Chapter 12

Law and Its Implications on Inclusiveness

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12.1 Formal equality and substantive equality

The question of what role the law plays in the inclusivity of a society is a complex one. It raises paradoxes in jurisprudence, namely the balancing act between the legal ideal of equality and the reality that there are situations where unequal treatment is required in order to achieve said equality, or at least some form of equity.

International law has long accepted that the Aristotelian concept of "formal equality", where the state treats everybody absolutely equally is an idea that is just in theory but fails upon closer inspection. It must be tempered with the practice of "like being treated alike". For instance, a juvenile lawbreaker should not be treated in the same way as an adult offender, and instead he or she must be treated in the same manner as other juvenile offenders.

Yet, even this modified version of "formal validity" is not entirely satisfactory as differences in history, cultural bias, economic planning and imbalanced societal development can lead to situations where those who are "alike" are in fact not. The marginalised may not have the same opportunities as the rest of "mainstream" society and are placed in a position of unfair disadvantage.

To counter this, the concept of equality has moved beyond mere "formal equality' into "substantive equality". This is where equality has to be contextualised, drawing upon values such as human dignity, distributive justice and equal participation. "Equality" then becomes about equality of opportunities, or the more aggressive equality of outcomes—the former being about levelling the playing field and the latter about forcing through greater representation, for example by the establishment of quotas.

Therefore in the context of the marginalised, taking into account the idea of substantive equality, it thus becomes possible, perhaps even desirable for a degree of "unequal" treatment. However, in the Belgian Linguistic Case of 1968[1] it was held that in order for unequal treatment to be justified, there has to be an objective and reasonable justification. This justification has to be assessed in relation to its aims and effects, and the action has to be proportionate to the ill that it is attempting to overcome. These conditions would act as a counterbalance against the potential abuse that can arise out of favourable treatment.

Although the Belgian Linguistic Case was specifically about equal treatment in education, the approach taken by the courts has been adopted by the United Nations Human Rights Committee, The Committee on the Elimination of Racial Discrimination, The Committee on Economic, Social and Cultural Rights and the Inter American Court of Human Rights Moeckli, D. et al. (2010, p.201).

In Malaysia, the supreme law of the land is the Federal Constitution, as expressed in Article 4 of the said document. Any investigation of legislative measures to improve inclusivity and to reduce marginalisation must therefore begin with it. Equality is guaranteed under Article 8 of the Constitution; to emphasise its importance to this *Report* the text is reproduced here in its entirety:

[1] *(1968) 1 ECHRR 252. This case heard in the European Court of Human Rights was a complaint amongst French speaking families in Belgium who felt that the Belgian law which divided the language of education in the country into Dutch, French and German had infringed their rights to equal treatment. Living in the Dutch speaking portion of the country, they felt that the lack of positive action on the part of the government to provide for French language education meant that they were being treated unequally.*












Article 8. Equality

1. All persons are equal before the law and entitled to the equal protection of the law.
2. Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
3. There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.
4. No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.
5. This Article does not invalidate or prohibit—
   a. Any provision regulating personal law;
   b. Any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;
   c. Any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;
   d. Any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;
   e. Any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;
   f. Any provision restricting enlistment in the Malay Regiment to Malays.

The concept of equality under the Constitution is not absolute, and there are both general and specific provisions that allow for unequal treatment. Article 8(2) provides for unequal treatment if the Constitution expressly authorises it. Article 8(5) then goes on to list several specific areas where such unequal treatment is allowed. For the purposes of this *Report*, Article 8(5) (c) is the most relevant as it deals with the Orang Asli of Peninsular Malaysia; it clearly allows for laws designed to protect and advance the welfare of the Orang Asli as well as make way for the establishment of quotas for their employment in government service.

These Constitutional provisions will be discussed in greater detail in this *Report*. At

this juncture, however, it is submitted that an examination of the Reid Commission, the body created to help draft the Malaysian Constitution in its report of 1957, had noted statements by the Alliance (the political ruling parties of the time) as well as the Sultans that, although the Constitution allows for unequal treatment, the underlying aspiration for the country was equality. The historical antecedents and the background to the negotiations underlying the special provision in Article 153 need to be properly understood in order to conduct a proper review of its implications for inclusive growth in this study.

In this chapter, there will be an examination of Malaysian legislation (both national as well as its international treaty obligations) that either directly or indirectly influences inclusivity. Laws affecting the poor, the Orang Asli, women, the disabled and children will be scrutinised. This examination will be conducted within the context of the Constitution as viewed through the lens of constitutionalism and principles of justice and fairness.

12.2 Article 153 of the constitution

Article 153 allows preferential treatment for Malays and the natives of Sabah and Sarawak. The reasoning behind this provision is that at the time of Malayan independence (1957) and at the time of the creation of Malaysia (1963) when Sabah and Sarawak join with Malaya, these specific ethnic groups were at an economic level far below that of other ethnic groups, particularly the Chinese. The need to protect the "special position" of the Malays and Borneo natives is also mentioned, meant to assuage the fear of being marginalised in what was deemed to be "their own land".

There might well have been ample justification for Article 153 considering that the British colonial policy of divide and rule meant that different ethnic communities were separated not only geographically but also in their economic endeavours, leaving the primarily rural and agricultural Malays and natives at an economic disadvantage. Their economic backwardness has been discussed repeatedly since the early 20th century when the concept of federalism was first introduced and practiced, and was seen again in subsequent periods. This is evident in the Federation of Malaya Agreement 1948 after World War II, the Communities Liaison Committee (CLC) of 1949-1951, the Reid Commission of 1956, and later embedded in the Federal Constitution of Malaya in 1957 and the Federal Constitution of Malaysia in 1963.

A strict reading of the Article 8 of the Constitution shows that any preferential treatment has to be "expressly authorised by this Constitution"; action taken under Article 153 has to be specifically mentioned by that Article.

These specific provisions are found in Article 153(2), which stipulates that "(the King) shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable *of positions in the public service (other than the public service of a State)* and of *scholarships, exhibitions and other similar educational or*

training privileges *or special facilities* given or accorded by the Federal Government and, when any *permit or license for the operation of any trade or business is required by federal law,* then, subject to the provisions of that law and this Article, of such permits and licenses."[2] Article 153 8(A) also allows for the establishment of a reasonable number of places in institutions of higher learning for Malay and native students—a quota.

A cautionary approach should be taken when using Article 153 to establish affirmative action policies and laws.

Furthermore, such actions must not impede on the rights of other ethnic groups in the country, by which it is meant that in the pursuit of the objectives of Article 153, whatever scholarship, license or permit already held by a non-Malay/native individual cannot be taken away nor can its renewal be denied if it would normally be approved. Another proviso that protects non-Malay/native citizens is found in Article 136 which states that "All persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially". Underlying all this is the constant use of the term "reasonable", meaning that such affirmative action cannot be taken to a level that can be deemed as unjust.

It has to be remembered however that Article 153 does not create a right for Malays and natives of Sabah and Sarawak. What it does is provide the permission as required by Article 8 to allow for specific unequal treatment to be practiced amongst the citizens of Malaysia, if such departures from the principle of non-discrimination are deemed necessary. It is this "permission" which makes it legally possible for policies such as the NEP to be made. This is consistent with the International Convention of the Elimination of all forms of Discrimination (ICERD) which makes a provision for positive discrimination. Countries such as India and the United States who have ratified ICERD continues to have laws for affirmative action for historically disadvantaged communities.

Both advocacy and criticism of the NEP's pro-Bumiputera preferential programmes (and by extension Article 153) are commonplace in Malaysia. The issues are too complex and contentious to be discussed in full here, but in the interest of inclusive growth, a few points are worth noting. First, the areas of intervention specified in Article 153 – higher education, public sector employment, licenses – principally involve productive and learning activity that potentially enhance Bumiputera capability and mobility, which are widely agreeable objectives. Hence, reasonable apportioning of opportunity, credible selection of beneficiaries and effective monitoring of outcomes are desirable to all communities, as well as nationally constructive. Second, we also gain from a full recognition of elements in Article 153 that provide balance and moderation, specifically that the necessity of reservations or quotas should first be established, and that the "legitimate interest" of communities other than Malays and the natives of Sabah and Sarawak also need to be safeguarded. This implies a cautionary approach should be taken when using Article 153 to establish affirmative action policies and laws.

Furthermore as to the future of

[2] *Writer's own emphasis.*

affirmative action, there is nothing in the Constitution that suggests the preferential treatment in positions in the federal public service, federal scholarship, federal permit or license, and tertiary education enrolment must be implemented if the Bumiputera community achievement is in some sort of equilibrium with other communities. There should be regular inspections checking the abuse of affirmative action and ensuring a right balance between the special position and legitimate interest. ICERD should be ratified, and it should be ensured that the bottom 40% have equal access, with particular focus on the natives of Sabah and Sarawak and the Orang Asli to ensure that the policy remains inclusive.

12.3 Women

Malaysia is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 2 (a) of this treaty requires all members to "embody the principle of the equality of men and women in their national constitutions or other appropriate legislation… and to ensure through law and other appropriate means, the practical realisation of this principle". Malaysia did this by adding the term "gender" into Article 8 of the Constitution via an amendment in September 2001.

There have been several cases testing the application of Article 8 and its assurance of gender equality, mainly in the area of women's rights in the workplace in relation to maternity. Article 11 (2)(a) of CEDAW requires states to ensure that they "prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status."

In the case of Noorfadilla bt Ahmad Saikin v Chayid bin Basirun & Ors (2012)[3], a woman had applied for and obtained a job as a teacher. After receiving her memo of appointment she was asked to attend a briefing. At that briefing she was asked if she was pregnant, to which she answered in the affirmative. Subsequently her letter of appointment was withdrawn. As defined by the newly amended Constitution, this act was a form of gender discrimination and therefore unlawful.

In contrast, there is the earlier case of Beatrice A/P Fernandez v Sistem Penerbangan Malaysia & Ors (2005)[4] where the appellant was a stewardess; part of the terms of her contract was that if she were to get pregnant, she would have to resign, failing which her employers may terminate her services. This policy was part of a collective agreement in which all stewardesses in the appellant's category agreed to.

It was held that Article 8 (1), which calls for equality, means equality amongst people in the same class. In this case the appellant was being treated equally with other stewardesses in her category. The court went on to say that constitutional protection deals only with the contravention of individual rights by the government and does not extend to infringements by other private individuals or entities, in this case the airline company.

It has to be noted that in the Beatrice Fernandez case, CEDAW was not raised and the matter was purely discussed on constitutional grounds. Otherwise, it would appear that the conditions imposed by the airline were clearly in contravention of Article 11 of CEDAW and the federal

[3] 1 MLJ 832.
[4] 3 MLJ 681.

government would have been obliged to ensure that such contractual terms are made unlawful[5].

What is particularly troubling about the case is the judges' contention that constitutional rights do not apply in relationships between private individuals[6]. This is a very narrow interpretation of the Constitution, leaving room for gender-biased conditions of employment. It is illogical that the protection supposedly provided for by the Constitution simply does not apply in the private sector. It effectively implies that such protections as enshrined by the Constitution itself are virtually meaningless outside the state/citizen dynamic. The case of Noorfadilla bt Ahmad Saikin does not deal with this issue as the employer was a government agency.

It is illogical that the protection supposedly provided for by the Constitution simply does not apply in the private sector.

The earlier case of Barat Estates Sdn Bhd & Anor v Parawakan A/L Subramaniam & Ors (2000)[7] however takes a different view. The court held that a private employer must behave in a manner that does not contravene an employee's constitutional rights, in this case Article 6 is applied, which is about the prevention of slavery and forced labour. Clearly this case supports the idea that constitutional rights apply not only in private/government relationships but also in private/private relationships. It is hoped that future courts take the Barat Estates approach—doing otherwise would seriously limit the level of protection that the Constitution is supposed to provide.

12.4 Children

Children in Malaysia have the Child Act 2001[8] which specifically deals with their protection. The act however is primarily concerned with the physical welfare of the child and their treatment within the justice system. It is not holistic in the sense that it does not cover issues such as the right to education or healthcare.

However, for Malaysian children there appears to be ample legal and policy provisions to cater for their basic needs. Child labour is governed by the Children and Young Persons (Employment) Act 1966 (revised 1988)[9] which provides for suitable employment that children can participate in, reasonable hours of work and working conditions. It is arguable that this 25-year-old law needs to be reviewed in light of current societal values, but despite its shortcomings it does provide a basic level of protection for working children.

Primary schooling is compulsory and free of charge, and access to school is guaranteed by Article 12 of the Constitution. But this "right" is actually the right to be treated equally by educational institutions—it is not a right to education per se. Therefore Article 25 (a) the Convention on the Rights of the Child 1989 (CRC), which calls for the provision of free primary education, is not expressly provided for by Malaysian law even though the nation is party to the CRC. However, it is still the country's policy to provide free primary education.

In the context of the marginalised, the children who are most at risk are those who are the offspring of refugees and stateless individuals. Stateless individuals are people who may be born in Malaysia but have no official documentation as they have not been registered. Without the requisite documentation, a child cannot lay claim to Article 12, severely limiting their schooling opportunities.

[5] *At the time of writing there have been no cases where a private employer has been challenged on the grounds that their actions are in breach of CEDAW.*
[6] *See also Maizatul, A. et al. (2011).*
[7] *4 MLJ 107.*
[8] *Laws of Malaysia Act 611.*
[9] *Laws of Malaysia Act 350.*

In a regional meeting in Bangkok on November 2012, a country report from the Malaysian Ministry of Education, referred to its own study conducted 2009, which reported that there were 43,973 undocumented children between the ages of seven and 17 years who were not attending school. Non-citizens accounted for the bigger bulk i.e. 38,702, and citizens 5,271. These include children from hardcore poor families from remote, rural or urban areas; children living permanently on boats with uncertain nationalities; immigrant children from the Philippines; Rohingya and Acehnese children whose parents are UNHCR card holders; stateless and street children; and children from high risk parents such as sex workers. Considering that these undocumented children tend to be the poorer sections of the community, a lack of basic education for their children only contributes to the continuation of the cycle of poverty.

In July 2010, Minister of Education YAB Tan Sri Muhyiddin Yassin, in a Bernama report gave the assurance that the government, with collaboration with government and non- government agencies, will ensure that undocumented children in Malaysia are given education in line with the principles of Education for All Goals 2015, irrespective of race, religion or locality. Currently, the ministry does not offer alternative learning curriculum other than the national education curriculum used by all schools in the national education system. However, efforts were made to provide alternative curriculum for at-risk and marginalised children.

In January 2011, an education centre for undocumented children was set up through a collaborative venture between the Ministry of Education, the Sabah Special Task Force and a teachers' foundation. It is managed by the local community using an alternative curriculum at the primary level that focuses on literacy in reading, writing and arithmetic, Islamic religious study and other life skills such as sewing. Some 300 children registered at this initial centre; registration had to close due to the overwhelming response and inadequate space.

However, the project has its share of challenges, such as financial support and the opening of more centres; parental cooperation; and understanding of policy of citizenship among administrators at the local level; for example whether or not to allow children of Malaysian citizens without proper documentation into national schools.

The Child Act defines a child as under the age of 18 while the Children and Young Persons (Employment) Act defines a child as someone under the age of 16. These differing definitions complicate the issue of child protection.

There are also problems with regards to the definition of "child". The Child Act defines a child as under the age of 18 while the Children and Young Persons (Employment) Act defines a child as someone under the age of 16. These differing definitions complicate the issue of child protection.

From the perspective of international law, Malaysia has made several reservations to the CRC[10]. In the context of this paper, the most damaging reservations are to Article 2 which is about non-discrimination, Article 7 which is about the right to nationality and Article 28(1) which is about the universal right to primary education. These reservations need to be removed in order to include a more complete legislative framework for all children in the developmental process and minimise marginalisation.

[10] UNICEF http://www.unicef.org/malaysia/17982_crc-reservations-malaysia.html accessed 26 July 2013

Box Article 12.1: Need for child-sensitive policies

There is evidence of the association between child poverty: impaired cognitive development, increased behavioural difficulties, poorer physical health, underachievement in school, lowered aspirations, higher risks of welfare dependency, greater likelihood of teenage pregnancy, increased probability of crime and drug abuse—the list goes on. These negative consequences affect not only children and their families, but the society as a whole, through increased likelihood of unemployment and welfare dependence, higher costs of judicial and social protection systems and, in the long term, an intergenerational poverty trap that blocks upward social mobility, creates an "underclass" and dampens a nation's productivity and development potential.

Malaysia is a young country where about 39% (11.3 million) of the population is under the age of 18. Ensuring that children are living out of poverty is not only a moral obligation for inclusive growth but also a strategic priority for a country that aspires to become a developed nation by 2020.

As part of a national initiative to eradicate poverty, one of the GTP's National Key Results Areas (NKRA) was "Raising Living Standards of Low Income Households". Child poverty has mainly been addressed indirectly in the past, focusing on the household rather than the child.

Despite the impressive achievements of that NKRA, there are still around 400,000 children living in households with incomes below the poverty line—a figure based on household income data surveys. The actual number is likely to be higher since some of the children most at risk of poverty do not live in households. They

400,000
Estimated number of children living in poverty in Malaysia

live in children's homes, hostels, hospitals, prisons, in houses for refugees, in mobile homes, on the streets, or in families and communities whose presence are unregistered.

Child poverty and child health are profoundly intertwined, and Malaysia has seen enormous achievements in the area of child health in the past four decades. Child mortality and maternal mortality have decreased dramatically between 1970 and 2000, followed by slower gains in the last decade. Like other upper-middle

2,700
Number of child deaths in Malaysia that could be prevented each year

income countries, Malaysia faces a double nutrition challenge, under-nutrition and obesity, both of which are largely preventable. Under-nutrition has not significantly improved in the last five years despite the existence of initiatives like the Rehabilitation of Children Programme or the 1Malaysia Milk programme. Childhood obesity meanwhile has become a major

cause for concern. The stagnation in further improvements in health indicators is mainly due to structural inequities.

There is also a lack of national initiatives and comprehensive data disaggregated for the 0-17 age group on important health issues, including physical and mental disability, child injuries, reproductive health and substance abuse. The World Health Organization's Global School-based Student Health Survey (GSHS) in 2012 indicates that among Malaysian teenage students (ages 13-17), two-thirds of those who have had sexual intercourse (around 10% of the overall teenage student population) do not use condoms, 11.5% smoked in the last 30 days and 6.2% have been drunk one or more times in their lives.

2,000,000
Number of children suffering nutrition problems in Malaysia

Education enhances a nation's human capacity and enables upward mobility within a society. Despite Malaysia's successes in achieving almost universal primary education and significant progress made towardsachieving universal secondary education, important challenges remain for groups of children from marginalised and disadvantaged communities. The Report on the Status of Children's Rights in Malaysia states that many children from the refugee, asylum-seeking, stateless and irregular migrant communities do not have access to formal education, while children with disabilities, children living in poverty and indigenous children face significant hurdles in accessing education.

1,800,000
Number of children suffering mental health problems in Malaysia

To progress toward Vision 2020's overarching goal of becoming a "democratic, liberal and tolerant, caring, economically just and equitable, progressive and prosperous" society (Mahathir Mohamad, 1991), much more needs to be invested in the wellbeing of our children. A National Plan Against Child Poverty should be prepared, coordinating efforts and initiatives between government and non-government bodies under a common set of targets; a multi-sectoral approach, consistent with the multidimensional character of child poverty and deprivation, should be promoted, addressing not only household income but child wellbeing; a set of child wellbeing indicators that serve as a guide for the effective rollout of outcome-based budgeting should be adopted; comprehensive policies that address structural inequality, exclusion and marginalisation across the health, education and social spheres should be developed; and finally to improve data collection in order to make adequate monitoring possible. To invest in the future of Malaysia, poverty policies must be child-sensitive.

Note: Article written based on inputs from UNICEF and P.S. the Children.

12.5 Indigenous peoples

The marginalisation of indigenous peoples in Malaysia is perhaps not as straightforward as other communities. A key issue is their right to practice their cultural beliefs and traditional way of life. As is often the case with indigenous communities around the world – and Malaysian indigenes are certainly no exception – this culture and way of life is intimately linked to land.

The United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) recognises this. This is expressed by provisions that emphasise the need to protect indigenous cultures which include their lands (UNDRIP Article 8) to those which specifically spell out a right to customary lands like Article 26 which reads:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Admittedly, UNDRIP is merely a declaration of the General Assembly and is therefore not a hard treaty law. Be that as it may, signatories (including Malaysia) still have a moral obligation to live up to the aspirations that they have agreed to when they signed this document.

Although constitutionally Malaysia has made provisions to help indigenous peoples (the Orang Asli in Article 8 (c) and the indigenous peoples of Sabah and Sarawak in Article 153) as a distinct community, they remain (in particular the orang Asli) some of the poorest communities in the country. A major point of contention is their lack of rights to customary land.

Although customary land may be set aside for indigenous communities (for example through the Aboriginal Peoples Act 1954[11]), this is far from having an actual right to the land. For example, Sections 6 and 7 of the Aboriginal peoples Act read:

Section 6. Aboriginal areas.

(1) The State Authority may, by notification in the Gazette, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared an aboriginal reserve under Section 7, to be an aboriginal area and may declare the area to be divided into one or more aboriginal cantons.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal area made under Subsection (1).

[11] *Laws of Malaysia Act 134.*

Section 7. Aboriginal reserves.

(1) The State Authority may, by notification in the Gazette, declare any area exclusively inhabited by aborigines to be an aboriginal reserve:

Provided –

(i) When it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under Subsection (1).

Without an overarching right to customary land, what this means is that the power to create either an aboriginal area or reserve is completely within the discretion of the government. Furthermore, both sections have provisions for declaring the loss of status for an aboriginal area or reserve.

In the case of Kajing Tubek v Ekran Bhd (1996)[12], the High Court judge did rule that a right to a cultural and traditional way of life which included the use of customary land was an extension of the right to life as laid down by Article 5 of the Constitution. However, in the appeal of this case[13], the Court of Appeal held:

"...they will suffer deprivation of their livelihood and cultural heritage by reason of the Project... This complaint certainly comes within the scope of the expression "life" I Article 5(1) of the Federal Constitution. For where there is deprivation of livelihood or one's way of life, that is to say, one's culture, there is deprivation of life itself... However, in the present case, as earlier observed, the State of Sarawak will extinguish the respondent's rights in accordance with the provision of existing written law obtaining in the State...Since, in this instance, life is being deprived in accordance with an existing and valid law, the requirements of Article 5(1) are met".

In effect, any protection afforded by the Constitution can be circumnavigated by a properly made law[14].

On a more positive note, there have been progressive case decisions relating to Orang Asli land. In the case of Koperasi Kijang Mas and 3 others v Kerajaan Negeri Perak and 2 others (1991)[15] the High Court held that Perak had breached the Aboriginal Peoples Act when it accepted a tender from a logging company to extract timber from land which has been approved as Orang Asli reserve. What is interesting here is that the land had yet to be gazetted as a reserve, it was merely approved for gazetting. Yet the judge said that it was sufficient enough to give the rights to the land and its produce to the Orang Asli.

The High Court held that Perak had breached the Aboriginal Peoples Act when it accepted a tender from a logging company to extract timber from land which has been approved as Orang Asli reserve.

In the cases of Adong bin Kawan v Kerajaan Negeri Johor & Anor (1997) and Sagong bin Tasi v Kerajaan Negeri Selangor (2002) it was held that customary land held the same status as alienated land, and thus the owners of such customary land had the same rights to compensation as any other

[12] 2 MLJ 388: This was a case where a group of indigenous peoples in Sarawak challenged the government for not allowing them the right to comment on the Environmental Impact Assessment Report regarding a dam that would have inundated a piece of land the size of Singapore, including their village.
[13] Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors (1997) 3 MLJ 23.
[14] For a critique of the Court of Appeal Decision, see Nijar G.S, "The Bakun Dam: A Critique" (1997) 2 MLJ 388.
[15] CLJ 486.

land owner. The compensation of Orang Asli customary land therefore was not limited to the feeble amounts provided for in the Aboriginal Peoples Act. Furthermore, the case of Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (2008)[16] also acknowledges that, as a point of law, indigenous peoples possess customary rights under common law, and common law is recognised by the Federal Constitution by virtue of Article 160 (2), making it part of Malaysian law.

Still, the security of native lands is suspect and this is reflected in the case of Jalang Paran & Anor v Government of the State of Sarawak & Anor (2010)[17] where it was held that there is no law which says that Native Customary Land cannot be extinguished. Furthermore, any protection from the implementation of the principles of UNDRIP was rejected in the case of Jimi Mantali & Ors v Superintendent of Lands & Surveys Samarahan Division & Anor (2010)[18] where it was held that UNDRIP could only be adopted by the court by virtue of an enabling provision in the Federal Constitution, or in the absence of such a provision a law specifically enacted by Parliament. Seeing as neither exists, it would appear that for the moment the indigenous communities of Malaysia would not be able to depend on UNDRIP to support their rights.

Section 18 of the Trade Unions Act provides the Director-General with broad discretion to effectively stop any union action.

However, in the case of Bato Bagi v Kerajaan Negeri Sarawak (2011)[19] the Federal Court was generally more vague as to the application of human rights values on native rights and as such leaves the door open to greater recognition of these rights. What is clearly required is the formal legislative recognition of customary native land rights as well as a formalised absorption of the principles of UNDRIP into the Malaysian legal system in order to ensure an overarching respect of indigenous peoples and their rights throughout every level of governance.

12.6 Workers' rights

The primary power that workers have in order to bargain for better pay and conditions is the power to unionise. This is provided for by the Trade Unions Act 1959 (revised 1982) (TUA)[20] . The establishment of a trade union requires the approval of the Director-General (D-G) by way of registration (TUA Section 12). The grounds for refusing to register a trade union are fairly innocuous except for Section 12(2) where an application for the creation of a trade union may be rejected if the D-G is of the opinion that a similar trade union already exists and could protect the welfare of the workers. This can be contentious if workers are not happy with the existing union and it is also arguably an affront to the right of association as guaranteed by Article 10 of the Constitution.

Perhaps what is more alarming is the power of the D-G under Section 18 of the TUA to suspend a trade union if they are of the opinion that it "is being used for purposes prejudicial to or incompatible with, the interest of the security of, or public order in Malaysia". This section provides the D-G with broad discretion to effectively stop any union action.

That is not to say any legal action on the part of a union is easy to come by. In

[16] 2 MLJ 677.
[17] Civil Appeal No: Q-01-133-06.
[18] Suit No: 22-57-2007-11.
[19] 6 MLJ 297.
[20] Laws of Malaysia Act 262.

order to call for a strike or a lockout, a union needs to conduct a secret ballot of all its members and they need to obtain a two-thirds majority before industrial action can be taken. The result of this secret ballot will then have to be sent to the D-G who, according to Section 40(6), "may upon receipt of the results thereof under Subsection (5), carry out all such investigations as he may deem necessary, and where he is satisfied that the proposed strike or lockout if carried out would contravene this Act or any other written law he shall direct the trade union not to commence the proposed strike or lockout."

12.7 The rights of the disabled

Malaysia is party to the Convention on the Rights of Persons with Disabilities 2007 (CRPD) and, via the Persons with Disabilities Act 2008 (PWDA)[21], it is submitted that much of the principles of accessibility put forward by the treaty has been legislated for. The PWDA is significantly faithful to the principles and ideals of the treaty[22].

According to the Act, the government is obliged to provide the necessary infrastructure in educational facilities from primary to tertiary level so that the general principle of equal access to education can be meaningfully practiced. Apart from access to ordinary institutions of education there is also an obligation to facilitate the special educational needs of the disabled such as the learning of sign language and Braille. This positive obligation extends to public transport where disabled access is also specifically called for by the Act.

With regards to employment, although there is a general obligation to ensure equal treatment of employees with disabilities, there are no specific provisions for affirmative action, such as a quota. There is however a social responsibility placed on employers to "endeavour to promote stable employment for persons with disabilities by properly evaluating their abilities, providing suitable places of employment and conducting proper employment management", and there is a requirement for the National Council for Persons With Disabilities[23] to formulate affirmative action programmes.

Access to transport, education and employment are key to ensuring that the disabled are able to lead independent lives, and it is submitted that the legislative framework required to provide for this is already in place. What remains is the actual implementation of the laws and policies that can be created.

12.8 Conclusion

It would be inaccurate to say that Malaysia does not have any laws to assist the marginalised. These laws do exist. However, these laws come with significant shortcomings:

i. Affirmative action is perceived as race-based when in actual fact it is more complex than that. As explained in Chapter 3, the main prong of the NEP which is poverty eradication covers all groups, not just the Malays. Nonetheless, the (wrong) perception can lead not only to societal divisions, but its uncontrolled implementation of the Second Prong i.e. restructuring of society can also lead to the erosion of the principles of a formal and just substantive equality. It is

[21] *Laws of Malaysia Act 685.*
[22] *The relevant sections are reproduced in the Appendix.*
[23] *Established under section 3 of the PWDA.*

important therefore to ensure that the implementation of affirmative action is not abused while balancing the special position of the Bumiputera with the legitimate interests of other communities.

ii. The protection of women's equal treatment and children's rights (particularly the child's right to education) requires respectively firm judicial support and the legislative affirmation of the child's right to education regardless of their nationality. Serious effort should be put into the construction of the alternative curriculum for marginalised and at-risk children. Furthermore, challenges faced by the education centre for undocumented children should be addressed accordingly to ensure the continuity of quality education for these children.

iii. The rights of indigenous peoples as espoused by UNDRIP is not given the weight of law either legislatively or judicially.

iv. Although Labour Laws in Malaysia are applicable for all legal workers without discrimination, the power of workers to defend their rights and to improve their lot is curtailed to the point of being useless.

Naturally, underlying all this is the need to have good implementation of laws. The best statute in the world is only as good as its enforcement.

However, what Malaysia lacks is an overarching law to deal with the issues of the marginalised. What exists appears to be piecemeal solutions with no attempt to approach the problem holistically and with intellectual depth. To this end, suggestions have been made by two NGOs (Saya Anak Bangsa Malaysia and HAKAM) for the creation of a Social Inclusion Law[24].

Their proposal is for the creation of a Social Inclusion Commission whose members are nominated by the King upon advice from a cross-party parliamentary committee. The Commission will consist of seven people who are experts in the issues related to social inclusiveness, and they are to facilitate research and later the drafting of policies to reduce marginalisation and encourage inclusivity. It would be an independent body answerable to Parliament.

This would open up the possibility of having a more thought–out, organised, democratic and transparent method through which a government can properly handle this matter of inclusivity. It holds out reasonable prospects for stewarding the inclusiveness agenda.

[24] *For a summary of the ideas see http://thestar.com.my/news/story.asp?file=/2012/10/17/focus/20121017073 945&sec=focus*