

MALAYSIA'S RATIFICATION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UN CRPD)¹

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ABSTRACT

Marginalization and discrimination of Persons with Disabilities (PWD) by a certain segment of societies are common problems in many countries mainly due to lack of legal measures in addressing the problems. This is one of the main factors that leads to the creation by the UN of the Convention on the Rights of Persons with Disabilities and the Optional Protocol (UN CRPD) in 2006. The treaty is significant due to various reasons and one of them is because it shifts the promotion and protection of the rights of people with disabilities from medical or charity model towards social model which adopts human rights based approach. This approach has become recent phenomena in international law which have been used by jurisdictions all over the world. As a member of the international community, Malaysia became a signatory of the UN CRPD in 2008 and later ratified it in 2010. The commitment was the impetus for the enactment of the PWD Act 2008. Malaysia, however, has made reservations on two main articles of the CRPD namely Article 15 (freedom of torture or cruel, inhuman or degrading treatment or punishment) and Article 18 (liberty of movement and nationality). It also does not sign the Optional Protocol which allows individual and groups complaint to the CRPD Committee for any breach occurred. This paper analyzes Malaysian's compliance with the rules and obligations under the UN CRPD. The Report of Roundtable Discussion on Removing Reservations of International Conventions (CEDAW, CRC & CRPD) from the Human Rights Commission of Malaysia (SUHAKAM) will be referred as part of the duty of SUHAKAM to ensure government's compliance with international human rights treaty. It is concluded that the reservation of the articles should be removed to ensure better progress of development on human rights in Malaysia.

Keywords: UN CRPD, Malaysia, Persons with Disabilities Act, reservation, interpretative declaration.

Introduction

The United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) provides significant opportunities to improve the lives of people with disabilities around the globe. Prior to this, there was little known about the promotion and protection of disabled people at international level. The existence of the UN CRPD and the Optional Protocol on 13th December 2006 have allowed many States Parties to sign and ratify this human rights treaty to show their commitment and participation in addressing various concerns which are related to people with disabilities which are the largest minority group in the world. There are two ways of ratifying international treaties; self-executing where the treaties automatically bind local laws and non-self-executing which allows the state to interpret international treaties suit to their domestic obligations. Most of the states choose the latter due to State practice (Arlene S Kanter, 2015).

Malaysia, as one of the State Parties to the CRPD, has shown the commitment to promote and protect the rights of people with disabilities. This is manifested by enacting new laws, formulating new policies and taking appropriate measures to comply with international law stipulated in the said treaty. Therefore, the main purpose of this article is to examine Malaysia's compliance with the UN CRPD and some preliminary issues surrounding the ratification of the treaty into the domestic legal framework. It will begin with the general overview of the UN CRPD together with the duty of State Parties to ensure the implementation of the treaty into domestic legislation. This article will further analyse the reservation towards Article 15 (freedom of torture or cruel, inhuman or degrading treatment or punishment) and Article 18 (liberty of movement and nationality) of UN CRPD made by Malaysia based on an official report known as The Roundtable Discussion on Removing Reservations of International Conventions (CEDAW, CRC & CRPD) (*Laporan Perbincangan Meja Bulat Mengenai Reservasi Terhadap Konvensyen Antarabangsa CEDAW, CRC & CRPD*) prepared by the Human Rights Commission of Malaysia (SUHAKAM) as the main reference. The final analysis showed there is an urgent need for the Malaysian government to remove the reservation to improve the development of human rights in Malaysia specifically addressed people with disabilities.

The General Overview of UN CRPD

Persons with disabilities is considered on an equal basis to other human beings. They have the same rights and responsibilities under the law. Historically, there were many initiative drawn by the UN to promote and protect the rights of people with disabilities prior to the CRPD such as the UN Declaration on the Rights of Mentally Retarded Persons in 1971, the UN Declaration on the Rights of Disabled Person in 1975 and the Standard Rules on Equalization of Opportunities for Persons with Disabilities in 1993. These 'soft laws' are adopted on voluntary basis and not legally binding which therefore hamper the

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objective to have full and equal recognition of people with disabilities under international law (Arlene S Kanter, 2015; Kayess & French, 2011; Quinn & Degener, 2002; M. Stein, 2007).

The initiative to create a treaty specifically on disability was promoted by several countries and had been proposed in several summits at UN stage. The Beijing Declaration on March 2000 explicitly called for the creation of legally binding treaty addressing the rights of disabled people and their full inclusion within society. Later in 2001, with the initiative from Mexico, the General Assembly adopted GA Resolution 56/168 establishing Ad Hoc Committee on a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities. This Ad Hoc Committee consists of 27 governments and 12 non-governmental organisations has the aim “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities...” which is based on holistic approach of social development, human rights and non-discrimination (“General Assembly Resolution 56/168,” 2001).

The UN CRPD was finally adopted by General Assembly on 13th December 2006 after almost eight sessions of consultation within Ad Hoc Committee. It was opened for signature by the Members States on 30th March 2007 and entered into force on 3rd May 2008. This convention has been widely accepted by the international community including State Members, non-governmental organizations, disabled people organizations (DPO) due to various reasons. Kanter (2015) list down four main reasons for broad support namely addressing long-term mistreatment suffered by people with disabilities; strengthening human rights approach towards disability issues; allowing international cooperation to assist inclusion of disabled people within community, and allowing monitoring mechanism at international, regional and domestic level in promoting and protecting the rights of disabled people.

The purpose of the UN CRPD is mentioned in Article 1 in which the states have ‘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.’ The principle of the UN CRPD has become the basic understanding for and set the foundation in promoting and protecting the rights of persons with disabilities around the world. The UN CRPD covers mainly the personal aspects and equal interaction within society including protection towards vulnerable group of people with disabilities such as woman and children. These principles, which are established under Article 3, include respect for inherent dignity; individual autonomy including the freedom to make one’s own choices, and 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; equality of opportunity; accessibility; equality between man and women; respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities and preserve their identities (UN CRPD, 2006).

There are various substantive rights protected under the CRPD. It includes the right to life, respect for privacy, equality under the law, education, employment, health, freedom from torture, inhuman or degrading treatment or punishment, and freedom from exploitation, violence, and abuse. The CRPD has shifted the charity paradigm towards people with disabilities to the human rights-based approach. the rights proclaimed in the treaty include not just civil and political rights but also socio-economic and cultural rights (Arlene S. Kanter, 2011; M. Stein, 2007). Most of these rights are also found in other human rights treaty. Thus the treaty has undeniably has expanded the concept of substantive rights protection addressing the needs and demand for the disabled community. To achieve the objectives of the treaty awareness and cooperation from the society are very much required. The effort of empowering persons with disabilities must be included in national agenda, and anything which leads to exclusion and discrimination against them must be stopped. Therefore, the implementation of rights must include the development of proper and systematic monitoring mechanisms. The unique innovation of human rights monitoring the UN CRPD which the involve various stakeholders such as government, non-governmental organizations (NGO), disabled people organizations (DPO), multinational corporation, private entities and individual are crucial to ensure large participation in addressing several issues involving disability rights (M. A. Stein & Lord, 2010).

The obligations of States Parties are stipulated under Article 4 of the UN CRPD. It requires each State Members to undertake measures to ensure the promotion and full realization of all persons with disabilities rights without being discriminated. The appropriate measures include adopting new legislation, policy and administrative matters to protect and promote human rights of people with disabilities from being discriminated and left behind another marginalized group. The state is also required to set up ‘focal points’ within government under Article 33 of CRPD for the implementation and monitoring mechanism to investigate any breach occurred under the convention. There are at least five major commitment by State Parties when signing and ratify the UN CRPD. First, each country need to modify laws, customs and practices that discriminate disabled people either directly or indirectly; second, mainstreaming disabilities in all policies; third, avoiding inconsistency practice with the UN CRPD; fourth, consulting people with disabilities and their organisations in implementing the treaty and finally providing reasonable accommodation in all aspects of environment which allow them to exercise their rights properly (Mittler, 2016).

Besides the existence of obligation of states under the UN CRPD, the Optional Protocol (OP) is an additional document to support the implementation and improvement of the rights of persons with disabilities. It allows the two-ways communication to the Committee on the Rights of Persons with Disabilities in the event of breach and violence of rights occurred within the States Parties; firstly from the individual or groups to the Committee (Article 1 OP) and secondly the Committee to State Parties to cooperate in examining the complaint (Article 6 OP). The Committee will make comments and recommendations after investigating the complaint through requesting State Parties to submit reliable information to the Committee or sending one of its Committee Members to investigate the breach or violence of rights with the consent of the State.

UN CRPD and Malaysia

Malaysia has become the signatory of the UN CRPD on 7th April 2008 and has ratified the treaty on 19th July 2010. This is a positive development on human rights obligation considering the fact that Malaysia only ratified three out of ten core human rights treaty. Prior to the ratification, Malaysia has enacted Persons with Disabilities Act 2008 to show the commitment towards international obligation stipulated under the UN CRPD (Tah, 2013). In addition, Malaysia has also committed to an Asian-Pacific regional commitment on Incheon Strategy 2013-2022 which allowed disability-inclusive development with ten (10) inter-related goals in promoting and protecting the rights of people with disabilities. One of the goals of the Incheon Strategy deals with the ratification of the UN CRPD. The recently implemented National Policy and Action Plan for Persons with Disabilities, which begins in 2016, has renewed the commitment by the government to include the minority group as the main agenda of sustainable development. These efforts by the government have been applauded by civil organizations and the disabled community. It manifests serious commitment to eliminate barriers and providing equal opportunities for people with disabilities in all aspects of life.

Although the UN CRPD was ratified, it is not fully implemented in the country due to several reasons. In most multilateral treaties, State Parties are allowed to make reservations, interpretative declaration, or even not signing the Optional Protocol of such treaty. Reservation can be defined as the refusal of states to bound by certain provisions of the treaty while consenting the rest of the agreement (Shaw, 2003). Article 2(1)(d) of Vienna Convention on the Law of Treaties 1969 (VCLOT) has described the reason for reservation of treaty is to modify the legal effect of certain provisions within treaty into domestic laws. The interpretative declaration, meanwhile, can be defined as the statement made by state parties to interpret certain clauses in a treaty for the purpose of clarification. In certain circumstances, the interpretative declaration might have a legal effect which inclined towards reservations. Therefore the International Law Commission (ILC) Report 2002 has stated that interpretative declaration needed to be distinguished from the reservation where the states require to make a declaration on the specific treaty provisions which were known as 'conditional interpretative declaration.' The latter must be made in good faith according to the ordinary meaning of the treaty where it is similar to the general rule of treaty interpretation as stated under Article 31 of VCLOT 1969 (ILC, 2002). In most circumstances, the purpose of the interpretative declaration is to show the consistency of international obligation within the treaty towards domestic laws (Abdul Ghafur Hamid, 2011). However in the case of *Belalos v Switzerland*, the European Court of Human Rights (ECtHR) argued that Switzerland's interpretive declaration on Article 6 of European Convention on Human Rights (ECHR) on right to fair trial which given more authority to judiciary over the act of public authorities did not comply with Article 64 European Convention on Human Rights (ECHR) which disallow any reservation which inconsistent with objective of the treaties. It shows that the state parties are needed to distinguish the effect of reservation and interpretative declaration and any act must not defeat the objectives and purpose of the main treaty.

Malaysia has made several reservations within the UN CRPD such as Article 15 and 18. It also made interpretative declarations on the principles of equality and non-discrimination as stated under Article 3 (b), 3 (e), 5 (2), and participating in cultural life, recreation, leisure and sport (Article 30). In addition, it did not sign the Optional Protocol. No formal reasons being given why the reservations being made (UN Treaties, 2016). Consequently, Malaysia has been criticized in the Second Universal Periodical Review 2013 because the current position may still cause discrimination against people with disabilities. Furthermore, the reservations of these two articles have been considered as infringement under Article 46 (1) CRPD where it is not permitted any reservations that incompatible with the object and purpose of the Convention be made. However, the Malaysian government has rejected the suggestions for lifting the reservations under the UN CRPD (SUHAKAM, 2015; *Universal Periodical Review Second Cycle (Malaysia)*, 2013).

Subsequently, due to changes in laws, policies and Government's actions in several circumstances, the reservation in the CEDAW and CRC were retracted in 1998 and 2010. SUHAKAM has played a significant role in the changes in accordance with its role as stated in SUHAKAM Act 1999 which is to advise the government on any matters related to human rights especially on matters related to the international human rights treaty. Section 4(1)(c) SUHAKAM Act 1999 has described the functions of the Commission to recommend to the government with regard to the subscription and accession of treaties and international instruments of human rights (SUHAKAM Act, 1999). In 2014, The Malaysian Commission of Human Rights (SUHAKAM) has taken initiative to organize and prepare a report on Roundtable Discussions on the reservation involving several other treaties that being ratified by Malaysia including the UN CRPD. The roundtable discussions had been attended by various stakeholders such as government's officers, human rights activists, representatives from various non-governmental organizations and academicians relating to woman, child and people with disabilities to discuss the issues and challenges pertaining to the reservation under three main human rights treaty ratified by Malaysia (SUHAKAM, 2015).

Malaysia has made a reservation on Article 15 UN CRPD. This article generally guarantees the rights of persons with disabilities freedom from torture or cruel, inhuman or degrading treatment or punishment. There are two main limbs involved; firstly on free consent from medical experiments, and secondly the duty of states to take proper legislative, administrative and judiciary measures to prevent disabled people subject of being torture or cruel, inhuman or degrading treatment or punishment. This article has much involved violation related to two main issues; medical and scientific experimentation and secondly, free and informed consent (Schulze, 2010). These two issues are crucial where much violations facing disabled people where they are subject to medical experiment without their free and informed consent such as in the case involving psychosocial disabilities (Waddington & McSherry, 2016). In Malaysia, Section 77 (1) Mental Health Act 2001 has provided that in any medical treatment including surgery, electroconvulsive therapy or clinical trial, the consent from patient is required with the assistance of patient's guardian, relatives or psychiatrist if the patient himself is incapable of giving consent (Mental Health Act, 2001; SUHAKAM, 2015). Meanwhile, there was no formal reasons were given for the reservation on Article 15. According to the SUHAKAM Report 2015, it was believed the reservation made was on the basis the broad interpretation involving the concept of 'torture or cruel, inhuman or degrading treatment or punishment.' Malaysia does not ratify the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture (CAT). Perhaps it is worth to note that the Penal Code and several other

criminal legislations contains death sentence and whipping as part of punishment which may be the reason for the reservations of both treaties (SUHAKAM, 2015).

Malaysia also made a reservation on Article 18 UN CRPD. This provision is relating to the liberty of movement and nationality whereby persons with disabilities must have the freedom to choose their residence and nationality on an equal basis with others. This provision is crucial to address the refusal of transportation providers denying access to travel for persons with disabilities (Schulze, 2010). In addition, the article provides protection for the children with disabilities to be registered immediately after birth including the right to get the name, acquire a nationality and taking care of their parents. The SUHAKAM Roundtable Discussion has suggested the removal to the reservation on Article 18 especially dealing with the issue of freedom of movement since it has been guaranteed under Article 9 of Federal Constitution. However, there is no official reason being given by the government but the main issue involving nationality may lead to the reservation. Malaysia has the strict law on nationality whereby Article 24 Federal Constitution disallowed dual nationality. With the reservation on nationality requirement stipulated under the UN CRC and UN CEDAW, the same applies towards the UN CRPD.

The interpretative declaration has stated that the concept of equality of opportunity and non-discrimination stipulated under Article 3 (b), 3 (e) and Article 5 (2) shall be read together with the application and interpretation of the Federal Constitution of Malaysia. In addition, Malaysia has also made an interpretative declaration on Article 30 which stated the recognition for participation in cultural life, recreation, leisure, and sport are in the matters of domestic legislation (UN Treaties, 2016).

Malaysia did not sign the Optional Protocol of the UN CRPD. The signing of the Optional Protocol would allow any individuals and groups to make complaints on any breach occurred against person with disabilities to the Committee of the UN CRPD. However, the SUHAKAM has suggested the careful study needed to be made to ensure all possible remedies within domestic jurisdiction being exhausted before signing the Optional Protocol (SUHAKAM, 2015).

Recommendation and Conclusion

There is no doubt that the UN CRPD has changed the lives of people with disabilities around the world. From the medical model towards social model, the UN CRPD has influenced various stakeholders including state parties, non-governmental organizations (NGO), disabled people organizations (DPO), disability activists, academician, and individuals, working and co-operate together to uphold the rights and dignity of the world's largest minority. The ratification of the UN CRPD by Malaysia has inherently shown worth and long-term commitment by the government to ensure the protection of persons with disabilities in accordance with international human rights standard. It has been materializing with the domestic legislation known as Persons with Disabilities (PWD) Act 2008 which become the first civil rights act specifically address disabled people who are facing attitudinal and environmental barriers which affected the basic enjoyment of their life. However, the reservation on Article 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment) and Article 18 (liberty of movement and nationality), in addition to the refusal of signing the Optional Protocol by the government have become the barriers towards full implementation of disability rights in Malaysia. As evidenced by the outcome and resolutions of the SUHAKAM Roundtable Discussion 2015, it is undeniable that there is urgent needed to remove these reservations. Finally, this paper would recommend that Malaysian government accepting the suggestion made by SUHAKAM on removing those reservations. Such removal would improve and uphold the condition and development of human rights in Malaysia in accordance with international standard stipulated under the UN CRPD.

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