

Right to Secondary Education - An Analysis of Malaysia's Domestic and International Obligations

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Abstract

Secondary education more so than primary education, plays a crucial role in the redistribution of income, growth and reducing poverty. So crucial is the role of secondary education that countries that have invested in secondary education show faster economic growth. Despite the significance of secondary education, education is only compulsory in Malaysia from the age of 6 until 11 with no compulsory secondary education required. Research shows that only 95.25% of children enrol in lower secondary school education. This percentage drops significantly to 86.46% enrolled in upper secondary school. While there have been calls to review the Education Act to make secondary education compulsory in Malaysia, there has been no shift to make that change. This study aims to look at the right to secondary education within the legal sphere, reviewing not only domestic laws but also against Malaysia's international obligation with the potential of being recognized as a stand-alone right within the domestic and international system of law. It finds that through liberal reading of the Federal Constitution, the right to secondary education could be recognized. This recognition is in line with Malaysia's international obligation. However, despite the possible recognition of the right, this paper finds that there is no provision in any Malaysian laws to provide for the right to secondary education.

Keywords: right to secondary education, human rights.

1. Introduction

Education is a fundamental right, one that is enshrined under the Universal Declaration of Human Rights (UDHR Article 26). Education as a right, is not only meant to be universal but also of the highest priority and a key right. The right to education has meant that states are placed with a legal obligation with regards to decisions on education and the education

system.¹ The scope of the right to education is broad and covers many aspects of education. This includes the right to a set number of compulsory years in school for every child in the state to be provided by law² and include providing secondary education. Secondary education more so than primary education, plays a significant role in redistributing income, ensuring growth and reducing poverty.³ So crucial is the role of secondary education that countries which invest in secondary education, show faster economic growth.⁴ Despite the significance of secondary education, Malaysia has one of the lowest years of compulsory education in the world, providing for only 6 compulsory years of education from the age of 6 until 11.

In early 2020, Raja Permaisuri Agong Tunku Hajah Azizah Aminah Maimunah Iskandariah tweeted her surprise to realize that there was no compulsory secondary education in Malaysia and called for a change.⁵ Prior to that on the 28th of January 2019, the former Deputy Minister of Education, YB Teo Nie Ching had highlighted that the then government was reviewing the Education Act to make it mandatory for students to complete schooling from Year One until Form Five. She was further quoted as saying that parents that fail to send their children to school will face a fine of up to RM5,000 or six months imprisonment. However, since that announcement there has been no change to the Education Act to make secondary education compulsory in Malaysia. The Malaysian Government previously committed to making lower and upper secondary education compulsory by 2015 as stated under the Malaysian Education Blueprint 2013- 2025.⁶ The target under the Malaysian Education Blueprint was for all students to leave formal schooling with a minimum SPM or equivalent vocational qualification.⁷ This was part of the target to provide equal access to quality education of international standard.⁸ The government's Shared Prosperity Vision 2030, extending the compulsory education from the age of 11, would ensure that the benefits from Malaysia's growth would be shared and distributed fairly and equitable. However, to date there is no compulsory secondary education in Malaysia, effectively discharging itself from the legal obligation of ensuring that older children in Malaysia receive basic secondary education.

¹ UNESCO, *Right to Education Handbook* (2019), 165.

² Sonja Grover, 'Secondary Education as a Universal Human Right, *Education and the Law*' (2004) 16(1) *Education and the Law* 21.

³ J.B.G. Tilak, *Education and Its Relation to Economic Growth, Poverty and Income Distribution - Past Evidence and Further Analysis*, World Bank - Discussion Paper (1989) (1) 46.

⁴ J.B.G. Tilak, *Education and Development in India: Critical Issues in Public Policy and Development* (Palgrave Macmillan, 2018) 219-266.

⁵ Asian Strategy & Leadership Incorporated (ASLI), *Compulsory Education: Building the Future through Compulsory Education* (2020).

⁶ Ministry of Education, *Malaysian Education Blueprint 2013 -2025, (Preschool to Post Secondary Education)*, 2013, 1-12.

⁷ *Ibid*, 1-12.

⁸ Ministry of Education, *Blueprint (n 6)*, 1-12.

It has to be noted that since independence wherein very few children had access to education, the Malaysian education system has achieved extensive and rapid coverage with the great majority of children in Malaysia having not only full access but completing their education. Within the Malaysian Education Blueprint, there were five outcomes for the Malaysian Education System as a whole, access, quality, equity, unity and efficiency.⁹ Ensuring that all Malaysian children deserve equal access to education, the Ministry of Education aspired for 100% enrolment of all children from preschool through to upper secondary school level by 2020.¹⁰ However, despite the rapid expansion in the enrolment of secondary school, enrolment rates in secondary schools have plateaued, remaining lower than that of high-performing education systems. This was a concern highlighted by the 2011 UNESCO Review. In comparison to many high performing countries, there is still an unacceptable percentage of Malaysian children between the ages of 12 to 16 who are not enrolled in secondary school. Typically, children in Malaysia enter lower secondary school in Form 1 at the age of 12 and complete at the age of 15. Upper secondary school at Form 4 starts at the age of 16. As of 2018, only 95.25% of children between the ages of 12 to 14 were enrolled in lower secondary school.¹¹ The percentage drops significantly to 86.46% of children between the ages of 15 to 16 are enrolled in upper secondary school.¹² Further in 2018, only 96.8% of children transition from Year 6, Primary School, to Form 1, Secondary School.¹³ Similarly, only 96.76% of children transition from Form 3, Secondary School to Form 4, Secondary School.¹⁴ In comparison to high performing nations, the enrolment ration of Malaysian children in secondary school only stands at 86 in comparison to 152, 152 and 151 in countries like Finland, United Kingdom and Australia respectively.¹⁵ Further, in countries like Finland, 99.99% of children transition from primary to secondary schools, however in Malaysia it is only 91.05%.¹⁶

The drop of enrolment in secondary schools is particularly an issue of concern with boys, wherein there is a massive gap with the male to female ratio.¹⁷ This gap is widened further between lower to upper secondary schools. The 'Lost Boys' is an area of concern, potentially creating social and political instability.¹⁸ Another segment of population that is under-enrolled in secondary schools are children from indigenous and minority groups, particularly Orang Asli, Penans,¹⁹ Peribumi Sabah and Peribumi Sarawak. The data on student outcomes for indigenous groups are limited. However, based on data on the Orang Asli, the enrolment

⁹ Ministry of Education, Blueprint (n 6), 2- 9.

¹⁰ Ministry of Education, Blueprint (n 6), 2-9.

¹¹ Ibid, 41.

¹² Ibid, 41.

¹³ Ibid, 41.

¹⁴ Ibid, 41.

¹⁵ Ibid, 43.

¹⁶ Ibid, 43.

¹⁷ Ibid, 3-20.

¹⁸ Ibid, 3- 20.

¹⁹ Ibid, 4-15.

rates of indigenous groups are alarmingly poor, with higher dropout rates in comparison with the national average.²⁰ In comparison to the national average, only 30% of indigenous children complete secondary school.²¹ This lower than acceptable enrolment is far from the target of the state to ensure 100% enrolment of all children in secondary school and could be attributed to the failure to recognise the right to secondary education and making secondary school education compulsory.

This study aims to look at the right to secondary education within the legal sphere, reviewing not only Malaysian domestic law but also Malaysia's international obligation with the potential of the right of secondary education being recognised as a stand-alone right within the domestic and international system of law. Secondary data on domestic constitutional and legislative setting will be analyzed as well as general international conventions, declarations, agreements and framework to determine the availability of the right of secondary education. The study aims to be a practical utility in demonstrating to policy makers of not only Malaysia's international obligation but also constitutional and legal obligations to ensure that all children in Malaysia have a right to secondary education.

2. Methodology

This study is done through a descriptive-comparative study methodology, encompassing empirical elements through qualitative content analysis by examining national and international sources of laws and policies on the right to secondary education not only in Malaysia but internationally. These sources of research include law reports locally as well as internationally, legislation and policies, journal and studies not only secondary education but also education in general.

Doctrinal study has its limitations, however it provides for the foundation towards further social-legal studies in partnership with other social scientists. Such joint work will in the future be part of the research trajectory on this novel area of law. The study in domestic as well as international law is required to clearly set out the borders and similarity between both international and domestic law and as a result acquiring a holistic perspective on the right to secondary education.

²⁰ Ibid, 4-20.

²¹ Ibid, 4-21.

3. Importance of Secondary Education

There is a two-prong benefit to education. The first is the private benefit of education which benefits the individual and the second is the social benefit which is gained by the state.²² One of the key individual benefits of education, is wealth. In fact one of the key correlations between poverty and for many the inability to even meet basic survival needs, is the lack of education.²³ The impact of secondary education can clearly be seen in terms of eradicating poverty, economic development and health and well-being. The impact is most significant in young women. As a result of the social benefit to the state from secondary education, states should protect and defend the right to secondary education.²⁴

It has always been thought that primary education was key to reducing poverty. However, research has indicated that, it is in fact extending compulsory education to the end of secondary education that is vital to the reduction of poverty.²⁵ The more educated an individual, the higher chance they have to obtain employment with higher earning potential.²⁶ Young people who complete secondary education have an 80% probability of avoiding poverty.²⁷ In fact, worldwide, between 72% to 96% of families that live in poverty have less than nine years of education.²⁸ It is estimated that an increase in school years among adults could reduce the number of people in poverty by close to 60 million and reduce worldwide poverty by 420 million.^{29,30} In Malaysia, income inequality has dropped significantly with secondary education. The Gini coefficient had dropped by 7% percentage points over two decades in Malaysia with the increase of adults with secondary education.³¹ Individuals with secondary education are able to earn a higher income subsequently contributing financially to the state through tax. A more educated and skilled labour force also promotes economic growth.³² In fact it is estimated that state per capita income would increase by 75% in low income countries which could eventually eradicate poverty.³³

²² M. Najeeb Shafiq, Benefits of Primary and Secondary Education, Forthcoming in Dominic Brewer & Lawrence Picus (Eds.), *Encyclopedia of Educational Economics and Finance*, forthcoming. Thousand Oaks, (2013) CA: SAGE, 1.

²³ Grover (n 2), 26.

²⁴ Katarina Tomasevski, Un-asked Question about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A response to Kenneth Roth, Leonard S. Rubenstein and Mary Robinson, *Human Rights Quarterly*, (2005) 27(2) 709- 720.

²⁵ Katarina Tomasevski, Progress report of the Special Rapporteur to the Economic and Social Council on the right to education (2002) 23 <<http://www.education.org>> accessed 22 January 2020.

²⁶ UNESCO, *Global Education Monitoring Report 2016 Education for People and Planet: Creating Sustainable Futures for All* (2016), 58.

²⁷ Tomasevski (n 25), 23.

²⁸ *Ibid*, 23.

²⁹ UNESCO, *Reducing global poverty through universal primary and secondary education* (2017) 12.

³⁰ UNESCO, *Global Education Monitoring Report 2016* (n 26), 61.

³¹ UNESCO, *Reducing global poverty through universal primary and secondary education* (n 29), 13.

³² UNESCO, *Right to Education Handbook* (n 1), 35.

³³ UNESCO, *Global Education Monitoring Report 2016* (n 26), 61.

In addition, eradicating poverty and economic development, secondary education also plays a significant role in the health and well-being of individuals. Empirical evidence has shown that individuals with more education live longer than their less educated fellow citizens.³⁴ In fact, higher education has correlation with a reduction in mortality from diseases³⁵ and reducing illness. This eventuality leads to less impact on the resources of the state.

Of the two genders, the impact of secondary education is the most significant with young women. Young women with higher education are less likely to die at childbirth³⁶ and have fewer and healthier children.³⁷ It is estimated that if girls receive all 12 years of education, the early birth rate drops by 59% and child deaths go down by 49%.³⁸ The benefit of secondary education also has an intergenerational benefits to girls especially as mothers with higher education have children who enter schools earlier and complete more years of school³⁹ Child marriages also reduced significantly as well. It is estimated that child marriages globally would be reduced by 64% if every girl completed 12 years of education.⁴⁰

4. Malaysia's Domestic Legislative Setting

4.1 Malaysian Federal Constitution

A lot of countries have provided for the right to education in their Constitution, adopting the provision in 1948 United Nations Universal Declaration of Human Rights that provides that the right to education should be provided to everyone under Article 26. However, in Malaysia, fundamental liberties are set out under Article 5 to 13 of the Federal Constitution. There are 9 headings: liberty to person, prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality, prohibition of banishment and freedom of movement, freedom of speech, assembly and association, freedom of religion, rights in respect of education and rights to property. One would note, that within these nine headings, there are no specific articles with reference to the right to education. It is commonly presumed that the right to education is found under Article 12(1) on rights in respect to education. However, Article 12(1) was actually drawn up with the core purpose of providing basic rights on education as opposed to the right to education.⁴¹

³⁴ Debora Mackenzie, 'More Education is what makes people live longer, not more money' (New Scientist, 18th April 2019) <<https://www.newscientist.com/article/2166833-more-education-is-what-makes-people-live-longer-not-more-money/>> accessed 22 November 2020.

³⁵ Robert A. Hahn, Benedict I. Truman, 'Education Improves Public Health and Promotes Health Equity' (2015) 45(4) International Journal Health Service 657-678.

³⁶ UNESCO, Teaching and Learning: Achieving Quality for All, EFA Global Monitoring Report 2013/4 (2013), 13.

³⁷ UNESCO, Education for All Global Monitoring Report: Education Transform Lives (2013) section 5.

³⁸ Malala Fund, Beyond Basics, Making 12 Years of Education a Reality for Girls Globally (2015) 6.

³⁹ Shafiq (n 22), 11.

⁴⁰ UNESCO, Global Education Monitoring Report (2017).

⁴¹ Joseph M. Fernandao and Shantiah Rajagopal, 'Fundamental Liberties in the Malayan Constitution and the Search For a Balance' (1956- 57) 13 (1) International Journal of Asia Pacific Studies 1-28 <<http://dx.doi.org/10.21315/ijaps2017.13.1.1>,12> accessed 1st October 2019.

The Article 12(1) provides that:

Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth

- a) in the administration of any education institution maintained by public authority, and in, particular, the admission of pupils or students or the payment of fees; or
- b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

The founding fathers in drafting the Federal Constitution included Article 12(1) to provide a safeguard for religious freedom and choice in terms of education,⁴² particularly in terms of the non-Malay communities to establish and maintain schools in the vernacular languages.⁴³ In addition, Article 12(1) aims to prevent discrimination on religious grounds in the administration of public education.⁴⁴ Professor Dr. Shad Saleem Faruqi reaffirms this view, explaining that the provisions in Article 12(1) have to do more with the federal-state relations in the management of education, ensuring equality and non-discrimination in public institutions of learning,⁴⁵ respect for the linguistic rights of minorities, respect for the rights of parents to choose their children's education, medium of instruction and affirmative action policies.⁴⁶ As such, while there are provisions for education under the Federal Constitution, these provisions do not guarantee the right to education or a right to free education.⁴⁷ As such, there is no guarantee to the right to secondary education, none of which would compel compulsory secondary education in Malaysia.

Despite the fact that there are no specific provisions to the right to education under the Federal Constitution, the right to secondary education could be implied from Article 5(1) of the Federal Constitution. The Indian Supreme Court took a similar approach in the interpretation of Article 21 of the Indian Constitution. Article 5(1) states that no person shall be deprived of his life or personal liberty, save in accordance with law. Similarly, Article 21 of the Indian Constitution provides that no person shall be deprived of his life or personal liberty except according to the procedure established in law. The Indian Supreme Court in the case of *Mohini Jain (Miss) v State of Karnataka and Others*⁴⁸ found that while the right

⁴² Ibid, 1-28.

⁴³ Fernandao and Rajagopal (n 41), 1-28.

⁴⁴ Andrew Harding, 'Law, Government and the Constitution in Malaysia' (1996) *Malayan Law Journal Sdn Bhd*, 202.

⁴⁵ Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publication (Malaysia) Bhd. 2008) Selangor, Malaysia, 356.

⁴⁶ Ibid, 356.

⁴⁷ Faruqi (n 45), 356.

⁴⁸ [1992] 3 SCC 666.

to education had not been guaranteed as a fundamental right under Part II of the Indian Constitution, the right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.⁴⁹ Here the Supreme Court explained that in order for all rights to create a life, dignity has to be satisfied. In India, a dignified life can only be met through education, as such education was key to a right to life and was a responsibility of the State. The Supreme Court of India was of the view that the framers of the Indian Constitution would have intended for the State Government to be under an obligation to provide educational facilities at all levels to its citizens.⁵⁰

The 1992 Supreme Court decision of *Mohini Jain* was subsequently reaffirmed a year later by the Indian Supreme Court in the case of *Unni Krishnan v State of Andhra Pradesh*.⁵¹ Here the Supreme Court interpreted 'deprivation of life', under Article 21 of the Indian Constitution, to mean living in dignity which includes within its education as well. The Indian Supreme Court further explained that education transfigures the human personality into a pattern of perfection through a synthetic process of the development of the body and the enrichment of the mind.⁵² As such, it was interpreted that the Article 21 of the Indian Constitution provided for the right of education up to the age of 14 years. The decisions by the Indian Supreme Court eventually led to the amendment of the Indian Constitution to include Article 21A 2002 which protected the right to free and compulsory education for children between the ages of six and fourteen in India as well passing of the Right of Children to Free and Compulsory Education (RTE) Act 2009 by the Indian Government. The impact of this change in India was so great as it had converted what was a non-enforceable right to education in Directive Principles of State Policy into an enforceable Fundamental Right.

In view of the interpretation from the Indian Supreme Court in *Unni Krishnan v State of Andhra Pradesh* and *Mohini Jain (Miss) v State of Karnataka and Others* of Article 21 of the Indian Constitution, Article 5(1) of the Malaysian Federal Constitution which refers to life and liberty to persons, could similarly also be interpreted to include not only the right to education but also the right to secondary education. Correspondingly to India, in order for Malaysian children to live a life of dignity, the state should protect the right to education. Malaysia should take a leaf from India, and make the necessary amendments to include provision for the protection to the right to education - at the very least, to protect the right to education until the age of 14.

⁴⁹ Ibid.

⁵⁰ [1992] 3 SCC 666, 673.

⁵¹ [1993] AIR 2178.

⁵² Ibid 2182.

It is worth noting that in discussing the inequity of primary education in Malaysia, it is worth stating that the Article 8 of the Federal Constitution provides that all persons are equal before the law and are entitled to equal protection of the law. There should be no discrimination on the ground of religions, race, descent, place of birth or gender in any law.

The right to education was reaffirmed by the High Court in 2000 in the case of *Jakob Renner (An Infant Suing Through His Father and Next Friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors*.⁵³ While this case involved a child with special needs and non-Malaysia, Low Hop Bing J, reinforced that justice is in favour of providing continuous education to children, particularly whose educational needs are disrupted. The views of the High Court stress the importance of education for all children in Malaysia and as such it is the role of the state to guarantee that education is available to all children in Malaysia.⁵⁴

Unlike a number of states around the world, there is no specific right to education, more so the right to secondary education enshrined in the Malaysian Federal Constitution. As such, there is no guarantee to the right to secondary education, none which would compel compulsory secondary education in Malaysia, ultimately limiting any form of protection as to education for young people in Malaysia. However, the implicit reading of the right to education into the Malaysian Federal Constitution and ultimate acknowledgement, would provide for the highest level of protection that can be accorded and ultimately enshrining the right to education in the legal codes in Malaysia, particularly the right to secondary education.

4.2 Education Act 1996

The key legislation on education in Malaysia is the Education Act 1996 (EA). The EA implements government policies on education that had been developed since independence in 1957. The EA is meant to be the most comprehensive legislation of all matters concerning education with the aim of fully developing the potential of children in Malaysia. Two key components of the EA refer to policies and directions and sources of regulation around primary and secondary education in Malaysia.⁵⁵

The Education Act 1961 (EA) came about to implement the Razak Report 1956 which outlined the education policies that would be the foundation to formulate the national

⁵³ [2000] 5 MLJ 254.

⁵⁴ Makhtar M, Asarik.N and Mohd Yusob M.L , 'Right to Education for Irregular Migrant Children in Malaysia: A Comparative Analysis' (2015) 23 (S) *Pertanika Journal Social Science & Humanities* 85-96, 89.

⁵⁵ ESPACT, Education Services Provided - National Education System <<https://www.espact.com.my/national-education-system/the-education-act-1996>> accessed 11 May 2020.

education system in Malaysia.⁵⁶ Sections 27-29A of the EA obligates the state to provide compulsory primary education to all Malaysian children. Primary education is to be provided free and is compulsory. These provisions were included in the EA through amendments in 2002 pursuant to the gazette by the Malaysian Government through Professional Circular No. 14/2002: Implementation of Compulsory Education in Primary Level in 2003 dated 27th November 2002 and Guidelines for Implementation of Compulsory Education in Primary Level in 2003. Free education here means that there are no tuition fees imposed. Pursuant to the recommendation by the United Nations Declarations of Human Rights (UNDHR) and Convention of the Rights of the Child (CRC), the Malaysian Government in 2012 had announced the abolishment of school fees in primary school with the aim of providing access to quality and affordable education to every child irrespective of their socio-economic background. Children in Malaysia are required to start primary education the year they turn 7 and are required to remain in primary school for the duration of the six years from the ages of 7 to 12 years old. While children are required to remain in primary school, pursuant to section 29 of the EA, children are allowed to complete their primary education within 5 to 7 years.

The state, through the Ministry of Education, is obligated to provide primary education under National and National-Type schools as well as required to maintain these schools under sections 27 and 28 of the EA.⁵⁷ The state has made primary education compulsory pursuant to section 29A(1) and made a decree to the same. In addition to the state having to provide primary education, every parent who is a Malaysian citizen is obligated to enrol their child upon attaining the age of six into primary schools pursuant to section 29A of the EA. Parents are required to ensure that their child remains in primary school for the six-year duration. Parents who fail to send their primary-age children to school shall be fined RM5000 or imprisonment or both. However, it is thought that this provision has yet to be applied.⁵⁸

Pursuant to section 2 of the EA, secondary education consists of the two parts, lower secondary and upper secondary. Students enter lower secondary level for three years and would sit for a public examination known as Pentaksiran Tingkatan 3 ('PT3') at the end of the three years. On completion of the three years, students then can enter upper secondary level for two years and will complete Sijil Pelajaran Malaysia ('SPM') at the end of the two years by the age of seventeen years old. Provisions with regards to secondary education are provided within sections 30 and 31 of the Education Act. Pursuant to section 30, the State only has a duty to provide secondary education under National secondary and technical

⁵⁶ Ministry of Education, *Education in Malaysia: A Journey to Excellence*, Appendix 1: A Brief History of Education in Malaysia (2008).

⁵⁷ Education Act 1996, sections 27 and 28.

⁵⁸ Maheran Makhtar and Nor Aida Ab Kadir, 'Child Marriages and the Right to Education: The Legal and Social Perspectives' (2019) 4(15) *International Journal of Law, Government and Communication* 22, SUHAKAM, Report on Access to Education in Malaysia (2013) 10.

school and any other secondary school that are determined by the Ministry of Education.⁵⁹ Further to section 30(2), the State may provide upper secondary education at any National school.⁶⁰ Further, the Ministry of Education, under section 31, may establish and maintain any secondary school.⁶¹ If one is to compare secondary education to primary education within the EA, the state has not only failed to make secondary education compulsory but are not compelled to maintain or provide secondary schools education. Further, while parents who fail to ensure their children's primary school education could be fined, or worse still imprisoned, there are no similar legislative provisions for secondary school level. This would suggest that there is no urgency or seriousness to ensure that all children in Malaysia enter and complete secondary school education.

4.3 Child Act 2001

The Child Act 2001 ('CA') contains provisions that are protective of the child. However, there are no provisions on the right to education or early childhood education in the CA. From this, one can deduce that the right to education or for that matter, the right to early childhood education, does not feature even indirectly through the CA.

4.4 Other Child Related Legislations

There are a number of child-related legislations that have references to children in Malaysia. Some statutes are more specific like the Child Care Centre Act 1984, the Sexual Offences Against Children Act 2017, the Guardianship of Infants Act 1961, the Care Centre Act 1993, the Children and Young Persons (Employment) Act 1966, and the Children and Young Person (Employment) Act 1966. Others like the Adoption Act 1952, the Anti-Trafficking in Persons Act 2007, the Birth and Death Registration Act 1957, the Sexual Offences Against Children Act 2017, the Guardianship of Infants Act 1961, the Domestic Violence Act 1994, the Criminal Procedure Code and the Penal Code have references to children. Some of these statutes are specifically enacted with children in mind, others have provisions with reference to children. These legislations have both public and private law elements that extend to protecting children ranging from citizenship and criminal law to family law. However, the legislations fail to provide any rights to education or right to secondary education.

In Malaysia, a review of the relevant legislation would indicate that there is no specific legislation providing and compelling for secondary education, which ultimately limits the protection afforded to children in Malaysia. It must be noted that while a legislative framework may not be as significant or provide for as strong a protection as a constitutional

⁵⁹ Education Act (n 57), section 30.

⁶⁰ Ibid, section 30(2).

⁶¹ Ibid, section 31.

one, a guarantee of education within a legislative framework allows a State to articulate the right to education in specific details and allows for changing needs of the individual state. Collectively, both legislative as well as constitutional protection, provides the strongest protection to the right to education.⁶²

5. International Frameworks

5.1 United Nations Declarations of Human Rights

One of the oldest international obligations is the 1948 UN Declaration of Human Rights (UNDHR). The UNDHR is the key reference on human rights principles. Article 26 discusses education and provides as follows:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 26(1) of UNDHR provides that ‘Everyone has the right to education’ which means everyone has the right to education not only at elementary stages but also at the later stages, including at secondary level. Article 26(1) further stipulates that education shall be free, at least in the elementary and fundamental stages and that elementary education shall be compulsory for all. This general right to education is one of the few rights with a socio-economic character to make it into the Universal Declaration.⁶³ Eventually leading to a shift in attitudes wherein education is now considered a public policy and intertwined with modern function of a state.⁶⁴ The ambitions of the declaration were subsequently followed through via general and specific human rights treaties.

⁶² UNESCO, *Implementing the Right to Education, A Compendium of Practical Examples, Based on Results of the Seventh Consultation of Member States on the Implementation of the Convention and the Recommendation against Discrimination in Education* (2010), 12.

⁶³ Laura Lundy, Karen Orr and Harry Shier, ‘Children’s Education Rights Global Perspective’ in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook on Children’s Rights: Global and Multidisciplinary Perspectives* (Routledge, Abingdon 2017) 364.

⁶⁴ UNESCO, *Right to Education Handbook* (n 1), 37.

There are however no requirements for States to make education compulsory until the end of secondary school. The lack of compulsion of secondary education however has resulted in an aborted basic education which Sonja Grover explains results in a violation of Article 26(2).⁶⁵ Article 26(2), which stresses that education is to encourage the development of the individual's full potential, "Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms ... ". As such, states including Malaysia not only have a legal obligation but ethical obligation to provide compulsory comprehensive 'basic education', which include secondary education, ensuring that the potential of children in Malaysia are maximised.⁶⁶

In addition to Article 26, Article 22 is equally as important in terms of ensuring education. Article 22 UNDHR provides that, "Everyone, as a member of society, is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." The lack of secondary education is inextricably linked to poverty but also health as well. As such, the right to secondary education can be interpreted implicitly to include the right of every person to a certain minimum acceptable quality of life and standard of life.⁶⁷

5.2 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is arguably the most important international treaty that deals with the right to education. This right is guaranteed under Article 13 of the ICESCR. According to the treaty body that monitors the implementation of the provisions of the ICESCR, the Committee on the Economic Social and Cultural Rights ('ICESCR'), Article 13 is the most wide-ranging and comprehensive article on the right to education in international human rights law.

State parties to the ICESCR recognise that everyone has a right to education and they agree that " ... education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace ... ". Further, the ICESCR comments that " ... education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities ... ".

⁶⁵ Grover (n 2), 21.

⁶⁶ Ibid, 25.

⁶⁷ Ibid, 26.

However, in paragraph 2 of Article 13, whilst recognising that the right to primary education shall be compulsory, the same is not for secondary education. Instead, it is recognised that secondary education ‘...shall be made generally available and accessible to all by every appropriate means’. For it to be made generally available, this means that it is not dependent on the student’s ability or capacity but that state parties will have to ensure that secondary education is made accessible to all without discrimination, within safe physical reach and affordable to all. In 1999, the Committee on Economic, Social and Cultural Rights, General Comment had reinforced that State parties have an obligation to take concrete steps towards achieving free secondary education.⁶⁸ In addition, states have to ensure the completion of basic education and consolidation of the foundation of life-long learning and human development, preparing students for vocational and higher educational opportunities.⁶⁹ Only 86.46% of children between the ages of 15+ - 16+ are enrolled in upper secondary schools,⁷⁰ which means nearly 15% of children in Malaysia between the ages of 15+ -16+ are not enrolled in any formal education and have not completed basic education. Further, only 17.78% of children between the ages of 17+ - 18+ are enrolled in post-secondary education, which means statistically less than 20% of children are being prepared for vocational and higher education opportunities.⁷¹ In comparison to countries like Australia and the United States of America, wherein 20% of the population have higher education, less than 10% of the Malaysian population have higher education.⁷² For states which do not have compulsory primary education upon being state parties to the ICESCR, Article 14 provides that those states are given 2 years to come up with a plan to progressively implement it within a reasonable number of years. However, there is no such requirement when it comes to secondary education.

5.3 International Covenant on Civil and Political Rights

As for the International Covenant on Civil and Political Rights (ICCPR), the right to education is not mentioned explicitly. However, the right can be implied in Article 18 and Article 24 paragraph 1. Article 18 which deals with religious and moral education provides that “State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions ...”. Article 24(1) provides that “ ... every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State ... ”.

⁶⁸ CESCR General Comment No. 13: The Right to Education (Art. 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10).

⁶⁹ Ibid.

⁷⁰ Ministry of Education (n 6), 41.

⁷¹ Ibid, 41.

⁷² Ibid, 41.

It can be said that this right to such measures of protection required by his status as a minor includes the right to education even though it is not explicitly mentioned in the ICCPR. In its General Comment no 17, the Human Rights Committee ('HRC'), which is the treaty body that monitors the implementation of the provisions of the ICCPR, notes that '...such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural'. The HRC goes further and notes that " ... every possible measure should be taken to... provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression ... ".

5.4 Other International Conventions

The right to education has also been recognised in the United Nations human rights treaties such as the Convention on the Elimination of Racial Discrimination 1965, Convention on the Elimination of Discrimination Against Women 1979 (CEDAW), the Convention on the Rights of Migrant Workers 1990, and the Convention on the Rights of Persons with Disabilities 2006 (CRPD). Malaysia is a state party to two of these human rights treaties, namely CEDAW and CRPD. In addition to that, Malaysia is also a state party to arguably the most important treaty regarding the right to education, the Convention on the Rights of the Child. The relevant provisions in the Convention on the Rights of the Child will be discussed in the following part.

5.4.1 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the UN General Assembly in 1979 and is often describe as an International Bill of Rights for women. It has been ratified by over 189 member states, including Malaysia. The right to education for women is pursuant to Article 2 and Article 10. Article 2 makes it compulsory for all states that ratify the CEDAW to ensure that there is no discrimination against women. Article 10 addresses girls' legal right to education and provides that state parties shall take all appropriate measures to eliminate discrimination to ensure to them equal rights with men in the field of education. Member states are required to eliminate discrimination against women in education throughout the life cycle and at all levels of education, which means that the education must be accessible in both law and practice to all women. The Committee on the Elimination of Discrimination against Women, in its general recommendation No. 36, have stated that member states have an obligation to protect girls and women from any form of discrimination that denies them access to all levels of education and to ensure that where this occurs that they have recourse to avenues to justice.⁷³

⁷³ Committee on the Elimination of Discrimination against Women, General recommendation No. 36, On the Rights of Girls and Women to Education (2017) 3.

Malaysia ratified CEDAW in August 1996 but had maintained reservations on Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) on consideration that these Articles are in conflict with the Federal Constitution and Islamic law. To date, Malaysia has yet to incorporate the CEDAW into national law. There have been calls to provide a comprehensive gender equality legislation, and while the government has previously indicated its intention to enact a Gender Equality Act, to date, there is no comprehensive national law pursuant to CEDAW. Despite the lack of national laws, Malaysia still has an obligation towards enforcing its obligation under CEDAW, including ensuring that there is no discrimination against women in terms of education as well as provide a legal protection to ensure that women have access to all levels of education, including secondary education. One of the issues that plague girls in Malaysia is access to schooling in remote areas in Malaysia, particularly in Sabah and Sarawak.⁷⁴ This has contributed to lower than average literacy rates than national literacy rates.⁷⁵ There is no protection provided under the Education Act 1996 to ensure that girls/women have access to secondary education. While there is a duty to provide secondary education, it is not compulsory to provide and ensure secondary school education.

5.4.2 Convention of the Rights of the Child

The Convention of the Rights of the Child (CRC) without doubt is the leading framework for protection of children's rights, internationally. In any debate and discussion on children's rights, the CRC will play an important role. The CRC was finally adopted in 1989 and came into force in 1990. Today, the CRC is the most ratified of all the United Nation Human Rights treaties and has helped transform children's lives around the world. The CRC provides bespoke rights for children by providing them an avenue constructed on an agreed international ambition for education of children, particularly their future. The specific provisions dealing with the child's right to education is found in Articles 28 and 29 of the CRC.

Article 28 focuses on making education accessible. State parties recognise the right of a child to education and are to make it accessible to all children equally. As for secondary education, Article 28 paragraph (1)(b) provides that state parties are to make it available and accessible to every child. There is no obligation imposed on state parties to make it compulsory. Article 29 on the other hand focuses on the aims of the education and its contents. It provides that education should be directed to the fullest development of the child, with respect for human rights and fundamental freedoms, gender equality, and other targets contained in the UN provides for the recognition by the state to the right of the child to education. The Committee on the Rights of the Child is of the view that " ... (a)n

⁷⁴ WAO, The status of Women Human Rights: 24 years of CEDAW in Malaysia (2019) 237.

⁷⁵ Ibid, 237.

Education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena ... ”.

All the rights of the child in the CRC, just like all human rights, are interdependent and interrelated, and as such to understand the said articles 28 and 29, they must be read together with the other provisions of the CRC. By doing so, it can be seen that these two articles combined with other provisions under CRC formed a series of interrelated privileges for children around the right to education. In fulfilling the obligations pursuant to Article 28 and 29, the state parties are not only obligated to respect, protect and fulfil rights (Article 4), the implementation of all rights under CRC including Article 28 and 29 are guided by all times by the rights to non-discrimination (Article 2), consideration of the best interest of the child (Article 3.1), life, survival and development (Article 6) and respect for the view of the child (Article 12).

Malaysia became a state party of the CRC in February 1995 and made several reservations to the provisions of the CRC. Malaysia has since withdrawn some of them and there are 5 reservations remaining. At that time, the available statutes in Malaysia were not in conformity with the provisions of the CRC and therefore, Malaysia enacted the Child Act 2001 ('CA') to transform their CRC treaty obligations into domestic law. In order to protect the welfare of children, the CA consolidated and amended the then existing laws which relate to the care, protection and rehabilitation of children. There are no provisions under CA towards providing children the right to education nor the right to secondary education.

One of the reservations entered by Malaysia is in Article 28 paragraph (1)(a) which provides for free compulsory education but only in relation to primary education. However, Malaysia also made a declaration saying that with the amendment of the Education Act 1996 in 2002, primary education is made compulsory in Malaysia. However, it is not made compulsory to all. It is submitted that this is related to the reservation to Article 2 of the CRC which emphasises the principal of non-discrimination requiring the State to ensure that necessary steps are taken to eliminate discrimination and safeguard equality in areas including education. In ratifying the CRC, Malaysia has committed itself and has an obligation to make laws and policies consistent with the provisions of the CRC.

5.5 ASEAN Human Rights Declaration 2012

The ASEAN (Association of South-East Asian Nations) Human Rights Declaration was adopted in November 2012 by the ASEAN member states. Malaysia is one of the member states. The ASEAN Human Rights Declaration 2012 provides for the right of education and it is found in Article 31. Article 31 provides as follows:

- (1) Every person has the right to education.
- (2) Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.
- (3) Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups and enhance the activities ASEAN for the maintenance of peace.

5.6 The Education For All Movement

The Education For All (EFA) Movement is a global commitment to provide quality basic education for everyone all around the world. The World Conference in Jomtien 1990 resulted in the World Declaration on Education For All and a Framework for Action to Meet Basic Learning Needs. It addressed the basic learning needs of children, youth, and adults. The commitment was reiterated in the World Education Forum (Dakar, 2000). Subsequently, the Incheon Declaration for Education 2030 adopted at the World Education Forum in Incheon, South Korea in 2015 reaffirms this commitment. The 6 education goals were identified:

- (a) Goal 1 - Expand and improved comprehensive early childhood care and education , especially for the most vulnerable and disadvantaged children;
- (b) Goal 2 - Ensure that by 2015, all children, particularly girls, those in difficult circumstances, and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality;
- (c) Goal 3 - Ensure that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programmes;
- (d) Goal 4 - Achieve a 50% improvement in adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults;
- (e) Goal 5 - Eliminate gender disparities in primary and secondary education by 2005 and achieve gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality; and
- (f) Goal 6 - Improve all aspects measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.

The EFA Framework was originally developed as a response to problems and challenges faced by least developed countries, however, Malaysia as an upper-middle-income country

has achieved most of the EFA goals.⁷⁶ Despite great strides and developments in the Malaysian Education System, the state understanding there was room to accelerate progress in meeting EFA goals, put into place the Education Development Master Plan 2001-2010 as well as the Malaysia Education Blueprint (2013- 2025). The plans state that 'every child in Malaysia deserves equal access to education'.

Despite the gains met under the EFA goals, there are several education section challenges. It has been difficult for the state to reach the percentage of children who for various reasons have either never enrolled or dropped out of education in Malaysia. It has yet to be conclusively identified whether these children are marginalized poor, immigrants or children from indigenous groups.⁷⁷ In addition, equity to education is an issue, and this is reflected in the gaps to access education between rural and urban areas, and socio economic backgrounds as well as in terms of gender.⁷⁸ In terms of secondary education, gains have been met in Goal 2 and Goal 5 of the EFA in Malaysia.

Goal 2 of the EFA refers to ensuring that all children have access to primary education. These policies, resources and structures that have been put into place to meet Goal 2 of the EFA in Malaysia, have also indirectly flowed into secondary education. There has been a number of programmes specifically implemented to ensure more children have access to education, particularly children from poor families in urban and rural areas, remote areas, indigenous population and undocumented children, children living in plantation estates and refugees.⁷⁹ These programmes include financial programmes providing sufficient financial aid to alleviate the financial burden of children of poor families to encourage these children to attend school as well specific programmes for the indigenous population.⁸⁰ These programmes were not only rolled out to primary school children but also have been extended to those in secondary education. The positive impact of these programmes can be seen by the increase in the enrolment rate, not only for primary education but also for secondary education.⁸¹ These increased rates are also the highest in the state of Sabah, which had previous high under-enrolment rate in comparison to the rest of the country.⁸² These higher rates indicate a positive impact of reaching indigenous population. However, despite these encouraging improvements in the enrolment rates, there are still 250,000 uncounted children that should be pursuing secondary school education.⁸³

⁷⁶ Ministry of Education, Malaysia Education for All End Decade Review Report 2000- 2015 (2015), 11.

⁷⁷ *Ibid*, 9.

⁷⁸ Ministry of Education, Education for All (n 77), 9.

⁷⁹ *Ibid*, 29.

⁸⁰ *Ibid*, 31.

⁸¹ *Ibid*, 33.

⁸² *Ibid*, 33.

⁸³ *Ibid*, 34.

As part of meeting Goal 5 of the EFA, a number of policies and resources have been allocated to ensuring equity and quality in education for male and female students in Malaysia. Malaysia has managed to achieve gender parity in education since 2005 for primary education. However, while girls have thrived under policies implemented, data have indicated boys have been falling behind, particularly in terms of secondary education.⁸⁴ Boys particularly leave at lower secondary education and do not transition into upper secondary.⁸⁵ While the issue of 'Lost Boys' is not a problem that is unique to Malaysia, it is an urgent issue of concern. If left unattended, it would result in a social and political instability.

The EFA Movement emphasizes the need for primary education to be made not only compulsory but also free. However, in comparison, secondary education is only to be made available and accessible. This is consistent with the provisions of the various human rights conventions referred to earlier. This does not however mean that the commitment towards secondary education is weaker - it is instead a recognition that making secondary education free and compulsory is currently beyond the resources of many countries. In ensuring access to primary education, the Education Act 1996 had been amended under the Education (Compulsory Education) Regulation 2002 to make primary education compulsory.⁸⁶ The policy implementing compulsory primary education has resulted in close to 100% primary school completion in Malaysia.⁸⁷ As such, similarly, the same approach should be adopted to make secondary school education compulsory as well to ensure 100% of children in Malaysia also complete secondary education.

5.7 The International Labour Organization Minimum Age Convention 1973

The International Labour Organization (ILO) Minimum Age Convention 1973 was adopted in 1973 to ensure the effective abolition of child labour and to ensure that the minimum age for admission into employment or work is consistent with the fullest physical and mental development of young persons. The convention provides that the minimum age for admission into employment or work " ... shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years ... ". Each state shall make a declaration upon ratification of the convention stating what it deems to be the said minimum age.

Malaysia made a declaration to the effect that the minimum age is 15 years. As such, that would mean that compulsory schooling in Malaysia should be up to 15 years old. It would appear then that Malaysia is technically in breach of this convention although the object

⁸⁴ Ibid, 58.

⁸⁵ Ibid, 60.

⁸⁶ Ibid, 29.

⁸⁷ Ibid, 29.

and purpose of the convention is not to determine the rights of children to education. Having said that, it means that the ILO is of the view that compulsory education should be up to at least 15 years old - in Malaysia, this will cover the lower-secondary school age.

6. Conclusion

Secondary education, more so than primary education, plays such a significant role in not only eradicating poverty and redistributing, but also ensuring economic growth and increasing the health and well-being of individuals, particularly young women. However, despite these significant gains in secondary education, Malaysia has one of the lowest years of compulsory education in the world, only providing for 6 compulsory years of education for ages 6 until 11. There are no national legislations, including the Education Act 1996 that provides for legal obligation to provide for the right to education. While the Education Act 1996 does state that there is a duty to provide access to secondary education, there is no legal obligation. As such, effectively discharging itself from the legal obligation of ensuring that older children in Malaysia receive basic secondary education.

However, while there is no legal obligation pursuant to any national legislation, there is a right to education, including the right to secondary education, pursuant liberal interpretation of right to life under Article 5(1) of the Federal Constitution. In addition, Malaysia's international obligation particularly pursuant to the requirements of CEDAW, CRC, ASEAN Human Rights Declaration and ILO Minimum Age Convention, would require Malaysia to make the necessary changes to make secondary school compulsory and provide for the right to education. Despite the state's increased commitment to financially support programmes for students not only more economically disadvantaged but also from indigenous groups through commitments for the state's goals under EFA, these efforts have not been sufficient to ensure that 5-10% of the hardest-to-reach population of children enter and complete secondary education. Further, while gender disparity has reduced significantly for girls, new emerging issues have arisen where boys are falling behind in secondary education. Ultimately, while policies and resources can be put into place, the best way forward is to ensure secondary school education is compulsory through amendments to the existing Education Act 1996. With these proposed changes, the enrolment of Malaysian children would significantly increase, ensuring that 100% Malaysian children received and complete secondary school education as targeted under the Malaysian Education Blueprint.

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