

## **Right to Early Childhood Education in Malaysia, An International and Domestic Perspectives**

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### **Abstract**

Education is one of the most empowering rights to set a person up for success throughout his or her life. Studies have revealed that early childhood education is a very important aspect of developmental growth that leads to a marked increase in qualifications and earnings. However, neither domestic nor international law focuses on the right to early childhood education. This research analyses the various international and domestic laws in relation to the right to early childhood education and its potential of being recognised as a stand-alone right within domestic and international systems of law.

**Keywords:** education, early childhood

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### **1. Introduction**

Malaysian courts recognize that a system of law worthy of being called 'just' must be founded on fundamental values. "The law must be related to the fundamental assessments of human values and the purposes of society".<sup>1</sup> Fundamental rights therefore must be protected. The right to education is thought to be encapsulated as part of the fundamental liberties of the State. However, a strict interpretation of Article 12 of the Federal Constitution however demonstrates that there is no right to education per se, merely rights in respect to education.

The term education in itself is broad-based and covers the whole spectrum of a person's life. A complete educational background after all provides the platform towards upward social mobility.<sup>2</sup> Needless to say, that the developmental years are the most important years of the child's life as it is at that point whereby the foundation is set without which the child will fall behind and may remain in that circumstance for the rest of his/her life.

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<sup>1</sup> *Alma Nudo Atenza v PP* [2019] 4 MLJ 1, 35.

<sup>2</sup> Prime Minister's Office, Malaysian Education Blueprint (2017) <<https://www.moe.gov.my/index.php/en/dasar/pelan-pembangunan-pendidikan-malaysia-2013-2025>> accessed 21 November 2018.

In Malaysia, there is no compulsion on the state to provide early childhood education. This could account for the low enrolment of Malaysian children in early childhood programmes in Malaysia. Research has indicated that only 84.2% of young children in Malaysia have been enrolled in early childhood education programmes.<sup>3</sup> There are intractable hurdles and challenges that have emerged, particularly within marginalized communities in Malaysia due to the lack of compulsory early childhood education.

This study looks at the right to early childhood education within the international legal sphere in comparison with the current national sphere. Secondary data on specific and general international conventions, declarations, agreements and framework in comparison to the domestic constitutional and legislative setting will be analyzed to determine the availability of early childhood education within an international sphere and Malaysia's obligations towards these international sources of law. The research aims to be of practical utility in demonstrating to policy makers Malaysia's international obligation and to provide a strategy for the implementation of early childhood education of children residing in Malaysia.

## 2. Methodology

The paradigm of research for this study is doctrinal, encompassing empirical elements through qualitative content analysis of relevant laws and policies.<sup>4</sup> This study aims at categorically analyzing the various formal international sources of law which provide either directly or indirectly for the right to education. These conventions include the Convention on the Rights of the Child 1989 (CRC),<sup>5</sup> the International Covenant on Civil and Political Rights 1966 (ICCPR)<sup>6</sup> and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).<sup>7</sup> These primary conventions are complemented by other secondary conventions, some of which have been acceded to by the Malaysian government.

The research also looks at various soft laws that exist within the international sphere such as declarations, committee comments and resolutions. These sources of law though merely evidentiary are no less important as they pave the way towards the formation of customary international law on the right to education in general.

The procedural aspect of incorporation of international norms to meet the educational needs of children residing in Malaysia is covered through an analysis of the theories of incorporation of international law into the domestic sphere. The focus here would be the dualism theory as Malaysia subscribes to this approach of application of international law.

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<sup>3</sup> Lydia Foong, *et al*, 'Private Sector Early Child Care and Education in Malaysia: Workforce Readiness for Further Education' (2018) 36 *Kajian Malaysia* 127.

<sup>4</sup> Anwarul Yaqin, *Legal Research and Writing* (LexisNexis 2007) 11.

<sup>5</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 13 (CRC).

<sup>6</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>7</sup> International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 993 (ICESCR).

Although a doctrinal study has its limitations, it does provide the foundational setting towards further socio-legal studies in collaboration with social scientists. Such collaborative work will be part of the research trajectory on this area of law. Selection of scope of study specifically covering international law as well as domestic law is conducted for the purpose of clearly demarcating both international and domestic law thereby acquiring a holistic perspective of the right to early childhood education.

### 3. Benefits of Early Childhood Education

It is evident that the early years of a child's life are crucial to later learning and social development.<sup>8</sup> It is the earliest years that lay the foundation of all learning. The building blocks of life are good health and nutrition, safety and support for emotional development in a caring home environment, and early and continuing cognitive stimulation through positive play and early learning.<sup>9</sup> It is in essence, the basic human right of every child to receive the support they need for their development. However, while early childhood is a time of massive potential for a child's development, it is also a period when children are especially susceptible to being left behind.<sup>10</sup>

Research in social science, psychology and neuroscience has shown that a child's early years is important to the progress in later years.<sup>11</sup> If a child has had the opportunity of early childhood education, research has proven that there is a marked increase in qualifications and earnings<sup>12</sup> from better school performance, increased school retention and increased higher education participation.<sup>13</sup> Further, studies have shown that children with the benefit of early childhood education have better social benefits including better health<sup>14</sup> and reduced crime levels.<sup>15</sup>

Beyond the development of a child, the lack of early childhood education has a great impact on a state. Research has indicated that it leads to a weaker economy and results in a great strain on the health, education and welfare system of a state.<sup>16</sup> An investment in early childhood education results in the most critical and cost-effective investment a

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<sup>8</sup> Anon, 'Early Childhood Education and Care' (No. 4, 2012) Oireachtas Library & Research Service 3.

<sup>9</sup> United Nations Educational, Scientific and Cultural Organization, 'Education for All 2000-2015: Achievements and Challenges' (UNESCO Publishing 2015) <<https://en.unesco.org/gem-report/report/2015/education-all-2000-2015-achievements-and-challenges>> accessed 13 December 2019.

<sup>10</sup> International Labour Office, *Right Beginnings: Early Childhood Education and Educators: Global Dialogue Forum on Conditions of Personnel in Early Childhood Education* (International Labour Office, Sectoral Activities Department 2012) 5 <<https://www.ohchr.org/Documents/Issues/Education/QuestionnaireEducation/ILOPartIIIOfIV.pdf>> accessed 13 May 2020.

<sup>11</sup> Oireachtas Library & Research Service(n 8) 3.

<sup>12</sup> Edward C. Melhuish, 'Preschool matters' (2011) *Science* 300.

<sup>13</sup> M. Najeeb Shafiq, Amanda E. Devercelli, Alexandria Valerio, 'Are There Long-Term Benefits from Early Childhood Education in Low- and Middle-Income Countries?' (24 September 2018) Education Policy Analysis Archives, 26(122) <<https://epaa.asu.edu/ojs/article/view/3239>> accessed 28 May 2020.

<sup>14</sup> Arthur J Reynolds, Suh-RuuOu, Judy A Temple, 'A Multicomponent, Preschool to Third Grade Preventive Intervention and Educational Attainment at 35 years of Age' (2018) *JAMA Pediatrics* 247.

<sup>15</sup> James J. Heckman, 'The economics of inequality: The value of early childhood education' (Spring 2011) *American Educator* 31, 32.

<sup>16</sup> Pia Rebello Britto, 'Early Moments Matter for Every Child UNICEF for Every Child' (2017) UNICEF 3.

country can make<sup>17</sup> as there would be a higher employment rates, increased tax revenues and accompanying reductions in welfare expenditure,<sup>18</sup> making early childhood a critical time to accumulate human capital.<sup>19</sup>

As early intervention is important, as such, early childhood education should be universal, free and inclusive.<sup>20</sup> Provisions of this nature, however, are yet to metamorphose into law within the international sphere. The states that do provide for compulsory early childhood education are few and far between. The main impediment is the lack of agreement among policymakers about the need for early childhood education.<sup>21</sup> Certain States indirectly provide for compulsory early childhood education via an early start to primary schooling coupled with free entitlement for those below the age of official primary schooling. Quality compulsory early childhood education is a privilege that only those who can afford private early childhood education can benefit from. The market approach that has led to early childhood education becoming a commodity and eventually minimizing the moral and legal responsibility of the state to provide the service.<sup>22</sup>

Governmental and social community involvement in providing early childhood education would be ideal coupled with the recognition that children are holders of rights of not only education but also early childhood education. The market approach should be replaced as it is the underserved in the community who would benefit from the opportunity of compulsory education early in life. This in turn will inadvertently stem the widening economic and equality gaps in society.

#### 4. Limitation of International Obligations - An Analysis

In relation to incorporation of the right to early childhood education into the Malaysian legal system, it is observed that this right is contained in various international and regional laws. Three limitations however surface:

Firstly, written provisions refer to the right to education in general or the right to primary education specifically. None of the international or regional laws specifically provide for early childhood education. Referring to the CRC, Lundy explains that qualifications and limitations reflect the actual rather than ideal position in a State.<sup>23</sup> Certain regions including South East Asia may not be equipped to provide free

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<sup>17</sup> Pia Rebello Britto, *et al*, 'Nurturing Care: Promoting Early Childhood Development' (2017) 389 *Advancing Early Childhood Development: From Science to Scale* 91-92.

<sup>18</sup> Alison Elliott, 'Early Childhood Education Pathways to Quality and Equity for All Children' (Australian Council for Educational Research (ACER) 2006) 24, 25 <<https://research.acer.edu.au/cgi/viewcontent.cgi?article=1003&context=aer>> accessed 13 May 2020.

<sup>19</sup> International Labour Office (n 10) 5.

<sup>20</sup> Maria Herczog, 'Right of the Child and Early Childhood Education and Care in Europe' (2012) 47 (4) *European Journal of Education* 550.

<sup>21</sup> International Labour Office (n 10) 5, 6.

<sup>22</sup> Jane Beach, Carolyn Ferns, 'From Child Care Market to Child Care System' (2015) *Our Schools/Ourselves* 53, 54.

<sup>23</sup> 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.

education within the broad corpus of educational stages which includes early childhood education.

Secondly, some of the international laws referred to are merely soft law. As long as these soft laws have not crystallized into customary international laws, they would not be binding on the States.

Thirdly, is that even if these treaties and customary laws are binding, Malaysia's reception to these international sources of law remain opaque. Malaysia is neither a party to the pertinent general human rights conventions such as the ICCPR and the ICESCR, nor are customary international laws automatically binding on Malaysia.<sup>24</sup>

These limitations nevertheless do not hamper the progressive development of the law and the gradual acknowledgement of the importance of early childhood education as part of the educational trajectory of every human being.

## 5. International Framework

One of the oldest international obligations is the 1948 UN Declaration of Human Rights ('UDHR'). To further strengthen the view that education starts early, Article 26(1) of UDHR provides that 'Everyone has the right to education'.<sup>25</sup> 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.<sup>26</sup> The ambitions of the declaration were subsequently followed via general and specific human rights treaties.

Both general and specific human rights treaties cover the right to education, which as mentioned in the paragraph above is of socio-economic character or also referred to as a second generation right. The general human rights treaties referred to in this analysis are the ICCPR and the ICESCR. States Parties to the ICESCR recognize the right of everyone to education through Article 13. States Parties agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. States Parties further 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.<sup>27</sup> Looking at Article 13(2)(a) of ICESCR, primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.

The second clause however limits the brush stroke approach of clause (1) where States Parties to the Covenant recognize that, with a view to achieving the full realization of this right, primary education shall be compulsory and available free to all. Through

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<sup>24</sup> *PP v Rajappan* [1986] 1 MLJ 152, 157.

<sup>25</sup> Universal Declaration of Human Rights (adopted 10 December 1948) U.N. Doc.A/810 p 71 (1948) (UDHR).

<sup>26</sup> Lundy, Orr and Shier (n 23) 364.

<sup>27</sup> ICESCR, Article 13 Clause 1.

Article 14, States commit to realize a plan within two years of becoming party to the covenant. However, nowhere in Articles 13 or 14 does early childhood education feature.

Although the ICCPR does not specifically refer to the right to education, under the ICCPR, the responsibility of providing protection to the child has been assigned to the family, society and the state pursuant to Article 24(1). Article 24(1) of ICCPR reads 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”. Early childhood education can be argued as being one of those measures of protection on the part of the State.

What is interesting to observe is that while most of the provisions refer very clearly to this right to education in general, Article 24 of the ICCPR refers to protection. The concept of child’s rights in itself is open to many perspectives. It has been said to be difficult to define and it is “ ... plaiting with fog and knitting with treacle.”<sup>28</sup> There has been research undertaken on the problems and inconsistencies of the child rights albeit somewhat rare.<sup>29</sup> A question arises as to whether the right to education is a right per se or is protective in nature. It can be argued that since most of the treaties refer to education as a right, the protective measures under the ICCPR may not be used to include education.

Adaptations of the general right to education have also been included in other conventions such as the Convention on the Elimination of Racial Discrimination 1965 (ICERD),<sup>30</sup> Convention on the Elimination of Discrimination Against Women 1979 (“CEDAW”),<sup>31</sup> and more recently the Convention on the Rights of Migrant Workers 1990 (“CRMW”)<sup>32</sup> and the Convention on the Rights of Persons with Disabilities 2006 (“CRPD”).<sup>33</sup> It is encouraging to note that out of these four conventions that provide for the adaptation of this right, Malaysia is party to two of them i.e. CEDAW & CRPD. In fact, Malaysia is party to the most comprehensive articulation of education rights i.e. the CRC<sup>34</sup> which will be dealt with in the following part of this analysis.

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<sup>28</sup> Sarah Te One, ‘Defining rights: Children’s rights in theory and in practice’ (March 2011) 2 (4) *He Kupu: The Word* 41.

<sup>29</sup> Ann Quennerstedt, Carol Robinson & John I’Anson, ‘The UNCRC: The Voice of Global Consensus on Children’s Rights?’ (2018) 36(1) *Nordic Journal of Human Rights* 38, 39.

<sup>30</sup> Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

<sup>31</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>32</sup> Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 39481 (CRMW).

<sup>33</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

<sup>34</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 13 (CRC).

The leading international framework for protection of children's rights is the CRC and is used in any discussion and debates on children's rights.<sup>35</sup> It started as a devotion towards children's welfare and optimism about their future and now used to protect children.<sup>36</sup> It is historically considered the most complete proclamation on children's rights. As a result of Initiatives by the Polish government in 1978,<sup>37</sup> the CRC was adopted in 1989 by member states of the United Nations. Today, the CRC is the most ratified of all the United Nation Human Rights treaties.<sup>38</sup>

Malaysia acceded to the CRC in February 1995 but has made reservations in respect of five main articles of the CRC.<sup>39</sup> State parties who ratified the CRC, had a mutual duty to implement the CRC in their own jurisdiction. Likewise, Malaysia, through the adoption of the Child Act 2001. As many of its current statutes on children did not conform with the CRC,<sup>40</sup> CA was drafted to consolidate and amend existing laws relating to the care, protection and rehabilitation of children<sup>41</sup> with the intention to uphold the protection and welfare of her children.<sup>42</sup>

The Child Act 2001 is said to be the most complete statute and covers all areas of law relating to children in Malaysia.<sup>43</sup> In addition to the Child Act 2001, Malaysia has also drafted the National Policy and Plan of Action for Children in 2008 as well as the National Child Protection Policy and Plan of Act to incorporate the CRC.<sup>44</sup>

The CRC provided bespoke rights for children by providing them an avenue that constructed on an agreed international ambition for education with a specific focus on children,<sup>45</sup> particularly their future.<sup>46</sup> As a result, were two extensive articles, Articles 28 & 29. Both provide for rights for children in relation to their education. One must keep in mind that the CRC must be understood as a whole and all rights are linked. As such, Article 28 & 29 cannot be considered in isolation. These two articles combined

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<sup>35</sup> Eugeen Verhellen, *The Convention on the Rights of the Child: Background, Motivation, Strategies, Main Themes* (Routledge International Handbook of Children's Rights Studies 2015) <<https://www.routledgehandbooks.com/doi/10.4324/9781315769530.ch3>> accessed on 31 May 2019.

<sup>36</sup> Paula S. Fass, 'A Historical Context for the United Nations Convention on the Rights of the Child' (2011) *The Annals of the American Academy* 27.

<sup>37</sup> Quennerstedt, Robinson & Anson (n 29) 40.

<sup>38</sup> Hanita Kosher, *Children's Rights and Social Work* (Springer 2016) 15.

<sup>39</sup> Article 2 (Non-discrimination), Article 7 (Name and Nationality), Article 14 (Freedom of Thought, Conscience and Religion), Article 28 (1)(a) (Free Compulsory Education at Primary Level) and Article 37 (Torture and Deprivation of Liberty) of the CRC. The provisions are only applicable if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

<sup>40</sup> Rojanah Kahar and Najibah Mohd. Zin, 'Child Related Policy and Legislative Reforms in Malaysia' (2011) 8 *International Journal of Social Policy and Society* 21.

<sup>41</sup> The Child Act 2001 repealed and consolidated the Juvenile Courts Act 1947, Women and Girls Protection Act 1973, and the Child Protection Act 1991.

<sup>42</sup> Anon, 'The Establishment of the National Council for Children: A Way Forward for a Better Protection of the Child' *Welfare in Malaysia* (2016) *Law Review* 2603.

<sup>43</sup> Kahar and Zin (n 40).

<sup>44</sup> *Child Protection System in Malaysia, An Analysis of the System for Prevention and Response to Abuse, Violence and Exploitation against Children, Ministry of Women, Family and Community Development and UNICEF Malaysia* (2013) UNICEF Malaysia 2.

<sup>45</sup> *Ibid*, 22.

<sup>46</sup> Lundy, Orr and Shier (n 23) 364.

with other provisions under CRC, particularly the General Principles, formed a series of interrelated privileges for children around the right to education.<sup>47</sup>

Article 28 of the CRC focuses on mainly issues of access to education by compelling countries to recognize the right of a child to education from primary to higher education with equal opportunity.<sup>48</sup> Article 29 focuses on goals of education and 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 state to the right of the child to education.<sup>49</sup>

In 2005, the UN Committee on the Rights of the Child adopted its General Comment: Implementing Child Rights in Early Childhood (CRC/C/GC/7/Rev. 1) General Comment No. 7, pursuant to the General Day of Discussion in 2004. The General Comment No. 7 on implementing child rights in early childhood, identified key areas where rights to early childhood were relevant.<sup>50</sup> The UN Committee interprets the right to education under Articles 28 and 29 during early childhood as beginning at birth and is closely linked to young children's right to maximum development, particularly under Article 29(1).<sup>51</sup> While the CRC Committee on the Rights of the Child acknowledges that that parents and primary caregivers are a child's first educators and have responsibilities to provide early childhood education, the Committee emphasized that the State should ensure that all young children receive early childhood education citing research that demonstrates that early childhood education has a positive impact on young children's successful transition to primary school, their education progress and their long term social adjustment.<sup>52</sup> The interpretation under General Comment 7 was welcomed by the UN agencies and organizations in assisting to reinforce efforts to develop quantity and quality early childhood programmes and facilities.<sup>53</sup>

While General Comments by the UN Human Rights Monitoring Committee are not themselves legally binding documents, these comments are widely regarded as useful contributions to the understanding of human rights instruments, including that of the CRC<sup>54</sup> by providing authoritative interpretation.<sup>55</sup> It has been recognized that the ratification and implementation of human rights conventions may impose legal duties, and the UN General Comments can help clarify and provide guidance to member states

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<sup>47</sup> Lundy, Orr and Shier (n 23) 364.

<sup>48</sup> Lundy, Orr and Shier (n 23) 364.

<sup>49</sup> Lundy, Orr and Shier (n 23) 365.

<sup>50</sup> Herczog (n 20) 542, 551.

<sup>51</sup> UN Committee on the Rights of the Child (CRC), 'General comment No. 7 (2005): Implementing Child Rights in Early Childhood' (2006) United Nations 13 <<https://www.refworld.org/docid/460bc5a62.html>> accessed 29 September 2019.

<sup>52</sup> *Ibid*, 14.

<sup>53</sup> Priscilla Toka Mmantsetsa Marope and Yoshie Kaga, 'Investing against Evidence - The Global State of Early Childhood Care and Education' (2015) UNESCO Publishing: United Nations Educational, Scientific and Cultural Organization 42 <<http://unesdoc.unesco.org/images/0023/002335/233558E.pdf>> accessed 29 September 2019.

<sup>54</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) *Right to Education Handbook*, 2019 165.

<sup>55</sup> Marope and Kaga (n 53) 42.

to their duties and obligations in the implementation of the rights in the respective conventions and covenants.<sup>56</sup>

In addition, while the CRC does not contain articles on the right of the child to the development of his or her capacities during the early years of life, it is worth noting that the CRC was drafted by the UN working group at a time when a majority of governments were confirming in the draft World Declaration on Education for All (1990) that “ ... learning begins at birth ... ”.<sup>57</sup>

According to the United Nations Committee on Economic, Social and Cultural Rights, 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.<sup>58</sup>

While primary education is not synonymous with basic education, there is a close correspondence between the two. “[B]asic learning needs” has been defined in the World Declaration on Education for All. The Declaration defines in its Article 1 as:

essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.<sup>59</sup>

Whilst enforcement remains weak within international law, regional law may be able to garner more stringent enforcement. It is observed that regional law also contains provisions in relation to the right to education. The ASEAN Human Rights Declaration 2012 stipulates in its Article 31 as follows:<sup>60</sup>

Article 31:

- (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.

While most of the international frameworks provide that compulsory education begins at primary level, the CRC Committee on the Rights of the Child through General Comment 7 has emphasized that the State should ensure that all young children receive

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<sup>56</sup> *Ibid.*

<sup>57</sup> Marope and Kaga (n 53) 39.

<sup>58</sup> UN Economic and Social Council, ‘General Comment No. 13: The Right to Education (Art. 13 of the Covenant)’ (UN Committee on Economic, Social and Cultural Rights (CESCR) 1999) E/C.12/1999/10.

<sup>59</sup> World Declaration on Education for All, Adopted by the World Conference on Education for All, Jomtien, Thailand, (5-9 March 1990).

<sup>60</sup> ASEAN Human Rights Declaration (adopted 18 Nov 2012) Phnom Penh, Cambodia (2012) (AHRD).

early childhood education citing research that demonstrates that early childhood education has a positive impact on young children, long term. This is further supported by the majority of governments confirming that learning begins at birth through the World Declaration on Education for All.<sup>61</sup>

Although Malaysia is yet to be party to the core human rights covenants such as the ICCPR and the ICESCR, these treaties have been for a long time the focus of SUHAKAM for governmental accession. There has been some level of optimism with regards to precipitated accession to the human rights covenants by the Pakatan Harapan government. This optimism however has been somewhat dampened due to the recent withdrawal of commitment to international treaties by the Malaysian government.

## 6. Malaysia's Domestic Legislative Setting

### 6.1 Malaysian Federal Constitution

The fundamental liberties in Malaysia 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. However, one would presume that to read the right of education into the Federal Constitution, one would have to refer to Article 12(1) on rights in respect to education. 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).

However, research has indicated that the main purpose of Article 12(1) was to provide basic rights on education as opposed to the right to education.<sup>62</sup> 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,<sup>63</sup> particularly in terms of the non-Malay communities to establish and maintain schools in the vernacular languages.<sup>64</sup> Further, Article 12(1) aims to prevent discrimination on religious grounds in the

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<sup>61</sup> Marope and Kaga (n 53) 39.

<sup>62</sup> 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 1 October 2019.

<sup>63</sup> *Ibid*, 1-28.

<sup>64</sup> Fernandao and Rajagopal (n 63) 1-28.

administration of public education.<sup>65</sup> 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,<sup>66</sup> respect for the linguistic rights of minorities, respect for the rights of parents to choose their children's education and medium of instruction.<sup>67</sup> 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.<sup>68</sup>

Despite the fact that there are no specific provisions to the right to education under the Federal Constitution, one could reference Article 5(1) of the Federal Education. Taking the lead from the Indian Supreme Court decisions, advocates for the right to education could refer to Article 5(1) of the Federal Constitution, wherein the right to education falls within the ambit of the right to life and liberty to person. Article 5(1) states that no person shall be deprived of his life or personal liberty in accordance with law. A similar provision can be found under Article 21 of the Indian Constitution. The Indian Supreme Court in the case of *Mohini Jain (Miss) v State of Karnataka and Others*<sup>69</sup> found that while the right of 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. Thus, the Supreme Court of India was of the view that the State Government is under an obligation to provide educational facilities at all levels to its citizens.<sup>70</sup>

The 1992 Supreme Court decision of *Mohini Jain*<sup>71</sup> was subsequently reaffirmed by the Indian Supreme Court in the case of *Unni Krishnan v State of Andhra Pradesh*.<sup>72</sup> 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. And 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.<sup>73</sup> 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.

In view of the decision from the Indian Supreme Court in *Unni Krishnan v State of Andhra Pradesh*<sup>74</sup> and *Mohini Jain (Miss) v State of Karnataka and Others*,<sup>75</sup> Article 5(1) of the Malaysian Federal Constitution which refers to life and liberty to persons, could also be interpreted to include the right to education. What is not clear, however, is

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<sup>65</sup> Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal Sdn. Bhd 1996) 202.

<sup>66</sup> Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publication (Malaysia) Bhd. 2008) Selangor, Malaysia 356.

<sup>67</sup> *Ibid*, 356.

<sup>68</sup> Faruqi (n 67) 356.

<sup>69</sup> [1992] 3 SCC 666.

<sup>70</sup> *Ibid*, 673.

<sup>71</sup> *Mohini Jain* (n 70) 672.

<sup>72</sup> [1993] AIR 2178.

<sup>73</sup> *Ibid*, 2182.

<sup>74</sup> *Mohini Jain* (n 70).

<sup>75</sup> *Mohini Jain* (n 70).

whether this line of argument could be extended to also include the right to early childhood education.

## 6.2 Education Act 1996

The key legislation on education in Malaysia is the Education Act 1996. The Education Act 1996 implements government policies on education that had been developed since independence in 1957. The Education Act 1996 is meant to be the most comprehensive legislation of all matters concerning education. Two key components of the Education Act 1996 refer to policies and directions and sources of regulation around primary and secondary education in Malaysia.<sup>76</sup>

Sections 27-29 of the Education Act 1996 obligate the state to provide primary education. These provisions were included in the Education Act 1996 through amendments in 2002. In addition to the states having to provide primary education, every parent is obligated to enrol their child upon attaining the age of six into primary schools pursuant to section 29A of the Education Act 1996. All children are required to remain in primary school for the duration of the six years. There are however no provisions under sections 27-29A that provide for early childhood education, as such there is no compulsion on the state to provide for early childhood education nor a similar obligation on parents to enrol their children into early childhood education programmes.<sup>77</sup>

Despite the lack of obligation on the state to provide early childhood education under the Education Act 1996, the Education Act 1996 does formally recognize the framework of early childhood education under section 15 of the act.<sup>78</sup> There is no age recommended for children to be enrolled in early childhood education, however, analysts have suggested that it is within the age of four to six.<sup>79</sup> Further Part IV Chapter 2 of the Education Act 1996, centres around the administrative framework implementing early childhood education, wherein it provides that early childhood education centres i.e. kindergartens/preschools must be registered under the Education Act 1996. These provisions also state that early childhood education providers are required to implement the Standard National Pre-School Curriculum.<sup>80</sup> The majority of pre-schools or early childhood providers are through private entities, however, the Ministry of Education is allowed to set-up pre-schools for early childhood education within the premises of a national primary school.<sup>81</sup>

Despite the lack of compulsion on the state or parents to provide for the right to early childhood education under the EA, the incorporation framework for administering early childhood education, would suggest an official acknowledgement for early childhood

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<sup>76</sup> ESPACT: Education Services Provider, 'National Education System: The Education Act 1996 (EA1996)' <<https://www.espact.com.my/national-education-system/the-education-act-1996>> accessed on 11<sup>th</sup> May 2020.

<sup>77</sup> Malaysian Education Act 1996, section 27-29A.

<sup>78</sup> *Ibid*, Section 15 Part IV Chapter 1.

<sup>79</sup> Foong and others (n 3) 127.

<sup>80</sup> Education Act 1996, section 22(1).

<sup>81</sup> Lily Muliana Mustafa and Mohamed Nor AzhariAzamn, 'Preschool Education in Malaysia: Emerging Trends and Implications for the Future' (2013) American Journal of Economics 347.

education in Malaysia. However, these official acknowledgments are not sufficient to resolve the low enrolment of children into early childhood education programmes, particularly in rural parts of Malaysia.<sup>82</sup> The recognition of the right to early childhood education and compulsion on the state and on parents to the necessary provisions under the EA to provide early childhood education, could resolve the lower enrolment rates in Malaysia.

### **6.3 Child Care Centre Act 1984**

The Child Care Centre Act 1984 provides for the registration, control and inspection of childcare centres and for purposes connected therewith. While the Child Care Centre Act 1984 itself does not provide for a child's education, it is mentioned in the Child Care Centre Regulations 2012. The term 'care' under Regulation 3 of the Child Care Centre Regulations 2012 has been defined to include minding, supervising and educating a child at a childcare centre indicating that educating a child is part of caring for a child. Pursuant to Child Care Centre Act 1984, a childcare provider would then be responsible to provide for this education at the childcare centre. There are however no provisions within the Child Care Centre Act 1984 or regulation as to how a childcare provider is to educate a child. The inclusion of education within Child Care Centre Regulations 2012, reinforces the view of the state's recognition of the need for early childhood education. There are provisions of the Child Care Centre Regulations 2012 that recognize the need for early childhood education. However, due to the non-compulsory nature of the provisions of the Act, this re-affirms that there is no right to early childhood education provided via the Act.

### **6.4 Child Act 2001**

The Child Act 2001 contains provisions that are protective of the child. However, there are no provisions on the right to education or early childhood education in the Child Act 2001. 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 Child Act 2001.

### **6.5 Other Child Related Legislations**

The Child Care Centre Act 1984 and the Child Act 2001 are not the only legislation in Malaysia that are referred to on the protection of children. There are the Adoption Act 1952,<sup>83</sup> Anti-Trafficking in Persons Act 2007,<sup>84</sup> Birth and Death Registration Act 1957,<sup>85</sup> Sexual Offences Against Children Act 2017,<sup>86</sup> Guardianship of Infants Act 1961,<sup>87</sup> Care Centre Act 1951,<sup>88</sup> Children and Young Persons (Employment) Act 1966,<sup>89</sup> Domestic Violence Act 1994,<sup>90</sup> Criminal Procedure Code<sup>91</sup> and Penal Code.<sup>92</sup>

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<sup>82</sup> Ministry of Education Malaysia, 'Education for All 2015: National Review Report Malaysia' (2015) UNESDOC Database <<http://unesdoc.unesco.org/images/0022/002297/229719E.pdf>> accessed 23 August 2019.

<sup>83</sup> Adoption Act 1952.

<sup>84</sup> Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

<sup>85</sup> Births and Deaths Registration Act 1957.

<sup>86</sup> Sexual Offences Against Children Act 2017.

<sup>87</sup> Guardianship of Infants Act 1961.

<sup>88</sup> Care Centre Act 1993.

Some of these legislations 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 early childhood education.

## 7. Conclusion

It cannot be disputed that early childhood education contributes extensively towards the educational success of a child. Our Malaysian Education Blueprint acknowledges that a thorough educational background serves as a bedrock for social mobility.<sup>93</sup>

At the international level, while the relevant international obligations refer to education in general, international bodies like the United Nations have emphasized on the need for early childhood education. The leading international framework for protection of children's rights is the CRC and is used in any discussion and debates on children's rights.<sup>94</sup> The UN Committee interprets the right to education under Article 28 & 29 of the CRC to begin at birth and is closely linked to a young child's right to maximum development.<sup>95</sup> The right to education is a right that is also enshrined in other international obligations.<sup>96</sup> As a signatory to many of these international obligations, Malaysia is bound by its obligation to provide education, now more so the early childhood education in view of the UN Committee Comments under the General Comment No. 7.

To date only 84.20% of young children in Malaysia are enrolled in early childhood education.<sup>97</sup> This is significantly lower than the nearly 100% enrolment of children in Malaysian primary schools. One of the factors could be that there is no compulsion on the state through legislation to early childhood education in Malaysia. While the Federal Constitution refers to rights in respect of education, the crux of Article 12 serves to provide a safeguard in religious freedom and choice in terms of education for non-Malay communities.<sup>98</sup> However, the right to life in Article 5(1) of the Federal Constitution could be liberally interpreted as has been done by the Supreme Court of India to include the right to education. Whilst there are provisions in the Education Act that provides a framework and recognition for early childhood education in Malaysia, there is no

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<sup>89</sup> Children and Young Persons (Employment) Act 1966.

<sup>90</sup> Domestic Violence Act 1994.

<sup>91</sup> Criminal Procedure Code.

<sup>92</sup> Penal Code (ACT 574).

<sup>93</sup> Prime Minister's Office (n 2).

<sup>94</sup> Verhellen (n 35).

<sup>95</sup> UNCRC, General Comment No. 7 (Implementing Child Rights In Early Childhood) CRC/C/GC/7/Rev.1, para 28.

<sup>96</sup> Article 26(1) 1948 UN Declaration of Human Rights, Article 13 & 14 International Covenant on Economic, Social and Cultural Rights 1966; Article 24 International Covenant on Civil and Political Rights 1966 as well as general right to education under Convention on the Elimination of Racial Discrimination, Convention on the Elimination of Discrimination Against Women and Convention on the Rights of Migrant Workers.

<sup>97</sup> Foong and others (n 3) 129.

<sup>98</sup> Harding (n 66) 202.

compulsion for the State nor for parents to provide for early childhood education unlike that of primary education.

Based on the laws that deal with children in general, there seems to be a scarcity of legislation that particularly refers to the right to education or the right to early childhood education. These statutes, whilst protective in nature, do not cover 'rights' per se in particular, the right to early childhood education. Without legislations providing for these rights, the possibility of having the 100% enrolment rate for early childhood education would be remote. However, all is not lost, as there is formal governmental recognition of the need for the right to early childhood education in Malaysia through a number of key legislations involving children. One of the two Key Result Areas specifically for education under the Government's Transformation Programme has been pre-school enrolment.<sup>99</sup> The crucial next steps would include the gradual transformation of policies on 100% enrolment for pre-schools into ensuring the right to early childhood education through the formal recognition and creation of the relevant constitutional and legislative provisions.

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<sup>99</sup> Prime Minister's Office (n 2).

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