

THE ROLE OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) IN PROTECTING REFUGEES IN MALAYSIA

Dr Ikmal Hisham Md. Tah
Faculty of Law
Universiti Teknologi MARA, 40450 Shah Alam, Malaysia
Email: ikmal@uitm.edu.my

Dr Zuraini Ab. Hamid
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia, 53100 Kuala Lumpur, Malaysia
Email: zurainihamid@iiu.edu.my

ABSTRACT

Protecting the refugees is part of humanitarian protection that exists in every nation, especially for the disabled. Refugee with disabilities is subject for being side-lined especially to their impairment due to environment, social and attitudinal barriers. Malaysia is the party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) since 2010; however, not becoming a party to the Refugee Conventions 1951. This paper will explore whether the CRPD is sufficient in protecting the rights of the refugee with disabilities despite not being party to the 1951 Convention. The paper adopts doctrinal analysis to who are refugees, what are the issues related to refugee with disabilities and what are issues related to non-ratification of 1951 Convention by Malaysia. This paper took the position that despite the ratification of CRPD, the reservation made on Article 18 CRPD on nationality by Malaysia has restricted the application of CRPD in Malaysia towards refugee with disabilities. The authors believe that the CRPD has its role in protecting the rights of the refugee with disabilities. Even with the non-ratification of the UN Refugee Convention 1951 by Malaysia, the treatment towards refugee with disabilities must be for the sake of an equal basis with others and humanitarian reasons.

Key words: refugee with disabilities, The UN Convention on the Rights of Persons with Disabilities, The UN Refugee Convention 1951, Malaysia, legal framework.

INTRODUCTION

According to the latest statistics by The United Nations High Commissioner for Refugees (UNHCR), since June 2020, there is 177,940 refugees and asylum-seekers registered with UNHCR in Malaysia. The majority are from Myanmar, especially Rohingya Community, then followed by other countries such as Pakistan, Yemen, Somalia, Syrian, Afghans, Sri Lanka, Iraq, Palestine and other countries. Majority of them are man, living in Selangor and Kuala Lumpur while 46, 370 are children below 18 years old (“UNHCR - Figures at a Glance in Malaysia,” 2020). However, none described on numbers involving refugee with disabilities, one of the most marginalize refugee community worldwide.

Refugee, especially with disabilities, has the potential of being excluded by from social support, services and durable solution. Their status as ‘invisible’ will open such potential if there is no proper legal and administrative mechanism to adopt by countries. In order for a better understanding of their status, the international and domestic legal commitment adopts by Malaysia and related to refugee with disabilities would be explained below.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is the first international human rights treaty promoting and protecting the rights of disabled people. For more than three decades, the CRPD has come to materialise on 13th December 2006 and opened for signature on 30th May 2007 (MacKay, 2007). This treaty has codified the universal rights including economic, social, cultural, civil and political rights for persons with disabilities. Article 4 CRPD sets up the general obligations of State to ensure and promote the full realisation of all human rights and fundamental freedom for persons with disabilities including undertaking appropriate domestic legislative, administrative and other measures to implement the rights in the CRPD into the State Party (Kayess & French, 2011). Malaysia had become the State Party to the CRPD when it signed in 2008 and ratified in 2010. In response to the obligation, Malaysia has enacted the Persons with Disabilities Act 2008 to ensure PWD protected within national legislation (Ikmal Hisham Md. Tah, 2013).

However, Malaysia has made reservation towards Article 15 and Article 18 CRPD and not bound to both provisions (Ikmal Hisham Md. Tah & Khairil Azmin Mokhtar, 2016). In addition, Malaysia also did not ratify Optional Protocol which allows individual complaints against State Party to the UN Committee on CRPD. Article 15 stated the obligation of State Parties to ensure PWD, on an equal basis with others, shall not subjected to torture, cruel, inhuman, or degrading treatment or punishment through legislative, administrative, judicial or other measures. Furthermore, this Article also stipulated that no one shall be subject for medical or scientific experimentation without free consent.

One of this reservation is related to Article 18, which deals with the rights of movement and nationality. The reservation is undeniably rejected implementation of rights towards refugee with disabilities who have denied the rights of movement and possibility of getting either permanent residence or citizenship.

THE REFUGEE CONVENTION 1951

The Refugee Convention has become essential tools under the international human rights treaty-based on two prominent tasks. Firstly, it is to determine the refugee status and secondly to establish substantive rights towards refugee, including economic and social rights (Crock, Smith-Khan, McCallum, & Saul, 2017, p. 185).

Refugee, according to Article 1(2) of The United Nations Convention on the status relating to Refugees 1951, stated as “As a result of events occurring before 1st January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. From the definition, we may generally conclude that a refugee is a person who is left their country due to fear of being persecuted for various reasons outside their own country and not being able to return to their home country. The various reasons are related to such conditions, race, religion, nationality, membership of a particular social group or political opinion. In 2017, the report by The High Commissioner for the Refugees (UNHCR) stated almost 65.6 million people left their country and being forced to do so (UNHCR, 2017).

Malaysia, however, did not sign the Refugee Convention 1951. Under the Malaysia Immigration Act 1959, the refugee is still under the category of illegal immigrants which covers under Section 5, 6, 8, 9 and 15 of the Act. Section 6 of the Malaysian Immigration Act 1959/63, provides that no person other than a citizen shall enter Malaysia unless he is in possession of a valid Entry Permit lawfully issued to him under section 10 or he is in possession of a valid Pass lawfully issued to him to enter Malaysia. Section 15 of the Malaysian Immigration Act further provides that without prejudice to any other provision of this Act prohibiting a person from remaining in Malaysia, a person shall not remain in Malaysia after the expiration of the period of any Pass relating to or issued to him. As a result, the status of ‘refugee’ does not exist in Malaysian law and, at least formally, the fact that a person has the recognition of the United Nations High Commissioner for Refugees (UNHCR) does not attract any special rights in Malaysian law.

Therefore, it is submitted that refugee with disabilities are not protected under the national legal framework. However, for many years, UNHCR has play significant role in providing welfare and portal for resettlement of the refugees. The Government has play minimal role in assisting and protecting refugee where this issue has its political sensitivity (Crock et al., 2017, p. 47). Recently, the issue of refugee has also creating xenophobic, uneasiness and tension amongst local community especially during the health pandemic of Covid-19 due to some issues and news related to the community (Fishbein, 2020).

ISSUES RELATED TO REFUGEES WITH DISABILITIES

Despite reservation on CRPD and non-ratification of the 1951 Refugee Convention, there is still crucial for most State Party to address the concern on the refugee issue. The CRPD has no severe consideration of excluding citizens and non-citizens, especially refugee and other displaced persons (Crock et al., 2017, p.

26). CRPD has provided a significant contribution in understanding the issues related to disability in displacement where it provided the duty of Government to ensure their laws, policies and practices in compliance with the duty under the treaty. It has created a range of extra barriers and added towards understanding disability from the perspectives of refugee and displacement (Crock et al., 2017, pp. 130–131).

Refugee with disabilities is considered as the most discriminated minority group and considered as vulnerable persons who experienced forced migration. The UNHCR has categorized disability into language of medical references and impairments, rather than barriers and environment factors that affected their ability to function and participate in the society. The categorized of disability are assigned through corresponding codes including, visual impairment including blindness (DS-BD), hearing impairment including deafness (DS-DF), moderate physical disabilities (DS-PM), severe physical disabilities (DS-PS), moderate mental disabilities (DS-MM), severe mental disabilities (DS-MS), speech impairment (DS_SD) and mental illness (SM-MI). According to Crock et.al (2017), the codes label might be confusing especially on the differences between moderate, severe physical disabilities and difficulties in providing suitable codes for those who were facing multiple disabilities. It shows that medical approach is still largely rely by most international organisations in dealing with disability issues (Crock et al., 2017, pp. 67–69).

The UNHCR has come out with two main guidelines on how to work with persons with disabilities in forced displacement and resettlement assessment tool for refugees with disabilities. These two documents were made both subsequently in 2019 (updated version since 2011) and in 2013 to show the UNHCR commitment in protecting the rights of the refugee with disabilities around the world (UNHCR). Besides two main latest guidelines the UNHCR has come out with the International Disability Alliance (IDA) on the Global Refugee Forum Pledging Guidance - Inclusion of Persons with Disabilities and the earliest report on The 39th Standing Committee (Executive Committee Of The Dist. High Commissioner's Programme) (EC/58/SC/CRP.14) on 6th June 2007 which stipulated on the protection of older persons and persons with disabilities.

In dealing with disability issues, especially refugee, the twin-track approach shall be adopted, firstly to design all responses to be inclusive and accessible to disabled people. Secondly, providing targeted actions to enable disabled people to participate in any decision affected their lives (UNHCR, 2019, p. 12). Therefore, it is crucial to understand various issues related to refugee with disabilities. Below are some issued highlighted related to refugee with disabilities.

1. Humanitarian intervention and emergencies

In most circumstances, a refugee with disabilities would face the risk of being exploited and violence. They are being left and considered as invisible, especially in any situation of risk, armed conflict and during emergencies and natural disaster. For example, in the situation involving forced migration from conflicted areas to neighbouring states or others (like in Iraq, Syria, Bangladesh), experiencing natural disasters (Myanmar, 2004 Asian Tsunami, 2010 Haitian earthquake). In Northern Uganda, the refugee with disabilities, especially woman, were facing disability-based abuse and persecution due to inability to flee rebel forces (Stein & Lord, 2011, p. 402).

Article 11 CRPD described the duty of the State Party to ensure safety and protection for persons with disabilities with necessary measures during the situation of risk, armed conflict, humanitarian emergencies and natural disaster. Furthermore, CRPD has allowed the progression of understanding and application of disability rights into the refugee, asylum international humanitarian law and international criminal law (Lord & Stein, 2017, p. 736).

This provision allows the protection against refugee with disabilities in any peace and conflict situation. The application of international humanitarian law (IHL) is crucial where disability are subjects of any risk situation and during armed conflict. In the peace situation, the application of human rights law, for example, is crucial in protecting refugee with disabilities, for example, during the current pandemic of Covid-19.

The CRPD also addressed the concern involving international criminal law. The CRPD should serve as a similar role with other human rights inquiry commission. For example, the UN Commission of Inquiry on Human Rights in the Democratic Republic of Korea has made well-documented abuses against persons with disabilities in North Korea (Lord & Stein, 2017, p. 738).

In Malaysia, there is still lack of understanding on promoting CRPD to protect refugees especially during humanitarian intervention and emergencies. In detailed research provided by Crock et.al (2017), there is missing link of connection between non-governmental refugees organisation (such as Coalition of Burma Ethnic Malaysia known as COBEM and other related human rights NGO), the UNHCR and disabled people organisations (DPO) in Malaysia. There had no further contact between NGO on refugees with any relevant DPO in Malaysia to discuss various issues related to refugee with disabilities. Furthermore, most of these organisations still viewed disability from medical or charity approach rather than right-based approach which stipulated within the CRPD (Crock et al., 2017, p. 49).

2. Accessibility

The CRPD has become the catalyst to support socio-economic rights that crucial for the survival of them in different nations (Peterson, 2013, p. 690). Article 9 CRPD has provided the inclusive and human rights-based approach to accessibility for physical, electronic accessibility and access to services on an equal basis with other people (Seatzu, 2017, p. 236).

Most of the refugee with disabilities are facing forced migration, which impacts them in various ways. For those who are staying in the camp, the physical layout and infrastructure of the camp are a primary concern due to mobility difficulties facing wheelchair users and surrounding of the camp which affected their psychological situation especially for woman and children with disabilities (Stein & Lord, 2011, pp. 404–405). The refugee with disabilities is also facing severe issues on accessibility due to stigma and isolation facing them. This issue includes access to education for refugee children with special needs, employment, understanding written, verbal information, registration of documents, support or recalling and recounting with the accuracy of relevant details during interviews (UNHCR, 2013). In Malaysia, most of refugee's children entered 'Community Learning Centres' instead of national school where they cannot enter into. This community learning centres are lack access in terms of limited training of volunteer's teachers on special needs children, and classrooms that are physically inaccessible. It leads to discriminate them on part of getting proper and meaningful education which would change their life in future (Crock et al., 2017, pp. 123–124). On part of employment, refugee has no legal rights to work and in 2016, there was government discussion to allow refugees from Rohingya and Syrian in Malaysia to work. However, in most circumstances' refugees are relying on support from local NGOs, own savings before displacement and remittances from relatives overseas (Crock et al., 2017, pp. 229–230).

3. Social support

The refugee with disabilities also lacks in terms of social support especially in personal, social support including the risk of longer-term physical and psychosocial disturbance which lead to mental health issues, family separation and abandon (UNHCR, 2013). During the process of moving the refugee by plane or ship, there was the possibility that refugee with disabilities losing their family support where family and caregivers were separated and make the difficulties in terms of mobility and visual disabilities due to physical barriers. At the same time, the deaf and intellectual disabilities would face communication barriers and lack of social support on their rights. In most circumstances, the humanitarian workers were also lack of training in dealing with any refugee with disabilities and therefore tended being neglected (Stein & Lord, 2011, p. 406).

The basic necessities and food are another concern on refugee with disabilities. In terms of basic necessities, the food distribution system would provide disadvantages towards disabled refugees where they need to queue up for a longer period due to their impairments. The situation would become deteriorated when they are separated in the camp and no peer support given to them. For the food and nutrition, it was reported in Nepal that providing special rations of vitamin-enriched milk in the refugee camp had given positive health

improvements for children with disabilities (Stein & Lord, 2011, p. 407). In Malaysia, the UNHCR has work together with local NGOs providing basic healthcare services for refugees. However, there is limited sources and high waiting time for refugees to get their proper treatment including health literacy and mental healthcare. In most cases, communal diseases amongst refugees in Malaysia including tuberculosis (TB) which might affected larger local community. The government has taken this seriously including improving accessed to medical responses for refugees diagnosed with this illness (Crock et al., 2017, pp. 203–204).

4. Long-term settlement / resettlement

The issue of resettlement has become a significant concern for any refugees fleeing their country. Any host country must provide short- and long-term places for them to settle down. The UNHCR provided Resettlement Assessment Tool in 2013 to deal with appropriate duration and needs for refugees with disabilities. This tool would identify the individual needs and how they might be integrated into society in the host country (UNHCR, 2013). The first step of resettlement according to the guidance is to identify the specific needs of the disabled refugee during the process of registration, raise awareness amongst staff, refugee communities, using appropriate information, dissemination, communication, establish referral system, monitor protection of the environment, health, medical assessment and assessing other appropriate other solutions including local integration. Besides, this guidance also provided proper language in dealing with refugee with disabilities, including avoiding offensive words used against disabled people such as spastic, cripple, retarded, crazy, mad. Instead, the preferred word shall be used, such as a person with physical disabilities, person with mental health issues and a person with Down Syndrome (UNHCR, 2013, p. 7). The proper attention of using such terms would be essential and crucial to avoid any stigmatisation facing refugee with disabilities, especially during interview sessions on resettlement.

Therefore, there must be a consultation in terms of the period of settlement in the host country for the refugee with disabilities. Malaysia has one of the largest numbers in world on part of resettlement program in 2012. A large number of refugees in Malaysia is concentrated in the city of Kuala Lumpur but living scattered based on their community and assisted by refugee-based NGO. For example, the Coalition of Burma Ethics (COBEM), Sri Lankan refugee association which are responsible for their community. Some of them are living in the squatter's area, abandoned housing project and fairly in poor neighborhoods (Crock et al., 2017, pp. 46–47). In research conducted by Crock et.al (2017) during the status of determining refugees known as Refugee Status Determination (RSD), the UNHCR's record might conflated disability with medical needs cases. This confusion leads to lack of understanding on proper procedures on identifying their status and none of them were understand any knowledge relating to their rights under the CRPD (Crock et al., 2017, pp. 144–145).

Suggestions and Recommendations

Through various issues surrounded refugee with disabilities, several suggestions can be made to improve the situation for the refugee with disabilities in Malaysia. First, the role of disabled people organisations (DPO) in Malaysia. The DPO has an active role in observing issues related to disabled refugee, especially on their difficulties on accessibility and social services. Based on the research made by Crock et al. (2015), there was little awareness by Disabled People Organisations (DPO) in Malaysia deal with issued related to refugees, At the same time there is also missing link between NGO refugee based organisation to deal with local DPO in dealing with issues related to disability (Crock et al., 2017, p. 49). It is timely for the DPO, including the NGO to take serious concern on matters about refugee with disabilities. Furthermore, the private company may take proper steps to employ refugee workers is another stepping stone to improve the situation and condition of refugee in this country.

The Government shall take the issue of refugee seriously. There is a suggestion for the Government to ratify the Refugee Convention 1951 to ensure Malaysia commits to the international commitment in protecting the refugees since this issue has become contentious in global eyes due to conflict occurred in most countries. It was also timely for Government to reconsidered further study on the reservation on Article 15 and 18, which undeniably denied the protection on the rights of the refugee with disabilities. At

the same time, the proper policy and action plan are needed to consider ensuring there is a proper plan and settlement on the issue of refugee for a longer period to ensure stability in the country.

CONCLUSION

To sum up, this paper concluded that refugees with disabilities are entitled to the same protections under the law with other marginal communities. The medical or charity approach has largely affected the treatment to this group rather than right-based approach. At the same time, by taking into consideration of national security and sovereignty, the Government may come out with proper legal and administrative measures as stipulated in the CRPD to address the concern on this marginalise and invisible community in the name of humanity.

ACKNOWLEDGMENT

This paper is funded by Fundamental Research Grant Scheme (FRGS19-121-0730) entitled “Formulating Legal Framework on Refugee Status in Protecting Sovereignty and Security of Malaysia” granted by the Ministry of Higher Education of Malaysia (MOHE).

REFERENCES

- Crock, M., Smith-Khan, L., McCallum, R., & Saul, B. (2017). *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* Cheltenham UK: Edward Elgar Publishing.
- Fishbein, E. (2020). The New Humanitarian | In Malaysia, coronavirus crackdowns fuel fear and uncertainty for refugees and asylum seekers. Retrieved July 23, 2020, from <https://www.thenewhumanitarian.org/news/2020/05/25/Malaysia-coronavirus-refugees-asylum-seekers-xenophobia>
- Ikmal Hisham Md. Tah. (2013). Rights of Persons with Disabilities: The “Almost Forgotten” Protection under the Federal Constitution. In Khairil Azmin Mokhtar (Ed.), *Constitutional Law & Human Rights in Malaysia: Topical Issues and Perspectives* (pp. 411–430). Petaling Jaya, Malaysia: Sweet & Maxwell Asia.
- Ikmal Hisham Md. Tah, & Khairil Azmin Mokhtar. (2016). Malaysia’s Ratification of the UN Convention on the Rights of Persons with Disabilities. *International Journal of Business, Economic and Laws*, 11(4), 83–87.
- Kayess, R., & French, P. (2011). Out of Darkness into light? Introducing the Convention on the Rights of Persons with Disabilities. *Human Rights Law Review*, 8(1), 1–34.
- Lord, J. E., & Stein, M. A. (2017). Charting the Development of Human Rights Law through the CRPD. In V. Della Fina, R. Cera, & G. Palmisano (Eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (pp. 731–748). Cham, Switzerland: Springer International Publishing.
- MacKay, D. (2007). The United Nations Convention on The Right of Persons with Disabilities. *Syracuse Journal of International Law and Commerce*, 34, 323–331.
- Seatzu, F. (2017). Article 9 [Accessibility]. In *The United Nations Convention on the Rights of Persons with Disabilities* (pp. 225–242). Springer.
- Stein, M. A., & Lord, J. E. (2011). Enabling refugee and IDP law and policy: Implications of the UN Convention on the Rights of Persons with Disabilities. *Arizona Journal of International & Comparative Law*, 28, 401.
- UNHCR. (2013). *Resettlement Assessment Tool : Refugees with Disabilities*.
- UNHCR. (2017). *GLOBAL TRENDS FORCED DISPLACEMENT IN 2016*. UNHCR. Geneva, Switzerland: UNHCR The UN Refugee Agency. <https://doi.org/10.1001/jama.1926.02680240008003>
- UNHCR. (2019). *WORKING WITH PERSONS WITH DISABILITIES IN FORCED DISPLACEMENT*. UNHCR (Vol. 2). UNHCR The UN Refugee Agency. <https://doi.org/10.1598/JAAL.54.8.2>
- UNHCR - Figures at a Glance in Malaysia. (2020). Retrieved July 23, 2020, from <https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>