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Malaysia Legislates the Rights of the Child: Challenges, Progress and Impact

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Abstract

Since the adoption by the United Nations in 1989 of the Convention on the Rights of the Child, all the 196 States including Malaysia have agreed to be bound by the treaty which simultaneously ushers the beginning of the new era in legislating the rights of the child based on binding norms that are now universally applicable. Hence, the paper intends to examine the status of Malaysia`s reservations, the challenges it has been facing in the light of its reservations, reporting requirements, and the international human rights monitoring procedure in implementing legislation concerned with the Child Act 2001. For the research methodology, the study applies International Law, Reservation and Convention and will analyse empirical materials including primary reports from the United Nations, the Malaysian government and non-government agencies. The paper concludes that Malaysia will continue to stride towards a humanely progressive promulgation of all the rights enshrined in the Treaty.

Keywords

UN Child Rights Convention, Malaysia, treaty obligations, National Child Act, Reservation Assessment

JEL Classifications: J11, F43

1. Introduction

"… mankind owes the child the best it has to give"
(UNGA Res. 1959)

On 17 February 2022, it has been twenty-seven years since Malaysia submitted the instrument of accession to the Treaty to the Secretary-General of the United Nations. Malaysia's accession to the Treaty in 1995, which entered into force on 19 March 1995, six years after its acceptance by the United Nations, ushers the beginning of a new era for its children – for their care, protection rehabilitation, participation and development based on binding norms that are now universally applicable. The accession, which took place during the administration of Tun Mahathir Mohamad, the fourth Prime Minister of Malaysia, represents Malaysia's historic commitment in elevating the rights of the child to that of the global standard. His administration created two important institutions that supervise the national incorporation of the Treaty: firstly, the Human Rights Commission of Malaysia (HRC), better known as SUHAKAM (HRC of Malaysia Act 1999) and secondly, the Ministry for Women, Family, and Community Development (the Ministry) which is responsible for matters that include children, women, and family. Together, the Ministry and SUHAKAM now play leading roles in the national implementation of this most-ratified human rights treaty (UNCRC 1989).

The acceptance of the Treaty by the United Nations in 1989 (Engle 2011) "has given the global community an instrument of high quality that protects the dignity, equality and basic human rights of the world's children" (de Cuellar 1989). The Treaty has been described as a "ground-breaking" human rights treaty because, not only, it provides a wide range of protection to all rights of the child as a human being (Cohen 1997, 29), but also, the norms embedded in the Treaty, according to Kilkelly (2011), have become the guiding principles to anyone who is working with and for children worldwide (Cohen 1997). Doek (2003), a Dutch jurist and former chairperson of the committee of experts (hereafter, the 'Committee') – claims it is the leading legal instrument on the rights of the child under international law.

The Treaty represents the fruits of, not just the lengthy drafting process, involving the like-minded Member States of the United Nations (UN), its agencies, numerous non-state actors – the non-governmental organisations (NGOs), including women organisations, all profoundly determined that the children of the world deserve the best, but also the overwhelming evidence of close collaboration, and interdependence among the world society (de Cueller 1989). Engle (2011) designates the Convention as "attractive" because it is "well-defined". Nelson Mandela, the former and late President of South Africa, whose struggle in human rights left a long lasting "imprint" (Sharma 2019) in the world, characterised the Treaty as "… that luminous document that enshrined the rights of the child, without

exception, to a life of dignity and self-fulfilment" (Government of South Africa 2000).

Although Malaysia has acceded to the two Optional Protocols to the Treaty relating to armed conflict and the sale, prostitution and child pornography (UNTC 2000a; UNTC 2000b), this paper primarily looks at the national implementation by Malaysia of its international obligations under the Treaty. Assessing the challenges it encounters and the impact of the international norms, the aim of this paper is to trace the progress of the incorporation by Malaysia of the international obligations under the Treaty by relying, *inter alia*, on the initial and subsequent periodic reports which Malaysia as a State Party is obliged to submit to the Committee, the concluding observations of the Committee, and the reports emanating from the Universal Periodic Review (see under 'Challenges and International Human Rights Monitoring Mechanism' below).

Thus, there are three scopes of discussion for this paper. Firstly, to examine the status of reservations, the challenges it has been facing in the light of its reservations, the reporting requirement, and the international human rights monitoring procedure which it is obliged to participate in. Secondly, it then assesses the progress of the incorporation of the child rights by reviewing the scope of the domestic legislation - the Child Act 2001 (KPWKM 2021a), which represents the first and an important step in fulfilling Malaysia's international obligations. Thirdly, the paper analyses the scope of the Child Act, and the extent of the subsequent amending legislation, the Child (Amendment) Act 2016 (KPWKM 2021b). Before any further discussion, the study defines first the meaning of international law as the conceptual framework of the paper. Then, it evaluates how and why its international legal framework on the Law of Treaties (UN Vienna Convention 1969) may regulate States' adherence or otherwise to multilateral treaties?

2. Conceptual Framework: International Law, Reservation and Objection

Human rights are political and legal standards set in the basic constitutional laws of various countries (Bielfeldt 1995). In the case of Malaysia, these are found in Part II – *Fundamental Liberties* (Articles 5 – 13) of the Federal Constitution (Tunku Sofiah Jewa et. al. 2007). Principally, the American "Virginia Declaration of Rights" of 1776 and the French "Declaration of the Rights of Man and of the Citizen" of 1789 ("declaration des droits de l'homme et du citoyen"), were the precursor of the Western standards (Bielefeldt 1995). The "Great Charter of Freedoms" or popularly known as "Magna Carta" (Hogg 1995), which was issued by the medieval King John of England during his rather hostile rule, was categorised by the then Lord Denning, an English judge, at the 750th Anniversary of Magna Carta, as the "greatest constitutional document of all times – the foundation of the freedom of the individual against arbitrary authority of the despot" (Lee 2015). The principles set out in these important documents have influenced the modern-day

development of human rights law which did not take place until after the Second World War (Bielefeldt 1995).

According to Bielefeldt, human rights in international law developed as the result of wrongdoings which took place in the modern world (Bielefeldt 1995). Bielefeldt notes that, the constitutions of the League of Nations and the United Nations envisioned some forms of international protection for human rights (ibid.). However, the modern international human rights law become entrenched when the Charter of the United Nations was agreed in 1945 following the end of the Second World War (Buergenthal 2017). According to Bielefeldt, the foundation for human rights lies in moral philosophy which exists, not only in the West, but also, in other parts of the world (Bielefeldt 1995). Bielefeldt identifies the Universal Declaration of Human Rights (UDHR 1948) as the product of a multi-party endeavour. In 1948, there were already sixty members of the United Nations, including, Myanmar (Burma), Thailand, Philippines from Southeast Asia; Iraq, Iran, Yemen, Saudi Arabia from the Middle-East; Ethiopia, South Africa from the African continent, and at least fourteen countries from Latin Americas (The Editors of Encyclopaedia Britannica 2016). Since then, the UDHR (1948) has been endorsed by nations around the world (Bielefeldt 1995). The Child Treaty is another of such international law. First, what is ‘international law’?

By ‘international law’ here means a “body of rules and principles binding upon … states in their relations with one another” (Kaczorowska 2010). Quoting Professor Shearer, Kaczorowska states that they include “rules relating to the functioning of international organisations…” and those “relating to individuals and non-states …” (ibid., 7). They are generally called public international law (Klabbers 2021). Article 38 (1) of the Statue of the International Court of Justice, one of the six principal organs of the United Nations, defines international law to include ‘conventions’ (or treaties). The Vienna Convention (1969) on the Law of Treaties (hereafter, ‘Vienna Convention’) of which Malaysia is a State Party since 1994, defines *treaty* as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (Article 2 (1) (a). The 1989 Treaty and its 2000 Optional Protocols fall within this definition (UNTC 2000a; 2000b). The Vienna Convention (1969) governs ‘reservation’ and ‘objection’ to any multilateral treaties, such as the Treaty, permitting States Parties to do so as appropriate (UN Vienna Convention 1969). A ‘reservation’ is a ‘unilateral statement’ made by a State, which seems to “exclude or modify the legal effect” of the Treaty in question to the State making the ‘reservation’ (Article 2 (1) (d), Vienna Convention 1969). Thus, the Netherlands’ reservation of 17 December 1997 vis-à-vis Article 26, states:

The Kingdom of the Netherlands accepts the provisions of article 26 of the Convention with the reservation that these provisions shall not imply an independent entitlement of children to social security, including social insurance (UNTC n.d.).

Likewise, the reservation entered by Denmark on 19 July 1991 states:

Article 40, paragraph 2 (b)(v) shall not be binding on Denmark. It is a fundamental principle of the Danish Administration of Justice Act that everybody shall be entitled to have any penal measures imposed on him or her by a court of first instance reviewed by a higher court. There are, however, some provisions limiting this right in certain cases, for instance verdicts returned by jury on the question of guilt, which have not been reversed by the legally trained judges of the court.

(UNTC n.d.).

Given that entering reservation is the right accorded equally to each State Party to the Treaty under international law, numerous States Parties to the Treaty, including Croatia, France, Holy See, Liechtenstein, New Zealand, to name a few, have made 'unilateral statements' to specific articles of the Treaty (UNTC n.d.). Malaysia, which has also exercised its right to do likewise, is not an exception. What are the reservations made by Malaysia?

Upon accession in 1995, Malaysia entered reservations to 12 articles of the Treaty, namely (UNTC, n.d.):

- Article 1 (defines who is the 'child');
- Article 2 (equal treatment of a child);
- Article 7 (child's right to be registered at birth, to a name, and nationality);
- Article 13 (child's right to express oneself);
- Article 14 (child's right to religion, etc.);
- Article 15 (child's right to associate and assemble peacefully);
- Article 22 (right to be protected as asylum-seekers and refugees);
- Article 28 (right to access education);
- Article 37 (right not to be tortured);
- Article 40 (right to due process of law);
- Article 44 (State Party to submit initial report), and
- Article 45 (State Party may request assistance from specialised UN agencies).

Based on this, what were the reactions of other States Parties towards Malaysia's reservations? What other pressures influenced Malaysia's subsequent decision to withdraw a number of the articles from the list? To answer these questions, the paper will now focus on the challenges faced by Malaysia and discuss the reasons as to why it continues to maintain several of these reservations.

3. Challenges and International Human Rights Monitoring Mechanism

Several States Parties to the Treaty reacted to Malaysia's reservations, expressing their disapprovals in writing to the Secretary-General of the United Nations (UNTC n.d.). Finland, for example, states that the reservations contradicted the 'object and purpose' of the Treaty (UNTC n.d.) as it is disallowed by article 19 of the Vienna Convention (UN Vienna Convention 1969). Germany points out that the reservation made by Malaysia tries to restrict its obligations under the Treaty

by using its domestic legislation as a reason, questioning Malaysia's commitment (UNTC n.d.). While objecting on similar ground as that proffered by Germany, Portugal believes that Malaysia's reservations are against the cornerstone of international agreement (UNTC n.d.), the *pacta sunt servanda* principle – the Latin phrase which means that 'agreement must be kept' (Article 26) (UN Vienna Convention 1969). There are two parts to the principle, firstly, it imposes legal obligation upon a State Party and secondly, the obligation must be performed (Aust 2013). But what is the view of the Treaty body (hereafter, the 'Committee') on the matter of reservations made by States Parties (including Malaysia) to the Treaty?

Article 43 of the Treaty provides supervisory powers to the Committee over States Parties' domestic incorporation of their international obligations (UNCRC 1989). It also monitors reservations made by States Parties to the Treaty. Juridically equal, State Parties to the Treaty are using their rights to make reservations and that their peers, likewise, have the corresponding right to raise objections provided by international law (Article 19) (UN Vienna Convention 1969).

The Committee's aim is for State Parties to legislate fully the rights enshrined in the Treaty. This goal can only be realised if State Parties completely agree with all the provisions in the Treaty, or where reservations have been made, to withdraw them all (UN Vienna Convention 1969). This is the only way to implement every right in the Treaty.

In 2006-2007, the Committee reviewed Malaysia's Initial Report (OHCHR 2006b; 2007a; 2007b) and made reference to the conclusion of the World Conference on Human Rights in Vienna of 25 June 1993 (Vienna Declaration 1993) relating to reservations of human rights treaties by States (OHCHR 1993). Tun Ahmad Badawi, the then Foreign Minister, led the Malaysian delegation to this conference (ibid.). The Vienna Declaration lays down two important rules regarding reservation: firstly, it is narrow and secondly, it should not contradict the *object and purpose* of the treaty (OHCHR 1993). During the review, the Committee determined Malaysia`s reservations as *unnecessary* (OHCHR 2006b). Clearly, any reservation by a State Party inhibits the complete domestic incorporation of all the rights in the Treaty. What was Malaysia's reaction to these external pressures?

As a result of these international pressures, Malaysia withdrew its reservations to most of the aforesaid articles, except articles, 2, 7, 28 paragraph 1 (a), and 37, on 19 July 2010 (UNTC 2010). It would appear that despite the unanimous conclusion reached at the SUHAKAM Roundtable in 2005 to remove articles 2, 7, 28(1)(a), and 37 from the list of reservations, these articles are still retained as of today (SUHAKAM 2005, 90-91).

However, Malaysia is not alone in entering and maintaining reservations to the Treaty. Similarly, other State Parties, including Islamic countries, do so in varying extent. On the one hand, Algeria, Bangladesh, Brunei Darussalam, Iraq, Jordan, Maldives, Morocco, Oman, Qatar, Somalia, Syria and UAE are among those which still maintain their reservations to article 14 on Freedom of Thought, Conscience and Religion (Hashemi 2007; Massoud 2009; UNTC n.d.). On the other,

Iran (Islamic Republic of) for instance, has entered a general reservation upon accession that reads:

"The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the International Legislation in effect (UNTC n.d.)".

Kuwait and Mauritania do likewise. However, they do not enter reservations in respect of articles 2, 28(1)(a), and 37 of the Treaty, which are still maintained by Malaysia. It is noted that Tunisia has withdrawn its reservation to article 2 (equal treatment) on 1 March 2002 because it was in conflict with the 'object and purpose' of the Treaty, thus, prohibited by article 19(c) (Vienna Convention 1969; UNTC n.d.).

Several of the Islamic State Parties, such as Afghanistan, Kuwait, Mauritania, Saudi Arabia, and Syria, are among those still maintaining their general reservations to the Treaty despite objections expressed by European State Parties (UNTC n.d.). It is not an unusual situation in the light of the universal acceptance of the Treaty. Notwithstanding the existence of a number of reservations by State Parties, Syed (1998) thinks that the popularity of the Treaty among Islamic countries is noteworthy and most welcome in international discourse on human rights (Syed 1998, 359).

By using the terms "*reservations, understandings, and declarations",* they are real and legitimate ways of showing that the world is endowed with cultural, religious or political multiplicity (Neumayer 2007, 398). This is particularly true for Malaysia, a nation of multi-ethnic and multi-religious population that comprise the Malays, who are the majority; the Chinese; the Indians; the aboriginal ethnic group (CLII 2019b), and the 'natives' of Sabah and Sarawak of East Malaysia (Article 161A, JAC, 1963). Neumayer posits that States which practice liberal democracies, in the sense of guaranteed individual rights and rule of law (Fukuyama 2022), which have registered their reservations to the Treaty, are those that regard human rights seriously, while others, he says, are apathetic and not interested in complying (Neumayer 2007, 398). Neumayer's views are directed towards other major human rights treaties which have not received global acceptance compared to the Treaty. These are:

(i) the Genocide Convention of 1948 (with 152 State Parties);
(ii) the International Covenant on Civil and Political Rights of 1966 (ICCPR, with 173 States Parties);
(iii) the International Covenant on Economic, Social, and Cultural Rights of 1966 (ICESCR, with 171 States Parties);
(iv) the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment of 1984 (the "Torture Convention", with 173 States Parties), and
(v) the 1966 International Convention on the Elimination of Racial Discrimination of 1966 (ICERD, with 182 State Parties).

Compared to the 196 States Parties to the Treaty, many Member States of the United Nations have not ratified the above treaties (UNTC n.d.).

All Member States of the United Nations must undergo a periodic review of its human rights record through a procedure known as the Universal Periodic Review (UPR), established by the United Nations General Assembly in 2006 (OHCHR 2006a, 2008). This is a peer review mechanism managed by the Human Rights Council (ibid.). The overall aim of the UPR is to improve human rights situation in every Member States of the United Nations while the procedure would help Member States address human rights challenges and share "best practices" (ibid.). In 2018, Malaysia participated in the UPR which was held in Geneva (Ying, 2014). Attended by 111 delegations, the review generated some 150 recommendations which Malaysia accepted for implementation (OHCHR 2019). A couple of delegations which took part in the review requested Malaysia to deregister its (remaining) reservations, which at the time of writing, Malaysia has not done so (UNTC n.d.).

As Member State of the United Nations, Malaysia approves the universal principles of human rights, one of the four pillars of the world body (UN Charter. (1945a). However, it underlines human right values that accommodate its history, the different background, traditions, and beliefs of its peoples in order to maintain unity in the country (OHCHR 2008; UNGA 1992; 2007). Malaysia also argues that its human rights situation is analogous to the wider Asian value system which considers the welfare and well-being of its peoples as a whole as more "*significant"* over individual rights (ibid.). In this regard, Malaysia supports the theory of "cultural relativism" which has been elaborately discussed by Sawad in the following paragraphs (Sawad 2017).

Sawad presents "the legitimacy debate between *universal* human rights and its apparent conflict with the Islamic value system" (Sawad 2017, 101). He accepts the existence of "cultural relativism", that is, the multiplicity of cultures and peoples, and that, members of one culture, he says, should not make any judgment against any other culture (ibid.). His views coincide with that of Etzioni`s (1997), stating that the argument about "cultural relativism" rests on the understanding that cross-cultural judgment is an anomaly in the absence of all-embracing "moral truths" that are globally applicable (Sawad 2017, 106).

Sawad posits that reservations registered by Islamic States (including Malaysia) to the Treaty tantamount to the cultural-religious world view of the Muslim society and they are contradictory to the belief that those standards are applicable to all communities and their peoples (Sawad 2017, 102). The reservations the States have made constitute their capacity to carry out their international obligations domestically (ibid.). States, according to Sawad, are "*increasingly compelled to navigate their cultural norms within a universalised system*" (Sawad 2017, 103). The "*interests, security, and well-being*" of the peoples influence the manner States engage themselves in the international fora so that the interests of their peoples are protected and not compromised (Sawad 2017, 103).

Sawad recognises Tatsuo (1999) and Little (USIP) among the critics of the cultural relativism theory (Sawad 2017). On the one hand, Tatsuo (1999) disapproves the concept of "Asian values", claiming it as an eastern ideal which attempts to reject the Western concepts of human rights (ibid., 108). On the other hand, Little does not recognise the cultural unity of Asia, Africa, and for that matter, Islamic, Buddhist or Christian, reasoning, these cultural zones are dissimilar (ibid., 108). Although there has been some support toward this critique, Sawad rightly ignores it, arguing firstly, that it is indifferent to the multiplicity of socio-cultural factors which exist in the world, and secondly, that it is oblivious to the fact that international relations take place within "diverse cultural zones" (Sawad 2017, 108).

Sawad's views seem to coincide with that of Bielefeldt who believes in the multiplicity of the human rights movement and has this to say on the practice:

"Pluralism and multiculturalism, both within and between States, cannot be abolished unless one wants to risk political disasters including civil wars, "ethnic cleansing," and the breakdown of international communication and cooperation. In the face of such political dangers, the idea of human rights seems to offer an opportunity for accomplishing a basic normative consensus across, ethnic, cultural, and religious boundaries (Bielefeldt 1995, 594)".

Bielefeldt argues against the wholesale introduction of the Western concepts of human rights given the multiplicity of traditions, beliefs – religious and political – ways of life of peoples in the world, which, he says, show the profound existence and dignity of mankind (Bielefeldt, 1995). In this regard, Bielefeldt asserts for the concept of human rights to be divergently interpreted to avoid it being seen as 'cultural imperialism' (Bielefeldt 1995, 594).

By explaining the reason as to why it has entered (and maintained) the reservations, Malaysia, as one of the Muslim middle powers for its active roles in championing Muslim issues and humanitarian aid (Abu-Hussin et.al. 2021; Idris & Salleh 2021) has taken the platform in presenting before the international community its legitimate concerns relating to the content of its reservations, as Sawad has rightly stated, by "providing a justification of the relativist interests of the State" (Sawad 2017, 149). Failing to recognise Malaysia's reservations is as good as not appreciating "the capacity of the State that desire to be part of international human rights regimes, to undertake and implement these universalistic standards (Sawad 2017, 105)."

While noting the unprecedented challenges posed by the COVID-19 pandemic during 2020 and 2021, which have affected all sectors in the country and the population at large (Lin 2020; Lim et al. 2021), Malaysia has taken genuine and progressive steps in shouldering its responsibility and remains committed to discharge its human rights obligations fairly (OHCHR 2018). Not only it is a recognition of its responsibility as Member State of the United Nations (UN Charter 1945; UNGA 1970), but also, a modest and long-term contribution towards United Nations' common vision as envisaged in "The Future We Want" (UNGA 2012).

4. Implementation of the Rights Under the Convention and Its Impact

Having acceded to the Treaty, Malaysia is under obligation to incorporate, in domestic legislation, the rights conferred for the child in the Treaty. Article 4 of the Treaty stipulates that State Parties are to take "all appropriate legislative, administrative and other measures" to implement the rights under the Treaty (OHCHR 2003). In Malaysia, provisions of a treaty do not apply directly without an enabling legislation, that is, a law passed by Parliament and duly assented to by the Yang Di-Pertuan Agong (the King) (Chapter 4, article 44 of the Federal Constitution) (JAC 1963; Shuaib 2012). This dualist doctrine considers international law and domestic law as separate and independent systems – international law is applicable between sovereign States, whereas domestic law regulates the activities of its citizens (Kaczorowska 2010).

The aforesaid principle has been adequately stated by the Malaysia Court of Appeal in *Air Asia Berhad v Rafidah Shima Mohammed Aris* (Malayan Law Journal 2014), where it ruled that although the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by Malaysia on 5 July 1995, it could not apply directly because the provisions of the treaty have not yet been incorporated into domestic law by an Act of Parliament at the time of the judgment (Fong 2016, 203). Although the Federal Constitution does not specify on the supremacy of either international law or municipal law, however, in the event of any conflict between them, the national statute will prevail (FMSLR 1919; Shuaib 2012). This does not mean that international law is devoid of any use nationally - principles laid out in a treaty in which Malaysia is not a State Party, can still be used in interpreting Malaysian law (Fong 2016, 202).

Six years following its accession to the Treaty, Malaysia Parliament enacted the Child Act in 2001 (hereafter, the 'principal Act') (KPWKM 2021a). The principal Act entered into force in August 2002 (Abd Razak 2017). It is a milestone undertaking as it is the first legislative 'measure' that Malaysia has adopted to enable each child enjoy the rights provided by the Treaty. The preamble of the principal Act envisions a Malaysia that is well-developed, placing social justice, moral and spiritual, and economic development on equal footings (Abdulwahid 2016). The preamble, not only views the child as the critical member of society which is key to the nation's survival, development (elaborated below), and prosperity, but also recognises the "family as the fundamental group in society that provides the natural environment for the growth, support, and well-being of its…. children", and for this reason the family is to be supported and assisted in order to carry out its responsibilities (KPWKM 2021a). According to section 15 of Malaysia's Interpretation Acts (CLII 2021), long title, preamble and schedules to the Act shall be construed and have effect as part of the Act. As envisaged in the Treaty, the family, society, and the government, through its numerous institutions, are given huge responsibility to provide care, protection and rehabilitation for the child. Thus,

through the principal Act, Malaysia has taken on this important role to protect the rights of each child.

The principal Act (KPWKM 2021a) spearheads the modernisation of Malaysia's juvenile criminal justice system by consolidating three important early legislation, namely: the Juvenile Courts Act 1947, the Women and Girl's Protection Act 1973, and the Child Protection Act 1999 (Abd Razak 2017). The principal Act which has fifteen parts with seventeen chapters, one hundred and thirty-five sections, and two schedules, now classifies children as follows:

i) those who require care and need to be protected (Part V: sections 17-37, as amended);
ii) those who need to be protected as well as rehabilitated (Part VI: sections 38-45, as amended);
iii) those which the Act termed as 'beyond control' (Part VII: sections 46-47, as amended), and
iv) those who infringe the law (Abd Razak, M. R. (2017).

Among the other highlights of the principal Act is the creation of the Co-ordination Council for the Protection of Children (Part II of the Act) which helps to co-ordinate, monitor, and administer the different teams involved in the frontline (KPWKM 2021a).

The inclusion of the Treaty's "best interests of the child" principle, appearing not less than twelve times in the principal Act, is an important undertaking. It is to ensure that decisions involving a child is undertaken thoroughly by institutions, including the Court for Children, parents, legal guardians, administering his or her case. Karp (1998) posits "…it should be … a specific outcome of balancing, weighing all of the interests from the child own perspective". Tobin asserts that the "best interests of the child" principle is "a substantive right, an interpretative legal principle and a rule of procedure" which must be applied when making a decision relating to a child (Tobin 2019).

The child's right to development is an important provision in the Treaty. The word 'development' appeared in several articles of the Treaty (see articles 6, 18(1), 23(3), 27(1), 29(1)(a), and 32(1)). Although the implementing legislation does not incorporate *verbatim* these articles of the Treaty, three of the six preambular paragraphs of the principal Act have endorsed the word 'development'. However, neither the Treaty nor the principal Act defines the word 'development'. According to Mercer, the word 'development' derives from French word (*développer / développement)* meaning 'unwrapping', unfolding or 'unfurling' (Mercer 2018). He says, it suggests a process that takes place over time (ibid.). When used to refer to human beings, development is about a series of physical, mental, emotional and behavioural changes that take place as human being grows older (ibid.). In this regard, a strong system of education helps nurture and mould the child to enable it "to participate in and contribute positively towards the attainment of the ideals of a civil Malaysian society" (the third preamble of the principal Act; KPWKM 2021a). By undertaking various reforms in education, including the publication in

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Sept 2012 of the Malaysia Education Blueprint (MEB) 2013-2025, Malaysia genuinely recognises the profound importance and needs of its children (MOE 1996; 2012).

The amendment to the principal Act, which took place fifteen years later, is testimony of Malaysia's goal in revamping the domestic legislation relating to the child. The Child (Amendment) Act 2016 (hereafter, the '2016 Act') has strengthened the provisions of the principal Act (KPWKM 2021b). Among the highlights of the amendments is the elevation of the Co-ordinating Council in the principal Act to National Council for Children (hereafter, the 'National Council') (section 3 (1)), with wide functions that include advisory and co-ordinating in nature (section 3 (2)). These are important functions given the nature and scope of the institutional activities relating to children. The National Council is an adviser to the Minister of Women, Family and Community Development (hereafter, the 'Ministry'): matters relating to gender, family, child protection, and social development in general fall under her responsibilities (OHCHR 2007). The National Council for Children also coordinates the resources required by the different governmental agencies for child protection. The functions involving the monitoring and implementation of the national policy and national plan of action relating to children are new and were absent under the previous Co-ordinating Council, thus, reflecting the crucial importance of this responsibility (KPWKM 2021b).

There are a number of new and progressive features in the 2016 amending legislation (KPWKM 2021b). An important attribute relates to the participation of the child: the National Council now has two representatives from among the children (sec. 4(1) (r). As stipulated in the National Council's functions, the representation is "to promote the participation of children in decision making process in matters affecting them" (sec. 3 (2) (i)). This is indeed a commendable response by the government in legislating the right under article 12 of the Treaty. Article 12 of the Treaty states that (UNCRC 1989):

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

According to Malaysia's Initial Report (KPWKM 2021b), Malaysian children have been given the chance to take part in and express their views through different fora such as the Malaysian Youth Council, despite that the wording of article 12 of the Treaty is not legislated *verbatim* in the Act. Karp posits that the "basic message of the Treaty is that a child is not a dormant entity, devoid of all capacity until the age of eighteen. In each phase of his (or her) development, the child is a human being, deserving of human dignity, and therefore, if capable,

should be a partner and participant in the choices affecting him (her)." (Karp 1998, 124). As the Committee has endorsed in its General Comment: "Listening to the children should not be seen as an end in itself, but rather as a means by which State make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights" (OHCHR 2003). Another important and new feature in the amending legislation touches on the data collection system. In its 2007 Concluding Observations on Malaysia's Initial Report, the Committee commended Malaysia for the substantial statistics it has provided in the report. However, the Committee pointed out on the lack of national data collection system in respect of the issues covered in the Treaty (OHCHR 2007a). The amendment, therefore, rectifies the gap.

A fundamental amendment relates to the community service order by the insertion of a new 'Chapter 3A" in the principal Act. However, neither the term 'community service' nor the phrase 'community service order' has been defined by the amendment. It would seem that the definition exists in other Malaysia legislation. The Criminal Procedure Code (RMP 2021) defines 'community service' to mean "any work, service or course of instruction for the betterment of the public at large that includes, any work performed which involves payment to the prison or local authority (Appukuttan 2020)." Community service comes within the responsibility of the Ministry which is responsible for child issues. The amended principal Act now regulates the issuance of the community service order by the Court for Children. It is an alternative to custodial sentence. What is more important is the fact that the finding of guilt for which a community service order is made "shall be deemed not to be a conviction…" (KPWKM 2021b). This is an important and much welcome provision for the protection of the child.

Malaysia's agreement to be bound by the Treaty and having participated in the international human rights monitoring process, like each of the other Member States of the United Nations have, in author's considered view, impacted profoundly on Malaysia's national policy and strategy relating to the child. By enacting the Child Act, it strengthens the childcare and protection mechanism (KPWKM 2021a). Putting in place the Ministry in 2004, Malaysia places all matters relating to the child under the responsibility of the Ministry at the Federal level. The creation of the Child Division in 2005 at the Department of Social Welfare in the Ministry helps streamline children's issues nation-wide. Since Malaysia's Initial Report, Federal and State laws for the protection of children and their rights have been amended. Among them are:

i) the Children and Young Persons (Employment) Act 1996 (Act 350);
ii) the Domestic Violence Act (1994, Act 521), and
iii) the Islamic Family Law (Selangor, Enactment 2003) which standardised the minimum age of marriage at 18 years) (OHCHR, 2018, pp. 6-9).

In 2009, the Ministry published the National Policy on Children and the National Child Protection Policy: the policies underscore the involvement of civil

society as well as children (OHCHR 2018, 9). The four general principles emanating from the Treaty, namely, equal treatment (art. 2); the 'best interest' (art. 3); right to live, survive, and develop (art. 6), and the right to be heard (art. 12) are the pillars of the aforesaid policies. These general principles, according to Tobin, are the bases for the impactful legislation on the rights provided by the Treaty (OHCHR 2013; Tobin 2019; CRCM 2012). What can also be vouched from the domestic incorporation of the Treaty provisions by Malaysia, thus far, is that there has been an enormous improvement of the consultation process spearheaded by the Ministry since 2019, that involves multi-stakeholders that have resulted in the production of the reports and policies (OHCHR 2018). Malaysia has also taken the opportunity to use the technical expertise of the United Nations agencies, such as UNESCO and UNICEF (OHCHR 2018; UNICEF 2020a; 2020b).

5. Conclusion

Malaysia's voluntary agreement to be bound by the Treaty in 1995 is an exercise of its national sovereignty, like each of the other 195 State Parties. Although Malaysia's accession may be seen as somewhat delayed given that seven of the ten ASEAN members have already either ratified or acceded to the Treaty at the time (UNTC, n.d.), it is, nevertheless, testimony of its international responsibility as a Member State of the United Nations that promotes, among others, human rights.

International law governs States' conducts when acceding to a treaty or entering reservation to it. Malaysia has thus exercised that right within the boundaries set by international law. It shoulders an enormous responsibility by being a State Party to the Treaty. Despite experiencing various challenges, including, the objections against its reservations by other State Parties, the stringent monitoring of compliance by the Committee, the examination of Malaysia's human rights records by other State Parties during the Universal Periodic Review process, Malaysia nevertheless managed to implement its international obligations under the Treaty, *albeit*, progressively, by enacting implementing legislation and policies for the care, protection, rehabilitation, and development of the child.

While the promulgation of the national law appeared to have taken some time, there is no doubt that Malaysia's national implementation of the rights conferred by the Treaty contributes to the global implementation of the rights of the child as a whole and is an encouraging trend. In a modest way, it is a long-term contribution to the United Nations common vision envisaged in the "The Future We Want". This process of institutionalisation of the rights of the child into domestic law is a great stride forward. It is hoped that the positive trend will continue and that Malaysia will strive towards an even more progressive implementation of its Treaty obligation in the future.

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