

Transforming Disability Studies through Legal Perspectives in Malaysia

Ikmal Hisham Md. Tah, Khairil Azmin Mokhtar

¹Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

Received: April 29, 2017

Accepted: July 1, 2017

ABSTRACT

Disability studies has created much interest from the various academic field to explore including medicine, and in most social sciences specialisation. These areas have become major threshold in understanding the needs of this minority groups where there is debated between two models; medical and social which best-represented disability. With the existence of the Convention on the Rights of Persons with Disabilities (CRPD), a specific international human rights treaty that addressed their affairs, legal perspective has penetrated into forming a new understanding of disability studies. The concept of rights, for example, has become major discussion and debatable within the social model of disability which forms a major understanding of the latter. This article asserts that legal perspective has strengthened the flourish of disability studies as potential academic discourse in future either globally or locally. Malaysia as State Members of the CRPD has enacted a domestic legislation known as Persons with Disabilities Act 2008 to fulfil the obligations under the treaty. This paper, based on doctrinal legal research, will explore the potential of transforming disability studies within the context of Malaysian legal framework to show the possible link of this two studies which will benefit not just in academic discourse but also in practical aspects of promoting and protecting the rights of persons with disabilities. The authors call for the need to strengthen disability studies through legal perspectives where it would allow greater and meaningful participation from whole society to address the concern and grievances suffer by this marginalize group.

KEYWORDS: Disability Studies, Legal Perspectives, Human Rights Approach, Malaysian Law

INTRODUCTION

As an academic discipline disability studies are interdisciplinary and multi-disciplinary. Its focus is on how disability is defined and represented in society by considering the social, cultural and political barriers that exist within society. In order to define disability and understand the disability experience the discipline uses interdisciplinary perspective and multiple theories. The studies examine the meaning, nature, and consequences of disability as a social construct. It challenges the way in which disability is constructed in society with the aim to remove the legal, physical, policy, and attitudinal barriers that exclude people with disabilities from society. Disability studies has emerged as a new academic area of studies penetrating all disciplines including philosophy, sociology, history and even law [1]. In most cases, it involved the study of individuals' feats having disabled experiences and interaction with the society. Undeniably such experience involved negative stigma and stereotype labeling from a society which leads towards discrimination facing them as an individual [1]. Disability studies are important because either directly or indirectly it affect almost everyone regardless of social class, community, nation, and wealth [2]. According to World Report on Disability, in every country about fifteen percent (15%) of the total population are people who are considered as persons with disabilities [3]. This number keeps on increasing not only within developing nations but also developed or rich countries. The expansion of the free market, social medicine, and health care improvement caused disabled people to be marginalized by the government and society, and become more vulnerable to any economic mishap [2]. In developing nations, also referred to as 'Global South' Nations, the disabled people are being marginalized and denied their rights to life within society through the experience of colonialization and poverty with the influence from 'Global North' nations [4].

Due to complexity issues and challenges involving disabled people, disability studies are becoming a crucial and important discipline in order to fulfil knowledge gap and improving social policy and legal quagmire facing the marginalized group [5]. Therefore, this paper will analyse the importance of disability studies in general and relationship with legal perspectives, especially within Malaysian legal framework, to ensure better promotion and protection of the rights persons with disabilities can be implemented.

Disability Studies – General

'Disability' is usually understood as 'functional limitation' which is caused by either chronic illness/impairment or the complex interaction between the limitations of the body and/or mind, and society at large. The word 'disability' may also be referred to as the individual experience of 'something missing either fiscally, physically, mentally or legally' [6]. It may be also defined as 'any restriction or lack of ability to perform any activities in manner which considered normal for human being.' This definition is synonymous to and associated with the terms 'impairment' and 'handicapped.' In order to avoid any confusion, World Health Organisation (WHO) has come out with The International Classification of Impairments, Disability and Handicap (ICIDH) in 1980. In it impairment is construed as 'any loss or abnormality of psychological or anatomical structure or function' while handicap is referred to as 'a disadvantage for given individual, resulting from an impairment or a disability that limits or prevents the fulfilment of a role that is normal for that individual' [3] [7]. People with disabilities are being discriminated in various sectors such as economic, social, medicine, education due to many factors such as armed conflict, malnutrition, poverty and child labour [8]. This social oppression requires the redefinition of the notion of disability mentioned that the move is important. It includes the restructuring of political disability movements which will contribute towards improving social justice and equitable rights within society [9]

The disability studies perspectives may be understood through developments and arguments involving several models. Most of the debates involved the concept of disability surrounding the dichotomy between medical and social models. Medical model views disability as functional and physical limitation suffered by individual consequently from 'tragic personal experience.' However, this model has been challenged by a social model which views disability is a social construct created by society through the existence of attitudinal and environmental barriers [10]. A model is what social scientists call a 'heuristic device' or an aid to understanding. 'A good model can enable us to see something which we do not understand because in the model it can be seen from different viewpoints... it is this multidimensional replica of reality that can trigger insights that we might not otherwise develop' [11].

There are three main criteria of the social model of disability [9]. The first criteria is that in contrast to the conventional individual medical model of disability, the social model is a deliberate attempt to switch the focus away from the functional limitations of impaired individuals onto the problems caused by disabling environments, barriers and cultures. The second criteria of the social model is it is an holistic approach that explains specific problems experienced by disabled people in terms of the totality of disabling environments and cultures. This includes inaccessible education, information and communication systems, working environments, inadequate disability benefits, discriminatory health and social support services, inaccessible transport, houses and public buildings and amenities, and the devaluing of disabled people through negative images in the media – films, television and newspapers. The third criteria is the social model's perspective does not deny the importance or value of appropriate individually based interventions in the lives of disabled people, whether they be medically, rehabilitative, educational or employment based, but draws attention to their limitations in terms of furthering their empowerment and inclusion in a society constructed by 'non-disabled people' for 'non-disabled' people. In short, the social model of disability is a tool with which to gain an insight into the disabling tendencies of modern society in order to generate policies and practices to facilitate their eradication.

Social model has since become the backbone of the first human rights treaty in 21st century specifically cater persons with disabilities. The UN CRPD has become the example to show the existence of social model in understanding disabilities where it is crucial to address the grievances and challenges facing this marginalize group [5].

Disability Studies - Malaysia

Initially disability studies in Malaysia are concentrated on social science and medicine research. When the country became an industrial nation in the 1990s, the involvement and participation of people with disabilities in national economic agenda became crucial and significant [12]. The study of the involvement of disabled people within their organisations has been studied [13] and [14]. There are also disability studies in areas of education and employment. [15] has written extensively on the policy of inclusive education in Malaysia. The focus on medical needs for the child with disabilities also being highlighted by [16][17]. The structural barriers to the participation of people with disabilities in sport also had been discussed by [18]. [19][20] [21] have written on part involving employment facing people with disabilities. The exclusion of people with disabilities among Malaysia has also being discussed by [22]. In addition, the legal perspectives on rights of employment for persons with disabilities also being discussed by [23]. Subsequently, writings on legal perspectives of disability much concentrated on accessibility to the public building as discussed by [24] and [25]. With the rapid development of CRPD and PWD Act 2008, there is now urgent need to expand the horizon of disability studies towards legal perspectives.

Disability Studies and Law

The relationship between disability studies and law originated from the improper treatment and negative perception facing this minority group [26]. [27] has proposed the social constructionist approach towards law and disability where the social model plays a significant role in regulating the rights of disabled people. The law should not be perceived as a command from authority and have sovereignty but as the reflection of the identity of society. Most people in the society exclude disabled people due to the negative perception arising out of medical model which views disabled person as someone who physically and mentally lacks in terms of body and being abnormal in his interaction with the society. Under legal perspectives, disabled people are considered to be lack of competency and legal capacity and as a consequence laws generally exclude them through the principle of normalcy. This principle excluded them from having similar capacity and equal basis under the laws [27]. The idea of 'social constructive' towards law and disability have been relevant for the social model approach. The existence of CRPD has reflected the existence of asocial model of disability whereby Article 1 stated the purpose of CRPD is to promote, protect and ensure the full and equal enjoyment of human rights and fundamental liberties including the inherent dignity of persons with disabilities. It leads towards strengthening law and disability by [28] who introduced the idea of 'disability legal studies' to become new academic discourse to be the focus by new researcher after the global success implementation of the CRPD.

The global implementation of CRPD has expanded the concept of human rights to the disability community. The human rights approach offers improvement towards asocial model of disability through the CRPD with the objectives to empower disabled people globally and locally [28] [29].

The CRPD was opened for signature in March 2007 and came into force in March 2007 where it allows every UN States Members to sign and ratify the treaty to ensure the minority group being protected through domestic legal and administrative mechanisms. Malaysia has signed the CRPD in 2008 and ratified on 19 July 2010. With the ratification, Malaysia is required to fulfill its obligation to enact a new domestic law in accordance with the international obligations [30].

Malaysian Legal Framework on Disability

An act that specifically addressed the concern of this group had been suggested in 2002 through various consultations between government and disabled people organisations. The current legislation dealing with disabled people known as Persons with Disabilities (PWD) Act 2008 (Act 685) was enacted to fulfill the spirit of the CRPD. Enactment of the Act is consequential to the ratification of CRPD by Malaysia in 2010. Besides the parent act, there are also other stipulated legislations covering the protection for disabled people such as Education Act 1996, Street, Drainage, and Building Act 1984, Employees' Social Security Act 1969, Limitation Act 1953 [31]. The current PWD Act 2008 has the objective stated in the preamble '*to provide for the registration, protection, rehabilitation, development and wellbeing of persons with disabilities, the establishment of the National Council for Persons with Disabilities, and for matters connected therewith.*' [32] [25].

This statute, divided into 5 parts and 46 sections, is the first right-based legislation promoting and protecting the rights of disabled people in Malaysia. [23, 30] Persons with disabilities have been defined under the act so as to '*include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society.*' (Section 2, PWD Act 2008). The Minister who is responsibility for PWD's matters is the Minister of Woman, Family and Community Development (MWFCD). Two main institutions that been given responsibility under the act are the National Council for PWD and Department for the Development of PWD (Section 2, PWD Act 2008). The act gives many functions and power to the Council for PWD to make recommendations, coordinate, oversee, monitor the implementation and impact of any laws, policies, programs and activities relating to PWD including encouraging, promoting research and development (R&D) relating as directed by Minister (Section 9, PWD Act 2008). The promotion and protection towards people with disabilities must be consistent with the Federal Constitution and any written laws, and take into consideration the financial obligation held by government (Section 14, PWD Act 2008).

The law also listed down several rights of promoting the wellbeing of people with disabilities. Various rights for disabled people are being protected under the legislation including access to public facilities, amenities, services and buildings, public transport facilities, education, employment, information, communication, and technology, cultural life, leisure and sports (Section 26-32, PWD Act 2008). In addition, the rights also cover rehabilitation, healthcare, community support services and assistance during a situation of risk and humanitarian emergencies (Section 33-40, PWD Act 2008).

Despite various promotion and protection gave toward disabled people under the act, there is also some issues and challenges including matters relating to enforcement. Section 41 PWD Act 2008, for example, has stated no action, suit, prosecution or other proceedings brought against the government and the Council on any act, neglect or default committed in good faith. The usage of Public Authority's Protection Act 1948 within Section 42 PWD Act 2008 also leads towards dissatisfaction where it disallowed any parties to take action against the government after the period ended. Both sections have shown a lack of commitment from authority

in taking full and effective responsibilities for any breach occurred under the act. The need for remedial provision is crucial to ensure human rights protection for PWD being upheld [10]. Furthermore, lack of political will also lead towards the lack of implementation of the act and policy related to people with disabilities. There is urgent need for government especially by the Council and the Department to ensure effective mechanism of implementation being added within stipulated time to promote and protect the rights of persons with disabilities in Malaysia [31] [23] [20].

CONCLUSION AND RECOMMENDATIONS

It is undeniable that disability studies has great potential as it is a relatively new academic area which need to be explored. With the existence of the CRPD and PWD Act 2008, there is a significant link between disability studies and law that need to be explored and analysed by academic scholars. More legal experts should embark in this area in various issues and matters such as education, employment and humanitarian affairs. Not only the research and studies will benefit the marginalized community it will also strengthen the link between disability studies and law.

ACKNOWLEDGEMENT

This research was funded by the Fundamental Research Grant Scheme (FRGS) [FRGS/1/2015/SSII0/UIAM/02/1] under the title of 'Establishment of Fundamental Institutional Framework through Innovation of Law and Policy relating to the Rights of Persons with Disabilities (PWD) in Malaysia.' We would like to thank the Ministry of Higher Education for providing us with the research grant.

REFERENCES

1. Johnstone, D. 2001. *An Introduction to Disability Studies*. Routledge: UK
2. Goodley, D. 2011. *Disability Studies: An Interdisciplinary Introduction*, Sage: London ,UK
3. World Report on Disability, 2011. World Health Organization & The World Bank
4. Meekosha, H. and K. Soldatic, 2011. Human Rights and the Global South: The Case of Disability. *Third World Quarterly*, 32(8): 1383-1397
5. Shakespeare, T. 2015. *Disability Research Today: International Perspectives*, Routledge: UK
6. Davis, L. J. 1995. *Enforcing Normalcy: Disability, Deafness, and the Body*. Verso: UK
7. Finkelstein, V. 1980. *Attitudes and Disability*, Geneva, World Rehabilitation Fund. Retrieved from: www.leeds.ac.uk/disability-studies/archiveuk/index
8. Goodley, D. 2011. *Disability Studies: An Interdisciplinary Introduction*. Sage: London UK
9. Barnes, C. 2003. *Disability Studies: What's the Point? Verbal Presentation at the Disability Studies: Theory, Policy, and Practice' Conference*. University of Lancaster, 4th September 2003, 1-28.
10. Oliver, M. and C, Barnes, 2012. *The New Politics of Disablement*, Palgrave Macmillan: UK
11. Finkelstein, V. 1980. *Attitudes and Disability*, Geneva, World Rehabilitation Fund. Retrieved from: www.leeds.ac.uk/disability-studies/archiveuk/index
12. Jayasooria, D. 1999. "Disabled People: Active or passive citizens-reflections from the Malaysian experience," *Disability & Society*, 14(3): 341-352
13. Jayasooria, D. Krishnan, B. and Ooi, G. 1997. *Disabled People in a Newly Industrialising Economy: Opportunities and Challenges in Malaysia*, *Disability and Society* 12(3): 455-463
14. Armstrong, M. J. 1993. *Disability Self-Help Organizations in the Developing World: A Case Study*

from Malaysia, *International Journal of Rehabilitation Research*, 15:185-194

15. Jelas, Z. M. and Ali, M. M. 2014. Inclusive Education in Malaysia: Policy and Practice, *International Journal of Inclusive Education*, 18(10): 991-1003.
16. Amar, H. S. S. 2008. Meeting the Needs of Children with Disability in Malaysia. *Medical Journal of Malaysia*, 63(1):1-3.
17. Tan, K. L. and H, Yadav. 2008. Reassessment on the Development of Children with Disability in Malaysia. *Medical Journal of Malaysia*. 63(1):17-20.
18. United Nations. 2006. The United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol. Retrieved from <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.
19. Haq, F. S. 2003. Career and Employment Opportunities for Women with Disabilities in Malaysia. *Asia Pacific Disability Rehabilitation Journal*. 14(1):71-8.
20. Khoo, S. L., L. T. Tiun and L. W. Lee. 2013. Workplace Discrimination Against Malaysians with Disabilities: Living with it or Fighting Against it? *Disability Studies Quarterly*, 33(3).
21. Ang, M. C. 2012. *Work and Disability: A Malaysian Scenario*. Penerbit Universiti Sains Malaysia, Pulau Pinang.
22. Islam, M. R. 2015. Rights of the People with Disabilities and Social Exclusion in Malaysia. *International Journal of Social Science and Humanity*, 5(2): 171-177.
23. Wahab, H, Z. A. Ayub, and H, Jaafar, 2014. Legal and Institutional Framework for Persons with Disabilities in Malaysia. *Current Law Journal*, 1, 1-17.
24. Sufian, A. 2006. The Accessibility of Buildings and Houses for Disabled Persons: The Law and Practice in Malaysia. *IUM Law Journal*, 15(1): 59-83.
25. Maidin, A. J., Sabri, S. Z, and Ahamed, N. F. 2013. Legal Framework for Improving Accessibility to Built Environment for Disabled Persons in Malaysia. *The Law Review*: 598-621.
26. Cooper, J. and S. Vernon, 1996. *Disability and the Law*. Jessica Kingsley: UK
27. Jones, M. and L. A. Baser. 1999. *Law and Social Construction of Disability*. In L. A. B. Melinda Jones (Ed.), *Disability, Diversity and Legal Change* Martinus Nijhoff, The Hague.
28. Kanter, A. S. 2015. *The Development of Disability Rights Under International Law: From Charity to Human Rights*. Taylor and Francis Group: Routledge.
29. Quinn, G, and Degener, T. 2002. *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*. Research report: United Nations New York and Geneva.
30. Md. Tah, I. H. 2013. Rights of Persons with Disabilities: The "Almost Forgotten" Protection under the Federal Constitution. In Mokhtar, K.A. (Ed.) *Constitutional Law and Human Rights in Malaysia: Topical Issues and Perspectives* (pp. 411-430). Sweet & Maxwell Asia, Petaling Jaya Malaysia.
31. Md. Tah, I. H. 2014. A Need for Remedial Provision to Protect Persons With Disabilities In Malaysia. *International Journal of Business, Economics, and Law*, 3(3): 1-4.
32. *Persons With Disabilities Act 2008 (Act 685)*, 2014. Percetakan Nasional Malaysia Berhad: Malaysia.