rehman, 2009). The fundamental objective stated in the Article 1 of the Convention purposely 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. A number of fundamental principles under Article 3 are including respect of inherent dignity, freedom to make choice, independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equal of opportunity; accessibility; equality between man and women; and finally respect of the capabilities and preserving identities of children with disabilities. This Convention covers a wide range of issues affected disabled including accessibility, personal mobility, health, education, employment, habilitation and rehabilitation, and participation in political life, equality and non-discrimination (MacKay, 2007). State Parties has to take all appropriate legislative, administrative and other measures to implement the rights under the Convention as been stated under Article 4 and 33. Article 35 and 36 stated the mechanism to send the State Reports after two years of signing the Convention and subsequent reports after four years whenever the Committee so requested. The report submitted will include challenges, suggestions and recommendations whether State Parties has taken further steps to promote and protect the rights of persons with disabilities. In order to look to the steps taken by the Members States, the utmost important part to analyze is looking to the legislation proposed.

Malaysia has become the parties to the Convention when become signatory on 8 April 2008 and ratified on 19 July 2010 ("UN Enable - Development and Human Rights for All," 2011). Despite ratified the Convention, Malaysia has made reservations under Article 15 (Freedom from torture or cruel, inhuman or degrading treatment or punishment) and Article 18 (Liberty of movement and nationality) of the Convention. Unfortunately, Malaysia also has not signed the Optional Protocol that allows individual complaints from residents or citizens to the international supervisory committee against non-compliance by the Governments and this raised much concern from Malaysian Bar (Wee, 2010).

#### **PERSONS WITH DISABILITIES ACT 2008 (MALAYSIA)**

Historically, the proposed law to cover the protection towards disabled people was suggested in 2002 when Malaysia became the host to the Consultative Expert Meeting on National Disability Legislation for Asian Pacific Region and prepared by Technical Working Group under National Advisory and Consultative Council for Disabled (Krishnan, 2008). However, the law that specifically covers the disabled people was only materialized when it came into force in July 2008 after signed the convention on 8<sup>th</sup> April 2008. Persons with Disabilities Act 2008 has significantly welcome by the community and shows the effort on protecting this minority group through right-based mechanism (Tah, 2013).

This act consist of 46 sections divided into five parts covering preliminary, national council for PWD, appointment of registrar general & registration for PWD, promotion & development for PWD, and general part. Section 2 has defined persons with disabilities as 'those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in the society.' There are two entities that responsible under this act including National Councils for Persons with Disabilities and Registrar General under supervision of Director General of Social Welfare (Yusof, 2011).

The Council, under Section 3 of the act, shall consists members including Minister in charge of social welfare (currently under Minister of Women, Family and Community Development) as Chairman, the Secretary General of same Ministry as Deputy Chairman, Attorney General, Secretary General of Ministry responsible for finance, transport, human resources, Director General of Health, Chairman of the Commercial Vehicle Licensing Board and not more than 10 members who have appropriate experience, knowledge and expertise on disability issues appointed by Minister. Meeting of the council shall be at least three times a year under Section 7 and may invite any person to advise the council any matters discussing. The functions of the Council have been described under Section 9 shall be including oversee the implementation, make recommendation, co-ordinate, monitor, review any policies and national plan related with persons with disabilities. Furthermore, the Council shall recommend under Section 9 (1) (f), any changes to existing laws or propose new law to secure full and effective participation in society of persons with disabilities, including to facilitate accessibility and this legal changes must be consulted with various agencies and non-governmental sectors under Section 13 of the Act. Other functions include encourage and support any appropriate measures to recognize the skills at workplace, employment opportunities for disabled, foster level of education for children with disabilities, collect data and research, training professional in habilitation and rehabilitation services and any other functions directed by Minister for proper implementation of the Act.

The Registrar General has the power to exercise general control and supervision all the matters pertaining to registrations of persons with disabilities. His power must be under direction and supervision from Director General of Social Welfare. The Minister may appoint a Social Welfare Officer as Registrar in every state and assisted by Assistant Registrar for any districts. Every Registrar shall keep and maintain a Register of Persons with Disabilities required under Section 21 and any application to register as persons with disabilities may be made to the Council under Section 22. A 'Kad OKU' will be issued by Registrar as conclusive evidence for persons that being registered as persons with disabilities under the Act.

The act has covers the promotion and development of the quality of life and wellbeing of persons with disabilities in many areas. Section 26 until 32 covers the issues of accessibility to public facilities, amenities, and services and building, public transport facilities, education, information, communication and technology, cultural life, recreation, leisure and sport. The appropriate

measures to assist PWD in habilitation and rehabilitation are addressed in Section 33 and 34. This act also concern about PWD's access to health, protection for those who suffered severe disabilities and assistance during risk and humanitarian emergencies.

### **A NEED FOR REMEDIAL PROVISION**

In any legislation protecting civil rights, there is the need to adopt anti-discrimination measures to show the implementation and enforcement of the rights. One of the important measures including the existence of remedial provision to address any breach occurred (Fenwick, 2007; Haswira Nor Mohd Hashim, 2009). This remedial provision may not just imposing penalties but also addressed the need for disabled to launch any complaints against authority or agencies related. Unfortunately, Section 41 of the act mentioned that no suit and legal proceeding can be filed to the courts in any event of act, omission, neglect or default done in good faith towards government especially to the council members. Furthermore, the Public Authorities Protection Act 1948 has been applied in this act as the 'shield' to escape the liabilities committed by government and the Council. This clause has been criticized by several quarters as toothless tiger. It means that government especially the Council is protected from legal suit file by those who being discriminated under the act (Wong Kar Fai, 2011). Mégret (2008) argued that the failure of states to advance human rights protection for disabled is not much about their rights being not covered under the law but failure of states to focus their attention to particular difficulties suffered by this group.

In many developed countries, state cannot claim immunity from being sued by certain parties on the inability to provide with better accessible facilities and rights. In United States, Section 502 of the American with Disabilities Act 1990 ("ADA 1990") provided that state cannot escape liabilities of being sued under any disability-related discrimination. The Attorney General has the responsibility under ADA 1990 to investigate alleged violation made by any parties who discriminate disabled people. If it believed the breach occurred reasonably, the civil suit maybe filed to the court under Section 308 ADA 1990 with the permission from Attorney General after failure to settle at negotiation level. Under Title III of ADA 1990 which covers access to public accommodations and commercial facilities, court may allow monetary damages not exceed \$50,000 for the first violation and not exceed \$100,000 for subsequent violation to any parties who cause the breach. Furthermore, in Great Britain which disability discrimination now covered under Equality Act 2010 ("EA 2010") (this act only applies in England, Wales and Scotland), allows claim under the tort and judicial review to the respective court under Section 119 of the act. It shown that these countries are now providing access to disabled people getting remedy from court for any breach occurred without being interfered by government.

Besides of getting remedy from the court, persons with disabilities may launch complaint towards respective commission or tribunal. In the United States, before going to the court, the dispute must settle first at negotiation level with assistance from Department of Justice. Section 107 of ADA 1990 has provided that in any event of discrimination suffered by disabled through employment, Department of Justice must coordinate mechanism of complaint through negotiation to settle the dispute first. Any complaints made can be filed to the Department of Justice. The Department may provide assistance in order to get their compensation. In Great Britain, Equality Act 2010 which covers disability discrimination stated that any complaints can be filed to the tribunal appointed under the act or civil court. Section 116 of EA 2010 has stated that any discriminatory practice in education sector must be filed first at tribunal. Similar approach also applied to the case of employment discrimination under Section 120 of EA 2010. In Australia, any aggrieved person or group of people who suffered disability discrimination may file complaints to Human Rights and Equal Opportunity Council (HREOC) which provided assistance and investigate complaints made. The council would make conciliation until agreement reach between disputable parties under Section 67 of Disability Discrimination Act 1992. However, the complainant may bring the matters to the Federal Court or Federal Magistrates Court if the conciliation not successful.

### **SUGGESTIONS & RECOMMENDATIONS**

It is suggested that Malaysia must take further action to ensure the Persons with Disabilities Act 2008 will have effective mechanisms of enforcement of their rights through remedial provisions. Any reservations made towards the Convention and Optional Protocol should be retracted which will hinder the potential development on equal life and non-discrimination for disabled people. In terms of State immunity, Section 41 and 42 which become the shield for any legal proceedings against government must be abolished to ensure there is seriously concerned to implement the act effectively in accordance with international standards and laws in developed countries (Tah, 2013; Wong Kar Fai, 2011). A need to introduce punitive remedy such as fine and summons in the act to those who breach the requirement under the act will strengthen the enforcement mechanism through judicial process.

The function of the National Council for Persons with Disabilities must be strengthen to include ability to provide legal and technical assistances to individual who want to file complaint against Government or any private entities in the case of disability-related discrimination. Moreover, the power to investigate those complaints must be given to the Council by allowing initiating a committee like commission or tribunal. This commission or tribunal might become the conciliatory body to remedy the discriminatory practices suffered by disabled community in various sector such as employment, education and access to buildings and facilities. At this moment Human Rights Commission of Malaysia (SUHAKAM) has taken initiative to set up task force addressing various issues relevant for disabled community since the law still not fully enforced (Noorazam, 2012).

## CONCLUSION

To sum up, the author humbly suggested that Section 41 and 42 of the act should be repealed as it against international human rights standards and disability legislation in developed nations like Great Britain, United States and Australia. Furthermore, the functions of the Council must be extended to investigate any complaints made by persons with disabilities by establish commission or tribunal to address those concern. It is timely for Persons with Disabilities Act 2008 to be enforced actively to shown the commitment by Malaysian authority in dealing with various issues pertaining to disabled community.

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## STATUTES/TREATY

United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol  
Persons with Disabilities Act 2008 (Malaysia)  
Equality Act 2010 (Great Britain)  
American with Disabilities Act 1990 (United States of America)  
Disability Discrimination Act 1992 (Australia)