

# WASHING THE TIGERS

**Addressing Discrimination  
and Inequality in Malaysia**

The Equal Rights Trust  
in partnership with Tenaganita





THE EQUAL RIGHTS TRUST  
IN PARTNERSHIP WITH TENAGANITA

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## **Addressing Discrimination And Inequality In Malaysia**

ERT Country Report Series:2  
London, November 2012

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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Design and layout: Dafina Gueorguieva

Printed in the UK by Stroma Ltd

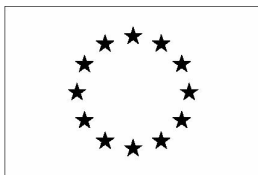
ISBN: 978-0-9560717-8-1

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Company number 5559173. Charity number 1113288.



This report has been prepared with the financial assistance of the European Union. The contents of this report are the sole responsibility of The Equal Rights Trust and Tenaganita and can in no way be taken to reflect the views of the European Union.

*A symbol of great strength, beauty and independence, the tiger was chosen as our national animal with the hope that it would protect the nation, illustrated by the two tigers flanking Malaysia's Coat-of-Arms in a protective stance.*

Datuk Douglas Uggah Embas,  
Minister of Natural Resources and Environment

*Bersih is a civil society movement based in Kuala Lumpur and comprising 84 non-government organisations. (...) This coalition of civil society soon appropriated for its name a word in Bahasa Malaysia that means "clean", "sweep" or "wash". (...) Bersih is a vital part of Malaysia because it seeks to give the country an electoral system that delivers a fundamental democratic right to its citizens – an electoral process that delivers fair and free general elections.*

[www.globalbersih.org](http://www.globalbersih.org)



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## ACKNOWLEDGEMENTS

This report is published by The Equal Rights Trust (ERT), in partnership with Tenaganita.

ERT and Tenaganita undertook field research during which testimony for the report was gathered. The first comprehensive draft of this report was developed by Libby Clarke (ERT) in the summer of 2011. She conducted most of the research at this stage and coordinated all work related to the report. The staff of ERT (including Amal De Chickera, Jessica Duggan-Larkin, Jim Fitzgerald and Nicola Simpson) and Tenaganita (including Glorene Das, Katrina Jorene and Liva Sreedharan) provided research assistance during the initial drafting phase. Mary Magdaline Pereira led Tenaganita's work on the report, including by providing context, drafting the section on discrimination on grounds of political opinion, identifying sources of information, commenting on drafts and coordinating and collating comments from Malaysian experts on discrimination law. Paola Uccellari (ERT) provided advice, did additional legal research, and edited the first draft. Irene Fernandez, Director of Tenaganita, provided advice, detailed comments and oversight throughout the drafting process. Dimitrina Petrova, Executive Director of ERT, oversaw the research and drafting of the report from start to end. From February 2012 onwards, she conducted and coordinated further research, reworked the report, coordinated expert reviews, edited and authorised the report for publication. In the last two months preceding publication, completion was made possible by the assistance of ERT staff, particularly Richard Wingfield who conducted additional legal research and redrafted the sections on enforcement and implementation.

ERT and Tenaganita are very grateful to Andrew Khoo for providing initial drafts of the Legal and Policy Frameworks section of the report. His assistance with identifying relevant legal sources was invaluable. Thanks go to members of the Malaysian Equality Forum, especially members of the project's "core team" from EMPOWER, the Malaysian Bar Council and Sisters in Islam, for their insight and analysis in reviewing early drafts of the report, providing sources of information, and supporting the aims and objectives of the project. Particular thanks are due to Maria Chin Abdullah, Mila Noordin, Janarthani Arumugam, Helen Chin, V.K. Raj, Niloh Asoh, Angela Kuga Thas and Thilaga Sulathireh. All individuals and organisations who responded to

queries, provided information and advice and met with ERT and Tenaganita are also thanked.

ERT and Tenaganita are grateful to interns and volunteers who undertook desk-based research and analysis. Particular thanks are due to Gonçalo Moreira and Juliette Herbelin who carried out the initial desk research for the report in its earliest stages. Thanks also go to ERT interns and volunteers Vanessa Long and Isidora Stakić who assisted in the latter stages of the drafting process. Assistance provided by Jenny Lor, intern from Tenaganita, in collating feedback from the CSO consultation on the draft report is greatly appreciated. Thank you also to ERT interns and volunteers Sarah Hutnik, Vania Kaneva, Lee Yin Ng, Kate Nickle and Leonid Raihman who performed meticulous fact-checking and verification during the later stages of drafting and editing.

As always, very special thanks go to our volunteer Dafina Gueorguieva who designed the cover and did the layout of the report.

This report is the outcome of a partnership between ERT and Tenaganita on a joint project entitled “Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation” funded by the European Union. The partners are very grateful for the support provided for this project. However, the contents of this publication are the sole responsibility of ERT and Tenaganita and can in no way be taken to reflect the views of the European Union.

Finally, we wish to thank all persons who shared their stories with us. This report is dedicated to them and all other persons in Malaysia who have suffered – and those who continue to suffer – discrimination and exclusion.

## ACRONYMS

<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BN</b>	Barisan Nasional (National Front)
<b>CAT</b>	Convention against Torture
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CESCR</b>	Committee on Economic Social and Cultural Rights
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>DAP</b>	Democratic Action Party
<b>EO</b>	Emergency Ordinance
<b>ERT</b>	The Equal Rights Trust
<b>FGM</b>	Female genital mutilation
<b>GDP</b>	Gross Domestic Product
<b>GGI</b>	Gender Gap Index
<b>HINDRAF</b>	Hindu Rights Action Force
<b>HRC</b>	Human Rights Committee
<b>ICC</b>	International Coordinating Committee of National Human Rights Institutions
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic Social and Cultural Rights
<b>IDC</b>	Immigration Detention Centre
<b>ILO</b>	International Labour Organisation
<b>ISA</b>	Internal Security Act
<b>LGBTI</b>	Lesbian, gay, bisexual, transgender and intersex
<b>MP</b>	Member of Parliament
<b>MSM</b>	Men who have sex with men
<b>NEM</b>	New Economic Model
<b>NEP</b>	New Economic Policy
<b>NGO</b>	Non-Governmental Organisation
<b>NRD</b>	National Registration Department
<b>NWP</b>	National Women Policy
<b>OIC</b>	Organisation of Islamic Cooperation

<b>OPP3</b>	Third Outline Perspective Plan (2001-2010)
<b>PAS</b>	Islamic Party of Malaysia
<b>PCB</b>	Public Complaints Bureau
<b>PKR</b>	People's Justice Party
<b>PR</b>	Pakatan Rakyat (People's Alliance)
<b>PSCI</b>	Parliamentary Select Committee on Integrity
<b>PSM</b>	Socialist Party of Malaysia
<b>RELA</b>	Ikatan Relawan Rakyat Malaysia (Malaysia People's Volunteer Corps)
<b>RM</b>	Ringgit (the currency unit in Malaysia)
<b>ROS</b>	Registrar of Societies
<b>SADIA</b>	Sarawak Dayak Iban Association
<b>SIS</b>	Sisters in Islam
<b>SUHAKAM</b>	National Human Rights Commission of Malaysia
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UMNO</b>	United Malays National Organisation
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>WCC Penang</b>	Women's Centre for Change (Penang)

## EXECUTIVE SUMMARY

On 28 April 2012, thousands of people took to the streets in Bersih 3.0, the biggest mass opposition rally in Malaysia's history. The protests, organised by the Coalition for Clean and Fair Elections (BERSIH – meaning “clean” in Malay), demanded changes to Malaysia's electoral system, which in their view favours the Barisan Nasional (BN) ruling coalition which has been in power since 1957 when Malaysia gained independence. A previous rally, Bersih 2.0 Walk for Democracy, took place on 9 July 2011. Both rallies were violently suppressed by the government. The Bersih movement started in 2007 and since then has insisted that Malaysia needs a cleaning operation to ensure equal political rights in deciding the country's future.

In recent years, a number of high-profile human rights issues in Malaysia have caught international attention, including the treatment of political opponents and protesters, the banning of the Seksualiti Merdeka Festival, the treatment of refugees and the situation of domestic workers. A fundamental aspect of all of these issues is the discrimination experienced by the affected groups.

### Part 1: Introduction

#### *Purpose and Structure of This Report*

The purpose of this report is to highlight and analyse discrimination and inequality in Malaysia and make recommendations on combating discrimination and promoting equality as a fundamental human right and basic principle of social justice. It explores long-recognised human rights problems within Malaysia, and also seeks to shed light upon less well-known patterns of discrimination. This is the first report that brings together evidence of the lived experience of discrimination and inequality in Malaysia on a wide range of grounds, including race and ethnicity, sex, religion, sexual orientation, gender identity, disability, citizenship and political opinion, and an analysis of the laws, policies and institutions established to address discrimination and inequality.

The report comprises four parts. Part 1 sets out the conceptual framework which has guided the authors' work as well as the methodology used during the research process. It then provides an overview of the demographic, eco-

conomic, social, political and historical context of discrimination and inequality in Malaysia. Part 2 discusses the principal patterns of discrimination and inequality affecting different groups in Malaysia. Part 3 analyses the legal and policy framework as it relates to discrimination and inequality. Part 4 contains conclusions and recommendations, drawn from an analysis of both the patterns of discrimination and inequality examined in Part 2 and the gaps, weaknesses and inconsistencies in the legal and policy framework identified in Part 3.

### *Conceptual Framework and Research Methodology*

The conceptual framework of this report is the **unified human rights framework on equality** which emphasises the integral role of equality in the enjoyment of all human rights, and seeks to overcome fragmentation, inconsistencies and gaps in the field of equality law, policies and practices. The unified human rights framework on equality is a holistic approach which, while keeping in view the specificities of the different strands of equality and the different types of disadvantage, seeks more effective implementation of the right to equality through highlighting also the overarching aspects of these different strands and types. The unified framework brings together inequalities based on different grounds, such as age, race, gender, religion, nationality, disability, sexual orientation and gender identity, and inequalities in different areas of life, such as the administration of justice, employment, education, and provision of goods and services.

The unified human rights framework on equality is expressed in the Declaration of Principles on Equality, adopted in 2008, signed initially by 128 and subsequently by thousands of experts and activists on equality and human rights from all over the world.

ERT and Tenaganita have been working in partnership, since 2009, on a project designed to empower civil society to combat discrimination and inequality in Malaysia. This report presents some of the results of their work. Throughout the project, the partners have undertaken research on discrimination and inequality by gathering direct testimony during field missions, as well as reviewing research conducted by others. They have also analysed the legal and policy framework related to discrimination and inequality in Malaysia. This partnership between an international and national organisation

has had a number of benefits, including enabling the use of both local and international sources and ensuring that research is both properly responsive to the local context and based on comparative international experience.

### *Country Context, Government and Politics*

Part 1 further provides an overview of the demographic, economic, social, political and historical context of discrimination and inequality in Malaysia. Some of the key background points include:

- Malaysia, located in Southeast Asia, consists of 13 states and three federal territories divided between Peninsular Malaysia and East Malaysia, which are separated by the South China Sea.
- According to 2010 data, it is the 67<sup>th</sup> largest country in the world, comprising a total land area of 330,803 sq km and providing home to approximately 28,250,000 people.
- The capital city is Kuala Lumpur, and Putrajaya is the seat of the federal government.
- Malaysian citizens consist of the ethnic groups Bumiputera (67.4%) which includes Malays and others native to Malaysia, Chinese (24.6%), Indians (7.3%) and others (0.7%). Among Malaysian citizens, Malays make up the predominant ethnic group in Peninsular Malaysia (63.1%). The indigenous Iban constituted 30.3% of the total population in Sarawak, while the indigenous Kadazan-Dusun made up 24.5% in Sabah.
- The country's official language is Bahasa Malay, but English, various dialects of Chinese, Tamil and other languages are also spoken.
- Islam is the most widely professed religion in Malaysia, accounting for 61.3% of the population. Other major religions practised are Buddhism (19.8%), Christianity (9.2%) and Hinduism (6.3%).
- There is a strong relationship between race and religion in Malaysia. The majority of Malays are Sunni Muslims. The indigenous groups from Peninsula Malaysia, Sabah and Sarawak are Christians or Muslims. Most Indians are Hindus, while the Chinese are generally Buddhists or Christians.
- Widely referred to as a new economic Asian Tiger, Malaysia has a strong economy and has recovered well from the world economic crisis of 2008-

2010. Malaysia's GDP for 2010 was US \$237,804 million, placing it in 35<sup>th</sup> place on the GDP list produced by the World Bank.

- The United Nations Development Programme ranked Malaysia in 61<sup>st</sup> place in its Human Development Index for 2011.
- Malaysia's Gini coefficient for 2011, measuring inequality in the distribution of wealth, was 46.2. The ratio of the average earnings of the richest 20% to those of the poorest 20% was 11.4.
- Malaysia is a constitutional monarchy which achieved its independence from the British Empire in 1957. The parliamentary system of government is based on the Westminster model but with significant modifications. One such modification is that, unlike the British Parliament, the Malaysian Parliament is not supreme; it is governed by a written constitution.
- At the federal level, the government is headed by a King, the Yang Di Pertuan Agong, who is elected by, and from among, the hereditary rulers of the nine states of Peninsular Malaysia – “the Conference of Rulers” – for a five year term and with limited executive powers, acting on the advice of the Prime Minister in most matters.
- The federal legislative branch consists of a bicameral Parliament with an upper house (the Senate) made up of appointed Senators and a lower house (the House of Representatives) made up of elected representatives.
- Since independence from the British Empire in 1957, Malaysia has been governed without interruption by the Alliance Party, later renamed the National Front or Barisan Nasional (BN), currently a coalition of 13 parties dominated by the United Malays National Organisation. Currently, there are two major political formations: BN and the People's Alliance, or Pakatan Rakyat (PR), which is the opposition coalition.
- The Prime Minister is the leader of the majority party represented in the House of Representatives and is considered to be the most powerful political authority. Since April 2009, Najib Tun Razak has been the Prime Minister of Malaysia – the sixth since independence.
- The judicial system in Malaysia is characterised by a dual legal system which comprises a system of civil and criminal courts and a separate system of Syariah courts for matters related to Islamic law. The Federal Constitution of Malaysia contains certain provisions to ensure an independent judiciary.
- In addition to the civil law and Syariah law systems, the states of Sabah and Sarawak also have systems of native customary law.



## Part 2: Patterns of Discrimination and Inequality

Part 2 discusses patterns of discrimination and inequality in Malaysia. Based on analysis of existing research from a range of sources, including research undertaken by international organisations, governments, non-governmental organisations (NGOs) and academics, news reports and statistical data, as well as original direct testimony collected from a wide range of individuals, it seeks to identify the principal patterns of discrimination and inequality which affect people in Malaysia. It does not seek to create an exhaustive picture, but rather to provide an insight into what appear to be the most significant issues. In respect of each ground of discrimination, the report discusses the ways in which people experience discrimination and inequality in a range of areas of life, including as a result of discriminatory laws, actions of state actors carrying out public functions, exposure to discriminatory violence and discrimination in areas such as employment, education and access to goods and services.

The study of the prevailing patterns of inequality has identified several **cross-cutting issues** specific to the Malaysian context: the first is the pervasive **importance of ethno-religious identity** which impacts upon all areas of life, not least as a result of the close alignment between race, religion and politics. The second is the role played by the **dual legal system**, according to which civil law and Syariah law operate in parallel and Muslims and non-Muslims are subject to different laws, particularly in the areas of family and criminal law. Furthermore, **Syariah law**, although enacted at state rather than federal level, creating different treatment of Muslims living in different Malaysian states, on the whole exerts a conservative influence on social attitudes and practices, particularly on the role of women in society and in the family, the freedom to choose one's sexual partners, or the upbringing of children. Conservative attitudes provide a context in which discrimination against non-conforming individuals occurs in all areas of life. The third cross-cutting issue is the determinative **role of poverty** as a factor reinforcing or underlying the experience of most of the patterns of discrimination identified. The severity of discrimination experienced by individuals and groups is usually directly related to their socio-economic standing or power position. For example, poverty among migrant workers is both a cause and a consequence of their disadvantaged, powerless status. Finally, the patterns of **political discrimination** typical of Malaysia reveal a strong democratic deficit that sets this country apart from societies in which equality is integral to a democratic political framework.

### *Racial and Ethnic Inequalities*

Race and ethnic relations are central to any discussion of discrimination and inequality in Malaysia. Race and ethnic relations have long played a key role in the politics, economy, society and culture of Malaysia, with the preferential treatment of the Bumiputera dating back to the British colonial era. The more favourable treatment of Malays and natives of Sabah and Sarawak (collectively referred to as the Bumiputera – “sons of the earth”) “and the legitimate interests of other communities” became constitutionally permitted by Article 153 of the Federal Constitution, and implemented through the New Economic Policy and subsequent economic policies intended to “reduce and eventually eliminate the identification of race with economic function”. While the impact of such policies is contested, some argue that in practice the principal beneficiaries have been a growing ethnic Malay middle class. As a result, other ethnic groups, including the Chinese, Indian and some indigenous communities, experience discrimination in the fields of education, employment, housing and political participation. Schools and universities in Malaysia are on the whole segregated along racial lines, primarily as a result of the use of Malay as the language of instruction in public schools. Vernacular national type schools and students are disadvantaged by the unequal financial support provided by the government which favours Malay schools and students. Within the employment field, Malay employees dominate the public sector as a result of affirmative action policies, and such policies have also led to preferential treatment of Malays in the housing sector. The Malaysian political process is also dominated by ethnic Malays who hold the most powerful senior leadership positions. Non-Malay political parties have been discriminated against through, for example, restrictions on their freedom of expression. Despite recent measures taken by the government, the continued lack of equal representation of ethnic groups within Malaysian politics serves to sustain the inequalities experienced in the other areas of life identified within this section.

### *Discrimination against Indigenous Groups*

Further, this section identifies the discrimination and inequality faced by indigenous groups in Malaysia. It covers the main indigenous groups in Malaysia as (i) the Negrito, Senoi and Proto-Malay of Peninsular Malaysia, (ii) the indigenous peoples and ethnic minorities in Sarawak (including the Dayak, Bukitan, Bisayah, Dusun, Kadayan, Kalabit, Kayan, Kenyah (including Sabup

and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit), Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun, and Ukit), and (iii) the indigenous peoples and ethnic minorities in Sabah (including the Kadazan-Dusun, Bajau and Murut). Indigenous groups in Malaysia face discrimination and inequality in relation to land rights, personal security, education, employment, birth registration, religious freedom and political participation. Despite the constitutional recognition of the customary laws which govern the native land rights of indigenous groups in Malaysia, other domestic legislation, including the Aboriginal Peoples Act 1954 and the Sarawak Land Code 1958 have encroached upon such rights. The result has been the termination of customary land rights, often in favour of oil palm plantations and logging companies. Indigenous groups have faced significant obstacles in challenging the loss of their lands. This section also highlights how the encroachment of such companies onto customary land has been accompanied by discriminatory violence and exploitation perpetrated by employees of these companies against primarily indigenous women, whose dependence upon such companies renders them vulnerable to such abuse. Indigenous communities are disadvantaged by a lack of physical access to places of education. Indigenous groups are also impeded in enjoying the social and economic benefits which accompany citizenship due to the obstacles they face in obtaining registration documentation. The marginalisation of indigenous groups in relation to the education system ultimately has implications for their ability to participate equally within the employment sector, and particularly the public employment sector.

### *Gender Inequalities*

Malaysia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 5 July 1995. The impact of this is, however, limited by Malaysia's declaration that accession is subject to compatibility with the Malaysian Constitution and the Syariah law. Malaysia had also made a series of reservations undermining the application of CEDAW, some of which have been withdrawn in recent years. However, the remaining reservations (on Articles 9 (2), 16 (1) (a), 16 (1) (f) and 16 (1) (g)) leave women without equal rights in respect to passing nationality to their children, entering into marriage, and parental and family rights. Whereas the Constitution prohibits discrimination on the basis of gender, the Committee on the Elimination of Discrimination against Women in its 2006 comments expressed concern that neither the Constitution nor other legislation contains a defini-

tion of discrimination against women. This section first sets out those patterns of discrimination which appear to affect women in Malaysia in general, including in relation to gender violence, education, employment, health and political participation. It then addresses those patterns of discrimination in which an individual's gender combines with another characteristic – religion, ethnicity or place of birth – to form a pattern of multiple discrimination based on two or more grounds.

The Committee on the Elimination of Discrimination against Women and the Gender Gap Index have highlighted that there is still a lot of progress to be made before Malaysia can confidently state compliance with its obligations under CEDAW. Traditional customs and attitudes are arguably responsible for maintaining a disadvantaged position in society for women in general. Gender-based violence, including domestic violence, rape, sexual harassment, trafficking and female genital mutilation, is detailed in this section. Regarding education, despite overall progress on gender equality in education, not all categories of women have enjoyed such progress. Indigenous women continue to face disadvantage in relation to access to education. Further, the progress made with regard to access to education has not translated into improved equality for women in employment. There continue to be low levels of female participation in the labour force, particularly in high income and decision-making roles. Women face discrimination with regard to promotions and salary, and also in relation to health and safety in the workplace. Women also face unequal access to healthcare. In relation to citizenship rights, women are disadvantaged under Articles 14 and 15 of the Federal Constitution which restrict the right to become a citizen by “operation of law” to children who have a citizen father, which leaves children born with only a citizen mother to depend on the discretionary “registration” process. Further, whilst the Constitution makes provision for the wives and children of male citizens to be registered as citizens, no equivalent provision allows citizenship by registration for husbands and children of female citizens. As with the patterns of discrimination discussed previously, the lack of equal participation of women in the political process serves to sustain their unequal position in other areas of life.

Particular challenges are faced by Muslim women and women who live and work in the rural areas of the country. As a result of Syaria law in Malaysia, Muslim women face dual discrimination in some areas of life on the combined grounds of gender and religion. Such discrimination is most evident in the

context of marriage and family life which for Muslim women are governed by the provisions of Islamic family law. Such provisions serve to sustain the subordinate position of women within the Muslim family. Further, many provisions of Syariah criminal law are discriminatory against Muslim women, in relation to the particular crimes for which a Muslim woman may be punished and the form of punishment to which she may be subjected. Finally, the freedom of Muslim women to move around and dress as they choose is also restricted by locally imposed Syariah law. Indigenous and rural women also are disadvantaged, particularly in relation to employment.

### *Discriminatory Patterns Related to Religion*

The right to equality requires that members of all religious and belief groups and those who do not subscribe to any religion should be able to participate in any area of economic, social, political, cultural and civil life on an equal basis. The main religions in Malaysia are Islam, Buddhism, Christianity and Hinduism, and there is a close relationship between race and religion. In carrying out research for this report, no statistics were found which disaggregate on the basis of religion data relating to education, employment, health care, etc. It is therefore not possible to draw precise conclusions relating to the impact which an individual's religion has on their ability to participate equally in these areas. Research has, however, identified patterns of discrimination in which an individual's religion impacts on their ability to practice that religion freely, change religion, and enjoy certain human rights.

Discrimination on the grounds of religion and belief in Malaysia affects members of all religious groups, including members of the majority Muslim community and the minority religious communities such as Hindus and Christians. However, Article 3(1) of the Constitution of Malaysia places Islam in a privileged position, which is reflected in other provisions of the Constitution. Restrictions have been placed on the religious freedoms of adherents to minority religions, which are considered to be "threatening" to the position of Islam, in order to protect the integrity of the official religion. Discrimination against non-Muslim religious groups has been practiced, including the destruction of Hindu temples; the arrest of Christians for allegedly trying to convert Muslims to Christianity; the restriction of Malay-language translations of the Bible and other printed materials; and violent attacks on non-Muslims. Non-Muslims are disadvantaged with respect to the financing of religious schools and religious education. Given the strong relationship be-

tween race and religion in Malaysia, such actions further compound the challenges identified above in relation to race discrimination. On the other hand, Muslims face restrictions which do not apply to other groups, including, most notably, their right to change religion and their freedom to engage in sexual relationships. Finally, there is belief-based discrimination against all Muslims who express beliefs not approved by official interpreters of Islam in respect of their right to participate in cultural life on an equal basis. Malaysia has therefore been unable to reconcile the position of Islam as the official religion with its obligation to protect the right to equality for members of all religions.

### *Discrimination Based on Sexual Orientation and Gender Identity*

While the right to be free from discrimination on the grounds of sexual orientation or gender identity is not explicitly set out in any of the United Nations human rights treaties to date, the UN Human Rights Committee has confirmed that the prohibition of discrimination in Article 26 should be treated as including sexual orientation within the ground of “sex”. In addition, the Committee on the Elimination of Discrimination against Women to which Malaysia is a party has referred to “sexual orientation and gender identity” as prohibited grounds of discrimination. Further, the Committee on the Rights of the Child, which has responsibility for monitoring the effectiveness of the Convention on the Rights of the Child to which Malaysia also is a party, has confirmed that the rights of children under the Convention should be guaranteed without discrimination on the ground of, *inter alia*, sexual orientation. The rights of individuals to be free from discrimination on the grounds of both sexual orientation and gender identity have been clarified by the Yogyakarta Principles, which elaborate the application of international human rights law in relation to sexual orientation and gender identity.

The rights of LGBTI persons in Malaysia are seriously undermined by the formulation of sexual offences found in both Syariah and secular criminal law, which create a perception that same-sex relationships are criminalised, and an environment in which rights violations regularly occur. The Penal Code contains, as a legacy of British colonial rule, the offences of “carnal intercourse against the order of nature” and “gross indecency” (section 377). These provisions are enforced through practices that amount to criminalisation and discriminatory ill-treatment of LGBTI persons. While the secular courts of Malaysia appear disinclined to recognise the gender identity of transgender and transsexual persons, the Syariah crim-

inal legislation is plainly discriminatory on the ground of gender identity. For example, section 28 of the Syariah Criminal Offences (Federal Territories) Act 1997 prohibits any cross-dressing and is used to target transgender persons within Muslim Malay society.

Restrictions on the right to discuss LGBTI rights and a lack of statistical data showing the discrimination faced by members of this group present significant challenges for those seeking to promote the right to equality irrespective of sexual orientation and gender identity. However, the available qualitative evidence suggests that LGBTI persons suffer discrimination in relation to their personal security, recognition before the law, employment, freedom of expression and other rights, perpetuating the unequal position of these persons in Malaysian society. The extent of the discrimination and inequality faced by LGBTI persons has been starkly highlighted by the recognition by the governments of Australia and the United Kingdom of Malaysian transgender asylum-seekers as refugees due to the persecution they face as a result of their gender identity in their country of origin.

### *Disadvantages Suffered by Persons Living with HIV/AIDS*

While there is limited information available regarding the ability of persons with HIV/AIDS to enjoy their rights in Malaysia, this section highlights a number of problems faced by this category of persons as a result of their health status. The evidence suggests that discrimination against persons living with HIV/AIDS has persisted in Malaysia. Interviewees alleged that discriminatory attitudes against persons living with HIV/AIDS are at the root of the state's failure to take effective measures to prevent the spread of the disease. There appears to be a lack of awareness and understanding of the nature of the disease and limited opportunities for this to be resolved, despite steps taken by the government to educate the public. Awareness-raising will therefore be key to stalling the continued discrimination against this disadvantaged group within society.

### *Inequalities Affecting Children*

The Convention on the Rights of the Child (CRC) is one of the few international human rights treaties ratified by Malaysia, but its application is subject to compatibility with the Malaysian Constitution and several reservations have been made. Children across Malaysia experience discrimina-



tory violence and sexual abuse. Social attitudes and barriers in access to justice prevent children from accessing those mechanisms which exist to protect them. Child labour, child marriages, sexual exploitation, trafficking and prostitution are also deeply concerning. Particular groups of children, such as indigenous children, stateless children, asylum seeking children, and the children of migrant workers, experience specific additional forms of discrimination. The provisions of the Evidence Act 1950 are discriminatory against children on the ground of their age by failing to attach due weight to the testimony of children.

### *Inequalities Based on Disability*

As a state party to the Convention on the Rights of Persons with Disabilities (CRPD), Malaysia must ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability and modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. Despite the Persons with Disabilities Act being passed in 2008, persons with disabilities in Malaysia continue to face real difficulties in accessing employment, education, housing, and public spaces and facilities. While the government does provide financial aid to persons with disabilities who earn less than a certain threshold, the sum is inadequate. Persons with disabilities in Malaysia experience varying degrees of disadvantage, depending on a number of factors. For example, children with disabilities living in remote areas do not have access to the same level of services as children living in other parts of the country.

Despite the lack of statistical data available, patterns of discrimination against persons with disabilities have been identified in the fields of education and employment. Education law in Malaysia is directly discriminatory against persons with disabilities. This is particularly notable in the Education Act (Special Education) Regulations 1997 which make a distinction between children who are “educable” and “non-educable” on the ground of disability. Children with disabilities are often segregated and taught in separate special classes within mainstream schools. Further, in the absence of official statistics, field research has uncovered evidence of the discrimination faced by persons with disabilities in the field of employment. The failure of the government to collect data regarding the par-



ticipation of persons with disabilities in various areas of life represents, in and of itself, a denial of equality and a perpetuation of disadvantage for disabled persons, as without such evidence, it is very difficult to advocate or plan for improvements.

### *Discrimination against Non-citizens*

This section identifies the patterns of discrimination faced by non-citizens in Malaysia – focussing on the experiences of asylum-seekers, refugees and migrant workers. Non-citizens suffer discrimination in respect to their fundamental rights, the patterns of which include violence, discriminatory detention and deportation, lack of access to justice, deprivation of family life, limited or non-existent health care, education and housing. Discrimination against non-citizens affects several categories within the non-citizen population, including asylum-seekers and refugees, who experience discrimination and disadvantage in the process of refugee status determination and employment, as well as migrant workers, of whom domestic workers are a particularly vulnerable section. Non-citizens are not covered by those provisions in the Constitution which enshrine the rights to equality and non-discrimination. They are also disadvantaged in relation to criminal justice (under Article 5 of the Federal Constitution), freedom of movement (under Article 9) and freedom of speech, assembly and association (under Article 10). Further, as a specific category of non-citizens, migrant workers are subjected to disadvantage as a result of discriminatory domestic legislation, including the Employment Act 1955 which does not offer the same protection to domestic workers as to other categories of workers, and the Workmen’s Compensation Act 1952 which excludes domestic workers from the right to receive compensation for workplace injuries and occupational illness. Finally, the Immigration Act of 1959-1960 hinders domestic workers from escaping abusive situations by imposing restrictive rules regarding work permits. The unprotected status of non-citizens is reflected throughout Malaysia’s legal framework, which does not contain the legal recognition of refugees, does not accord migrant workers key rights under employment legislation, and, through its immigration rules, creates a situation of extreme vulnerability amongst migrant workers.

As a result of this discrimination in the legal system, migrant workers are exposed to discrimination in all areas of life. Asylum seekers and others found to have committed immigration offences are subject to detention in appalling conditions. The actions of the Malaysia People’s Volunteer Corps, or Ikatan

Relawan Rakyat Malaysia (RELA), a voluntary body of citizens who enforce local security alongside law enforcement authorities and assist the Immigration Department in the arrest of illegal immigrants and in the administration of Immigration depots, are particularly concerning in this regard, as well as the conditions and the treatment of migrants in immigration detention. Some migrant workers are vulnerable to inhuman and degrading treatment owing to their situation of bonded labour. All non-citizens face insurmountable hurdles to accessing economic and social rights, and significant restrictions on their ability to enjoy a family life. Finally, their lack of rights under the law means that non-citizens are deprived of any meaningful redress.

### *Discrimination on the Basis of Political Opinion*

The picture of inequalities in Malaysia would be strongly distorted without an understanding of discrimination based on political opinion. The main patterns of politically-based discrimination are related to voting rights and other political participation rights, arbitrary detention on political grounds, freedom of association and assembly, and freedom of expression. Given the strong alignment of political parties with race and religion, this form of discrimination intersects and overlaps with ethnic and/or religious discrimination and this makes it difficult to disentangle the causal factors. This report has revealed the extreme lengths to which the government will go in order to suppress opinions which are seen as “opposing” it, or which are viewed as “seditious”, through raising obstacles to equal political participation, using arbitrary detention, and curtailing freedom of association and assembly. Article 10(4) of the Federal Constitution is discriminatory on the ground of political opinion. It sets out exceptions to the freedom of speech and expression conferred under Article 10(1)(a) which are highly political in nature and are used to restrict the activities of political opponents of the government. Domestic legislation, such as the Police Act 1967, has been enforced in a discriminatory manner so as to prevent public assemblies by political opponents of the government. In addition to the repression of freedom of association and assembly, the Malaysian government has also used the Internal Security Act to detain political opponents in a discriminatory manner. The Sedition Act, the Official Secrets Act and the Printing Press and Publication Acts have been used to silence, intimidate and punish critics of the government. The most obvious victims of this form of discrimination are leaders of opposition parties such as the Democratic Action Party (DAP), the People’s Justice Party (PKR), the Islamic Party of Malaysia (PAS) and the Socialist Party of Malaysia

(PSM). However, outspoken critics of the government, including NGO leaders, lawyers, journalists, bloggers, academics and cartoonists, have also suffered the consequences of political discrimination in Malaysia. Others have been discriminated against because, rightly or wrongly, they are perceived as “anti-government” or opposition sympathisers. Finally, opposition parties have been unable to participate in the political process on an equal basis with the ruling party due to a series of in-built and administrative biases in the Malaysian electoral system, and due to the discriminatory allocation of funds to elected representatives which favours members of the BN coalition. Such discriminatory practices on the grounds of political opinion present a fundamental challenge to principles of both equality and democracy, and also create an environment in which it is difficult to challenge the status quo and undo the disadvantage faced not only by political opponents but other groups discussed in this report.

### **Part 3: The Legal and Policy Framework Related to Equality**

This part reviews the Malaysian legal and policy framework related to equality. It aims to establish whether Malaysian law provides sufficient protection from discrimination, and finds that while some level of protection does exist, in many cases the law itself is used as a tool to further entrench the disadvantage faced by the different groups described above. This part addresses both the international legal obligations of the state and the domestic legal and policy frameworks which protect the rights to equality and non-discrimination. In respect of domestic law, it examines the Federal Constitution of Malaysia, specific anti-discrimination laws and non-discrimination provisions in other areas of law. It also refers to government policies which have an impact on inequality or discrimination. Finally, the section examines the implementation and enforcement mechanisms of the law, both through the courts and through specialised institutions.

#### *International and Regional Law*

Malaysia has a relatively **weak legal and policy framework related to equality**, characterised by a number of significant gaps and limitations. One aspect of the weakness of the legal framework is Malaysia’s **poor participation in the major United Nations treaties** relevant to equality rights; it is a party to only three of the major human rights treaties: CEDAW, CRC, and CRPD. Malaysia has not yet joined crucial international human rights trea-

ties and, most significantly, is not yet a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons, and the ILO Convention No. 169 on Indigenous and Tribal Peoples, among others. Further, Malaysia's commitment to CEDAW, CRC and CRPD is subject to significant declarations and reservations. It is also unfortunate that Malaysia has not signed up to the Optional Protocols to CEDAW and CRPD to which it is a party, making it impossible for persons under its jurisdiction to file individual complaints and seek remedy via the relevant complaint mechanisms. A further limitation is that the treaties to which Malaysia is a party have not been broadly understood to have direct application but rather must be implemented through domestic legislation. That said, the courts have recently created a precedent of direct application of international treaties to which Malaysia is a party in reaching decisions in fundamental rights cases, as demonstrated in the pregnancy discrimination case of *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors* in which CEDAW has been applied.

The forthcoming ASEAN Declaration on Human Rights could prove to be a pivotal step forward in the promotion and protection of human rights in the region. Malaysia should ratify any future regional treaties and protocols which serve to enhance the protection of the right to equality, and take an active part in strengthening the regional human rights system at the ASEAN level.

### *National Law*

The national legal framework related to equality includes protection provisions in the **Federal Constitution**, particularly Articles 8, 12 and 136, as well as affirmative action provisions. Article 8 forms the cornerstone of the constitutional protection of the rights to equality and non-discrimination, with Article 8(1) guaranteeing equality before the law and equal protection of the law, and Article 8(2) prohibiting discrimination against citizens on the grounds of religion, race, descent, place of birth or gender. Article 12 expands the protection from discrimination in relation to certain protected grounds to the area of education. Article 136 provides protection from differential treatment within state employment on the ground of race. While the Federal Constitution contains some protection of the right to equality, its provisions are inadequate in a number of ways, most notably in relation to the restricted list

of protected grounds, the failure to protect both citizens and non-citizens, and the breadth of exceptions which means that matters of personal law (which has been interpreted to include the majority of Syariah law) are not subject to the prohibition on discrimination contained in the Constitution.

Among the strongest causes for concern is the continued existence of Articles 89 and 153 creating **ethnic preferences**, which, failing to meet the criteria for positive action, amount to racial discrimination. These provisions, establishing a privileged position for the Malay and the natives of Sabah and Sarawak, violate international law standards established under, *inter alia*, CEDAW and ICERD in relation to positive action. The positive action measures under these provisions are not time-limited or function-limited. The permanent privilege enjoyed by the Malay and the natives of Sabah and Sarawak therefore appears to maintain unequal and separate standards, on the ground of race, in conflict with the constitutional prohibition of discrimination.

Malaysia **lacks comprehensive equality legislation** and equality enforcement bodies across all grounds. Given the limitations of the constitutional equality protections, the lack of legislation prohibiting all forms of discrimination by both the state and private individuals represents a failure to meet obligations under CEDAW, CRPD, CRC and international customary law. It is submitted that the lack of comprehensive equality legislation in Malaysia is a significant factor contributing to the persistence of the patterns of discrimination and inequality identified in Part 2.

The only specific equality and anti-discrimination Act in Malaysia is the Persons with Disabilities Act 2008. This Act represents a positive step towards the protection of the rights of persons with disabilities. Regrettably, however, the Persons with Disabilities Act does not include operative provisions setting out the rights to equality and non-discrimination of persons with disabilities, but it does incorporate some of Malaysia's obligations under CRPD in a manner which arguably serves to overcome some elements of the disadvantage faced by persons with disabilities. In order for this Act to comply fully with Malaysia's obligations under the Convention, it will require significant amendment.

Some non-discrimination provisions are found in legislation governing other legal fields: criminal law, family law, and law related to domestic violence.

However, this protection is rarely rights-based, and is very limited, patchy and inconsistent. There is no prohibition of discrimination on any ground in legislation constituting the fields of employment law, education law or health law in Malaysia. Protection from discrimination in these fields of law is thus possible only on the basis of the Constitution and international treaties. Overall, the normative framework is not sufficient to meet Malaysia's obligations under international human rights law.

Malaysian criminal law endeavours to provide protection for women from gender-based violence which has been defined by the Committee on the Elimination of Discrimination against Women as a form of discrimination. It does not, however, provide adequate protection for married women as they are not covered by the anti-rape provisions set out in the Malaysian Penal Code. In addition, the definition of rape in the Penal Code is not sufficiently broad to cover all forms of sexual assault and therefore leaves women unprotected from certain forms of gender-based violence. The protection from gender based violence is confounded by the provisions of the Evidence Act 1950 that limit protection offered to women under the Penal Code as a result of the restrictions which it imposes on evidence at trials for rape. Further, the evidential requirements relating to rape in Syariah law fail to give adequate protection to Muslim women who have been victims of rape. On the positive side, the Evidence Act 1950 goes some way towards reasonable accommodation for persons with disabilities. The Anti-Trafficking in Persons Act 2007 and its problematic amendment of 2010 contain a number of serious weaknesses, including an inadequate definition of human trafficking that does not comply with international criminal law, and the conflation of trafficking and smuggling in a way that deprives victims of smuggling from any protection rights, even if they are refugees. Malaysia ought to revise its anti-smuggling laws to protect undocumented migrants from discriminatory ill-treatment.

Various provisions within Malaysian family law legislation serve to protect the rights to equality and non-discrimination. While falling short of implementing the full suite of obligations assumed by Malaysia under the CRC, the Child Act 2001 does seek to protect children from various forms of violence, ill-treatment and abuse which they suffer as a result of their age. The Guardianship of Infants Act 1961, after amendment by the Guardianship of Infants (Amendments) Act 1999, addresses the issue of potential inequality of parental rights by granting equal guardianship rights to mothers and fa-

thers. Similar gender equality provisions are found in the Inheritance (Family Provision) Act 1971 and the Distribution Act 1958 which have both been made gender-neutral. Finally, the Law Reform (Marriage and Divorce) Act 1976 criminalises the act of compelling an individual to marry against their will. While each of these provisions is a small step towards greater equality for children and women within the realm of family law, the piecemeal and scattered approach to the protection of the rights to equality and non-discrimination is unfortunate.

Legislation addressing specific violations of the equal right to personal security without any discrimination includes the Domestic Violence Act 1994 and the Domestic Violence (Amendment) Act 2012. Whereas these statutes address significant issues of gender-based violence in Malaysia, they have been criticised both in relation to their content and their enforcement, which is viewed as inadequate.

Employment law also offers some protection. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organise a trade union. Both the Employment Act 1955 and the Industrial Relations Act cover migrant workers. Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers. Migrant workers should receive the same rights and protections as local workers. Notwithstanding the lack of a constitutional guarantee in this regard, the Trade Union Act permits migrant workers to become members of trade unions and take part in trade union activities, but they cannot hold executive positions. However, given the patterns of discrimination against migrants set out in Part 2 of this report, it is clear that these provisions are not being adequately implemented.

### *National Policies Impacting on Discrimination and Inequality*

The Malaysian government has developed a number of national policies relevant to equality and non-discrimination, including both general policies which contain strong non-discrimination themes such as the National Social Policy, the National Social Welfare Policy, and policies designed at combating discrimination against and accelerating progress of particular disadvantaged groups, such as the National Women Policy, National Policy for the Elderly, the Code of Practice on Prevention and Management of

HIV/AIDS at the Workplace and the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace. The National Cultural Policy and the New Economic Policy, however, continue to promote the privileged position of the Bumiputera community in Malaysia, with the result that racial and ethnic minorities face perpetual disadvantage in many areas of life.

### *Enforcement and Implementation*

Malaysia has a rather poor record of implementation and enforcement of equality rights, including in respect to access to justice, administrative mechanisms, legal aid, and remedies and sanctions. Jurisprudence on equality and non-discrimination is weak, as is the implementation of existing law and policies. Despite the necessity of effective legal redress and remedies in order to ensure that the rights to equality and non-discrimination are effective, the enforcement mechanisms available to victims of discrimination in Malaysia are inadequate. In the absence of a single equality body with responsibility for overseeing the enforcement of the rights to equality and non-discrimination set out in the Federal Constitution, the Human Rights Commission of Malaysia arguably has a role to play in this regard. This body has, however, been criticised for its lack of independence and effectiveness. Further, victims of discrimination face additional obstacles in seeking legal redress and remedies as a result of legal aid provision being unavailable for claims of discrimination, a very narrow interpretation of the right to equality by the Federal Court and Court of Appeal, and a lack of sanctions which can be imposed upon discriminators. There has been only limited case law pertaining to equality and discrimination in Malaysia.

## **Part 4: Conclusions and Recommendations**

The last part of the report sums up the findings of ERT and Tenaganita's research and provides a set of recommendations on the basis of these findings. All recommendations are based on international law related to equality, and on the Declaration of Principles on Equality, a document of international best practice which sums up the most essential elements of international law related to equality. **Central among the recommenda-**



tions are those related to (i) the need to amend discriminatory provisions, particularly those related to “positive action” favouring the Bumiputera, and (ii) the need to develop comprehensive equality legislation reflecting the current international understanding of the principles of equality.

A detailed list of the report’s recommendations is presented below:

### **(1) Strengthening of International Commitments**

(1)(a) Malaysia is urged to join the following international treaties and other instruments which are relevant to the rights to equality and non-discrimination:

#### ***United Nations Instruments:***

- Convention relating to the Status of Refugees (1951);
- Convention relating to the Status of Stateless Persons (1954);
- International Convention on the Elimination of All Forms of Racial Discrimination (1965), additionally making a Declaration under its Article 14 allowing individual complaints;
- UNESCO Convention against Discrimination in Education (1960);
- International Covenant on Civil and Political Rights (1966) and Optional Protocol I to the International Covenant Civil and Political Rights (1976);
- International Covenant on Economic, Social and Cultural Rights (1966) and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
- Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999);
- International Convention for the Protection of All Persons from Enforced Disappearances (2006);

- Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006);
- Optional Protocol III to the Convention on the Rights of the Child (2011).

### ***International Labour Organisation Conventions:***

- ILO Convention No. 111 on Discrimination in Employment and Occupation (1958);
- ILO Convention No. 169 on Indigenous and Tribal Peoples (1989);
- ILO Convention No. 189 on Domestic Workers (2011).

(1)(b) Malaysia is urged to review and remove its reservations to the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

### **(2) Repeal of Discriminatory Legislation and Policies**

(2)(a) There are a significant number of directly discriminatory provisions in Malaysian legislation, and a number which – while they do not appear to discriminate directly – are either indirectly discriminatory or open to discriminatory application. The existence of this legislation is in breach of Malaysia's international human rights obligation to respect the right to be free from discrimination. Moreover, the existence of such legislation can serve to legitimise stigma and stereotyping of vulnerable groups, which can have direct impact in perpetuating the patterns of discrimination identified in Part 2 above. Malaysia is urged to undertake a review of all federal and state legislation and policies in order to (i) assess compatibility with the right to equality; and (ii) amend, and where necessary, abolish existing laws, regulations, and policies that conflict or are incompatible with the right to equality. This process should include the repeal of all discriminatory laws, provisions and policies. In particular, the following discriminatory provisions should be repealed or amended to remove discriminatory elements:

### ***Constitutional Provisions:***

- All provisions in the Federal Constitution which offer protection of the rights of only citizens rather than of the rights of all persons within the territory or under the jurisdiction of Malaysia, including Articles 5(4), 8(2), 9, 10 and 12(1);

- Article 9, which is discriminatory on the grounds of place of residence;
- Article 10, which is discriminatory on the grounds of political opinion;
- Article 11, which is discriminatory on the ground of religion;
- Articles 14, 15, 24 and 26, which discriminate against women in relation to citizenship rights;
- Articles 89, 153 and 161 which discriminate on the basis of race or ethnicity.

(2)(b) Malaysia is urged to amend its Syariah law legislation, fatwas and policies in order to remove those aspects which are discriminatory, particularly on the grounds of gender, sexual orientation and gender identity. Malaysia is urged to adopt progressive interpretations of Syariah law which respect the right to equality. In particular, the following discriminatory provisions should be amended or repealed:

***Syariah Law:***

- Syariah criminal legislation, including sections 23, 25, 26, 27, 28, 41 and 56 of the Syariah Criminal Offences (Federal Territories) Act 1997 and the equivalent criminal legislation in all other states;
- Syariah family law, including sections 8, 10, 13, 14, 23, 47, 49, 50, 52, 59, 83, 84 and 88 of the Islamic Family Law (Federal Territories) Act 1984 and the equivalent family law legislation in all other states.

(2)(c) Malaysia is urged to amend its criminal law to remove discriminatory provisions, in particular:

***Criminal Law:***

- Sections 376 and 377 of the Penal Code regarding whipping;
- Sections 375 and 375A of the Penal Code regarding marital rape;
- Section 377A of the Penal Code regarding “carnal intercourse against the order of nature”;
- Section 21 of the Minor Offences Act 1955 which should not be used to prosecute transgender individuals or anyone else for simply expressing their gender identity;

- Section 133A of the Evidence Act 1950 regarding evidence provided to court by children;
- Section 146A of the Evidence Act 1950 regarding evidence during a rape trial.

(2)(d) Malaysia is urged to amend its education law to remove discriminatory provisions, in particular:

***Education Law:***

- Those provisions of the Education Act 1996 which privilege Malay Muslim students over students belonging to other ethnic groups and religions, for example sections 50 and 52;
- The Education (Special Education) Regulations) 1997 should be amended to remove the distinction between “educable” and “uneducable” children with disabilities;
- Any provisions and policies which prevent non-citizen children from attending primary and/or secondary school.

(2)(e) Malaysia is urged to amend its employment law to remove discriminatory provisions, in particular:

***Employment Law:***

- The protections under the Employment Act 1955 must be extended to all workers, including domestic workers, as a bare minimum level of protection which can be improved upon but not reduced in employment contracts;
- Sections 34 and 35 of the Employment 1955, which are discriminatory against women;
- The Workmen’s Compensation Act 1952 should be amended to remove provisions which are discriminatory against women, and to include protection for all migrant workers.

(2)(f) Malaysia is urged to amend its family law to remove discriminatory provisions, in particular:

***Family Law:***

Sections 10, 49 and 77 of the Law Reform (Marriage and Divorce) Act 1976, which are discriminatory on the ground of gender.

(2)(g) Malaysia is urged to amend its nationality and immigration law to remove discriminatory provisions, in particular:

***Nationality and Immigration Law:***

- Section 12 of Immigration Act 1959/1963 should be amended to allow women equal rights to endorse the name of their spouse and children on their passport;
- The Immigration Regulations 1963 should be amended to ensure that a foreign husband of a Malaysian woman is entitled to a dependant's pass on an equal basis as a foreign wife of a Malaysian man.

(2)(h) Malaysia is urged to amend its tax law to remove discriminatory provisions, in particular:

***Tax Law:***

- Section 47(1) of the Income Tax Act 1978 should be amended so as to remove discrimination on ground of gender;
- Those provisions which permit Muslims to benefit from tax deductions in relation to the religious taxes which they pay whilst members of other religions are entitled to no such deductions.

(2)(i) Malaysia is urged to review its **economic policies** to ensure that any privileges which are granted on the ground of race and ethnicity, or any other protected characteristic, with the intention of overcoming past disadvantage, are kept under regular review so as to ensure the continued legitimacy of purpose and proportionality.

**(3) Laws Protecting the Rights to Equality and Non-discrimination**

(3)(a) Malaysia is urged to adopt appropriate constitutional and legislative measures for the implementation of the right to equality. Such measures

should ensure comprehensive protection across all grounds of discrimination and in all areas of activity regulated by law. The constitutional protections of the rights to equality and non-discrimination are currently severely limited. It is therefore recommended to **amend the Federal Constitution** in order for Malaysia to comply fully with its international human rights obligations. Such amendments should include:

- (i) ensuring that both citizens and non-citizens benefit from the protections of the rights to equality and non-discrimination, through amendment of Article 8(2) of the Federal Constitution, among others;
- (ii) broadening the list of grounds of discrimination found in Articles 8 and 12 so as to include all grounds referenced in Principle 5 of the Declaration of Principles on Equality – including political opinion, sexual orientation, gender identity, age, disability, health status and nationality; and allow for a test for the inclusion of additional grounds, so that such grounds could be incorporated as necessary over time without requiring constitutional amendments;
- (iii) providing a clearer definition of what behaviours are prohibited as discrimination;
- (iv) extending the protection of the rights to equality and non-discrimination to all areas of activity regulated by law;
- (v) ensuring that the rights to equality and non-discrimination are enjoyed in both the public and private sector;
- (vi) removing the exclusion of personal laws from the prohibition of discrimination;
- (vii) ensuring that any provisions permitting positive action in order to overcome past disadvantage and to accelerate the progress towards equality of particular groups meet criteria established in international law and best practice, such as time limits and proportionality;
- (viii) removing from Article 8(5) of the Federal Constitution the list of exceptions to the prohibition on discrimination or ensuring that any exceptions to the principle of equality are only permitted to the extent that they accord

with strictly defined criteria, and are justified as a proportionate means of achieving a legitimate objective;

(ix) removing the provision by the state of preferential treatment in the form of establishing and maintaining Islamic educational institutions.

(3)(b) It is further recommended that Malaysia should also consider strengthening the existing constitutional protections of the rights to equality and non-discrimination through the **enactment of comprehensive equality legislation**.

(3)(c) The enactment of comprehensive equality legislation should give effect to the principles of equality under international law and ensure the expanded constitutional protection against discrimination and the promotion of the right to equality. Equality legislation should aim at eliminating direct and indirect discrimination and harassment in all areas of life regulated by law; cover all prohibited grounds listed in Principle 5 of the Declaration of Principles on Equality; and attribute obligations to public and private actors, including in relation to the promotion of substantive equality and the collection of data relevant to equality.

(3)(d) Comprehensive equality legislation could either take the form of:

(i) A single Equality Act, which offers consistent protection against discrimination across all grounds of discrimination and in all areas of life regulated by law; or

(ii) A coherent system of Acts and provisions in other legislation which together address all grounds of discrimination in all areas of life regulated by law.

(3)(e) Members of groups who may be distinguished by one or more of the prohibited grounds should be given the opportunity to participate in the decision-making processes which lead to the adoption of such legislative measures.

(3)(f) It is recommended that a thorough review of the Persons with Disabilities Act 2008 is carried out in order to bring it into line with Malaysia's obligations under CRPD. Most importantly, the rights enshrined in the Act must be made enforceable, either through the civil courts, or through an enforcement mechanism designed for this specific purpose.

(3)(g) In order to ensure that the right to equality is effective in Malaysia, the government is urged to consider taking positive action, which includes a range of legislative, administrative and policy measures, in order to overcome past disadvantage and to accelerate progress towards equality of particular groups, including women and persons with disabilities.

#### **(4) Ensuring Consistency between Syariah and Secular Law Provisions**

Malaysia is urged to take all necessary steps to remove discriminatory effects of the legal dualism arising from the co-existence and unclear relationship between secular and Syariah legislation at the national as well as the state level. It must be ensured that, especially in family and religious matters, for which Muslims are subject to Syariah law and to the jurisdiction of Syariah courts and for which non-Muslims are subject to the provisions of secular law and to the jurisdiction of the secular courts, these two systems apply in a way that does not discriminate on any prohibited ground. Malaysia is urged to review in particular the relationship between the two systems so as to address legal disputes between non-Muslim mothers and fathers who have converted to Islam.

#### **(5) Education on Equality**

Malaysia is urged to take action to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right. Such action is particularly necessary in order to modify social and cultural patterns of conduct and to eliminate prejudices and customary practices which are based on the idea of the inferiority or superiority of one group within society over another.

#### **(6) Enforcement**

(6)(a) Malaysia is urged to ensure that persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and administrative procedures, and appropriate legal aid for this purpose.

(6)(b) Malaysia is urged to introduce legislation or other measures to protect individuals from victimisation, defined as any adverse treatment or con-



sequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.

(6)(c) Malaysia is urged to ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

(6)(d) Malaysia is urged to adapt legal rules related to evidence and proof in order to ensure that victims of discrimination are not unduly inhibited from obtaining redress. In particular, rules on evidence and proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the right of equality.

(6)(e) Malaysia must ensure that sanctions for breach of the right to equality are effective, proportionate and dissuasive. Appropriate remedies should include reparations for material and non-material damages. Sanctions should also include the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy changes that are necessary for the realisation of the right to equality.

(6)(f) Malaysia is urged to establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. Such bodies must have independent status and competences, in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

(6)(g) Malaysia is urged to establish a focal point within government to coordinate policy and action relating to the right to equality.

## **(7) Duty to Gather Information**

During the research for this report, it has been established that there is a significant lack of information, including statistics available in relation to key

indicators of equality in Malaysia. Malaysia is therefore urged to collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. Wherever statistics are collected in relation to key indicators of equality, they should be disaggregated in order to demonstrate the different experiences of disadvantaged groups within Malaysian society. Malaysia should further ensure that such information is not used in a manner that violates human rights.

### **(8) Dissemination of Information**

Laws and policies adopted to give effect to the right to equality must be accessible to all persons. Malaysia must take steps to ensure that all such laws and policies are brought to the attention of all persons who may be concerned by all appropriate means.

### **(9) Prohibition of Regressive Interpretation**

In adopting and implementing laws and policies to promote equality, Malaysia should not allow any regression from the level of protection against discrimination that has already been achieved.

### **(10) Derogations and Reservations**

No derogation from the right to equality should be permitted. Any reservation to a treaty or other international instrument, which would derogate from the right to equality, should be considered null and void.

# 1. INTRODUCTION

## 1.1 Purpose and Structure of This Report

In a speech given on the eve of Malaysia Day 2011, Prime Minister Najib Razak asked whether Malaysians:

*[w]ith their diverse backgrounds, varying socioeconomic statuses and political understandings (...) can arrive at a consensus to not bow or surrender to the trappings of hate and distrust which would certainly drag us down into a valley of disgrace. Instead, let us all brave a future filled with hope and nobility together.<sup>1</sup>*

Malaysia is indeed a country characterised by the rich diversity of its peoples. Along with the great opportunities that this brings, comes the challenge of ensuring that no group or individual in society suffers discrimination or disadvantage linked to their personal characteristics.

But the country's rich diversity has not found expression in equality of rights. On 28 April 2012, thousands of people took to the streets in Bersih 3.0, the biggest mass opposition rally in Malaysia's history. The protests, organised by the Coalition for Clean and Fair Elections (BERSIH – meaning “clean” in Malay), demanded changes to Malaysia's electoral system, which in their view favours the Barisan Nasional (BN) ruling coalition which has been in power since 1957 when Malaysia gained independence. A previous rally, Bersih 2.0 Walk for Democracy, took place on 9 July 2011. Both rallies were violently suppressed by the government. The Bersih movement started in 2007 and since then has insisted that Malaysia needs a cleaning operation to ensure equal political rights in deciding the country's future.

In recent years, a number of high-profile human rights issues in Malaysia have caught international attention, including the treatment of political opponents and protesters, the banning of the Seksualiti Merdeka Festival, the treatment

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<sup>1</sup> Office of the Prime Minister of Malaysia, Speech by Prime Minister Najib Razak on 15 September 2011 in Angkasapuri, Kuala Lumpur, available at: [http://www.pmo.gov.my/?menu=speech&news\\_id=525&page=1676&speech\\_cat=2](http://www.pmo.gov.my/?menu=speech&news_id=525&page=1676&speech_cat=2).

of refugees and the situation of domestic workers. A fundamental aspect of all of these issues is the discrimination experienced by the affected groups.

The purpose of this report is to highlight and analyse discrimination and inequality in Malaysia and recommend steps aimed at combating discrimination and promoting equality. It explores long-recognised human rights problems, and also seeks to shed light upon less well-known patterns of discrimination. The report bring together – for the first time – evidence of the lived experience of discrimination and inequality in Malaysia on a wide range of grounds with an analysis of the laws, policies, practices and institutions established to address these problems.

ERT and Tenaganita have been working in partnership since 2010 on a project designed to empower civil society to combat discrimination and inequality in Malaysia. Throughout the project, the partners have undertaken research on discrimination and inequality by gathering direct testimony during field missions, as well as reviewing research conducted by others. They have also analysed the legal and policy framework governing discrimination and inequality in Malaysia. This report presents some of their findings.

The report comprises four parts. Part 1 sets out the conceptual framework which has guided the authors' work as well as the methodology used during the research process. It then provides an overview of the demographic, economic, social, political and historical context of discrimination and inequality in Malaysia. Part 2 discusses the principal patterns of discrimination and inequality affecting different groups in Malaysia. Part 3 analyses the legal and policy framework as it relates to discrimination and inequality. Part 4 contains conclusions and recommendations, drawn from an analysis of both the patterns of discrimination and inequality examined in Part 2 and the gaps, weaknesses and inconsistencies in the legal and policy framework identified in Part 3.

## **1.2 Conceptual Framework and Research Methodology**

This report takes as its conceptual framework the unified human rights perspective on equality which emphasises the integral role of equality in the enjoyment of all human rights, and seeks to overcome fragmentation in the field of equality law and policies. The unified human rights framework on equality is a holistic approach which, while keeping in view the specificities of the dif-

ferent strands of equality and the different types of disadvantage, seeks more effective implementation of the right to equality by stressing the overarching aspects of these different strands and types. The framework brings together inequalities based on different grounds, such as age, gender, race, religion, nationality, disability, sexual orientation and gender identity; and inequalities in different areas of life, such as the administration of justice, policing, employment, education, and provision of goods and services.

### ***The Unified Human Rights Perspective on Equality***

The unified human rights perspective on equality is expressed in the Declaration of Principles on Equality, developed and launched by the Equal Rights Trust (ERT) in 2008, following consultations with 128 human rights and equality experts from 47 countries in different regions of the world. Principle 1 of the Declaration defines the right to equality:

*The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.<sup>2</sup>*

Thus defined, the right to equality has a broader scope, when compared with the traditional approach in most national legal systems, and its content is richer than that of a right to non-discrimination. Most importantly, it encompasses a right to equal participation in all areas of life in which human rights apply, and it is a right which is autonomous. As Dimitrina Petrova states in a commentary on the Declaration:

*Defining the right to equality as requiring participation on an equal basis with others in any area of economic, social, political, cultural or civil life is consistent with international human rights law in delineating the areas in which human rights apply. But the Declaration defines the areas of application of the*

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2 Declaration of Principles on Equality, The Equal Rights Trust, London, 2008, Principle 1, p. 5.

*right to equality without drawing the distinctions between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, which have for so long bedevilled international human rights law. At the same time, the Declaration goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right (...) In the drafters' view, the right to equality (and non-discrimination) can be claimed in any of the listed five areas of social life, even in the absence of certain legal rights within them. (...) The definition in Principle 1 does not require the right to equality to be based on or related to the enjoyment of any other human right.*<sup>3</sup>

Thus the right to equality implies not only the equal enjoyment of other human rights. Nor is it limited to the equal benefit of rights set out in law. The Declaration proclaims that this right extends to guarantee equality in all areas of human life normally regulated by law, and should be addressed holistically. This approach recognises the interconnectedness of inequalities arising in different contexts, which makes it necessary to take a comprehensive approach to combating manifestations of discrimination arising in all areas of life. Therefore, this report examines the extent to which equality is enjoyed across all areas of economic, social, political, cultural or civil life.

This report takes the right to equality, as expressed in the Declaration, as the baseline against which it assesses the presence or degree of inequality. It goes beyond poorer notions of equality found in many legal systems, by comprising not only a right to be free from all forms of discrimination, but also a right to substantive equality in practice. As discussed below, this motivates an analysis of disadvantages affecting different groups beyond that which arises as a result of discernible acts of discrimination. From this perspective, many societal inequalities are seen as a consequence of historic disadvantage, but with a realisation that the broad right to equality defined in the Declaration requires states to address such inequalities, however “innocuous” their cause. Thus the unified framework makes *de facto* inequalities, whether or not they result from discrimination, a relevant subject for this report.

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3 Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, above note 2, pp. 30-31.

Regarding the relationship between the rights to equality and non-discrimination, the Declaration construes the right to be free from discrimination as subsumed in the right to equality.<sup>4</sup> Thus, when examining the situation of a particular group of persons, the report looks both at examples of discrimination and at inequality in participation in areas such as employment or public life, differential access to goods and services and socio-economic disadvantage.

The unified human rights perspective on equality makes it desirable and possible to provide a general legal definition of discrimination covering all types of discrimination. Principle 5 of the Declaration offers such a definition:

*Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.*

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.*

*Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.*

*Discrimination may be direct or indirect.*

**Direct discrimination** occurs when for a reason related to one or more prohibited grounds a person or group of persons is

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4 See above, note 2, Principle 4, p. 6.

*treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.*

**Indirect discrimination** occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

**Harassment** constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

*An act of discrimination may be committed intentionally or unintentionally.<sup>5</sup>*

This definition of discrimination takes a broad view regarding the list of **protected characteristics**. It contains both an extensive list of explicitly prohibited grounds of discrimination and a “test” for the inclusion of further grounds, according to which “candidate grounds” have to meet at least one of three conditions.<sup>6</sup> Thus, the definition provides a foundation for tackling the

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5 See above, note 2, Principle 5, p. 6-7.

6 See above, note 3, p. 34: “The definition of discrimination in Principle 5 includes an extended list of ‘prohibited grounds’ of discrimination, omitting the expression ‘or other status’ which follows the list of characteristics in Article 2 of the Universal Declaration of Human Rights. While intending to avoid abuse of anti-discrimination law by claiming discrimination on any number of irrelevant or spurious grounds, the definition nonetheless contains the possibility of extending the list of ‘prohibited grounds’ and includes three criteria, each of which would be sufficient to recognise a further characteristic as a ‘prohibited ground’. This approach is inspired by the solution to the open versus closed list of ‘prohibited grounds’ dilemma provided by the South African Promotion of Equality and Prevention of Unfair Discrimination Act (2000).”



full complexity of the problem to be addressed – a person’s lived experience of discrimination. It recognises that a single person may experience discrimination on a “combination” of subtly interacting grounds, or on grounds not previously recognised as “prohibited”, and that the cumulative impact of discrimination on different grounds can be bigger than the sum of its parts. The unified perspective on equality acknowledges that the phenomenon of discrimination must be addressed holistically, if it is to be effectively challenged.

Principle 5 provides the basis for consideration of the range of identity-based groups included in the report. Thus, at various points, the report examines discrimination on grounds of race and ethnicity; gender; nationality; sexual orientation and gender identity; disability; and health status. Furthermore, the report examines some patterns of discrimination and inequality – such as the discrimination suffered by indigenous rural women – which do not fall within any of the specified grounds, but which it is felt need to be covered, in compliance with the second paragraph of the definition, and also because they are important patterns of multiple discrimination.

The Declaration defines three forms of **prohibited conduct** which constitute discrimination: direct discrimination, indirect discrimination and harassment. All three concepts reflect current expert opinion on the definitions of the different forms of discrimination in international<sup>7</sup> and regional<sup>8</sup> human rights and equality law. They are used throughout Part 2 to assess the patterns of discrimination identified by the research against the state’s obligation to respect the right to non-discrimination, and in Part 3 as a basis against which to assess the adequacy of legal provisions intended to protect people from discrimination.

This report relies on a number of other important concepts and definitions contained in the Declaration of Principles on Equality. Thus, the report em-

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7 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 10.

8 See, for example, European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Articles 2(a), 2(b) and 3; and European Union Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Articles 2(a), 2(b) and 3.

plays the definition of **reasonable accommodation** provided in Principle 13 of the Declaration:

*To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.*

*Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.<sup>9</sup>*

In line with international law in this area, the approach taken in the report is that a denial of reasonable accommodation constitutes discrimination.<sup>10</sup> Reflecting an emerging international consensus on this issue, the concept of reasonable accommodation “is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life”.<sup>11</sup> Thus, in the context of this report, it is accepted that the duty of reasonable accommodation can arise in respect of any ground.

Similarly, the report employs the understanding of **positive action** provided in Principle 3 of the Declaration. As with other principles in the Declaration, this principle draws upon emerging approaches in international and regional human rights law, in this case with regards to the concepts of special meas-

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9 See above, note 2, Principle 13, p. 10-11.

10 See, for example, Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006, Article 2; Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities*, UN Doc. E/1995/22, 1995, Para 15: “disability-based discrimination” includes the denial of “reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.

11 See above, note 3, p. 39.

ures in the various instruments,<sup>12</sup> whereby “it should be noted that the Declaration captures the growing tendency of interpreting “special measures” as part of, rather than an exception to, equal treatment”.<sup>13</sup> Principle 3 states:

*To be effective, the right to equality requires positive action.*

*Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.*<sup>14</sup>

The notion of positive action plays an important role in the unified perspective on equality, and, therefore, in the approach of this report. As previously discussed, the right to equality extends beyond a right to be free from discrimination and contains an element of participation on an equal basis with others in all areas of life regulated by law. Positive action is key to addressing those inequalities which are not attributable solely to discrimination. Having identified patterns of substantive inequality in Part 2, Part 3 of this report analyses the adequacy of positive action measures to address these.

The review of laws and policies in Part 3 of this report is based on an assessment against those parts of the Declaration which set out the **obligations of the state** with regards to the rights to equality and non-discrimination, including in particular Principle 11. In this regard, the Declaration applies the understanding of state obligations in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as explained, *inter alia*, in General Comment 3 of the Committee on Economic, Social and Cultural Rights (CESCR) and Gen-

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12 See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Article 1(4); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 1979, Article 4(1); and Organisation of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6, 2000, Article 2(1)(d).

13 See above, note 3, p. 32.

14 See above, note 2, Principle 3, p. 5.

eral Comment 31 of the Human Rights Committee (HRC). As stated in the commentary on the Declaration:

*By analogy with the interpretation of States' obligations set out in General Comment 3 of the UN Committee on Economic, Social and Cultural Rights, States are required to take all necessary steps, including legislation, to give effect to the right to equality in the domestic order and in their international co-operation programmes. The right to full and effective equality may be difficult to fulfil; however, the State does not have an excuse for failing to take concrete steps in this direction. The requirement to take such steps is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to cultural, economic, political, security, social or other factors.<sup>15</sup>*

### **Research Methodology**

Applying the unified human rights perspective on equality has a number of consequences for the content, structure and methodology of this report. The **first consequence** is reflected in the subject and scope of the report – the presentation of discrimination and inequality on a number of different grounds in the same study, covering the grounds of race or ethnicity, gender, sexual orientation, etc., side by side. While it is clearly beyond the scope of the report to provide a detailed analysis of discrimination and inequality arising on every ground, the aim has been to present what appear to be the most significant patterns of discrimination and inequality found in the Malaysian context. In respect of certain grounds, it has not been possible to include every group which is vulnerable to discrimination and inequality on that ground: the examination of issues affecting indigenous communities, for example, looks at just a few of these communities to illustrate the issues which affect indigenous communities in general.

Presenting patterns of discrimination and inequality alongside each other also requires a specific weighing of the sources of evidence. To some extent,

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15 See above, note 3, p. 38.

Part 2 of the report relies on pre-existing research into inequalities affecting particular groups, which was substantial and readily available in some areas, but limited in others. In those areas where pre-existing research was unavailable, ERT has relied more heavily on direct testimony from individual victims, or interviews with professionals working on behalf of particular groups. The evidence obtained through field research and desk research has been weighed and contextualised, with a view to mapping out discrimination and disadvantage in Malaysia as true to reality as possible. In so doing, it is hoped that the report also illuminates the links between inequalities on different grounds, through identifying overarching issues, instances of multiple discrimination and common experiences.

The **second consequence** of applying the unified human rights perspective relates to the scope of application of the right to equality, which encompasses all areas of activity regulated by law. In respect of each ground of discrimination and inequality, the report seeks to assess people's experience of discrimination across the full range of areas of activity, such as public functions, employment, education, or healthcare. But in this respect, too, the evidence is uneven: there is little evidence of discrimination or inequality in particular areas of life for certain disadvantaged groups, either because persons within these groups do not experience disadvantage in a particular area, or because evidence of such disadvantage was not forthcoming in the course of the research. Thus, the approach taken was to seek evidence of discrimination and inequality in all areas of life regulated by law, but to focus on those areas where problems appeared to be more significant, and to pass over areas where evidence was not forthcoming.

The **third consequence** of applying the unified perspective is to require an analysis of both violations of the right to non-discrimination and the right to equality. The report takes the right to equality, as defined in the Declaration of Principles on Equality, as the baseline against which it assesses the degree of inequality. Thus, the report investigates patterns of substantive inequality, by looking at the element of "participation on an equal basis with others in economic, social, political, cultural or civil life", thereby extending beyond experiences of discrimination. In discussing the patterns of gender inequality, for example, the report finds extensive evidence of substantive inequality in access to basic amenities, employment, education and healthcare. While in some cases these can be easily put down to current or past discrimination, whether direct or indirect, in other cases this would not be relevant. In any

case, the state should take steps to addressing these substantive inequalities, thus going beyond its obligations understood as ensuring formal equality.

The **final consequence** of this approach is to present evidence of patterns of discrimination and inequality alongside an analysis of the legal and policy framework on promoting equality. The existence and enforcement of laws and policies prohibiting discrimination and promoting equality is a critical factor – though by no means the only one – in ensuring enjoyment of the rights to non-discrimination and equality. Protecting people from discrimination by enacting such laws is a key state obligation in respect of these rights. Thus, this report seeks to match an assessment of the lived experience of discrimination and inequality with a review of Malaysia’s legal and policy framework, in order to establish where the law discriminates, where gaps and inconsistencies in legal protection exist, and where laws are inadequately enforced. The analysis of patterns of discrimination in Part 2 of the report gives rise to a number of concerns about the adequacy and enforcement of the laws and policies designed to address discrimination and inequality in Malaysia. Part 3 of this report assesses the adequacy of the legal and policy framework in the light of the Declaration’s principles relating to access to justice for discrimination victims, evidence and proof in discrimination proceedings, and other elements of enforcement of equality rights.<sup>16</sup> While the necessity of effective enforcement of the rights to non-discrimination and equality is illustrated by the findings in Part 2 of this report, these issues are discussed in more detail in Part 3, and Part 4 formulates recommendations about legal and policy reform, implementation and enforcement. Thus, it is hoped that the information contained in Part 2 provides a strong evidence base for analysing the effectiveness of the laws and policies discussed in Part 3, and therefore to ensure that the conclusions and recommendations in Part 4 are relevant and robust.

ERT and Tenaganita have been working in partnership since 2010, on a project designed to empower civil society to combat discrimination and inequality in Malaysia. Throughout the project, the partners have undertaken research on discrimination and inequality by gathering direct testimony during field missions, including through structured interviews, focus groups discussions, and soliciting submissions from organisations working with those who are

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16 See above, note 2, Principles 18-25, pp. 12-14.

vulnerable to discrimination in Malaysia. The partners have also reviewed research conducted by others, including human rights reports produced by non-governmental organisations (NGOs), academic articles, government statistics, and data compiled by international organisations. In analysing the legal and policy framework governing discrimination and inequality in Malaysia the partners were advised by a Malaysian legal expert, and have otherwise relied upon government websites containing details of government policy and legislation which is available online.

The partnership between an international and national organisation has had a number of benefits, including enabling the use of both local and international sources and ensuring that research is both properly responsive to the local context and based on comparative international expertise.

### ***Scope and Limitations of the Report***

The reality of discrimination and inequality is such that experiences are as many and varied as the population of Malaysia itself. Each person will have their own experiences of discrimination and inequality, arising in different areas of life, in different circumstances, in interaction with different persons, institutions or organisations and as a result of any aspect of their identity, or any combination of these aspects. Given this, the aim of Part 2 is to provide a broad overview of the principal patterns of discrimination and inequality which arise in relation to those grounds felt to be most significant in the Malaysian context. It does not address the experiences of all categories or groups of people in all areas of life.

The research for this report was severely constrained by a lack of disaggregated statistical data pertaining to the situation of certain groups, and certain areas of life. Consequently, certain issues, which would usually fall within the scope of a report addressing equality and discrimination, do not feature in the report at all. For example, the situation of older persons is not addressed, because of a lack of data and testimony from which it could be seen whether older persons in Malaysia are significantly disadvantaged through age discrimination. Further, the absence of disaggregated data in relation to certain areas of life, such as housing, education, employment, criminal justice, physical security, etc., has limited the extent to which the authors have been able to discuss all aspects of life for every equality group in Malaysia. Consequently, while the report may discuss the experiences of one or more groups in the

education system, or employment, or their health outcomes, it has not been possible to examine all groups' experiences in all areas of life. These omissions should not be interpreted as an indication that there is no disadvantage in the omitted areas, or in respect to the omitted groups. Rather, the decision not to include an assessment of discrimination or inequality in a particular area or for a particular group was motivated simply by a lack of evidence during the desk and field research stages of producing this report. Indeed, a lack of evidence in respect of a particular group could in itself indicate a lack of commitment to understanding and addressing their needs.

### 1.3 Country Context

Malaysia, located in Southeast Asia, consists of 13 states and 3 federal territories divided between Peninsular Malaysia and East Malaysia, which are separated by the South China Sea. According to 2010 data, it is the 67<sup>th</sup> largest country in the world, comprising a total land area of 330,803 km<sup>2</sup> and providing home to approximately 28,250,000 people.<sup>17</sup> The capital city is Kuala Lumpur, and Putrajaya is the seat of the federal government.

Malaysia is ethnically diverse. According to the 2010 Population and Housing Census, Malaysian citizens consist of the following ethnic groups: Bumiputera (67.4%), Chinese (24.6%), Indians (7.3%) and others (0.7%).<sup>18</sup> Bumiputera ("sons of the earth") is a non-legal term used to refer to ethnic Malays and the natives of Sabah and Sarawak. Among Malaysian citizens, in 2010 the Malays made up the predominant ethnic group in Peninsular Malaysia, constituting 63.1%. In the same year, the indigenous Iban were 30.3% of the total citizens in Sarawak, while Kadazan-Dusun made up 24.5% in Sabah.<sup>19</sup> In January 2012, the Office of the United Nations High Commissioner for Refugees (UNHCR) estimated that there were over 130,000 refugees, asylum seekers and stateless persons in Malaysia.<sup>20</sup> In 2010, 8.2% of the population were

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17 United Nations, *Demographic Yearbook 2009-10*, New York, 2011, p. 64.

18 Department of Statistics, Malaysia, *Population and Housing Census, Malaysia 2010*.

19 Ibid.

20 United Nations High Commissioner for Refugees, *2012 UNHCR country operations profile – Malaysia*, 2012.



non-citizens.<sup>21</sup> The country's official language is Malay, but English, various dialects of Chinese, Tamil and other languages are also spoken.

Islam is the most widely professed religion in Malaysia, accounting for 61.3% of the population. Other major religions practised are Buddhism (19.8%), Christianity (9.2%) and Hinduism (6.3%).<sup>22</sup> There is a strong relationship between race and religion in Malaysia. The majority of Malays are Sunni Muslims of the Shafi'i school of thought, while many of the indigenous groups from Peninsula Malaysia, Sabah and Sarawak are Christians or Muslims. Most Indians are Hindus, while the Chinese are generally Buddhists or Christians.<sup>23</sup>

Widely referred to as a new economic Asian Tiger, Malaysia has a strong economy and was less affected than expected by the global economic crisis of 2008-2010. Its fiscal position is among the strongest in Asia.<sup>24</sup> Malaysia's Gross Domestic Product (GDP) for 2010 was US \$237,804 million, placing it in 35<sup>th</sup> place on the GDP list produced by the World Bank.<sup>25</sup>

The United Nations Development Programme ranked Malaysia in 61<sup>st</sup> place in its Human Development Index for 2011.<sup>26</sup> Malaysia's Income Gini coefficient for 2011, measuring inequality in the distribution of wealth, was 46.2. The ratio of the average earnings of the richest 20% to those of the poorest 20% was 11.4.<sup>27</sup>

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21 See above, note 18.

22 Ibid.

23 Minority Rights Group International, *Malaysia Overview*.

24 Vardy, N., "Another Unassuming Asian Tiger", *Money Show*, 27 May 2010.

25 The World Bank, *Gross Domestic Product 2010*, 2010.

26 United Nations Development Programme, *Human Development Index: 2011 Rankings*, 2011.

27 United Nations Development Programme, *Human Development Report 2011: Sustainability and Equity – A Better Future for All*, United Nations Development Programme, 2011, p. 136.

## 1.4 Government and Politics

Malaysia is a constitutional monarchy which became independent from the British Empire in 1957. The parliamentary system of government is based on the Westminster model but with significant differences. The bicameral federal parliament consists of the lower house, the House of Representatives and the upper house, the Senate. However, unlike the British Parliament, the Malaysian Parliament is not supreme; it is governed by a written constitution.

Malaysia is a federation with a Federal Government and 13 state governments. At the federal level, the government is headed by a King, the Yang Di Pertuan Agong, who is elected for a five-year term by, and from among, the hereditary rulers of the nine states of Peninsular Malaysia – “the Conference of Rulers”. He has limited executive powers, acting on the advice of the Prime Minister in most matters. The state governments are headed by a hereditary Malay Ruler (in nine of the states) or an appointed Governor (in four states). The state legislatures are unicameral made up of elected state “assemblymen”. There is also a third tier of local government made up of city councils, municipal councils and district councils. This tier is made up of appointed local councillors after local government elections were abolished in 1965.

Elections are based on the “first-past-the-post” system and are carried out every five years. Since independence, Malaysia has been governed without interruption by the Alliance Party, later renamed the National Front or Barisan Nasional (BN), a coalition of 13 parties dominated by the United Malays National Organisation (UMNO). The other parties are the Malaysian Chinese Association (MCA), the Malaysian Indian Congress (MIC), the Malaysian People’s Movement Party (GERAKAN), the People’s Progressive Party (PPP), Parti Pesaka Bumiputera Bersatu (PBB), the Sarawak United People’s Party (SUPP), Parti Bersatu Sabah (PBS), the Liberal Democratic Party (LDP), Parti Bersatu Rakyat Sabah (PBRS), the United Pasokmomogun Kadazandusun Murut Organisation (UPKO), the Sarawak Progressive Democratic Party (SPDP) and the Sarawak People’s Party (PRS). The Prime Minister is the leader of the majority party in the House of Representatives and is considered to be the most power-

ful political authority.<sup>28</sup> Since April 2009, Najib Tun Razak has been the Prime Minister of Malaysia – the sixth since independence. The People’s Alliance, or Pakatan Rakyat (PR), is the main opposition coalition.

The judicial system in Malaysia is characterised by a dual legal system which comprises a system of civil and criminal courts and a separate system of Sharia (or Syariah – the preferred spelling in Malaysia) courts for matters related to Islamic law. The highest court in the judicial system is the Federal Court, followed by the Court of Appeal and two high courts, one for Peninsular Malaysia and one for East Malaysia. The Islamic judges sitting in Syariah courts are expected to follow the Shafi’i legal school of Islam. Malaysia also has a special court to hear cases brought by or against Royalty.

The Federal Constitution of Malaysia contains certain provisions to ensure an independent judiciary. However, since the judicial crisis of 1988,<sup>29</sup> the image of the judiciary has deteriorated significantly, resulting in loss of public confidence, made worse after its handling of the sodomy trial of the dismissed Deputy Prime Minister, Anwar Ibrahim, in the late 1990s.<sup>30</sup> The government has referred to Anwar Ibrahim’s January 2012 acquittal as evidence of the judiciary’s independence.<sup>31</sup>

In addition to the civil law and Syariah law systems, the states of Sabah and Sarawak also have systems of native customary law. The many different native communities within these states recognise their own sets of

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28 Library of Congress, *Country Profile: Malaysia*, September 2006, p. 18.

29 For information on the events of the 1988 crisis, see Koshy, S. et al, “Events that led to judicial crisis of ‘88”, *The Star*, 18 April 2008.

30 For information on the trial, see Joint Mission on Behalf of the International Bar Association, the ICJ Center for the Independence of Judges and Lawyers, the Commonwealth Lawyers’ Association, and Union Internationale des Avocats, *Justice in Jeopardy: Malaysia 2000*, 10 June 2008, pp. 40-49.

31 BBC, “Anwar Ibrahim acquitted of sodomy in Malaysia”, *BBC News*, 9 January 2012.

customs, although often these are not codified, which leads to uncertainty both in terms of the applicability and content of the laws. Native Courts in each district are headed by native chiefs assisted by the village head, and an appeal can be addressed to District Officers and ultimately to the native Court of Appeal. The process is largely informal. Records are not kept and evidence is given only orally. Cases do not form a binding precedent on the courts and decisions are confined to the relevant district or village. Under this system, a native may elect to seek settlement in a Native Court rather than in the Civil Court.<sup>32</sup>

Malaysia's human rights record is mixed.<sup>33</sup> International and domestic human rights organisations express grave concern in some areas. The Internal Security Act 1960, the Official Secrets Act 1972 and the Printing Presses and Publications Act 1984 have been used to suppress the development of civil society. While Prime Minister Najib Razak pledged to repeal the Internal Security Act in September 2011, November 2011 reports suggested that a number of people had been arbitrarily arrested under the Act, which permits indefinite detention without charge or trial.<sup>34</sup>

Further, newspapers, broadcasters, cartoonists and bloggers have been subject to restrictions under the Sedition Act 1948, the Printing Press and Publications Act 1984 and the Communications and Multimedia Act 1998.<sup>35</sup> In November 2011, in a move which has been described as "an alarming indication of backsliding in freedom of assembly and expres-

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32 NGO Shadow Report Group, *NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 2005, Para 5.3.

33 See United Nations Development Programme, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development*, 2010, p. 165. Malaysia scored 2 (for the year 2008) in respect of human rights violations, where a score of 1 indicates the lowest degree and 5 the highest degree of human rights violations, with statistical assessments based on Amnesty International reports.

34 Human Rights Watch, *Malaysia: End Use of Internal Security Act*, 21 November 2011.

35 Human Rights Watch, *Country Summary – Malaysia*, January 2010; Amnesty International, *Annual Report 2011: The State of the World's Human Rights*, 2011.

sion”, the Malaysian Senate passed the Peaceful Assembly Bill, which further restricted political freedoms.<sup>36</sup>

On 28 April 2012 thousands of people took to the streets in the biggest mass opposition rally in Malaysia’s history. The protests, organised by a coalition of non-government organisations called Bersih, demanded changes to Malaysia’s electoral system, which in their view favours the BN coalition which has been in power since independence. The protests turned violent as the police

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36 BBC, “Malaysia passes street protest ban as lawyers march”, *BBC News*, 29 November 2011. As this report was at a late stage of finalisation, in April 2012, rapid new developments took place in a burst of legislative activity in the Malaysian parliament. The Internal Security Act 1960 has been abolished and replaced by the Security Offences (Special Measures) Bill, which was passed by the Dewan Rakyat (House of Representatives) in April 2012 after one and a half days of debate. Although the Bill incorporated some of the suggestions of the Bar Council and SUHAKAM (the National Human Rights Commission of Malaysia), including a 28-day detention period (see *The Star*, “President: Detention period under replacement Act is consistent with our stand”, *The Star*, 12 April 2012), the Bar Council, SUHAKAM and Human Rights Watch have warned that the Bill contained provisions which may set the stage for future violations of civil liberties and urged for a longer deliberation period. (See Shukry, A., “Suhakam joins call for review of ISA replacement law”, *The Malaysian Insider*, 16 April 2012; see also Human Rights Watch, *Malaysia: Security Bill Threatens Basic Liberties*, 10 April 2012.) Also in April, the Printing Presses and Publications (Amendment) Bill 2012 was passed by the Dewan Rakyat. It aimed to remove the Home Affairs Minister’s “absolute discretion” under section 3(3) of the Printing Press and Publications Act 1984 to grant or refuse printing press licences, and enable publishers to challenge such a decision in court. (See Bernama, “Greenlight for Printing Presses and Publications (Amendment) Bill 2012”, *New Straits Times*, 20 April 2012; see also Meikeng, Y., “Dewan Rakyat passes Printing Presses and Publications (Amendment) Bill 2012”, *The Star*, 20 April 2012.) However, as this Bill was one of eight Bills passed in one day in an unprecedented rush to pass Bills in Dewan Rakyat despite outcry from the opposition, it was feared that there were further provisions in the Bill which, similar to the Security Offences (Special Measures) Bill, may create additional restrictions on human rights. (See Chooi, C., “BN not ‘bulldozing’ laws, says deputy minister”, *The Malaysian Insider*, 19 April 2012; *idem*, “As polls loom, Parliament’s last session ‘suspends’ time to approve laws”, *The Malaysian Insider*, 20 April 2012.) Regarding freedom of association, two of the eight Bills passed in April – the Universities and University Colleges (Amendment) Bill 2012 and the Private Higher Educational Institutions (Amendment) Bill 2012, have amended provisions in previous legislation that had made student membership in a political party illegal. However, the Bar Council warned that, while permitting students to be members of a political party, the Bills placed restrictions on the rights of association, speech and expression that render the improvement illusory. (See Malaysian Bar Council, *Press Release: Bills relating to students’ freedoms inconsistent with constitutional guarantees*, 13 April 2012.) The Educational Institutions (Discipline) (Amendment) Bill 2012 was also seen to have a similar effect. On the positive side, the Election Offences (Amendment) Bill 2012, possibly the most controversial among the eight Bills, which would remove, among other measures, a political candidate’s right to have his agents monitor the process of voter identification, was abandoned – which many speculate to be a result of the hostile response to it shown by the public. (See, for example, *Freemalaysiakini*, “Election amendment Bill a fraudster’s charter”, *Freemalaysiakini*, 25 April 2012.)

used water cannons, fired teargas at protesters and put up barricades, and a number of arrests were made. In the aftermath of the protest opposition leader Anwar Ibrahim was charged with violating the laws on street protests. He has denied the charges and claimed that they were part of a politically motivated campaign against him, which also included the charges of sodomy of which he was acquitted in January 2012.

## 2. PATTERNS OF DISCRIMINATION AND INEQUALITY

This section discusses patterns of discrimination and inequality in Malaysia. Based on original direct testimony and analysis of existing research from sources including international organisations, governments, non-governmental organisations, academics and news reports, it seeks to elaborate the principal patterns of discrimination and inequality which affect people in Malaysia. This section discusses discrimination on grounds of race and ethnicity, gender, religion and belief, sexual orientation, gender identity, age, disability, health status, immigration status and political opinion. In respect of each ground, there is, to the extent that the necessary information is available, a discussion of different groups' experiences in each area of life, including as a result of discriminatory laws, actions of state actors carrying out public functions, exposure to discriminatory violence and discrimination in areas such as employment, education and access to goods and services.

A number of key themes can be identified as central to these patterns of discrimination. The first is the pervasiveness of race relations issues, which impact upon all areas of life, not least as a result of the close alignment between race, religion and politics. A second is the role played by the dual legal system, according to which civil law and Syariah law operate in parallel and Muslims and non-Muslims are subject to different laws, particularly in the areas of family and criminal law. Thirdly, the prominence of a conservative interpretation and implementation of Islam within Malaysian culture creates an environment in which societal attitudes and practices are governed by conservative perceptions of, *inter alia*, the role of women within society, and the appropriateness of behaviour deemed to be "irreligious", such as sex outside of wedlock, same-sex relationships and cross-dressing. Such attitudes provide a context in which discrimination against women, children, gay and transgender persons occurs in all areas of life. Fourthly, it is notable that poverty is a common thread running throughout most of the patterns of discrimination identified. The severity of discrimination experienced by individuals and groups is usually directly related to their socio-economic standing or their relative position of power. Finally, Malaysia's large migrant population is the target of discriminatory conduct and is denied the ability to participate in most areas of life on an equal basis with citizens, despite the reliance of the expanding Malaysian economy on this additional work force. Each of these themes is discussed further in the subsections below.

## 2.1 Racial and Ethnic Inequalities

Race relations and race politics pervade any discussion of politics, economy, society and culture in Malaysia, but are particularly relevant when examining issues of discrimination and inequality. The affirmative action policy adopted by the government of Malaysia in the early 1970s continues to apply, and has disadvantaged not only those ethnic groups who are excluded from the benefits of affirmative action (mainly Chinese and Indians), but also those within the Bumiputera community who are on lower to average incomes. The main areas of disadvantage identified relate to education, employment and housing.

### *Affirmative Action Policy*

Even before independence, race and ethnicity played an important role in Malaysia. During the British colonial administration, the British accorded a special status to the Malays, whom they regarded as the original inhabitants of Malaysia,<sup>37</sup> even though many Malays had themselves migrated from Indonesia. The British propagated the idea that the Malays were in need of protection against the immigrant Chinese and Indians, and accorded them preferential rights in various spheres of society.<sup>38</sup> Ironically, the same level of protection was not accorded to the Orang Asli (“original people”, “natural people” or “aboriginal people” in Malay) – the 18 tribes who had a longer history of settlement in the country.

As with many other laws and policies of the British colonial administration, this policy was continued by the Alliance Party after independence. The special position of the Malays was enshrined in Article 153 of the Federal Constitution of Malaysia which did, however, also acknowledge the “legitimate interests” of other communities. In 1963, with the inclusion of Sabah and Sarawak in the federation, the privileged position accorded to the Malays was extended to cover the “natives” of the two new states. Article 153 of the Con-

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37 Crouch, H., “Managing Ethnic Tensions Through Affirmative Action: The Malaysian Experience”, in Colletta, N.J., Lim, T.G., and Kelles-Viitanen, A. (eds.), *Social Cohesion and Conflict Prevention in Asia*, The World Bank, Washington DC, 2001, p. 230.

38 Haque, M.S., “The Role of the State in Managing Ethnic Tensions in Malaysia”, *American Behavioral Scientist*, Vol. 47(3), November 2003, p. 244.



stitution requires the King of Malaysia to “safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities”. He is also required to reserve for the Malays and natives of any of the States of Sabah and Sarawak (often identified as “Bumiputera”, even though the latter term has no legal meaning) such proportion that he deems reasonable of:

- (i) *positions in the public service (other than the public service of a State);*
- (ii) *scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government; and*
- (iii) *any permit or license for the operation of any trade or business as required by federal law, subject to the provisions of that law.*<sup>39</sup>

Since its enactment, Article 153 has been extended to cover places in post-secondary education.<sup>40</sup> Article 153 is supplemented by Article 89, relating to “Malay reservation” land, which is land reserved for alienation to Malays or to natives of the state in which it lies.<sup>41</sup>

The 1960s saw rising ethnic tensions and increasing challenges against the policy of according special status to the Bumiputera. There was a lack of consensus on the need for, and rationale behind, the policy. While some insisted the policy was justified by Malay supremacy (*ketuanan Melayu*),<sup>42</sup> others ral-

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39 Federal Constitution of Malaysia 1957 as amended, The Commissioner of Law Revision, Malaysia, in collaboration with Percetakan Nasional Bhd, 2006, Article 153(2).

40 Ibid., Article 153(8A).

41 Ibid., Article 89(6).

42 See Wade, G., “The Origins and Evolution of Ethnocracy in Malaysia”, *Asia Research Institute Working Paper Series No. 112*, Asia Research Institute: National University of Singapore, April 2009, p. 33.

lied behind the idea of a “Malaysian Malaysia”.<sup>43</sup> Ethnic tensions were exacerbated by the perceived inter-ethnic economic inequality.<sup>44</sup> These ethnic tensions culminated in the race riots of May 1969, following a dismal performance by the Alliance Party in elections and strong electoral gains by political opposition parties associated with Indian and Chinese minorities. Almost 200 (mostly Chinese) people were killed.<sup>45</sup>

Post-1969 governance in Malaysia was characterised by moves to redress the ethnic socio-economic imbalance that the government identified as the root cause of the 1969 riots. In 1971, Article 153 of the Constitution was implemented by the government in the form of the explicit and wide-ranging pro-Bumiputera policies in the New Economic Policy (NEP). The Policy broadened the scope of preferential treatment for the Bumiputera even further. The NEP was intended to be a temporary measure “to reduce and eventually eradicate poverty” and to restructure “Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function”.<sup>46</sup> The key elements of the NEP were:

- Quotas for Bumiputera in admission to state universities and premier residential schools;
- Quotas in the granting of scholarships;
- Quotas for Bumiputera in public employment positions;
- A statutory share of 30% of corporate equity for Bumiputera;
- Bumiputera employment quotas in the private sector to ensure increase in the number of Bumiputera businessmen;
- Bumiputera quotas in the tendering of government contracts and business licences;

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43 Ibid., p. 19.

44 See above, note 37, p. 230.

45 Minority Rights Group International, *Malaysia Overview*.

46 Government of Malaysia, *Second National Plan (1971–75)*, 1971.

- Preferential treatment in the allocation of public low-cost housing; and
- Bumiputera discounts for the purchase of residential properties.

In 1990, the NEP was replaced by the National Development Policy. While the two-pronged objectives of poverty eradication and economic restructuring remained, the 1990s saw discontinuation of some pro-Bumiputera measures through liberalisation of certain investment and education policies, for example in foreign equity ownership, and teaching of maths and science in English rather than Bahasa Malaysia. Today, preferential treatment of Bumiputera continues in land ownership, employment, business permits and licences and education, with the complete exclusion of some groups from participation in certain cases.

Positive action is an important tool for accelerating progress towards substantive equality for particular groups. Where properly designed and implemented, it is entirely consistent with the right to be free from discrimination, and even required by the right to equality.<sup>47</sup> Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states as follows:

*States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.*<sup>48</sup>

However, in order to be compatible with the right to equality, positive action must meet a number of conditions. The Committee on the Elimination of Racial Discrimination (CERD) states that any such measures must be:

*[A]ppropriate to the situation to be remedied, be legitimate,*

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47 *Declaration of Principles on Equality*, The Equal Rights Trust, London 2008, Principle 3, p. 5.

48 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Article 2(2).

*necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.*<sup>49</sup>

Positive action must be undertaken for the sole purpose of ensuring the equal enjoyment of human rights and fundamental freedoms and must not lead to the maintenance of separate rights for different racial groups.<sup>50</sup> They shall “in no way entail as a consequence the maintenance of unequal or separate standards”.<sup>51</sup>

Article 153 and Article 89 of the Constitution are intended to protect the Malays and indigenous persons of Sabah and Sarawak from the disadvantage which they were perceived to be experiencing as a result of Chinese advancement after independence. However, the privileges accorded to certain racial groups in the Constitution do not meet a number of the requirements set out by the treaty bodies in order for positive action to be legitimate. The proportionality of the measures taken under Article 153 is far from clear. The power of the Yang Di Pertuan Agong to reserve such proportion of employment, business and educational opportunities as he deems reasonable is very broad, and the discretionary nature of the provision leaves it open to arbitrary application. Article 153 contains some checks and balances,<sup>52</sup> but these have often been overlooked. For example, Article 153(9) provides that, “[n]othing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak”. However, it is well-known in Malaysia that “Class F” construction licences (which commission projects worth the smallest sums – up to RM (ringgit) 200,000) are only issued to Bumiputera contractors. In order to be legitimate, positive action measures must not only be proportionate in their design, but also in their implementation.

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49 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, CERD/C/GC/32, August 2009, Para 16.

50 Ibid., Paras 21 and 26.

51 See above, note 48, Article 4.

52 See, for example, Articles 153(4), 153(5), 153(7), 153(8) and 153(9) of the Federal Constitution of Malaysia, above note 39.

While the Reid Commission that drafted the constitution recommended that the provision on the special position of the Malays be reviewed after 15 years, Articles 153 and 89 have been enshrined in the Constitution as a permanent privilege enjoyed by Malays and indigenous persons of Sabah and Sarawak. They appear, therefore, to maintain unequal or separate standards, in contravention of the prohibition of discrimination.

Further, there is dispute as to whether the objectives of the “positive action” in Article 153 and Article 89 have been achieved. Government statistics suggest that the Malay majority in Malaysia remains in a disadvantaged position, whilst other studies indicate that the objectives of the NEP were met many years ago. For example, one major target of the policy, that the Bumiputera should hold 30% of the nation’s corporate equity, has been met and sustained. While the government claims that this target is yet to be met, other studies have shown that the programme has reached and potentially exceeded its target.<sup>53</sup> A Centre for Public Policy Studies report, for example, argued that government figures from 2008 showing that the Bumiputera owned only 19.4% of corporate equity in 2008 were based on questionable methodology and that the Bumiputera owned 70% of government-linked companies. The report was later retracted, allegedly under government pressure.<sup>54</sup> The government has not responded to public requests to make its methodology available.<sup>55</sup> To be legitimate, affirmative action measures must be “designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned”.<sup>56</sup>

Government statistics and reports do indicate significant benefits enjoyed by the Bumiputera as a result of these affirmative action policies, especially in terms of poverty reduction and growth of the Malay middle class. But those who have benefited the most are generally those with strong political links

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53 United States Department of State, *2010 Human Rights Report: Malaysia*, 8 April 2011, p. 29.

54 The Coalition of Malaysia NGOs in the UPR Process, *Submission to the Universal Periodic Review on Malaysia*, September 2008, Para B2.

55 See above, note 53.

56 See above, note 49.

to the ruling party.<sup>57</sup> As the race-based policies were not subject to upper income limitations, they have contributed to the widening economic disparity within the Bumiputera community.<sup>58</sup> Further, while the NEP was premised on the notion of an expanding economic pie, and intended to ensure that no ethnic group would be deprived of the benefits of economic growth, some sections of the Chinese and Indian populations in Malaysia have felt the negative impact of the affirmative action policies, in part due to a decline in economic growth. The Indian community continues to be disadvantaged economically, and faces significant poverty and low levels of education in comparison to both the Chinese and the dominant Malay.<sup>59</sup>

There has been some recognition of the need to adjust policies in response to such developments. In April 2009, the Prime Minister announced that the government had lifted the 30% Bumiputera equity requirement in 27 service subsectors including health, tourism, business and computer services. But observers have commented that, as companies still have to offer 50% of the public shareholding spread to Bumiputera investors, this is only a minor adjustment to the affirmative action policies which favour the Malay community.<sup>60</sup> In early 2010, Prime Minister Najib introduced his New Economic Model (NEM). Acknowledging growing intra-ethnic disparities, he said public spending on poverty should be needs-based, rather than ethnically oriented.<sup>61</sup> However, it remains to be seen whether the BN-controlled Federal Government will introduce significant reforms to ensure greater substantive equality in practice.

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57 Fee, L.K. and Appudurai, J., "Race, Class and Politics in Peninsular Malaysia: The General Election of 2008", *Asian Studies Review*, March 2011, Vol. 35, p. 72.

58 See above, note 53.

59 Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples: Malaysia Indians*.

60 Spykerman, N. and Lian, L.W., "Najib slashes Bumiputera equity quotas, FIC role", *The Malaysian Insider*, 30 June 2009; see also above note 53, p. 42.

61 Gooch, L., "Malaysia Outlines New Growth Strategy", *The New York Times*, 30 March 2010.

## Education

Education was seen as key nation-building tool following independence. Schools in the primary education system are divided into two categories: national primary schools, which teach in Malay, and vernacular schools, which teach in Chinese or Tamil. As part of nation-building, use of Malay language has been thought to be an important means of creating a national identity.<sup>62</sup> However, the use of Malay as the language of instruction in state schools directly disadvantages those whose first language is not Malay and has led, in practice, to greater racial segregation, and a situation in which different racial groups have vastly different educational experiences. Students who have their secondary education in Malay but have not been in primary state schools may be put at a particular disadvantage as compared to those who have attended primary state schools since the early stages of primary education, as in primary state schools most students, both Malay and non-Malay, only learn practical or written Malay and therefore are better in the practical application of the Malay language, especially its technical usage in science and mathematics.

In the report of his visit to Malaysia in 2007, the Human Rights Council's Special Rapporteur on the right to education identified the segregation of primary school education into three types: (i) national schools (Malay); (ii) type C schools (Chinese national type); and (iii) type T schools (Tamil national type). The national schools, numbering 5,774 at the time of the Special Rapporteur's visit, used Malay as the language of instruction and were established and entirely financed by the government. The type C and T schools are subsidised by the government and numbered 1,288 and 523 respectively at the time of the Special Rapporteur's visit. Parents have the choice as to which school they will send their child to, but the Special Rapporteur noted that these decisions were usually made

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62 Puteh, A., "The Language Medium Policy in Malaysia: A Plural Society Model?", *Review of European Studies*, Vol. 2(2), December 2010, p. 194.

“in line with their ethnic origin”.<sup>63</sup> The report notes that Chinese and Tamil communities were concerned by the fact that their schools receive less funding than Malay schools. Section 21(2) of the 1961 Education Act had allowed the Minister of Education to convert Chinese and Tamil primary schools, which did not use Malay as the language of instruction, into national primary schools using Malay. Out of 71 Chinese schools, 54 were converted, whereas 17 opted to be independent schools. The 1996 Education Act repealed this provision, and was interpreted in some quarters as a softening of government control over non-Malays educational institutions, and therefore considered as an “accommodative integration” policy.<sup>64</sup> However, other measures in the Act, including those which allow the government to exert control over the curriculum and examinations in Chinese and Tamil schools,<sup>65</sup> were less welcome.

Lower and upper secondary studies are taught in Malay. Section 31 of the 1996 Education Act gives the Minister of Education authority to establish and maintain national secondary schools, defined in section 2 of the 1996 Act as, among other characteristics, “using the national language as the main medium of instruction”. Section 34 enables the Minister to establish any other educational institutions. The Special Rapporteur noted that there are 60 secondary schools which are administered and financed by the Chinese communities and which use Mandarin as the language of instruction, but the government does not recognise the examinations taken in such schools. Therefore, pupils at such Chinese schools are forced to take two different sets of exams.<sup>66</sup> The Special Rapporteur notes the difficulty in establishing and operating new educational centres for the Chinese in order to meet the increased population within some Chinese ar-

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63 United Nations Human Rights Council, *Report of the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos: Mission to Malaysia*, UN Doc. A/HRC/11/8/Add.2, 20 March 2009, Para 15.

64 For this amendment, see Education Act 1996, published by the Commissioner of Law Revision, Malaysia in collaboration with Percetakan Nasional Bhd, 2006, Section 155(1). See comments in Segawa, N., “Malaysia’s 1996 Education Act: The Impact of a Multiculturalism-type Approach on National Integration”, *Journal of Social Issues in Southeast Asia*, April 2007, Vol. 22(1), p. 33.

65 See, for example, Education Act 1996, sections 17-18.

66 See above, note 63, Para 18.



eas, which leads to the overcrowding of the existent schools. He also noted the closure of a number of Tamil schools.<sup>67</sup> Noriyuki Segawa has argued that:

*“If the government treats Independent Chinese Secondary Schools in the same way as national secondary schools are treated in terms of guaranteed continued existence, financial support and a clear recognition of the Unified Examinations, most Chinese people are likely to be satisfied that there has been a genuine ideological shift towards multiculturalism.”<sup>68</sup>*

The use of Malay as the official language in state schools and universities has disadvantaged and sometimes excluded minorities (especially Chinese and Indians) from participating in education. When the government made conferment of qualifications equivalent to the General Certificate of Education conditional upon attainment of a “pass” in the Malay language, many non-Malay students were unable to further their studies in public schools and universities. This, in some measure, also contributed to increased enrolment in the independent (private) Chinese vernacular schools. Although the 1996 Education Act repealed section 21 of the 1961 Act, which had been the focus of much resentment, section 17 of the 1996 Act, which states that the main medium of instruction shall be Malay in all educational institutions except for national type schools established after 1996 or other educational institutions exempted by the Minister of Education, was less welcome.

The segregation continues into the tertiary education sector. For example, the Universiti Teknologi Mara has had a Bumiputera-only policy since it was established, and the suggestion that 10% of places should be open to non-Bumiputera students was rejected by the Prime Minister, the Minister of Higher Education and the Vice Chancellor of the University.<sup>69</sup> Further, the BN-controlled federal government has been accused of practising discrimination in the award of scholarships. Statistics released by the government shows

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67 Ibid., Para 51.

68 Segawa, above note 64, p. 50.

69 See above, note 54, Para B3; see also The Straits Times Singapore, “Call to open uni to non-bumis slammed”, *The Straits Times Singapore*, 15 August 2008.

that the government awarded 80% of overseas scholarships to Bumiputera students every year between 2000 and 2005. In addition, between 2002 and 2005 it allocated 30% of local undergraduate scholarships to non-Bumiputera, with the rest reserved for Bumiputera.<sup>70</sup> But in 2008, an increased quota of 45% non-Bumiputera allocation of overseas scholarships was announced, and in 2010, the Prime Minister stated that scholarships were for students of all races who want to pursue higher studies in local or foreign institutions, declaring that:

*[E]ach student irrespective whether Malay, Chinese, Indian, Kadazan or others who obtain 9A+ (in their SPM results) qualify for the JPA scholarships, be it for studies locally or overseas.*<sup>71</sup>

The effect of the pro-Bumiputera policies in the past has been significant. Between 1970 and 1985, the proportion of Malay students in tertiary level education increased from 40% to 63% of the total. The same period saw a decline in Chinese students from 49% to 30% of the total. By 1999, this percentage rose to 72.7% for Malays while it dropped to 27.3% for non-Malays. This radical change is attributed to quotas with respect to Malay student intake which are officially 55%, though in practice it is thought that some universities may apply a quota of up to 75%.<sup>72</sup>

Race and ethnicity can influence not only a pupil's access to education, but also the nature of their experiences during their education. There have been a number of reports of racism in schools in the last few years. In one case, it was alleged that the principal of a school made racist slurs against her Chinese students. In another case, 20 police reports were lodged by students against their principal, accusing her of making derogatory remarks against Chinese and Indian students.<sup>73</sup>

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70 Education in Malaysia, "Scholarship Quotas", *Education in Malaysia*, 16 May 2006.

71 The Malaysian Insider, "PM: Outstanding students deserve JPA scholarships irrespective of race", *The Malaysian Insider*, 10 July 2010.

72 See above, note 38, p. 252.

73 Chong, D. and Kumar, D., "Now, Kedah school principal accused of racism", *The Malaysian Insider*, 20 August 2010.

## Employment

Prior to independence, the British administration had created occupational segregation according to ethnicity.<sup>74</sup> One objective of the 1971 NEP was to reduce the extent of the correlation between economic function and ethnicity. This was largely successful in the private sector, but the same progress has not been seen in the public sector.

One strategy used by the government to raise the percentage of private sector positions filled by Bumiputera was to issue manufacturing licenses that were conditional upon the applicant firm's compliance with the Bumiputera employment quota,<sup>75</sup> under section 4 of the Industrial Coordination Act 1975. Thus, it is common practice to advertise job vacancies that explicitly state that preference will be given to Bumiputera candidates.

Bumiputera continue to dominate public sector employment. According to government figures, in 1999 the Bumiputera were clearly overrepresented in the public service personnel, comprising 76.9% of employees, while the Chinese represented merely 16.2% and the Indians 5.5%.<sup>76</sup> In October 2009, the Deputy Minister in the Prime Minister's Department, Datuk Liew Vui Keong stated in Parliament that the Malaysian civil service was made up predominantly by Malays at 76.2%, with only 6% of employees Chinese and 4.1% Indian.<sup>77</sup> It is reported that more recent statistics show an even greater disparity, with, for example, less than 2% of civil servants in the Ministry of Housing and Local Government identified as Chinese.<sup>78</sup> The predominance of Malays is especially evident in the upper echelons of the civil service.

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74 See above, note 38, p. 244.

75 Sahoo, N., "Private Sector Participation in Affirmative Action in Malaysia: Lessons for India", *The Asian Scholar*, No. 7, p. 12.

76 Teik, K.B., "Ethnic Structure, Inequality and Governance in the Public Sector: Malaysian Experiences", *United Nations Research Institute for Social Development: Democracy, Governance and Human Rights Programme Paper Number 20*, 2005, p. 19.

77 Lim, K.S., "A Malaysian Civil Service totally against 1Malaysia concept", *Lim Kit Siang for Malaysia*, 30 October 2009.

78 Tawie, J., "Shocking racial 'imbalance' in civil service", *Free Malaysia Today*, 20 August 2011.

In January 2010, Datuk Shagul Hamid Abdullah, the director-general of the National Civics Bureau, said:

*It must be stated categorically that there has never been any deliberate and conscious effort to discourage the non-Malays from entering and staying in public service. This has never been a policy except in isolated cases where the religion or religious belief of a potential recruit becomes a relevant and pertinent factor.<sup>79</sup>*

However, there is a lack of confidence, especially among the non-Bumiputera population, in the assurances given by the government that there is no ethnic bias in recruitment and promotions in the civil service.

### ***Housing***

The national economic policies in force since the 1970s entitle the Bumiputera to a discount of between 5% and 15% in housing loans. They also require housing developers to reserve a minimum of 30% of the available housing for the Bumiputera.<sup>80</sup> However, housing is an area in which the affirmative action policies adopted under the NEP in favour of the Bumiputera can be seen to have an uneven impact. Only the richer Bumiputera have been able to take advantage of this policy as the poor, whether Bumiputera or not, have been unable to afford these houses. Nor do poorer Bumiputera qualify for bank loans. Since not all Bumiputera have been able to benefit from these policies, they have resulted in an ever-widening economic disparity within the privileged ethnic group. This is one of many examples of economic inequalities cutting across other patterns of discrimination in Malaysia.

### ***Political Participation***

Ethnic Malays dominate the political process, holding the most powerful senior leadership positions. In 2010, non-Malays filled 11 of the 30 ministerial

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79 Datuk Shagul, H.A., "Emphasis on raising standards", *The Star*, 30 January 2010.

80 Real Estate and Housing Developers' Association of Malaysia, *Bumiputera Housing*, 2010.

posts, and 23 of the 42 deputy minister posts.<sup>81</sup> The more important portfolios in the Cabinet such as Education, Finance, Internal Affairs and Defence, are all helmed by Malay politicians from UMNO, which is widely perceived as the dominant party in the BN coalition. The Prime Minister's post has been held by a Malay person since independence and all the Chief Ministers of the states in West Malaysia, except Penang, are Malays.

A strong link between ethnic identity and political opinion has long been prevalent in Malaysia. However, the 2008 election, while maintaining the BN majority, saw an unprecedented swing of votes across the ethnic divide, against the ruling government and towards an opposition coalition espousing multiculturalism, including the People's Justice Party, Malaysia's first "truly multiracial party".<sup>82</sup> The results were thought to "put in doubt the system of racially-based politics" on which the power of the Malaysian rulers depends and show a decline in the extent of the correlation between race and political affiliation. For example, M. Manoharan, an ethnic-Indian lawyer, was elected to the state assembly of Selangor, in a predominantly ethnic-Chinese constituency.<sup>83</sup>

Political parties and organisations associated with non-Malay ethnic groups have been discriminated against in relation to their freedom of expression. On 27 February 2011, 54 participants in a peaceful rally against racial discrimination, organised by Hindu Rights Action Force (HINDRAF) Makkal Sakthi (an NGO which advocates for equal rights of Malaysians of Indian origin), were prosecuted for being members of an "unlawful society" under the Societies Act.<sup>84</sup> HINDRAF was banned in 2008 after having organised a series of meetings and rallies to protest against the demolition of a number of Hindu temples. In 2008, an Amnesty International mission to Malaysia found that

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81 See above, note 53, p. 32.

82 The Economist, "Anwar overturns the apple cart", *The Economist*, 13 March 2008.

83 Ibid.

84 Amnesty International, *Malaysia's crack-down on anti-racism protesters flouts freedom of association*, 19 March 2011.

the sole reason behind the arrest of five HINDRAF members was that they had expressed concerns about the marginalisation of ethnic South Asians within Malaysian society.<sup>85</sup> The government described the arrested activists as leaders and lawyers of “forums whose activities incite racial sentiment and hatred towards government among Indians”.<sup>86</sup>

Their limited influence over Malaysian political machinery and the challenges faced by non-Malay political organisations make it difficult for non-Malays to challenge the system under which they are disadvantaged. Thus inequality in the representation of ethnic groups within Malaysian politics and civil society serves to sustain the inequalities experienced in the other areas of life identified within this section.

### ***Summary***

Articles 153 and 89 of the Malaysian Constitution establish a privileged position for the Bumiputera in Malaysia, but these Articles do not meet the international law standards established under ICERD for legitimate positive action. These provisions are not time-limited or function-limited. Further, the on-going need and proportionality of the constitutional privileges is far from clear. Continuing favourable treatment of the Bumiputera under these provisions means that race continues to be a key determinant of a person's life experiences and of disadvantage in Malaysian society.

## **2.2 Discrimination against Indigenous Groups**

Indigenous peoples in Peninsular Malaysia, Sabah and Sarawak make up a not insignificant proportion of Malaysia's population. In Peninsular Malaysia, the main indigenous group is known as the Orang Asli, a collective term for 18 ethnic groups, meaning “original people”. They are divided into three main groupings: Negrito, Senoi and Proto-Malay. The non-Muslim indigenous groups of Sarawak, accounting for 40% of Sarawak's inhabitants, are collectively called Dayak. The two biggest groups within the

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85 Amnesty International, *Malaysia: Internal Security Act used to punish human rights activists*, 4 September 2008.

86 Ibid.

Dayak community are the Iban (31%) and the Bidayuh, while the other groups are Bukitan, Bisayah, Dusun, Kadayan, Kalabit, Kayan, Kenyah (including Sabup and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowits), Lugat Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun, and Ukit. Sabah's population of 3 million is for the most part non-Malay, comprising indigenous people (60%), Chinese (20%) and ethnic groups originating from the southern Philippines, Indonesia or other parts of Malaysia. The largest minorities in Sabah are Kadazan-Dusun (25%), Bajau (15%) and Murut (3%). There is a great diversity amongst the numerous indigenous and minority groups of Sabah, in terms of language, occupation and religion.

While members of indigenous groups share the constitutional rights afforded to others and, in certain respects, even enjoy privileges afforded to the Malay population under Article 153 of the Constitution, in practice there remain key areas in which they face disadvantage, including in relation to land rights, discriminatory violence, education, employment, birth registration, religious freedom and political participation, each of which is explored below. The combined impact of these different forms of disadvantage can be significant.

### ***Land Entitlement***

Indigenous peoples in Peninsular Malaysia, Sabah and Sarawak enjoy native title to their lands on the basis of customary law rights. It is in relation to these customary law rights that one of the most significant patterns of discrimination faced by indigenous groups is observed. Article 26 of the UN Declaration on the Rights of Indigenous Peoples, adopted by Malaysia on 13 September 2007, states:

- 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.*<sup>87</sup>

In line with these provisions, Article 160(2) of the Constitution recognises customary law, and the system of customary land tenure was found to be customary law in the case of *Sahrip v Mitchell & Anor*.<sup>88</sup> Article 150(6A) of the Constitution acknowledges that Parliament does not have power over any matter of native law and customs in the states of Sabah and Sarawak, even in an emergency, and thereby emphasises the “important and unique protection for rights based on customs, whatever form they take”.<sup>89</sup>

Despite the constitutional recognition of the customary laws which govern native land rights, in practice, these rights have been overridden. Legislation has been enacted which restricts indigenous peoples’ freedoms in respect of their lands. For example, whilst the Aboriginal Peoples Act permits Orang Asli to live on designated lands as tenants-at-will, they do not possess any land rights. It has been reported that over the years, the designated land has decreased, and in some cases, been reclaimed for development projects. The Sarawak Land Code 1958 sets out the process for establishing native customary rights over land after 1958, and the process to be followed by the state in seeking to terminate such rights. The burden imposed by the Sarawak Land Code upon indigenous peoples in order to establish the ownership of their lands is onerous as it requires documentary proof of ownership, which is often unavailable to those relying on native customs and traditions as the basis of their ownership. Further, the state is arguably too easily able to terminate customary rights over land, by providing notice

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<sup>87</sup> United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, UN Doc. A/RES/61/295, 2007, Article 26.

<sup>88</sup> *Sahrip v Mitchell & Anor* (1877) Leic Reports 466.

<sup>89</sup> Bulan, R. and Locklear, A., *Legal Perspectives on Native Customary Land Rights in Sarawak*, Human Rights Commission of Malaysia, 2008, p. 19.



and compensation.<sup>90</sup> In July 2011, the Sarawak Court of Appeal overturned a 2005 court decision which had recognised the land rights of an Iban community that had lost hundreds of hectares to an acacia plantation. While the court found that there must be clear legislation providing compensation when the government quashes native rights to customary lands, it also rejected the use of oral history to prove indigenous entitlement to land.

The government's failure to fully respect the native customary title of indigenous communities has resulted in the forcible appropriation of land, without the free and informed consent of its inhabitants. According to the Indigenous Peoples Network of Malaysia, in September 2008, 7,000 hectares of indigenous Orang Asli reserves had been de-gazetted without the Orang Asli being informed. In Sabah and Sarawak, many communities have discovered that their lands have been given to oil palm plantation companies and logging companies without consent, and often without compensation.<sup>91</sup> An employee of Sarawak Dayak Iban Association (SADIA) told ERT that the houses and properties of Bidayuh peoples from four different villages (Kampung Bojong, Kampung Taba Sait, Kampung Semban and Kampung Rijoi) were to be flooded soon to make way for the Bengoh Dam.<sup>92</sup> Such forced evictions have often been followed by forced resettlements. The construction of the Bakun hydro-electric dam, completed in 2010, resulted in thousands of indigenous people, including members of the Penan tribe, being driven from their lands.<sup>93</sup> In June 2011, it was reported that owing to plans to build the controversial Murum

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90 Ibid. Actually, the State Authority is not obliged to provide compensation – under section 12 of the Aboriginal Peoples Act 1954 the State Authority “may” grant compensation “entitled in his opinion thereto”, or “pay the same to the Director General to be held by him as a common fund”, and where the land has fruit or rubber trees, compensation has to be paid under section 11(1) but only “as shall appear to the State Authority to be just”. (See Aboriginal Peoples Act 1954, sections 12 and 11(1).)

91 Indigenous Peoples Network of Malaysia, *Submission to Universal Periodic Review*, 7 September 2008, Paras 16-17.

92 ERT Interview with an employee of Sarawak Dayak Iban Association, 27 June 2011. Throughout this report, ERT has withheld the names and/or other personal characteristics of certain individuals, on their request and/or because ERT has determined that this is necessary in the interest of the safety or privacy of the individuals concerned.

93 Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2010*, July 2010.

dam, more than 1,000 Penan tribes people were to be relocated from their native territory to a part of the Penan's ancestral forest that had been sold to a palm oil company, Shin Yang, and was currently being denuded.<sup>94</sup> The Penan people, hunter-gatherers, rely on the forest for their survival.

Indigenous groups face hurdles in accessing justice to enforce their land rights. The government often awards lucrative logging contracts to companies with links to the state, leading to a lack of accountability for the way in which logging occurs.<sup>95</sup> Whilst the Malaysian courts have in a number of cases ruled that native title arises out of native customs which are part of the law of Malaysia and are protected under the Federal Constitution,<sup>96</sup> these judgments have not been treated as having precedential value, and indigenous communities have therefore been forced to treat each new land entitlement claim as a fresh legal argument.<sup>97</sup> The ability of the indigenous communities to challenge the removal of their lands has been severely limited by the restrictions placed on the jurisdiction of customary courts combined with the prohibitive costs of pursuing such a case in the civil courts. As such, the violation of the proper rights of such communities remains unaddressed.

Like in many countries around the world that are home to indigenous peoples, the violations of indigenous land rights in Malaysia is one of the strongest generators and perpetuators of poverty. The Orang Asli, for example, are the poorest group in Malaysia. According to the Tenth Malaysia Plan 2011-

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94 Survival International, *Penan hunter-gatherers to be dumped in vast oil-palm plantation*, 15 June 2011.

95 The Penan Support Group, FORUM-ASIA and Asian Indigenous Women's Network, *The Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia*, July 2010, pp. v-vi.

96 *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (High Court, Johor Bahru); *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 2 CLJ 769 (High Court of Sabah and Sarawak, Kuching); *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors*, MTI-21-314-1996 (High Court of Malaya, Shah Alam), 12 April 2002; *Rambilin binti Ambit v Assistant Collector for Land Revenue*, Pitas, No/ K 25-02-2002 (Unreported) (High Court of Sabah and Sarawak, Kota Kinabalu), 9 July 2007; and *Superintendent of Land & Surveys Miri Division & Anor v Madeli Salleh* [2007] 6 CLJ 509 (Federal Court).

97 See above, note 91.

2015, published by the Economic Planning Unit of the Prime Minister's Department, 50% of the 29,990 Orang Asli households live below the poverty line, and about 5,700 households were considered to be "hardcore poor".<sup>98</sup>

### ***Discriminatory Violence***

The intrusion of logging and palm oil companies into the native lands of the indigenous peoples has been accompanied by other serious forms of discrimination. Indigenous women have been subjected to sexual violence and exploitation by the employees of the companies involved. The United States State Department has reported that workers from two logging companies regularly subjected Penan women and girls to sexual abuse, and that in September 2009, the Minister of Women, Family and Community Development confirmed that Penan girls had indeed been raped by timber company workers.<sup>99</sup> In November 2008, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples raised concerns about sexual abuses of Penan girls with the government. In the letter, the Special Rapporteur advised as follows:

*Since the arrival in the 1990s of logging companies in areas inhabited by the Penan community, workers from Malaysian companies, in particular Interhill and Samling, have been harassing and in a number of cases raping Penan women and girls. Reportedly, Penan children often have difficulties getting to school; by foot, the journey can take them as long as one week, however if they travel in vehicles they can reach their schools within three to six hours. The information indicates that, as Penan families cannot afford private transport, the Penans have become dependent on logging company vehicles for accessing areas outside their settlements, including schools.*<sup>100</sup>

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98 Economic Planning Unit, Prime Minister's Department, *Tenth Malaysia Plan 2011-2015*, 2010, p. 162; see also Nicholas, C., "Land Control Is Key for Orang Asli", *New Straits Time*, 12 June 2010.

99 See above, note 53, p. 45.

100 United Nations Human Rights Council, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, UN Doc. A/HRC/15/37/Add.1, 15 September 2010, Para 273.

In its response to the Special Rapporteur dated November 2009, the government confirmed that a Task Force has been established to address these claims, which concluded that the sexual abuse complained of by Penan women and school girls had occurred, and that it was largely a result of survivors' dependence on logging companies and other outsiders. It also stated as follows:

*The Penan community are exposed to sexual abuse and exploitation due to: poverty; isolated places of residence; high dependency on logging companies, not only for transport for health services and schooling, but also for basic necessities such as water, electric generators, etc; lack of trust towards higher authorities; and the negative perception, prejudice and negative stereotypes with labels such as lazy, liars and alcoholics directed at the Penan by the rest of Malaysian society making the Penan feel alienated and suffering from low esteem.*<sup>101</sup>

The government stated that it was taking measures “to ensure the safety of Penan women and girls and ensure that Penan children are provided safe affordable transportation to reach their schools”, through the development of Service Centres in the Penan area and the provision of financial support for transportation.<sup>102</sup>

Following the report by the government Task Force, an independent fact-finding mission was carried out by the Penan Support Group, FORUM-ASIA and the Asian Indigenous Women's Network. The report on the mission's findings, *A Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia*, was published in July 2010. This report concluded that despite the promises made by the Task Force in November 2009, little had been done subsequently to improve the situation for Penan women and girls, and few actions had been taken to bring the perpetrators to justice.<sup>103</sup>

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101 Ibid., Para 274(h).

102 Ibid., Para 274(j).

103 See above, note 95, p. iii.

The conclusions of the government's Task Force provide an insight into the factors which interact to disadvantage the Penan people, including prejudicial attitudes within society, denial of socio-economic rights, and poor relationships with the authorities. These findings as to the interconnectedness of the different forms of discrimination and inequality faced by indigenous people are echoed in the joint report of the Penan Support Group *et al*, which analyses the wider context in which the sexual exploitation of Penan women and girls takes place. It emphasises the role of continuing poverty in rendering the Penan people vulnerable to dependency, exploitation and violence. It found that the loss of land and land rights keeps the Penan people in poverty and affects their "security, autonomy, livelihoods, culture and sustainability".<sup>104</sup> The land disputes that have often arisen, and which do on occasion lead to violence, create a fertile environment within which sexual violence against Penan women takes place. Where the authorities have failed to investigate complaints of violence, there is not only a barrier to justice, but also a growing lack of trust in the system, meaning that subsequent incidents go unreported. Many Penans lack identification cards and are thus unable to vote, which compounds their lack of trust in the authorities. The UN Special Rapporteur on violence against women, in communicating with the Malaysian government in relation to reported sexual abuses against Penan women, also recognised the complexity of the problem. She encouraged the government:

*[T]o address the specific circumstances facing indigenous women and girls, in relation to gender-based violence, especially sexual violence, arising from multiple, intersecting and aggravated forms of discrimination, and paying particular attention to the structural causes of violence.*<sup>105</sup>

## Education

Indigenous groups have become increasingly marginalised within the education system, as a result of the content of the curriculum, the language in which

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104 Ibid., pp. v-vi.

105 United Nations Human Rights Council, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, Addendum: Communications to and from Governments*, UN Doc. A/HRC/14/22/Add.1, 2 June 2010, Para 244.

it is taught, logistical difficulties in accessing educational establishments, and formalities which act as a barrier.

Malay has replaced English and indigenous languages, such as Iban in Sarawak, as the language used in schools and government. This has had broad and serious consequences for indigenous groups. In Sarawak, where the use of Iban in schools has decreased significantly, indigenous people are increasingly marginalised, which is reflected not only in the high number of school drop-outs, but also in access to employment opportunities, which are predicated on fluency in Malay.<sup>106</sup> Studies have found that many Penan do not complete their education as a result of the challenge of studying in the Malay language.<sup>107</sup> In relation to Sabah, the Special Rapporteur on the right to education expressed concern regarding the “alarming drop in the number of pupils completing primary education”, which fell from 96% in 1996 to 88% in 2001.<sup>108</sup> The Special Rapporteur noted that literacy rates were lower in Sabah and Sarawak than in other states.<sup>109</sup>

In 2009, the Special Rapporteur noted the challenges caused by “infrastructure deficiencies” in securing enjoyment of the right to education. He found that the concentration of secondary schools in urban areas presented difficulties for children, and particularly girls, from poor rural families in accessing schools.<sup>110</sup> He urged the authorities to compile and issue statistics regarding participation in education which is disaggregated by rural and urban areas.<sup>111</sup> He also highlighted the problem faced by those

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106 Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples: Indigenous peoples and ethnic minorities in Sarawak*.

107 See above, note 95, pp. v, 33.

108 See above, note 63, Para 19.

109 Ibid., Para 24.

110 Ibid., Paras 27-28.

111 Ibid., Para 19.

children who did not have birth certificates, as they were unable to access education without such documentation.<sup>112</sup>

The government has taken steps to promote access to education for indigenous communities. It introduced a special curriculum focussed on the particular needs of the Orang Asli and has provided financial support to cover transport costs to school and meals during the day. However, the Special Rapporteur on the right to education has expressed concern that the criteria for determining who should benefit from such initiatives were not clear.<sup>113</sup> Further, indigenous peoples living outside of Peninsular Malaysia did not benefit from such initiatives to the same extent as the Orang Asli, and there remained “various obstacles impeding their access to education”.<sup>114</sup>

### ***Citizenship and Birth Registration***

A disproportionate number of Orang Asli lack identification papers, primarily as a result of lack of access to the infrastructure and machinery which they require in order to obtain such documentation.<sup>115</sup> Without documentation, a citizen is deprived of social and economic benefits and the right to citizenship. Lack of documentation also makes it very difficult for them to deal with the authorities, including the police.<sup>116</sup>

### ***Employment***

As noted above, the marginalisation of indigenous groups in relation to the education system ultimately has implications for their ability to par-

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112 Ibid., Para 33.

113 Ibid., Para 31.

114 Ibid., Para 32.

115 See above, note 91, Paras 29-31.

116 Survival International, *Borneo tribe denied vote in crucial election*, 13 April 2011. This issue is addressed further in relation to the present situation of stateless persons in Malaysia more broadly, in section 2.9 below.

ticipate equally in the employment sector. While employment statistics disaggregated by race and ethnicity are not readily available, this in itself raises questions as to Malaysia's ability to comply with the right to equality. As a matter of principle:

*To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. States must not use such information in a manner that violates human rights.*<sup>117</sup>

Despite the constitutional privileges granted to the inhabitants of Sabah and Sarawak under Article 153 of the Federal Constitution, ERT gathered testimony showing that discrimination against indigenous peoples occurs in recruitment into government services. For example, members of the Dayak community of Sarawak have reported being disqualified in applications for the army or police force because of the traditional tattoos which they have on their bodies.

## ***Health***

An employee of SADIA who spoke with ERT expressed concerns regarding access to reproductive health amongst indigenous groups. According to SADIA, indigenous women have reported being put under pressure not to have many children and have been given medicines to prevent pregnancy. Penan persons without identity cards have reportedly not been recognised as Malaysian citizens, and have consequently been charged much higher fees at public hospitals.

## ***Political Participation***

Having identified many of the above issues of concern in his report of September 2010, the UN Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples emphasised the need for "increased involvement of the Penan tribe in the decision-making processes relevant to them".<sup>118</sup>

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117 See above, note 47, Principle 22, p. 14.

118 See above, note 100, Para 276.



In so doing, he highlighted the importance of political participation as a means of addressing situations of inequality and disadvantage. Indigenous groups in Malaysia, however, are unable to participate in the political process on an equal basis with their non-indigenous compatriots.

Federal laws relating to the indigenous people of the peninsular region (the Orang Asli) give authority to the non-Orang Asli minister for rural development for the protection, control and decision-making relating to this community. This severely restricts the ability of the Orang Asli to participate in the decision-making processes which affect them.<sup>119</sup> Efforts to monitor the development of the Orang Asli, including the establishment of a government-sponsored national advisory council, have failed to ensure sufficient Orang Asli involvement. The 17 member national advisory council includes only five Orang Asli. In 2010, only one Orang Asli held a management position in the government's Department of Orang Asli Affairs.<sup>120</sup>

The authorities are also alleged to have taken deliberate steps to undermine the political influence of people from indigenous groups. The flow of refugees and illegal immigration into Sabah is said to have been facilitated, and in some cases encouraged, by the state authorities so as to ensure an influx of Muslims from the southern Philippines and Indonesia and to strengthen support for the Malay-dominated government's control over Sabah. The influx of immigrants has resulted in the decline in the political significance of indigenous non-Muslim groups such as the Kadazan-Dusun, Murut and Chinese.<sup>121</sup> On 16 April 2011, thousands of Penan tribal people were denied the right to vote at a key state election in Sarawak, in the Malaysian part of Borneo, as they were not given identity cards. The elections reinstated Chief Minister Taib Mahmud as the head of the Sarawak state. According to the NGO Survival International, since Taib Mahmud's government had sold the Penan's land to logging companies, destroying much of the rainforest on which they rely for their survival,

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119 See above, note 53, p. 42.

120 Ibid.

121 Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples: Indigenous peoples and ethnic minorities in Sabah*.

it did not want the Penan people to vote. Activists and election watchdog organisations were denied the right to enter Sarawak on the day of the election. (Under the Malaysia Agreement, Sarawak has the power to ban anyone, including citizens from peninsular Malaysia, to enter the state).<sup>122</sup> According to an employee of SADIA, the experience of the Penan people of Sarawak in April 2011 is only one example of many similar cases experienced by indigenous peoples who live in the rural interior areas of Sarawak.<sup>123</sup> Such moves have seen increasing political marginalisation of indigenous groups.

### ***Freedom of Religion***

Indigenous people have suffered serious attacks on their religious freedoms. The majority of indigenous communities in Malaysia are non-Muslim. 70% of the Orang Asli practise traditional animist religions, whilst about 15-20% are Muslim and 10% are Christian. Most of the non-Muslim indigenous groups of Sarawak are Christians or have animist beliefs. Of the indigenous peoples and ethnic minorities in Sabah, a majority of Kadazun-Dusun are Catholics or animists. The majority of Bajau are Muslim, whilst Murut are primarily Christian.<sup>124</sup> The government has exerted pressure on non-Muslim members of indigenous groups to convert to the state religion. State missionary programmes are carried out under the premise of encouraging integration into “mainstream society”. For example, Minority Rights Group International has reported that in parts of Malaysia Muslim men who married Orang Asli women are given RM 10,000.<sup>125</sup> In August 2010, a report by TV network Al Jazeera claimed that indigenous peoples in Pahang state were being offered development aid only in exchange for

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122 Free Malaysia Today, “No cause for BN to rejoice”, *Free Malaysia Today*, 18 April 2011.

123 See above, note 92.

124 Minority Rights Group International, *World Directory of Minorities: Indigenous Peoples and Ethnic Minorities in Sabah*.

125 Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples: Orang Asli*.

converting to Islam.<sup>126</sup> Earlier, in 2008, the Indigenous Peoples Network of Malaysia reported that religious structures associated with religions other than Islam have been demolished by local authorities.<sup>127</sup>

## **Summary**

Under Malaysia's Constitution, indigenous people are not only protected against discrimination, but are also accorded the "special privileges" of Article 153. In spite of this, indigenous people continue to experience disadvantage and discrimination across the full spectrum of economic, social, cultural, civil and political rights. ERT research identified evidence of discriminatory violence against indigenous persons and discrimination and inequality in relation to birth registration, religious freedom and political participation. It also found inequality of access and outcome in relation to socio-economic rights such as education, employment and health. These forms of inequality are underpinned by the violation of indigenous peoples' land rights. Indeed, the most important conclusion to be drawn from our analysis of the discrimination affecting indigenous persons is the interconnectedness of their experiences in different areas of life.

## **2.3 Gender Inequalities**

Traditional views on the role of women in society play a significant role in perpetuating gender discrimination against women in Malaysia. In its report to the Committee on the Elimination of Discrimination against Women in 2004, the government of Malaysia acknowledged the existence of "widespread stereotyping of women as followers and supporters rather than leaders or equal partners in Malaysian society" and "various cultural and institutional factors which are predicated on restrictive notions of a woman's role in society" and which "often intersect to form barriers to the advancement of women's career and upward mobility in an organization".<sup>128</sup>

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126 Tan, G., "Malaysia Tribes 'Forced to Convert'", *Al Jazeera*, 8 August 2010.

127 See above, note 91, Para 28.

128 Convention on the Elimination of Discrimination against Women, Combined initial and second periodic reports of States parties: Malaysia, UN Doc. CEDAW/C/MYS/1-2, 2004, Paras 89-90.

The government has, however, played its own role in sustaining such “notions”. The Eighth Malaysia Plan (2001-2005) (being followed when the government of Malaysia last reported to the Committee) required that any strategies and programmes implemented in support of the advancement of women must be compatible with Malaysian values, religious beliefs and cultural norms. Such values, beliefs and cultural norms are frequently, however, an impediment to gender equality. Similarly, while Malaysia expressed its commitment to gender equality with its ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 5 July 1995, its impact is limited by Malaysia’s declaration that its accession is subject to the compatibility of the Convention’s provisions with the Malaysian Constitution and Syariah law.

Malaysia’s unwillingness to commit fully to the principles contained in CEDAW, and the prevalence of attitudes which view women as subordinate to men, are reflected in the situation on the ground. International indexes measuring gender equality present a mixed picture in relation to Malaysia. According to the Gender Gap Index (GGI) 2011, which measures the gender gap in terms of education, health, economic and political participation, Malaysia’s was 0.6525 in 2011, where 1 is gender equality and 0 is inequality.<sup>129</sup> This ranks Malaysia a disappointing 97<sup>th</sup> out of 135 countries. Within Asia Pacific, Malaysia is ranked 13<sup>th</sup> out of 22 countries, leaving it below many poorer countries in the region.<sup>130</sup> Furthermore, Malaysia has not made significant progress in reducing gender inequality since 2006, when Malaysia’s overall GGI score was 0.6509. According to the UNDP’s 2011 Human Development Index, Malaysia ranked 43<sup>rd</sup> out of 145 countries in the gender inequality index, which is a composite measure reflecting inequality in achievements between women and men in reproductive health, empowerment and the labour market. It achieved a score of 0.286, where 0 represents a situation in which women and men fare equally and 1 is where one gender fares as poorly as possible in all measured dimen-

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129 Hausmann, R., Tyson, L.D., and Zahidi, S., *The Global Gender Gap Report 2011*, World Economic Forum, Geneva, Switzerland, 2011, p. 11.

130 Ibid., p. 18.

sions.<sup>131</sup> These scores largely reflect the poor levels of political and economic participation amongst women in Malaysia discussed below. In the spheres of health and education, Malaysia has an impressive record, having reached gender parity in several areas. At the same time, ERT research identified problems of discriminatory violence against women and discrimination in relation to the family.

### ***Marriage and Family Relations***

Article 16 of CEDAW contains Malaysia's obligations regarding women's rights in respect of marriage and family life. While Malaysia withdrew many of its original reservations to the Convention in 2010, the remaining reservations in relations to Articles 9 and 16 leave women without equal rights in respect of passing nationality to their children, entering into marriage, and parental and family rights. The lack of guarantee for these rights at the international level is reflected in the provisions of domestic law governing family relationships.

A review of the Islamic Family Law (Federal Territories) Act 1984 (the Islamic Family Law Act) demonstrates the prevalence of discriminatory provisions within Malaysia's Syariah family law system. This statute was intended to serve as a model for other states to follow. The original act was viewed as "among the most progressive codified Muslim family laws in terms of rights and protections for women".<sup>132</sup> However, subsequent amendments have served to undo many of the positive provisions for women. While Article 16(a) of CEDAW requires that men and women should have the "same right to enter into marriage", the Islamic Family Law Act's provisions which govern the right to enter into a marriage in Malaysia discriminate against women. In spite of the clear condemnation of polygamy by the Committee on the Elimination of

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131 United Nations Development Programme, *Human Development Report 2011: Sustainability and Equity – A Better Future for All*, 2011, p. 140.

132 Anwar, Z. and Rumminger, J.S., "Justice and Equality in Muslim Family Laws: Challenges, Possibilities and Strategies for Reform", 64 *Washington and Lee Law Review*, 1529, p. 2; see also Noriani, N.B.S., *Codifications of Muslim Family Laws in Malaysia*, Sisters in Islam, 16 March 2006.

Discrimination against Women,<sup>133</sup> in Malaysia Muslim men may marry more than one wife, but a woman may only have a monogamous marriage (sections 14(1) and 23).<sup>134</sup> The minimum age of marriage is lower for women than for men (section 8): in order to marry, a man must be over the age of eighteen, and a woman must be over the age of sixteen, unless approved by a judge. The Committee considers states which maintain different marital ages for men and women to contravene Article 16(2) of the Convention:

*Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished.*<sup>135</sup>

Further, the Committee has stated that the minimum age of marriage should not be younger than 18:

*The Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.*

*37. This not only affects women personally but also limits the development of their skills and independence and reduces ac-*

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133 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in marriage and family relations*, UN Doc. 49/38, 1994, Para 14, which states: "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited."

134 Islamic Family Law (Federal Territories) Act 1984, sections 14(1) and 23.

135 See above, note 133, Para 38.

*cess to employment, thereby detrimentally affecting their families and communities.*<sup>136</sup>

Article 16(b) of CEDAW requires that men and women should have the “same right freely to choose a spouse and enter into marriage only with their free and full consent”. The CEDAW Committee has said that, “A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being”.<sup>137</sup> In spite of Malaysia’s obligations in this respect, women subject to the Islamic Family Law Act are only entitled to marry with the consent of their guardian, a judge, or a person authorised by a judge (section 13). A man does not require consent of a guardian to marry. Further, while a Muslim man is permitted to marry a non-Muslim woman in certain circumstances, a Muslim woman is never permitted to marry a non-Muslim man (section 10).

Article 16(c) of CEDAW requires that men and women should have the “same rights and responsibilities during marriage and at its dissolution”, yet the Islamic Family Law Act also contains discriminatory provisions regulating the couple’s conduct during the marriage and their positions at its end. Women are required to obey their husbands (section 129), and failure to do so may result in a loss of a woman’s right to maintenance (section 59). A man is entitled to divorce his wife at will without seeking a court order, whilst a woman must obtain a judicial divorce on one of a specific list of grounds, the proof of which requires extensive evidence (sections 47, 49, 50 and 52). In addition to the provisions of Syariah family legislation, Malaysian NGOs have drawn attention to the content of premarital courses which are compulsory for Muslims, and which further “reinforce the value of gender-based submission and domination”.<sup>138</sup>

Article 16(d) of CEDAW requires that men and women should have the “same rights and responsibilities as parents, irrespective of their marital

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136 Ibid., Paras 36-37.

137 Ibid., Para 16.

138 NGO Shadow Report Group, *NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government’s Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 2005, p. 23, Para 2.1.

status, in matters relating to their children". This is not the case in Syariah laws relating to custody and guardianship which favour the male parent. Women's rights in respect of their children are seriously restricted, undermining not only a woman's own rights, but also meaning that the child's best interests are not the paramount consideration in determining matters of care and guardianship of the child, in contravention of the Convention on the Rights of the Child (CRC). The mother only has a right to physical custody of her children up to the age of seven for a son and nine for a daughter, after which custody automatically moves to the father (Section 84); a woman can also lose custody of her children on several grounds, including "gross and open immorality" (Section 83(b)), change of residence so as to prevent the father from exercising the necessary supervision over the child (Section 83(c)), and abjuration of Islam (Section 83(d)). The same conditions do not apply to the father's custody rights. A woman is not entitled to guardianship of her children, which remains with the father, and on the father's death, moves to one of several male Muslim relatives (Section 88); there is no provision for a father's loss of guardianship rights in the case of failure to provide children's maintenance.

In its General Recommendation on equality in marriage and family relations, the CEDAW Committee has said that "whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires".<sup>139</sup> In view of this obligation, the Committee made the following recommendation in reviewing Malaysia's state report:

*The Committee urges the State party to undertake a process of law reform to remove inconsistencies between civil law and Syariah law, including by ensuring that any conflict of law with regard to women's rights to equality and non-discrimination is resolved in full compliance with the Constitution and the provisions of the Convention and the Committee's general recommendations, particularly general recommendation 21 on equality in marriage and family relations. In this regard, it encourages the State party to obtain information on comparative*

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139 See above, note 133, Para 13.



*jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms. It also encourages the State party to take all necessary steps to increase support for law reform, including through partnerships and collaboration with Islamic jurisprudence research organisations, civil society organisations, women's non-governmental organisations and community leaders. The Committee further recommends a strong federal mechanism be put in place to harmonize and ensure consistency of application of Syariah laws across all States.*<sup>140</sup>

There are also a number of notable discriminatory provisions under the Law Reform (Marriage and Divorce) Act 1976, which does not apply to Muslims,<sup>141</sup> nor to the natives of Sabah and Sarawak or the aborigines of Peninsular Malaysia (subject to minimal exceptions).<sup>142</sup> Section 10 differentiates on the grounds of sex, providing that, in certain circumstances, a female may marry from the age of 16, whilst a male can only marry once he reaches the age of 18. There are also provisions within the Act which arguably discriminate against men. For example, section 49 grants a woman the right to seek divorce even though her husband is not domiciled or resident in Malaysia, whilst a man does not have the same right to do so in relation to a wife in the same circumstances. Article 77 provides that the conditions under which a husband can claim maintenance from his wife after a divorce are much more restrictive than the conditions under which a wife can claim maintenance from her husband:

*Power for court to order maintenance of spouse.*

*(1) The court may order a man to pay maintenance to his wife or former wife -  
(a) during the course of any matrimonial proceedings;*

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140 Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia*, UN Doc. CEDAW/C/MYS/CO/2, 31 May 2006, Para 14.

141 Law Reform (Marriage and Divorce) Act of 1976, Article 3(3).

142 Ibid., Article 3(4).

*(b) when granting or subsequent to the grant of a decree of divorce or judicial separation;  
(c) if, after a decree declaring her presumed to be dead, she is found to be alive.*

*(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill health, and the court is satisfied that having regard to her means it is reasonable so to order.<sup>143</sup>*

Under the Islamic law of inheritance (*Hukum Faraid*) women may inherit property from family members, but their share is generally smaller than that to which men are entitled.<sup>144</sup> CEDAW has clearly condemned this practice:

*There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. (...) Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.<sup>145</sup>*

These rules governing the division of property, which clearly discriminate against women, undermine women's economic empowerment and independence from the male members of their family.<sup>146</sup>

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143 Ibid., Article 77.

144 Social Institutions and Gender Index, *Gender Equality and Social Institutions in Malaysia*, available at: <http://genderindex.org/sites/default/files/pdfs/MYS.pdf>.

145 See above, note 133, Para 35.

146 See above, note 138, p. 24, Para 2.3.

The fact that women have different rights, depending on whether they are subject to civil law or Syariah law, gives rise to particular equality and discrimination issues in relation to marriage, divorce, child custody, maintenance, and property rights when one spouse (usually the husband) in a non-Muslim marriage subsequently converts to Islam. According to a report published by Minority Rights Group, non-Muslim men sometimes convert to Islam in order to remarry without divorcing their first wife, because under Muslim law a man can have up to four wives.<sup>147</sup> The implications for women in such cases are serious. Islamic religious officials argue that infant children in such a marriage are automatically converted to Islam and the non-Muslim spouse loses his or her rights to guardianship and custody of the children. Further, the dual legal system in Malaysia means that there are barriers for those affected in accessing justice. Conflicting judgments have been given in the courts in such matrimonial disputes.

In *Shamala Sathiyaseelan v Dr Jeyaganesh C. Mogarajah & Anor*, the Federal Court refused to hear the application of a Hindu mother in a custody battle where her estranged husband had converted to Islam and converted their children without her knowing.<sup>148</sup> The Federal Court held that the civil court had no jurisdiction to hear a case involving the issue of conversion to Islam. The result of the decision was that a Hindu mother of children who have been converted to Islam without her knowledge or consent is left with no remedy at law, as the civil courts will not assume jurisdiction, and she has no legal standing before the Syariah courts. The High Court ultimately granted the mother custody of the children conditional on her maintaining the religion of the children as Islam. In a similar case (*Subashini a/p Rajasingam v Saravanan a/l Thangathoray*), the mother was told she should bring her case before a Syariah Court, despite her being non-Muslim and therefore being unable to do so.<sup>149</sup>

In the *Indra Gandhi* case (as yet unreported), the plaintiff and her husband were married under Hindu rites. Her husband converted himself and their

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147 Mihlar, F., *Ethnic and religious discrimination big challenge for Malaysia's minorities*, Minority Rights Group International, 25 May 2011.

148 *Shamala Sathiyaseelan v Dr Jeyaganesh C. Mogarajah & Anor* [2004] 2 CLJ 416 (High Court).

149 *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2007] 2 MLJ 705.

three children to Islam, and obtained a custody order from the Syariah court. Armed with that custody order, the husband took physical custody of their infant baby girl (who was still being breastfed), an act which is generally accepted to be contrary to Islamic law. He subsequently refused to let his wife see the baby. In so doing, the husband disobeyed an interim custody order of the civil court and refused to honour mutual undertakings (recorded by consent) for access to the baby. The High Court at Ipoh held it had jurisdiction to hear the mother's application for custody notwithstanding the conversion to Islam by the husband.<sup>150</sup> The Syariah High Court order obtained was held to be of "no legal effect" in the civil courts. The civil High Court also applied the decision in *Tan Sung Mooi (f) v Too Miew Kim*<sup>151</sup> which held that jurisdiction continues with the civil courts even though one spouse has converted to Islam. However the husband has refused to comply with the order of the civil court, claiming the protection of the Syariah court order. The High Court is yet to decide on an application by the plaintiff, who is seeking to quash her three children's conversion to Islam, to send the matter to the Federal Court for hearing.

A Muslim convert is also required by the law of his or her new religion to deal with his or her previous marriage and any children therefrom according to the dictates of the new religion. The spouse of a Muslim convert loses his or her rights in respect of children and inheritance. This is precisely what happened in *Majlis Agama Islam Wilayah Persekutuan v Lim Ee Seng & Yg Lain*.<sup>152</sup> The non-Muslim family of the deceased, declared to have converted to Islam during her lifetime, was disinherited and the estate went to the state Islamic treasury (Baitul Mal).

The Committee on the Elimination of Discrimination against Women highlighted these problems in its 2006 Concluding comments on Malaysia. It stated:

*The Committee is further concerned about the lack of clarity in the legal system, particularly as to whether civil or Syariah*

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150 Per the decision of Wan Afrah J. on 11 March 2010.

151 *Tan Sung Mooi v Too Miew Kim* [1993] 3 MLJ 117 (High Court).

152 *Majlis Agama Islam Wilayah Persekutuan v Lim Ee Seng & Yg Lain* [2000] 2 AMR (20) 2062 (High Court).

*law applies to the marriages of non-Muslim women whose husbands convert to Islam.*<sup>153</sup>

### ***Gender-based Violence***

In its General Recommendation 19, the Committee on the Elimination of Discrimination against Women confirmed that gender-based violence is a form of discrimination against women.<sup>154</sup> Gender-based violence is defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>155</sup> In the General Recommendation, the Committee condemned various forms of gender-based violence, including family violence, rape, sexual harassment, trafficking and female circumcision.<sup>156</sup> It recognised that perceptions which subordinate women serve to perpetuate practices of gender-based violence.<sup>157</sup>

Despite the Committee’s recommendation that states should compile statistics on the extent, causes and effects of gender-based violence,<sup>158</sup> there is a notable lack of official data showing the prevalence of gender-based violence in Malaysia. It is, however, evident that violence against women is common. According to Women’s Centre for Change (Penang) (WCC Penang), there were a total of 3,173 domestic violence cases identified by the state in Malaysia in 2010.<sup>159</sup> The World Values Survey asks

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153 See above, note 140, Para 13.

154 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc. A/47/38, 1992, Para 1.

155 *Ibid.*, Para 6.

156 *Ibid.*, Paras 23, 24(b), 18, 14, and 20 respectively.

157 *Ibid.*, Para 11.

158 *Ibid.*, Para 24(c).

159 See Leng, T.P., “Safety Issues in Penang from a Gender Perspective”, Paper presented at the Advance Gender Budgeting Workshop, Universiti Sains Malaysia, Penang, 6-7 June 2011, Table 3.

respondents to rate on a scale from 1 to 10 the degree to which they think it is justifiable for a man to beat his wife. In Malaysia, over 50% of respondents felt that it was sometimes justifiable for a man to beat his wife.<sup>160</sup> WCC Penang found that most of the domestic violence survivors with whom it worked were from lower income groups, with 74% earning less than RM 1,500 or having no income.<sup>161</sup>

The Committee on the Elimination of Discrimination against Women has emphasized that not only must states enact legislation to protect women from gender-based violence, but they must also ensure that such protection is effective. Malaysia's Domestic Violence Act 1994 contains only limited protection, and is not effectively implemented. Reports have shown that women experience difficulties seeking legal protection when there are no obvious signs of physical violence.<sup>162</sup> Protection orders aimed at preventing spouses from committing further violent acts towards the complainant can in practice be ineffective as the procedure to obtain them is long and complicated.<sup>163</sup> In its Annual Report for 2010, WCC Penang stated that out of the 130 cases of domestic violence with which the organisation was involved during the year, only six women had applied for Interim Protection Orders under the Domestic Violence Act.<sup>164</sup> Domestic violence survivors have also said that more should be done to keep survivors informed of the status of their procedure and increase understanding of domestic violence amongst police and hospital staff.<sup>165</sup> WCC Penang contributed to a survey, which took place between 2008 and 2010, in which 316 domestic violence survivors were interviewed. Only 33% of the survivors were satisfied with the police assistance which

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160 See United Nations Women, *Progress of the World's Women: Perceptions of Domestic Violence*, 2011.

161 Women's Centre for Change, *Annual Review 2010*, p. 13.

162 Yasmin Bahari Legal News, "The Domestic Violence Act (DVA) in Malaysia – WAO", *Yasmin Bahari Legal News*, 17 January 2011.

163 Ibid.

164 See above, note 161, p. 12.

165 See above, note 162.

they received and only 38% were satisfied with the hospital and health care services which they used.<sup>166</sup>

Those statistics which are available suggest that sexual violence is also a significant problem in Malaysia. A 2011 report, which was based on statistics provided by the sexual crimes and child abuse investigations division of the Federal police, suggests that rape levels are such that a rape is taking place every two and a half hours.<sup>167</sup> The report states that in 2010, 3,595 rape cases and 3,173 domestic violence cases were recorded. 2,658 of the rape cases were reported to have involved victims under the age of 18. The high proportion of reported rapes involving minors may indicate greater willingness to report such cases to the authorities. According to a December 2010 report by the Home Ministry, 2,426 rape cases were reported from January to August 2010, but only 119 persons were charged.<sup>168</sup> The disparity between alleged rape figures and actual charges made is concerning. As with domestic violence, it betrays the ineffectiveness of legal protections and processes in ensuring that women are protected from sexual violence.

The Committee on the Elimination of Discrimination against Women has stated that sexual harassment is a form of gender-specific violence which can seriously impair the ability of women to achieve equality in the workplace.<sup>169</sup> For many years, Malaysia lacked effective legislative protection against sexual harassment suggesting that the government did not consider it to be a priority. It has also been very difficult to obtain statistics relating to the prevalence of sexual harassment in Malaysia. In December 2009, however, the Human Resources Ministry announced that there had been 276 reported cases of sexual harassment between 1999 and 2009, of which 271 had been resolved. Just a year later, a December 2010 report by the Home Ministry stated that 1,441 sexual harassment cases had been reported from January to August 2010, with 73

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<sup>166</sup> See above, note 161, p. 18.

<sup>167</sup> The Malay Mail, "A Rape Every 2.5 hours", *The Malay Mail*, 19 May 2011.

<sup>168</sup> See above, note 53, p. 35.

<sup>169</sup> See above, note 154, Para 17.

brought to court.<sup>170</sup> The incompatibility of these sets of statistics suggests that the 2009 report by the Human Resources Ministry has been flawed. Gender rights activists and lawyers in Malaysia have been lobbying the government to enact legislation which would protect women from sexual harassment. This effort resulted in the Employment (Amendment) Act 2012 which received the Royal Assent on 30 January 2012 and entered in force on 1 April 2012. The Act contains new provisions (Part XVA) on sexual harassment which, among other things, impose an obligation on the employer to inquire into any complaints of sexual harassment and take action if satisfied that such an event has occurred, or risk a fine not exceeding RM 10,000. However, it does not require employers to have a written workplace sexual harassment policy.

While it is difficult to obtain accurate statistics on trafficking and the exploitation of prostitution due to the nature of the crimes involved, it is evident that these remain a significant problem in Malaysia. The United States Department of State Trafficking in Persons Report published in June 2012 categorised Malaysia, for a third consecutive year, as a “Tier 2” country and stated that a significant number of young foreign women were recruited ostensibly for legal work in Malaysian restaurants and hotels, but coerced into the commercial sex trade. The report also stated that an increasing number of Ugandan women were fraudulently recruited to Malaysia and forced into prostitution, and that Ugandan and Nigerian syndicates transported victims between China and Malaysia, using threats of physical harm, including through voodoo, to victims and their families to coerce them into prostitution.<sup>171</sup> Women and children are trafficked into sexual exploitation and forced labour, including as domestic workers. The overwhelming majority of trafficking victims are among the estimated two million documented

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170 See above, note 53, p. 36.

171 United States Department of State, *Trafficking in Persons Report 2012*, 2012, p. 234. The tier rankings are established upon an assessment of a country's actions to prevent trafficking in persons, to prosecute traffickers and to protect survivors of trafficking. As Tenaganita has commented, this ranking reflects Malaysia's poor governance, unwillingness to build genuine and collaborative partnerships with civil society and a lack of political will to collectively, systematically and holistically combat modern day slavery and human trafficking. (Tenaganita, *Where's the Collaboration, Why the Use of ISA, Where's the Rationale in Prosecutions? Increase Transparency to Ensure Effective Prosecution under Anti-Trafficking in Persons Act*, Press Statement, 28 June 2012.)



and two million or more undocumented foreign workers in Malaysia,<sup>172</sup> which suggests that the vast majority of trafficked women are among the nearly four million migrant workers in Malaysia. In 2011, 125 foreign women, 75 foreign men, and 22 foreign children were certified as trafficking victims and detained in government facilities.<sup>173</sup> The government “identified an unknown number of Malaysian victims who were exploited within the country”<sup>174</sup> in 2011 but have not provided information on their gender. The key problems relating to trafficking and women’s rights have included:

- (i) The detention and deportation of trafficked women without regard for their rights or the risks they face on return to their countries of origin.
- (ii) Many victims of trafficking are identified as illegal immigrants rather than trafficking victims and are therefore charged with immigration offences without investigation of their account of having been trafficked. These concerns were reflected in the Committee on the Elimination of Discrimination against Women’s latest concluding observations in relation to Malaysia.<sup>175</sup> This problem with identification is further compounded by the inadequacies in the Anti-trafficking in Persons Act 2010 which conflates trafficking and smuggling.<sup>176</sup>
- (iii) There is an urgent need for appropriate shelters and support services. Currently all shelters are government-run with no funding allocated to NGO-run shelters that would be in a position to provide gender-sensitive and victim-centred support. Since the closure of the Tenaganita shelter in January 2011, there has been a serious lack of support for victims of trafficking.

Female genital mutilation (FGM), a practice which the Committee on the Elimination of Discrimination against Women has defined as a form of

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172 Ibid.

173 Ibid., p. 236.

174 Ibid.

175 See above, note 140, Para 23.

176 See United States Department of State, *Trafficking in Persons Report 2011*, 2011, p. 244.

gender-based violence, continues in Malaysia. Under a National Fatwa issued in 2009, the National Council for Islamic Affairs in Malaysia stated as follows:

*The Committee has decided that female circumcision is part of Islamic teachings and it should be observed by Muslims. However, as Islam also pays attention to the safety of its people, the circumcision can be exempted if the practice brings harm to the person. As far as the majority of the jurists' views are concerned, the Committee has decided that female circumcision is obligatory (wajib). However, if it is harmful, it must be avoided.*<sup>177</sup>

As with other forms of gender-based violence, there are no precise numbers showing the occurrence of FGM in Malaysia. Muslim women in the state of Kelantan (the most conservative state in Malaysia) have reported having undergone circumcision as infants, although no clinical injury has been detectable. It has been suggested that much of FGM in Malaysia consists of symbolic non-cutting rituals, as well as that forms of FGM may be becoming more popular in Malaysia, although reliable data is not available.<sup>178</sup>

## **Education**

Article 10 of CEDAW obliges states parties to “take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education”. This section explores how far Malaysia has complied with this obligation.

According to the GGI 2011, Malaysia scored 0.9906 for educational achievement,<sup>179</sup> where 1 is gender equality and 0 is inequality. Malaysia has

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177 86<sup>th</sup> Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia, *Ruling on Female Genital Mutilation*, 21-23 April 2009.

178 See above, note 144; see also Zaman, D., “FGM: It Happens in Malaysia Too”, *The Malaysian Insider*, 3 February 2011.

179 See above, note 129, p. 16.

made significant gains in improving equal access to education. At primary level, gender parity has been achieved in entry levels; and at both secondary and tertiary level, female enrolment rates exceed male enrolment rates.<sup>180</sup> However, the UNDP's assessment of the percentage of men and women over 25 who have completed secondary education shows a disparity, with 66% of women reaching this level, compared with 72.8% of men.<sup>181</sup> Literacy rates are lower overall for women than men, at 90% and 95% respectively,<sup>182</sup> but gains are being made every year, reflecting increasing access to schooling for girls and women.

However, not all women have benefitted from these achievements. The Special Rapporteur on the right to education has highlighted the problems still faced by girls in rural communities in accessing education.<sup>183</sup> Further, it is clear that whilst numbers of female students engaging in the education process are rising, the content of the education which they are receiving is not sufficiently suited to their needs. The quality of the education provided should be improved, to integrate gender and human rights into the curricula and avoid gender biases and stereotyping within the education system,<sup>184</sup> as required by Article 10(c) of CEDAW which highlights the need to eliminate "any stereotyped concept of the roles of men and women at all levels and in all forms of education". The Committee on the Elimination of Discrimination against Women did note, however, the work of the Ministry of Education in providing guidelines in relation to school textbooks in order to eliminate gender stereotypes.<sup>185</sup>

While the achievements in relation to gender equality in education are commendable, gender parity in access to education should not be perceived as an

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180 Ibid., p. 242.

181 See above, note 131.

182 See above, note 129, p. 242.

183 See above, note 63, Paras 27-28.

184 MDG3, *Promote Gender Equality and Empower Women*, 2010, p. 60.

185 See above, note 140, Para 15.

end in itself. Improved access to education for girls is yet to be translated into increased equality in the labour market and economic spheres or increased participation in decision-making processes.

### ***Employment***

Article 11 of CEDAW requires states parties to “take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights”. In its 2006 report, however, the Committee on the Elimination of Discrimination against Women expressed concern about “the lack of employment opportunities for women despite the high level of education attained by girls and women”.<sup>186</sup>

According to the GGI 2011, Malaysia scored 0.5941 for economic participation and opportunity, where 1 is gender equality and 0 is inequality.<sup>187</sup> In June 2011, the Department of Statistics published a report which presents labour market data, compiled in order to comply with the standard Key Indicators of the Labour Market developed by the International Labour Organisation (ILO). The report confirmed that in 2010, 76.1% of men of working age (15-64 years) were employed, whilst only 44.5% of women of working age were employed.<sup>188</sup>

The low proportion of women in high income and decision making roles is of particular concern. Women occupy two thirds of public service positions and many middle management roles,<sup>189</sup> but are under-represented in top management positions. However, there has been considerable progress: the share of women in top management positions in the public service has

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186 Ibid., Para 19.

187 See above, note 129, p. 15.

188 Department of Statistics, Malaysia, *Key Indicator of the Labour Market: Malaysia 2001-2010*, June 2011, p. 3.

189 See above, note 184, p. 55.

increased from 6.9% in 1995 to 32.3% in 2010.<sup>190</sup> The female to male ratio of legislators, senior officials and managers is only 0.32.<sup>191</sup> On 30 June 2010, the Malaysian Court issued statistics showing that the Chief Justice of the Federal Court, the President of the Court of Appeal, and the Chief Judges of the High Courts of Malaysia and in Sabah and Sarawak were all male. Further, only 14.3% of the judges of the Federal Court, 13% of the judges of the Court of Appeal, and 36.7% of the judges of the High Courts in Malaya, Sabah and Sarawak were female.<sup>192</sup> The Department of the Syariah Judiciary Malaysia confirmed that there are no women amongst the Chief Justice, the judges of the Court of Appeal, or the Chief Registrars of the State Syariah Courts. Women have only been permitted to become judges in Syariah courts since 2010,<sup>193</sup> and only 1.7% of Syariah judges are female (i.e. two out of 117 judges). In August 2010, the Ministry of Foreign Affairs revealed that only 13.4% of Malaysian Ambassadors, 14.3% of High Commissioners and 33.3% of Permanent Representatives to the United Nations were female.<sup>194</sup> In July 2010, the Ministry of Education published data showing that only 34.9% of primary school head teachers and 45.2% of secondary school principals are female.<sup>195</sup> The Committee on the Elimination of Discrimination against Women has noted the low representation of women in the foreign service and in private sector organisations.<sup>196</sup>

Article 11(b) of CEDAW specifically requires that men and women must have the “right to the same employment opportunities”. In spite of this, the Employment Act of 1955 explicitly discriminates against women in that it

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190 Ibid.

191 See above, note 129, p. 242.

192 Salim, R., *Malaysia's Action Plan in Line with UN Women's Strategic Plan 2011-2013: Leadership and 30 Percent Women in Decision Making Position*, Kuala Lumpur, 13 June 2011.

193 England, V., “Malaysian groups welcome first Islamic women judges”, *BBC News*, 9 July 2010.

194 See above, note 192.

195 Ibid.

196 See above, note 140, Para 17.

prohibits women from working at night and underground. It also allows the government to prohibit women from working in other circumstances as the government sees fit. Section 34 (1) states that:

*Except in accordance with regulations made under this Act or any exemption granted under the provision to this subsection no employer shall require any female employee to work in any industrial or agricultural undertaking between the hours of ten o'clock in the evening and five o'clock in the morning nor commence work for the day without having had a period of eleven consecutive hours free from such work: Provided that the Director General may, on application made to him in any particular case, exempt in writing any female employee or class of female employees from any restriction in this subsection, subject to any conditions he may impose.<sup>197</sup>*

Section 35 states that “[n]o female employee shall be employed in any underground working” and Section 36 states that “[n]otwithstanding the provisions of this Part the Minister may by order prohibit or permit the employment of female employees in such circumstances or under such conditions as may be described in such order”.<sup>198</sup> By limiting the types of work in which women can participate, the Employment Act 1955 is limiting the employment opportunities available to women as compared to men. The CEDAW Committee has raised concerns about the discriminatory treatment of women in relation to work noting that “restrictions on women’s employment, as well as protective employment legislation, policies and benefits for women perpetuate traditional stereotypes regarding women’s roles and responsibilities in public life and in the family”.<sup>199</sup>

There are reports that women who do enter the labour force can face unacceptable conditions. Article 11(f) of CEDAW obliges states to protect the right of women to health and to safety in working conditions. There is, however,

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197 Employment Act 1955, section 34(1).

198 Ibid., sections 35-36.

199 See above, note 140, Para 19.

evidence that women in Malaysia face disproportionate health problems in various work environments. An NGO shadow report to the Committee on the Elimination of Discrimination against Women identified: (i) the office work environment; (ii) hospitals, and particularly the work requirements of female nurses; and (iii) plantation industries, and particularly the dangers facing predominantly female pesticide sprayers, as working environments which have a differential impact on the health of women. Further, the report noted that insurance schemes do not include provisions towards women's reproductive expenses or health, despite accepting women as contributors into such schemes.<sup>200</sup> In spite of women's low participation in the labour market, they are over-represented in those activities which tend to be unregulated, or in which health and safety regulations are not rigorously enforced. For example, women represent over 50% of workers in the Export Processing Zones.<sup>201</sup>

When female participation rates in the labour market are disaggregated by ethnicity, it is clear that some groups are making more gains in terms of gender equality than others. The gender gap in labour participation has increased for "other Bumiputera" and Indian women. In 1990, "other Bumiputera" women had the highest labour force participation rates at 57%, but by 2008, it was the lowest at 43%.<sup>202</sup> This is most likely due to the changing structure of agricultural activity, with a move from subsistence farming, which traditionally engages both women and men, to wage labour in the timber and plantation industry, which is largely undertaken by men. This factor, together with migration from rural to urban settings in which women frequently engage in home care activities, has led "other Bumiputera" women to become more economically dependent on men. For Indian minority women, the increasing gender gap is probably due to a shift away from agricultural activities.<sup>203</sup> For all other groups, there has been a modest narrowing of the gap, probably as a result of increased enrolment in education for both men and women.

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200 See above, note 138, Para 7.

201 United Nations Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice*, 2011, p. 35, Figure 1.7.

202 See above, note 184, p. 50.

203 Ibid., p. 51.

Overall, low female participation levels in the labour force have not increased in the last two decades. With the female to male labour force participation stagnating since the 1980s at around the 0.57 mark, and the female to male earned income ratio hovering around 0.4 for the same period,<sup>204</sup> more consideration needs to be given as to what structural barriers prevent women with good levels of educational attainment from entering the workforce on equal terms with men and from receiving equal pay. Women confront significant barriers to entering the labour market and making progress in their careers. Participation rates disaggregated by age indicate a decline in participation around the time of marriage and childbearing, indicating that gender roles in unpaid care work in the home and other social norms constitute major barriers to equality. There is, for example, a 10% drop in the female labour force in the 30-34 age group.<sup>205</sup> It is also arguable that Malaysian employment law fails to adequately accommodate the needs of women. Section 37 of the Employment Act 1955 provides for a maternity leave of 60 days, rather than the 90 days set as standard by the ILO.<sup>206</sup> Further, maternity leave is not always guaranteed, particularly to those employed as civil servants who are not protected by the provisions of the Employment Act. It has been argued that a lack of alternative childcare forces women to leave the workforce after the arrival of a child.<sup>207</sup>

There has also been evidence that women experience direct discrimination in the labour market. The Committee on the Elimination of Discrimination against Women has expressed concern that the preliminary findings of a study conducted to determine factors contributing to the mismatch between women's educational achievements and their opportunities in the labour market indicate that employers have a preference for male employees due to strongly held stereotypes of men as more reliable workers.<sup>208</sup> The National

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204 Ibid., p. 50, Figure 3.3.

205 Ibid., p. 50.

206 International Labour Organization, Maternity Protection Convention, C183, adopted 15 June 2000, entered into force 7 February 2002, Article 4.

207 Azizan, H., "Still far from equal", *The Star*, 6 March 2011.

208 See above, note 140, Para 19.



Human Rights Commission of Malaysia (SUHAKAM), the official human rights monitoring body, has expressed its concerns over the discrimination against women in terms of promotion and salary.<sup>209</sup> There is also evidence showing that women of child-bearing age, pregnant women, as well as women returning from a long maternity leave, have been discriminated against by their employers.<sup>210</sup> This pattern of discrimination is illustrated by the case of Noorfadilla who has been a victim of pregnancy discrimination (see Box 1).<sup>211</sup>

### Box 1

### Noorfadilla's Testimony

I applied for a job as an untrained relief teacher in late 2008. I received a call from the Hulu Langat District Education office in December 2008 inviting me for an interview on 2 January 2009. After I attended the interview, I received a message (SMS) from the District Education Office on 11 January telling me that I had been successful and that I should attend at their office to collect a Placement Memorandum for a job at a school in Kajang. I was asked to wear appropriate clothing to the meeting as I would need to report to the school directly afterwards. At the meeting, along with a number of other people who had been offered jobs as untrained relief teachers, I was given my Placement Memorandum which served as my employment contract. This was a contract for one year but which would be renewable on a month-by-month basis until a permanent teacher could be appointed. We were informed of the full terms of employment, including the notice requirements for termination and resignation. We were told that we would receive first payment after three months. We were also

209 Commissioner Tan Sri Asiah Abu Samah expressed these concerns, as reported in Habibi, S., "Suhakam slams private sector for 'blatant' gender bias", *The Star*, 27 May 2009.

210 See above, note 207.

211 ERT Interview with Ms Noorfadilla, 21 July 2011, Kuala Lumpur.

informed that we should report for duty at our respective schools immediately in order to start work.

At the end of the briefing session, one of the Education Officers asked all pregnant women to step forward to inform him. I was three months pregnant at that time, so I stepped forward with two other female candidates, one of whom was 8 months pregnant at that stage. The Education Officer immediately took back the Placement Memorandum from me and the other two candidates and informed us that pregnant candidates are not allowed to be appointed as untrained relief teachers. I requested an explanation, but the officer was unable to provide a good one. He simply said that relief teachers are required to be involved in extracurricular activities at school, and this would not be acceptable for pregnant women. I left the office in tears and called my husband to inform him that I had not been given the position as I was pregnant.

The next day, my husband lodged a complaint with the Ministry of Education via email. A few weeks later, my husband called the Ministry of Education Office in Putrajaya. He requested an explanation for what happened as we had been unable to find any Circular or official statement from the government, or the Ministry of Education, which confirmed that a pregnant woman could not be appointed as an untrained relief teacher. We also continued to email them to make sure we had a written record. They were unable to explain their actions. My husband then initiated email communication with various parties, namely the Ministry of Education, the State Education Department of Selangor, the Public Services Department, the Women's Ministry and the Prime Minister's Office. The only replies we received were an acknowledgement of our email from the Ministry of Education, followed by a message from their Corporate Communication Unit stating that there was a Ministry of Education Circular which confirmed that pregnant women could not apply for the position of untrained relief teacher. They were unable to provide us with the actual copy of the Circular. Eventually, through our own internet re-

search, we found the Circular which they were referring to, but it simply stated that there would be no maternity leave granted to either untrained or trained relief teachers. It said nothing about pregnant women not being able to fulfil these roles. We also found a power point slide presentation from the Civil Service Department about leave entitlements. This presentation said that even though untrained relief teachers are not eligible for maternity leave, they would be entitled to an allowance should they give birth during a semester break.

In March 2009, the Ministry of Education called us for a meeting. By this stage, I had already met with my lawyer, Edmund Bon who had volunteered to take my case on a pro-bono basis. I attended the meeting with a member of parliament from the opposition party who was assisting us at that stage and a representative of my lawyer. When I reached the Ministry of Education Office in Putrajaya, I was informed that none of my representatives could attend the meeting with me, even though I had previously notified them that they would be present and there was no official objection from the Ministry at that time. As there were eight to ten people from the Ministry of Education in the meeting, I chose not to go ahead with it as I did not want to be outnumbered or cornered during the meeting.

Following this, later in March 2009 my husband and I went to Parliament in order to meet with the Education Minister and the Minister for Women. We spoke with the Personal Aide of the Education Minister who told us that the Minister of Education was too busy to meet with us. We received no further communication from them.

In May 2009, I was called for a meeting with the Public Complaints Bureau of the Prime Minister's Office. My husband and I attended with a representative from the opposition party, and there were many government representatives present, including from the

Ministry of Education, the State Education Department, the Hulu Langat District Education Office, the Public Service Department (legal counsel), the Welfare Department and the Women, Family & Community Development Ministry. They tried to argue that the job offer was not retracted because I was never given a letter of appointment. I argued that the Placement Memorandum was clearly an early part of a contract. We asked the representative from the Ministry of Women what they were doing to assist in this situation. They said that they had initiated a discussion with the Ministry of Education in relation to a change of policy. We also showed everyone the Circular which we found online, and they were unable to point to any section which said that pregnant women could not be employed as untrained relief teachers. The meeting ended with no solution which was agreeable to all parties. The Public Complaints Bureau could not order the Ministry of Education to reinstate my appointment. The Ministry of Education was adamant on their decision that no pregnant candidate will be employed for the position. The State Education Department, however, agreed to give a new contract of employment after I give birth and am fit to work. But no parties were to admit that the decision to retract my employment offer was wrong.

In May 2010, we filed a civil law suit against the government, claiming that the refusal of the Ministry of Education to employ me because I was pregnant was unconstitutional as it was a violation of Article 8(2) of the Constitution, and also a violation of Malaysia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women. The hearing was postponed until 20 June 2011. I was unable to attend as I had just given birth to my third child and was still in confinement (as is tradition in Malaysia for 40 days after birth). My husband attended the hearing on my behalf, and then returned to the court on 12 July to hear the decision. The judge found in my favour stating that the action of the government was indeed unconstitutional and that they had failed

to comply with obligations under CEDAW. Also, the judge said that the Ministry of Education had failed to comply with their own Circular, which says nothing about not employing pregnant women as relief teachers and also implies that such women can be employed because it makes reference to maternity entitlements. This was a great victory for us as it is very rare for anyone who fights against the government in a court of law to win their case. We have recently learnt that the government is appealing against the decision of the court in my case, so we will have to continue with the battle.

The Income Tax Act 1978 is discriminatory on the grounds of sex. Section 47(1) allows a man to deduct RM 2,000 from his chargeable income as “wife relief” if his wife is living with him. There is not, however, a corresponding provision to enable a woman to make a similar deduction if she is supporting her husband.<sup>212</sup> It is notable, however, that Section 47(1) ensures that a woman’s income can be assessed separately for tax purposes, and that women have equal rights to all benefits as long as they are qualified.

With the participation of women in employment at such low levels, Malaysia has a long way to go before its obligations under Article 11 of CEDAW are fulfilled. Women do not enjoy equal treatment in the field of employment at present. This is the result of a range of factors which deserve urgent attention in law and policy.

### ***Health***

Article 12 of CEDAW obliges States Parties to “take all appropriate measures to eliminate discrimination against women in the field of health care”. This obligation is further elaborated in General Recommendation 24 of the Committee on the Elimination of Discrimination against Women. The ability of women to access health care which addresses their specific needs is a fundamental factor

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212 Income Tax Act 1967, section 47(1).

contributing to gender equality in general, as poor health hinders the ability to participate in other areas of life, such as education, employment and politics.

Malaysia has made some advances in making health care more equal. In the Global Gender Gap report, Malaysia scores 0.9736 in respect of health and survival, where 0 is inequality and 1 is equality.<sup>213</sup> Malaysia has made advances in improving maternal health as part of the commitment to Millennium Development Goal 5. Maternal mortality rates have been reduced from 44 per 100,000 births in 1991 to 28.9 in 2008 and the proportion of births attended by skilled health personnel has risen from 96.6 in 1990 to 98.6 in 2008, with the most gains made in rural areas such as Sabah which has seen attendance increase from 74% to 90%.<sup>214</sup>

Despite these indicators and Malaysia's advanced health care system, there is evidence that women experience inequality in some areas related to healthcare. The 2005 NGO Shadow Report to the CEDAW Committee identified five main causes of concern in relation to gender inequality in health care in Malaysia:

- (i) Unequal access for marginalised women: there is evidence to demonstrate that marginalised women, including members of rural indigenous communities and those from low income groups, have less access to health care than other women. For example, it was reported in 1994 that out of 42 women who died in labour, 25 (60%) were Orang Asli women.
- (ii) Unequal access for migrant women: migrant women, and particularly migrant domestic workers, find that their right to health is compromised by:
  - (a) the higher fee which they are charged for health services;
  - (b) the mandatory medical examinations which may result in deportation if they are found to carry one or more of 15 infectious diseases or if they are found to be pregnant, and which are carried out without the consent of the women and without post-testing counselling; and
  - (c) the breach of medical confidentiality arising from the fact that employers are informed of the results of such mandatory tests, even in the case of HIV/AIDS.

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213 See above, note 129, p. 15.

214 United Nations Country Team, Malaysia, *Malaysia: The Millennium Development Goals at 2010 Overview*, 2011, p. 6.

(iii) Reproductive rights and reproductive health services: while national family planning services do exist, they focus on the reproductive health of married women rather than all women. Young and adolescent women, single women and others deemed to be “outsiders” are unable to access such services. The Committee on the Rights of the Child noted with concern that pregnant adolescents are often stigmatised.<sup>215</sup> Further, some women are denied the right to make decisions about reproduction. For example, hospitals have refused to carry out sterilisation procedures without the consent of a woman’s husband, whereas the consent of a wife is not required in order for similar surgery to be carried out on a husband.

(iv) HIV/AIDS: there has been an increase in the number of women infected with HIV. The proportion of women with HIV rose from 9.4% of reported cases in 2000 to 18% in 2009.<sup>216</sup> Women are more susceptible to HIV infection than men, largely as a result of unequal gender relations between men and women.

(v) Lack of adolescent health programmes: the National Adolescent Health Policy launched in 2000 does not address gender issues relating to adolescent health, such as the fact that adolescent girls are both biologically and psychologically more vulnerable than boys to sexual abuse, violence and prostitution, and to the consequences of unprotected and premature sexual relations.<sup>217</sup>

### ***Political Participation***

The ability of women to participate in the political process is often a necessary pre-requisite to tackling the pervasive attitudes and practices which sustain the unequal position of women in society. Article 7 of CEDAW therefore obliges states parties to “take all appropriate measures to eliminate discrimination against women in the political and public life of the country” including by ensuring (i) equal ability to vote in all elections and to be eligible for elections; (ii) equal participation in the formulation of government policy and its im-

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215 Committee on the Rights of the Child, *Concluding Observations, Malaysia*, UN Doc. CRC/C/MYS/CO/1, June 2007, Para 66.

216 See above, note 214.

217 See above, note 138.

plementation; and (iii) equal participation in non-governmental organisations and associations concerned with the public and political life of the country.

While women face no legal bar on participation in government and politics, recent statistics demonstrate that women are not participating equally in political life in Malaysia at present. For political participation, Malaysia's score in the GGI 2011 was only 0.0517.<sup>218</sup> On 4 June 2010, the Cabinet Division of the Prime Minister's Department said that only 7.1% of Cabinet Ministers and 16.7% of Deputy Ministers were female. Since 1957, the number of women in the Cabinet has never exceeded three.<sup>219</sup> In 2011, 14% of parliamentarians were female.<sup>220</sup> Women are also under-represented at state level. In 2009, women accounted for only 8% of representatives in state assemblies. On average, women have made up less than 20% of local councillors.<sup>221</sup> While the Ninth Malaysia Plan (2006 - 2010) set a target of 30% of women in parliament, there have been no legislative provisions to back up this aspiration.

Women who have entered politics report negative experiences. One study about the experience of women in politics found that they came up against a "culture of masculinity", and felt the impact of sexism, ageism and ethnicity. Women reported that male colleagues failed to take them seriously, displayed open hostility to their presence, and harassed them. The process of appointment to decision-making positions was found to exclude women.<sup>222</sup>

The NGO Shadow Report to the CEDAW Committee identified six critical areas of concern in relation to the participation of women in politics and public life. These were: (i) the low participation of women as candidates in the elec-

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218 See above, note 129, p. 15.

219 Ng, C., "The Hazy New Dawn: Democracy, Women and Politics in Malaysia", *Asia Research Institute Working Paper Series No. 136*, Asia Research Institute: National University of Singapore, March 2010, p. 7, note 4.

220 See above, note 201, p. 123.

221 See above, note 219.

222 *Ibid.*, pp. 13-14.



toral process; (ii) the low number of women as elected representatives; (iii) the lack of access for women to information about candidates and election issues; (iv) the under-representation of women in public office or decision-making processes; (v) the limited representation of women in the leadership of the trade union movement; and (vi) the challenges faced by women within the non-governmental organisations. The report then went on to discuss a number of factors which contribute to the low participation of women in the Malaysian political process, including:

(i) Too few women participate as candidates in the electoral process, which is a result of laws and social perceptions which hinder their ability to do so.

(ii) The leading political parties are structured to segregate men and women into separate “wings” within the party; a practice which further perpetuates a political environment in which men and women do not interact or work together on political issues.

(iii) The high cost of elections, including the increased election deposits, places a bar against the participation of those with limited economic resources. Women have far less access to such resources than men, given that the female to male ratio of estimated earned income was 0.42 in 2010.<sup>223</sup>

(iv) The absence of local government elections since 1965 has prevented women from having an important local avenue through which they are able to engage in the political process.

(v) There have been no specific measures to increase the number of women in Parliament.

(vi) There has been no capacity-building for women.

(vii) The lack of support services, such as child care facilities, in public service departments has put women at a disadvantage.<sup>224</sup>

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223 World Economic Forum, *The Global Gender Gap Report 2010*, 2010, p. 212.

224 See above, note 138.

The very low number of women in public and political life has been noted with concern by the Committee on the Elimination of Discrimination against Women.<sup>225</sup> Since there is often a link between increasing female participation in parliament and gains for women elsewhere in society, such as access to employment and social services,<sup>226</sup> the lack of political participation amongst women has serious implications for other instances of disadvantage faced by women.

### ***Criminal Law***

Malaysia's declaration that its obligations under CEDAW are subject to the provisions of Syariah law has compromised the impact of CEDAW for the majority of women in Malaysia. The Committee on the Elimination of Discrimination against Women has expressed concern about the existence of this dual legal system "which results in continuing discrimination against women".<sup>227</sup> As the authors of the NGO Shadow Report to the CEDAW Committee noted:

*There is due concern that the use of religion has often perpetuated discrimination against Muslim women and denied them the increasing sphere of rights that is being granted to their non-Muslim counterparts. It would be most unreasonable for Muslim women to find themselves occupying a civil status that would be legally inferior not only to the status of Muslim men but also to that of non-Muslim women, and to find that they are unable to exercise some of the rights that may be exercised by all the other citizens in Malaysia i.e. the men and women of other faiths.*<sup>228</sup>

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225 See above, note 140, Para 17.

226 Hassim, S., *Rethinking Gender Politics in a Liberal Age: Institutions, Constituencies and Equality in Comparative Perspective*, United Nations Research Institute for Social Development, August 2009, p. 4.

227 See above, note 140, Para 13.

228 See above, note 138, Article 16, Para 3.8.

Syariah criminal law contains many provisions which are discriminatory against Muslim women, both in comparison to Muslim men and non-Muslim women. Discrimination occurs in relation to: (i) the crimes for which a Muslim woman may be punished; (ii) the form of punishment to which she is subjected; (iii) the evidential burden which she must satisfy in court; and (iv) the penalty imposed on the perpetrators in rape cases. Syariah criminal law is enacted on a state-by-state basis and, as such, there is also a lack of consistency between states; however, the Syariah Criminal Offences (Federal Territories) Act 1997, which applies to Muslims within the Federal Territories (i.e. Kuala Lumpur, Labuan and Putrajaya), provides an insight into the content of such laws. Section 41 states that where a woman alleges rape without procuring four male witnesses or an *iqrar* of the accused person, the individual alleging the rape shall be guilty of an offence (*qazaf*: false accusation of illicit intercourse or *zina*) and potentially liable to imprisonment for up to three years.<sup>229</sup> This provision is likely to deter women from reporting rape, thus raising questions as to the accuracy of official statistics indicating the prevalence of rape, and it undermines the “adequate protection” of Muslim women against rape, as required under paragraph 24(b) of General Recommendation 19 of the Committee on the Elimination of Discrimination against Women. Regarding the penalty, the Syariah criminal courts are limited to imposing fines for an amount not more than RM 5,000 and imprisonment to not more than 3 years, whereby under the secular penal code the offence of rape carries a penalty of imprisonment of between 5 and 20 years.

Section 23 prohibits sexual intercourse out of wedlock for both men (section 23(1)) and women (section 23(2)) with a punishment of imprisonment of up to three years, or whipping not exceeding six strokes. However, women are disadvantaged by the evidential rules pertaining to this offence. Section 23(3) states that “[t]he fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be *prima facie* evidence of the commission of an offence under subsection (2) by that woman”. In practice, this can result in the woman being punished whilst the relevant man is not, as evidenced by the testimony collected by ERT (see Box 2).<sup>230</sup>

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229 Syariah Criminal Offences (Federal Territories) Act 1997, section 41.

230 ERT Interview with F, 27 June 2011, Kuala Lumpur.

## Box 2

## F's Testimony

I am an Indian Muslim from Melaka. I am 30 years old. I have four children and I am currently pregnant with my fifth. I got married in September 2010, and my husband is the father of my fourth and fifth children.

I met the father of my first three children in Melaka when I was 19. I did not know that he was married. He used to take me to pubs and to karaoke lounges. When I was 21, I fell pregnant with my first child. My partner wanted me to have an abortion, and he was willing to pay for it, but I refused. During my pregnancy, I did not go to the medical clinic, because I was afraid that the religious authorities would come after me because I was not married. When I was four months pregnant, I told my uncle and he agreed that I could live with him as my parents were very upset with me. My aunty wanted to know who the father of the baby was, but I was too afraid to tell them in case they made a report to the police. Eventually, when I was about to give birth, I gave them his number and they tried to contact him but he did not want to come to the hospital. I gave birth to a girl on 31 July 2003.

The hospital reported me to the state religious authorities after three days, but they did nothing at first. After two months, I received a call from the religious authorities and they asked me to visit their office in Melaka. They took a statement from me, but they said that because I was over 21 years of age, and I had already delivered the child, they would not take the case any further. They were satisfied that my parents were looking after the child and I also had a job.

At first it was difficult for me to register my child because I did not have the necessary records of maternity checks because I had not attended the clinic during my pregnancy. Eventually I tried to register the child again with my parents in attendance. On this occasion, they agreed to register my daughter, but I was fined 50 ringgit due to the delay in registration.

I returned to work at the gas station where I was working before I gave birth to my daughter. I got back into contact with my partner, and he met his daughter. I fell pregnant with my second child, by the same man, when my daughter was almost one year old. About four months later, I was forced to give my first child away to my aunt who was unable to have children. I felt that I had no choice but to do this.

My partner refused to marry me, so I tried to give myself a natural abortion through eating pineapple but this was not successful. Abortions are illegal in Malaysia unless you have a lot of money. I therefore proceeded with the pregnancy, and my mother took me to have a scan when I was five months pregnant. She was concerned that I should have the necessary medical records this time. My parents were not angry this time, because we discovered that I was going to give birth to a boy. My second child was born in February 2005. Three days after he was born, the hospital informed the Religious Authorities, and the welfare department came to take my baby away as they were concerned that I would not be able to care for my son because I was not married. My parents met with the Welfare department representatives, and assured them that they would help me to look after the child. My child was not, therefore, taken away on the proviso that I had to stay with my parents until my son was three years old. The religious authorities also took no further action.

As my child had a cleft palate, I was forced to go back to work straight away so that I could pay for an operation for the baby. I went to work with my father as a security guard. I informed the father of the child, but for a long time he did not come to visit. Eventually, he brought me to meet his family but his parents refused to accept me. His wife knew about me, and she suggested that we should get married quietly. Unfortunately, my partner's family was willing to accept my son, but not me. They threatened to take me to court to fight for custody of my son, but they did not do this.

In February 2006, I gave birth to my third child, a daughter, with the same man. I was forced to give my baby away when she was only three days old. She went to a colleague of my mother. I was made to give my daughters away, but I was allowed to keep my son.

It was at this stage that the religious and welfare authorities took action. Two days after I gave birth to my third child, the welfare department visited me, and a week later, the state religious authorities arrived. The hospital had refused to discharge me until the religious authorities had visited me. They scolded me for continuing to have children out of wedlock and then relying on my parents to look after them. I gave birth to my first and third children in the same hospital, so this is how the religious authorities knew my history. The religious authorities gave me a letter saying that I would be asked to attend an interview with them in April 2006. I never received the invitation to an interview.

I went back to work at the gas station I had worked at previously. I then met the man to whom I am now married. I fell pregnant with my fourth child and gave birth in June 2007. After I gave birth to my daughter, I received a letter from the religious authorities, asking me to attend the Syariah Court in relation to my third child. I attended the Melaka Syariah Court on the charge of having a child out of wedlock. I was called to a hearing in April 2008 when my third child was two years old. They did this because at that age, the child can be separated from the mother. I was sentenced to either 24 months in jail or a 3,000 ringgit fine. The father of my fourth child paid the fine by borrowing money from his boss. I was held in detention for one day while we waited for the payment to be made. After I was released, I went back to work and continued to live with the father of my fourth child. Soon after, we moved to Kuala Lumpur. As my partner was a drug addict, we got in contact with an NGO. My partner was put into rehabilitation and I was sent with my daughter to stay in one NGO whilst my son went to stay in another.

In January 2010, the Syariah court in Melaka sent a letter to my mother's address regarding my first child. At the end of January

2010, I attended a further hearing at the Melaka Syariah court. I was sentenced to six months in prison and a 2,700 ringgit fine on account of having my first child out of wedlock. I was unable to pay the fine at that time, so I asked the woman who ran the NGO I was living with if she could pay the fine and then deduct the sum from my regular *baitulmal*\* payments from the Islamic welfare department. Unfortunately, the fine did not get paid, so I was sent to prison for four months in Kajang prison. My children remained in the NGO accommodation during that time.

The conditions in the prison were terrible. There were seven to eight people in each cell and the food was very bad. When I was released, I returned to the NGO where I had been staying before. I no longer trusted the person running the shelter because she had not paid my fine as agreed, so eventually I ran away. I married my husband at the end of 2010 and we now live together in Kuala Lumpur.

The Syariah people are not fair. They do not take action against people who dump their children and disappear, but they do take action against single mothers like me who just want to look after their children.

\* **Baitulmal** is a form of welfare benefit payment distributed from zakat charitable collections.

Syariah-based criminal law gives less credibility to the testimony given by female witnesses. The failure of the Syariah courts to take into account the testimony of female witnesses is in violation of Malaysia's obligations under Article 15(2) of CEDAW which requires that women must be treated "equally in all stages of procedure in courts and tribunals". The UN Human Rights Committee (HRC) has noted the obligation of states to "ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law".<sup>231</sup>

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231 Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, 29 March 2000, Para 5.

Muslim women are also subject to discrimination in the sentencing process under Syariah criminal law. Caning of women has raised particular concern. Whilst federal law prohibits the caning of women, there is no such protection for women under Syariah law and women have been subjected to caning in certain states. In July 2009, Kartika Sari Dewi Shukarno was sentenced by the Kauantan Syariah High Court (in Pahang state) to six strokes of a cane for consuming alcohol in a hotel in Pahang state in 2008. The Special Rapporteur on violence against women sent an urgent appeal, jointly with the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, to the government of Malaysia on 3 August 2009 to seek further information regarding the sentence which Kartika Sari Dewi Shurkarno had received, including a request for the government to “provide details of any measures taken to promote the rights of women in Malaysia, including in relation to the application of physical punishments based on prejudices, customary practices and all other practices which lie on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women”.<sup>232</sup> In its response dated 1 September 2009, the government stated that the sentence given to Kartika Sari Dewi Shurkarno was not discriminatory, “as it is based on the laws enforceable in Malaysia and has been executed in a number of cases involving men”.<sup>233</sup> In response, the Special Rapporteur emphasised “the importance of addressing situations of violence and discrimination that affect many women as well as other individuals on the grounds or in the name of religion or belief or in accordance with cultural and traditional practices”.<sup>234</sup> On 1 April 2010 the Sultan of Pahang commuted her caning sentence and substituted it with 20 days of community service.<sup>235</sup> On 17 February 2010, the Home Ministry announced that three Muslim women and four Muslim men, found guilty of illicit sex under Syariah law, had been caned on 9 February 2010. The canings of the women took place in a prison in Selangor and were administered by government officials, rather than reli-

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232 See above, note 105, Para 226(4).

233 Ibid., Para 228.

234 Ibid., Para 232.

235 See above, note 53, p. 5.



gious authorities.<sup>236</sup> Section 56 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides that where a court has convicted a woman of any offence under Part IV (Offences relating to Decency), it may commit her to an “approved home” for a period not exceeding six months, either in lieu of, or in addition to, any other punishment specified for the offence. This provision may entail that women are subjected to a punishment which is longer or otherwise more onerous than that given to a man for the same offence. This is in flagrant contravention to the principle of equality before the law.

### ***Freedom of Movement and Expression***

The freedom of Muslim women to move around and dress as they choose is also restricted by Syariah law. This creates inequality of treatment between Muslim men and Muslim women, and also between Muslim and non-Muslim women. While women in Malaysia legally enjoy freedom of movement, locally imposed restrictions based on Syariah law often apply. For example, cinemas are gender-segregated in Kelantan state. Similarly, women are in theory free to dress as they wish, but the National Fatwa Council issued in 2009 a fatwa (religious edict) prohibiting girls from acting and dressing like boys, alleging it encouraged homosexuality and violated Islamic teachings.<sup>237</sup> Under the so-called “tomboy” fatwa, girls cannot have short hair, or dress, walk, or act like boys. A fatwa is legally binding, although enforcement depends on the Islamic authorities of each state. There were no reports of enforcement actions taken under this fatwa.<sup>238</sup> In Kelantan, Muslim women are forced by local authorities to wear headscarves and to conceal all but their face and hands. Non-compliance with this local rule can result in high fines.<sup>239</sup> The testimony gathered by ERT and Tenaganita describes how these challenges are experienced by Muslim women (see Box 3).<sup>240</sup>

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236 Ibid.

237 83<sup>rd</sup> Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia, *Ruling on Women Imitating Men (Tomboy)*, 22-24 October 2008.

238 United States Department of State, *International Religious Freedom Report 2010*, 17 November 2010.

239 Ibid.

240 ERT Interview with Nabila, 26 June 2011, Petaling Jaya.

### Box 3

### Nabila's Testimony

I am a Malay Muslim. When I was about 12, I was physically abused by my Religious Studies teacher at school because I refused to wear the hijab. I was doing well at school. I was part of a promising class which received extra lessons in preparation for the forthcoming exams.

During one school holiday, there was a special camp arranged for Muslim students. I was unable to attend as my mother had booked an alternative holiday for us. When I came back to school after the holiday, all the Muslim girls who had attended the camp were wearing the hijab. I was told that if I did not wear the hijab, I would be treated as an apostate. I did not want to wear it, because it was too hot for me, and my parents were very open-minded and always told me that there should be no compulsion in religion.

I found the situation very scary as it seemed that my friends had been brainwashed. I was subsequently ostracised for the remainder of the school year, because the teachers told my friends that if they talked to me they were sinners. During religious classes, the Muslim and non-Muslim students were separated, so I was all alone as none of the Muslim girls would talk to me. I used to sit on my own at the back of the class. Every day, the Religious Studies teacher would come back to where I was sitting and say nasty things to me. She would also pinch the side of my abdomen. This happened every day for four or five months. At the end of the school year, I entered a singing competition with a non-Muslim girl. We won, and afterwards, the Religious Studies teacher told my friends not to listen to my voice because it was sinful. I was very unhappy but I did not complain, but I don't know why. I wrote in my diary that I wanted to commit suicide.

Malaysia has specifically declared that its compliance with CEDAW is subject to the provisions of Syariah law, and Malaysia's constitutional prohibition of sex discrimination does not apply to personal laws (which have been interpreted to include Syariah law). However, the Committee on the Elimination of Discrimination against Women has noted that Malaysia adopts a particularly "restrictive" interpretation of Syariah law. It encouraged Malaysia "to obtain information on comparative jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms".<sup>241</sup> Malaysia's ability to find such progressive interpretations which respect the right to equality within Syariah law will provide the way forward in relation to eradicating discriminatory practices against women in the name of religion.

### ***Citizenship Rights***

General Recommendation 21 of the Committee on the Elimination of All Forms of Discrimination against Women states that nationality is critical to full participation in society. Further, Article 15(4) of CEDAW states that women must be given the same rights as men in relation to the movement of persons and the freedom to choose their residence and domicile. However, provisions in the Federal Constitution relating to citizenship discriminate on grounds of sex.

Articles 14 and 15 of the Federal Constitution govern the rights to citizenship "by operation of law" and "by registration" respectively. Those born outside of Malaysia after independence "whose father is at the time of birth a citizen" may become citizens "by operation of law". There is no provision for a child born outside of Malaysia, whose mother is at the time of birth a citizen, to become a citizen by operation of law (unless born in Singapore). Instead, such children must rely on Article 15(2) which states that "the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian".<sup>242</sup> Such children, therefore, only have access to "citizenship by registration" and such

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241 See above, note 140, Paras 13-14.

242 See above, note 39, Article 15(2).

registration is at the discretion of the government. This may result in statelessness and thus be in violation of Article 7 of the CRC. Further, the Federal Constitution makes provision for the wives of male citizens to be registered as citizens. There is no related provision to allow citizenship by registration for husbands of citizens.<sup>243</sup> This is discriminatory against the foreign male spouses of Malaysian women, and can be a failure to address statelessness if the man is stateless.

The provisions regulating the loss of citizenship also discriminate on the basis of sex. Article 24(4) states:

*If the Federal Government is satisfied that any woman who is a citizen by registration under Clause (1) of Article 15 has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen, the Federal Government may by order deprive her of her citizenship.*<sup>244</sup>

Therefore, a woman who has acquired citizenship “by registration” owing to her marriage to a Malaysian citizen, and then proceeds to acquire the citizenship of another country by virtue of her marriage to a non-Malaysian citizen may be deprived of her Malaysian citizenship. Non-citizen husbands of female Malaysian citizens cannot acquire citizenship by virtue of Article 15(1), and so are not subject to an equivalent provision.

Similarly, Article 26(2) provides that:

*The Federal Government may by order deprive of her citizenship any woman who is a citizen by registration under Clause (1) of Article 15 if satisfied that the marriage by virtue of which she was registered has been dissolved, otherwise than by death, within the period of two years beginning with the date of the marriage.*<sup>245</sup>

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243 Ibid., Article 15(5).

244 Ibid., Article 24(4).

245 Ibid., Article 26(2).

Again, there are no equivalent provisions relating to men as men cannot be registered under Article 15(1). This is discriminatory on the basis of civil status in that it creates two classes of citizens – those whose nationality is permanent and those whose nationality is subject to their marital status. Furthermore, this too can result in statelessness – particularly if the spouses of Malaysian men lose their original nationality upon receiving Malaysian nationality, or were always stateless. The impact of Articles 24(4) and 26(2) on the rights of women to retain their nationality represents a violation of Malaysia's obligations under Article 9 of CEDAW, which provides that women shall be granted "equal rights with men to acquire, change or retain their nationality". It further requires states parties to "ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband". The CEDAW Committee has stated that the citizenship of women "should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality".<sup>246</sup>

Malaysian women who marry foreign men are treated less favourably than Malaysian men who marry foreign women. Section 12 of the Immigration Act of 1959/1963 allows the Director General to endorse the names of a passport holder's wife and children, but does not contain analogous provisions for a female passport holder's spouse and children. Under the Immigration Regulations of 1963, a foreign husband of a Malaysian woman is not entitled to a dependant's pass while a foreign wife of a Malaysian man is.<sup>247</sup> Further, under Section 3(1) of the Immigration (Prohibition of Entry) Order 1983, non-professional foreign men who marry Malaysian women are at risk of losing their job permits and visas. The NGO Shadow Report to the CEDAW Committee states that Malaysian women who marry foreign spouses would rather live in another country than face the obstacles imposed by Malaysian immigration rules.<sup>248</sup>

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246 See above, note 133, Para 6.

247 Immigration Regulations 1963, Article 10.

248 See above, note 138, Article 9.

It should be highlighted that there have been some attempts to improve this situation. In its report to the Committee on the Elimination of Discrimination against Women, the Ministry of Women and Family Development confirmed that foreign husbands were to be allowed to stay in the country under a social visit pass for one year as opposed to three months.<sup>249</sup> There are, however, a number of conditions attached to this regulation, including that the foreign husband must be seeking gainful employment, whereas the foreign wives of Malaysian husbands are under no obligation to seek work under a social pass.

### **2.3.1 Discrimination against Rural and Indigenous Women**

Article 14 of CEDAW obliges states parties to “take into account the particular problems faced by rural women and (...) take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas”. In Malaysia, rural women face challenges which do not affect women living and working in the urban centres, or affect them to a lesser extent.

Poverty remains a significant issue for female estate workers. Rural households headed by women registered high incidences of poverty at 25.7%.<sup>250</sup> They suffer serious inequality of income because they engage in unpaid agricultural work, and, even when paid, men are usually able to earn more, owing to the physical nature of estate work. A number of the jobs on the estates have significant health implications for women, including the use of pesticide spray which can have a detrimental effect on a woman’s reproductive health.<sup>251</sup> This is compounded by a lack of access to social and health facilities.

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249 Ministry of Women and Family Development, *Report to the UN Committee for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Article 2, Para 73(vii).

250 Economic Planning Unit, Prime Minister’s Department, *Mid-Term Review of the Eighth Malaysia Plan 2001-2005*, 2003, p. 60.

251 See Sangaralingam, M., “Malaysia: Plantation Workers Face Poverty and Poison”, Consumers’ Association of Penang, 2005.

The extent of these challenges remains hidden by a lack of official data recording the situation of rural women. The CEDAW Committee, referring to the work of rural women in the “non-monetized sectors of the economy”, has expressed its concern that the information provided in relation to rural women was out of date.<sup>252</sup> The NGO Shadow Report to the CEDAW Committee also identified the failure of government statistics to capture unpaid work carried out by female agricultural workers. The result is that such workers have been overlooked in the agricultural revival of the country which has included the offering of incentives for food production, the creation of Food Production Parks to promote commercial farming and special funds such as the Fund for Food which provided credit for agricultural workers. Some of these issues were identified in the testimony collected by ERT (see Box 4).<sup>253</sup>

#### **Box 4**

#### **Testimony of a Palm Oil Plantation Worker**

I am 38 years old and until recently, I worked as a tractor driver on a palm oil plantation near Kelang. I had worked there since I was 19 years old. My parents had also worked on the same plantation. I was generally happy working as a tractor driver, although the pay is very low. I earned 23 ringgit per 8-hour day, which was not enough money so it was necessary for me to work overtime, for which I was paid double.

I was a union leader at the plantation, and I was also a member of the Gender Committee. As a member of the Gender Committee which met every three months, I often raised the problems faced by the women employees on the plantation. I explained that there were pregnant women who were still forced to do heavy work during their pregnancy. I have also raised concerns about women working with fertiliser spray which can cause them more harm than men, and which is prohibited by the Roundtable on Sustainability of Palm Oil. I also highlighted the

252 See above, note 140, Para 29.

253 ERT Interview with M., 28 June 2011, Kuala Lumpur.

differences between the pay received by male and female employees. For example, the male tractor drivers received 30 ringgit per day, whilst I was only paid 23 ringgit per day. I also pointed out problems with the conditions in the workers' living quarters, such as the presence of termites and blocked drains. There is also differential treatment of the general workers, and the management and other staff on the plantation. General workers are forced to stop working when they reach 55 years of age, whilst other staff are able to work until they are 60.

In February 2011, I was dismissed from my job as tractor driver. I was accused of stealing some of the fruit which we harvest in order to make money for myself. The accusation was based on the fact that I was found cutting grass near an area where some fruit branches were lying. Two men who saw these branches near me reported me to the voluntary police on the estate. I was initially suspended for 14 days, and was then called to an inquiry to give evidence. After the inquiry hearing, I was sent a termination letter and asked to vacate my living quarters in three days' time.

I believe that all of this happened because I am a union leader and because I made complaints about the way that women were unfairly treated on the plantation. I have always been the person that speaks up about problems, and I do it on behalf of all the workers and not just myself. The managers of the plantation pay more attention to male workers than to female workers, and I believe that this is happening on many other estates as well.

In addition to the inequalities faced by rural women in general, female members of indigenous groups in Malaysia face dual discrimination. The NGO Shadow Report identified indigenous women as a group particularly disadvantaged, presenting a pattern of intersectional inequality. While there is little information regarding the position of indigenous women in Malaysia, there are a number of key areas of concern. The impact of the violation of indigenous land rights and the forced resettlements is arguably greater on women. For women, displacement, which pushes indigenous communities



further into the interior, leads to increased work burden, due to the loss of easily accessible resources for food, medicine and material for handicraft from the forest, river and loss of land for farming; this means women have to walk farther to collect forest produce and complete their daily chores.<sup>254</sup> Further, due to the distance at which they are ordinarily placed from services such as hospitals, women face increased challenges in accessing health care. Malaysia's public healthcare provision has improved greatly, but it still suffers geographical variations with some predominantly rural parts of the country well below average.<sup>255</sup>

Finally, the native customary legal system treats indigenous women unequally as compared to men. While in theory indigenous women can seek remedy at the Native Courts (subordinate courts in Sabah and Sarawak having jurisdiction on matters of native law and custom), due to social and cultural constraints they have limited access to justice as compared to indigenous men. Women may also be disadvantaged by cases being heard in the Native Courts rather than in the Civil Courts. For example, in cases of sexual offences, both parties are liable to pay a fine, even where the woman was the victim of rape or was under-age. In Sabah, a discriminatory system of inheritance is found amongst the Nabai Muruts community. The wife has no right to claim any of the property acquired during marriage by either party.<sup>256</sup>

### ***Summary***

Despite Malaysia's accession to CEDAW in 1995, the Committee on the Elimination of Discrimination against Women and the Gender Gap Index have highlighted that there is still a lot of progress to be made before Malaysia can confidently state compliance with its obligations under the Convention. Traditional customs and attitudes are arguably responsible for maintaining a disadvantaged position in society for women in general. Gender-based violence, including domestic violence, rape, sexual harassment, and trafficking remains widespread, and FGM may also be found. Further, despite

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254 See above, note 138, Article 14, Para 3.1.

255 European Community, *Malaysia – European Community Strategy Paper for the Period 2007-2013*, p. 6.

256 See above, note 138, Article 5, Para 2.3.

significant progress regarding gender equality in education, not all women have benefited from these improvements. Indigenous women continue to face disadvantage in accessing education. The progress made with regard to access to education has not translated into improved equality for women in employment. There continue to be low levels of female participation in the labour force, particularly in high income and decision-making roles. Women face discrimination with regard to promotions and salary, and also in relation to health and safety in the workplace. Women also face unequal access to healthcare. The lack of equal participation of women in the political process serves to sustain their unequal position in other areas of life. Women are discriminated against in their ability to pass on citizenship and residence rights to their children and spouses.

Particular challenges are faced by Muslim women and women who live and work in the rural areas of the country. As a result of Syariah law in Malaysia, Muslim women face multiple discrimination in some areas of life on the grounds of gender and religion. Such discrimination is most evident in the context of marriage and family life, which for Muslim women are governed by the provisions of Islamic family law. Such provisions serve to sustain the subordinate position of women within the Muslim family. Further, many provisions of Syariah criminal law are discriminatory against Muslim women, in relation to the particular crimes for which a Muslim woman may be punished and the form of punishment to which she may be subjected. Finally, the freedom of Muslim women to move around and dress as they choose is also restricted by locally imposed Syariah law.

## **2.4 Discriminatory Patterns Related to Religion**

The right to equality requires that people should be able to participate in any area of economic, social, political, cultural and civil life on an equal basis, regardless of their religion or belief. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that “[d]iscrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations”, and as such states should

*[T]ake effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights*

*and fundamental freedoms in all fields of civil, economic, political, social and cultural life.*<sup>257</sup>

In carrying out research for this report, the authors have found no statistics which disaggregate data relating to participation in various areas of life (e.g. education, employment, health care, etc.) on the basis of religion. It is therefore not possible to draw firm conclusions relating to the impact which an individual's religion has on their experiences in these areas, save that there is a close relationship between race and religion and thus comments made above in relation to the outcomes for different racial groups are relevant. ERT and Tenaganita's research has, however, identified patterns of discrimination in which an individual's religion impacts on their religious freedoms and enjoyment of the right to respect for private and family life. While states are able to place limits on the right to religious freedom in order to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, the HRC has been clear that they "may not be imposed for discriminatory purposes or applied in a discriminatory manner"<sup>258</sup> and that it "views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community".<sup>259</sup>

### ***Freedom to Manifest and Practise One's Religion***

The Constitution provides that Malay persons are Muslims,<sup>260</sup> and that Islam is the religion of Malaysia, but that other religions may be practised in peace and

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257 United Nations General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. A/RES/36/55, 25 November 1981, Articles 3 and 4.

258 Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, Para 8.

259 Ibid., Para 2.

260 According to the Constitution, "Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and -

(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or

(b) is the issue of such a person." (Federal Constitution of Malaysia, above note 39, Article 160.)

harmony in any part of Malaysia.<sup>261</sup> In addition, the right to freedom of religion is enshrined in Article 11 of the Malaysian Constitution. However, this freedom is not enjoyed equally. Despite the constitutional right of all persons to practice their religion, the government has restricted non-Muslims, including Hindus and Christians as well as non-Sunni Muslims, from manifesting their religion.

Article 11(4) of the Federal Constitution allows state and federal governments to control or restrict the propagation of religious doctrine or belief among persons professing the religion of Islam. Under these powers, discriminatory restrictions have increasingly been placed on the religious freedoms of Christians, ostensibly to prevent them from proselytising to Muslims and threatening the supremacy of Islam in Malaysia. Laws prohibiting the proselytisation by non-Muslims were reportedly used by the Selangor Islamic Religious Department to suppress the activities of the Damansara Utama Methodist Church. Reports alleged that the religious authorities carried out a raid on the church, having received a complaint that Muslims were attending a dinner at the church. The use of words including “Quran” and “pray” in the course of the gathering led the authorities to conclude that proselytisation (in violation of Selangor’s Non-Islamic Religions (Control of Propagation amongst Muslims) Enactment) was taking place. According to reports, the individuals involved may face charges for insulting Islam under Section 10 of the Syariah Criminal Offences Enactment 1995.<sup>262</sup> In 2009, nine Christians were arrested by Malaysian police at Universiti Putra Malaysia (Malaysia Public University) in Serdang, near Kuala Lumpur, for allegedly trying to convert Muslims to Christianity. They were freed soon after when the charges appeared unfounded.<sup>263</sup> A week before, there had been controversy concerning two journalists who had hidden their Muslim identity in order to carry out an undercover investigation into Muslim apostasy, by attending a Christian church.<sup>264</sup> The govern-

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261 Ibid., Article 3(1).

262 See Asia One News, “Full text of Sultan of Selangor’s statement on church operation controversy”, *Asia One News*, 11 October 2011; see also Chooi, C. and Chong, D., “1988 state law allows Jais to act against non-Muslims”, *The Malaysian Insider*, 7 August 2011.

263 Global Security, *Malaysia religion*, available at: <http://www.globalsecurity.org/military/world/malaysia/religion.htm>.

264 Ibid.

ment has also restricted the distribution of Malay-language translations of the Bible and other printed materials, as well as Christian audio and video materials.<sup>265</sup> In 2005, the then prime minister Abdullah put into place a policy requiring Malay-language Bibles to have the words “Not for Muslims” printed on the cover and authorised their distribution only in churches and Christian bookshops.<sup>266</sup>

Article 11(4) of the Federal Constitution is the basis upon which state laws have prohibited the use of certain words and phrases by those not professing the religion of Islam.<sup>267</sup> The Malaysian government has banned the use of the word “Allah” by other religions, on the basis that Muslims would be confused by the use of “Allah” in other religious publications. Malaysia’s Christians continue to use the word to refer to God, and argue that the Arabic word predates Islam and that the members of other religions should, therefore, be able to use the word.<sup>268</sup> The *Herald* case illustrates how such restrictions operate. The Ministry of Home Affairs had issued a publication licence to the Catholic Church in respect of its newspaper, but included a condition that they were prohibited from referring to God as “Allah”. During the hearing, officials from the Ministry of Home Affairs argued that the word “Allah” was specific to the religion of Islam, and could not be used by any other religion. They cited state legislation that provided for this prohibition. In December 2009 the High Court handed down its decision that the newspaper had the right to use the word “Allah” when referring to God. However, with the consent of the parties, the decision was stayed pending the outcome of an appeal by the government. Since, as of May 2012, the Court of Appeal had yet to fix a date to hear the appeal, more than two years later, non-Muslims continued to be prohibited from using the word “Allah”.<sup>269</sup> In March 2009 the Malaysian government seized

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265 See above, note 238.

266 Ibid.

267 The use of certain words and phrases by those not professing the religion of Islam has been prohibited by federal law – the Internal Security Act 1960, as well as state law, e.g. the Selangor Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, Section 9 and the Schedule.

268 Christian Post, “35,000 Bibles To Be Released by Malaysian Gov’t”, *Christian Post*, 15 March 2011.

269 *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* [2008] 9 CLJ 503 (High Court, Kuala Lumpur).

5,000 Malaysian- language Bibles in Port Klang and another 30,000 copies at the Port of Kuching in Sarawak state, on the basis that they contained the word “Allah”. All 35,000 books were finally released in March 2011, under the condition that each copy be stamped with the usual “Not for Muslims”, as well as a serial number, the official seal of the relevant department of the Bahagian Kawalan Penerbitan Dan Teks Al-Quran, and the words “by order of the Minister of Home Affairs”.<sup>270</sup> In February 2012 a concert by Grammy-award winning US singer Erykah Badu was cancelled as a publicity photograph of her appeared showing a tattoo with the word “Allah” in Arabic.<sup>271</sup>

In the Malaysian context, the belief that only the religiously learned (the *ulama*) are entitled to opine on religious matters in Islam has created a culture of taboos, at the expense of the right to freedom of religion without discrimination. However, if Islam is a source of law, it must be open to public debate. Contrary to this basic assumption, in Malaysia today those Muslims who do not follow the officially sanctioned religion can face persecution. As Sunni Islam is the officially accepted branch of Islam in Malaysia, any other forms, practices or schools of Islamic thought are vulnerable to being classified deviant. The Malaysian government maintains an official list of 56 sects of Islam it considers “deviant” and a threat to national security, which includes Shi’a Islam, the Ahmadi religion, transcendental meditation, and some messianic sects of Islam. The government, upon approval by a Syariah court, may detain Muslims who deviate from accepted Sunni principles and subject them to mandatory “rehabilitation” in centres that teach and enforce government-approved Islamic practices.<sup>272</sup> In 2006, Malaysian police detained 107 persons, including children, during a raid in Kuala Lumpur, of suspected followers of the al Arqam Islamic group, which had been banned in 1994 for being a “deviant sect”. The detainees were subsequently released, but Ashaari Muhammad, the leader of the group’s approximately 10,000 followers, was sentenced to ten years of house arrest. In 2005, at the instruction of state officials, police

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270 See above, note 268. There is no available official translation into English of the name “Bahagian Kawalan Penerbitan Dan Teks Al-Quran”, but it means approximately “Department of Control of Publications and Quran Texts”. This is a department under the Ministry of Home Affairs.

271 BBC, “Malaysia cancels Erykah Badu show over ‘Allah tattoos’”, *BBC News*, 28 February 2012.

272 See above, note 238, Section II: Legal/Policy Framework, Para 2.

arrested approximately 70 Sky Kingdom members (a non-violent religious group in Terengganu state, also known as the teapot cult because it built a giant teapot to symbolise its belief in the healing purity of water), and destroyed all non-residential buildings on the group's compound. Ayah Pin, the leader of the group, escaped arrest and went to live in exile in Thailand.<sup>273</sup> In 2007, a gathering of Rufaqa' Corporation was raided by the Penang Islamic Religious Affairs Department on the grounds that it violated Islamic law and 43 attendees at the gathering were charged.<sup>274</sup>

Non-Islamic religions have faced obstacles in respect of establishing and maintaining places of worship. In 2006, numerous Hindu temples were destroyed, some of them almost two centuries old, causing anger amongst the Indian minority.<sup>275</sup> In 2007, authorities demolished the 100 year old Maha Mariamman Hindu Temple in Padang Jawa, Selangor, and reportedly assaulted its Chief Priest. Later that year, the Sri Periyachi Amman Temple in Tambak Paya, Malacca state, was demolished by local authorities to make way for a development project, despite having received a "stay order" from state officials.<sup>276</sup> Christians in Malaysia often find it very difficult to obtain a permit to build churches,<sup>277</sup> and face restrictions with regard to the appearance and functioning of churches once built. For example, the ringing of church bells has been forbidden in some cases.

In contrast to Muslims who can freely make a pilgrimage to Saudi Arabia, Christians have faced restrictions imposed by the government in pilgrimages to Jerusalem. Malaysia doesn't have diplomatic relations with Israel and has long prohibited its passport holders from going there, but it allows exemp-

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273 See above, note 263. He is rumoured to have returned to Malaysia and remarried an 18 year old girl following his first wife's death, and then suffered a stroke. (See Jen, O. K., Lai, A., and Raman, A., "Ayah Pin in sorry state", *The Star*, 29 March 2012).

274 SUARAM, *Malaysia Human Rights Report 2007*, 2008, p. 123. Rufaqa' Corporation is a company founded by Al-Arqam founder Asaari Muhammad after Al-Arqam was banned by the government.

275 Associated Press, "Hindu group protests 'temple cleansing' in Malaysia", *Financial Express*, 23 May 2006.

276 See above, note 263.

277 Mission Network News, "Church construction thwarted in Malaysia", *Mission Network News*, 23 September 2010; Catholic News, "Catholics sue to build church in Malaysia", *Catholic News*, 19 April 2001.

tions for Christians. Despite the lifting of a two-year freeze on Christian visits to Israel in 2011, in 2012 the government has imposed lower quotas, limited travel time and lengthened travel approval for Christians, whose trips are usually organised by Christian Churches.<sup>278</sup>

Discrimination against non-Muslims in Malaysia is practised not only by the state. Examples of discriminatory acts against non-Muslims by private individuals have also been reported. In 2009, Muslims angry at the construction of a new Hindu temple paraded in front of it with a cow head.<sup>279</sup> In early 2010, after the High Court granted religious minorities the right to use the word “Allah”, 11 churches were firebombed by Muslims. As tensions rose, a Sikh temple, several mosques and Muslim prayer halls were subsequently also attacked. While most of the attacks did little damage, one Protestant church, the Metro Tabernacle Assembly of God Church in a suburb of Kuala Lumpur, was seriously damaged. However, in signs that the government is taking action to tackle religious intolerance, it quickly condemned the attacks and mobilized the police to monitor places of worship. It also allocated RM 500,000 to repair the church. Later, when two boars’ heads were put at two mosques in Selangor State, the government called on the people to refrain from retaliation.<sup>280</sup>

### ***Freedom to Change One’s Religion***

Freedom of religion, as expressed in the Universal Declaration on Human Rights, includes the freedom to change one’s religion.<sup>281</sup> Syariah law, however, severely restricts Muslims from renouncing their faith and from converting to other religions. Islamic teachings propose severe punishment for apostasy. While conversion is extremely difficult, it is not impossible to convert legally from Islam in Malaysia. In June 2011, Dato’ Sri Jamil Khir bin Baharom, a minister in the Prime Minister’s Department, reported 135 conversions ap-

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278 Fernandez, C., “Malaysian Christians Complain About Israel Travel Rules”, *The Wall Street Journal*, 7 July 2012.

279 Agence France-Presse, “Malaysian Muslim ‘cow head’ demo criticized”, 29 August 2009.

280 See above, note 238.

281 Universal Declaration of Human Rights, GA Res. 217 A (III), 1948, Article 18; see also International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 1966, Article 18(1).



proved by Syariah courts over ten years, from 2000 to 2010. The minister gave a breakdown of statistics in a number of states throughout the same period of time: 67 successful applications out of 237 in Sabah, 33 out of 172 in Negeri Sembilan, 10 out of 56 in Wilayah Persekutuan and 1 out of 36 in Pulau Pinang. However, these cases, according to comments in the media, were not technically “conversions” but instead instances where individuals applying for a change of religion were subsequently discovered to not have officially and/or correctly entered the Islamic religion in the first place.<sup>282</sup> Given these statistics and their interpretation, it is unclear whether apostasy is severely restricted or prohibited entirely in Malaysia, but renouncing Islam is definitely more difficult in Malaysia than renouncing any other religion. Non-Muslims are not subject to the same degree of restriction.

Muslims who wish to renounce their religion either in favour of another religion or otherwise, and to remove or replace the description as “Muslim” on their ID cards, are required by law to obtain permission from the Islamic courts, and be issued by these courts with a certificate that they are no longer Muslims. Apostasy and religious conversion are matters regulated at state level and not at the federal level, with discretion left for the courts in each case. Islamic courts, however, have been very resistant to allowing renunciation of Islam, considering that it is forbidden under Syariah law. Those who are subject to negative decisions from the courts are left in limbo and by law are compelled to continue acting as Muslims or else suffer the penalties prescribed by law. Ms Kamariah Ali, 60, a follower of the Sky Kingdom sect, protested being charged with apostasy of Islam, as she did not consider herself a Muslim. Ms Kamariah had asked the civil courts to declare her freedom to worship, as guaranteed by the Constitution. But the court ruled that only Islamic courts could allow her to renounce her faith because she was born a Muslim. Ms Kamariah’s case is one of a growing number of legal challenges brought by those caught between the Islamic authorities and the civil courts.<sup>283</sup>

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282 Zulkifli, O. Z., “Jamil Khir: 135 tidak sah masuk Islam, bukan murtad”, *The Malaysian Insider*, 15 June 2011.

283 BBC, “Malaysian ‘teapot cult’ woman loses Islam legal bid”, *BBC News*, 19 July 2011; see the court decision in *Kamariah Ali v Kerajaan Negeri Kelantan* [2004] 3 CLJ 409 (Federal Court); see also *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585, [2007] 3 CLJ 557 (Federal Court); *Subashini Rajasingam v Saravanan Thangathoray* [2008] 2 CLJ 1 (Federal Court); *Kaliammal Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors* [2011] 2 CLJ 165 (Court of Appeal).

In some cases, those who attempted to convert away from Islam have been ordered to take religious “rehabilitation” classes by Syariah courts and were forbidden from leaving rehabilitation centres until they complete the programme.<sup>284</sup> The government has not released statistics on the number of persons sentenced to such religious rehabilitation centres.<sup>285</sup>

The severe restrictions on conversion affecting Muslims have broad implications. Those who attempt to change religion are unable to have their new religion formally recognised through an alteration to their national identity card. This has implications for their ability to enjoy other rights, including the right to marry. The most well-known conversion case was that of Ms Lina Joy. Ms Lina Joy, born Azlina Jailani, converted to Christianity when she was 26. She applied to have her name changed and the mention of “Islam” removed from her identity card. The name change was granted but the removal of the mention of “Islam” was refused, as the Syariah Court had not allowed it.<sup>286</sup> The Federal Court, in a 2-1 decision, dismissed Ms Joy’s appeal. The Court ruled that only the Syariah Court had the power to allow Ms Joy to remove the religious designation of Islam from her national identity card.<sup>287</sup> This left Ms Joy in a limbo: she was not able to marry her Christian fiancé, as Malaysian law does not allow Muslims to wed non-Muslims.

A further example is the case of Revathi Massosai, whose parents converted to Islam before her birth, but she was raised a Hindu by her grandparents. Her identity card, however, stated her religion to be Islam. She married a Hindu man, but the marriage was not recognised by the state and a Syariah court sentenced her to a total of 180 days of detention in a rehabilitation centre for attempting to commit apostasy. It also granted custody of her newly born child to her Muslim mother, as the child’s fa-

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284 See above, note 238.

285 Ibid.

286 Lee, H.S., “Lina Joy, a case of state minded religion”, *The Asia Mag*, 4 April 2009.

287 *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & 2 Ors* [2005] 6 MLJ 193 (Court of Appeal).

ther was not recognised as her legal husband. The court also forbade the father from seeing the child, tearing the family apart.<sup>288</sup> In a well-known conversion case, an elderly woman named Nyonya Tahir who converted to Buddhism in 1936 had her decision accepted – 69 years later – in 2006, long after she had died.<sup>289</sup>

There have also been cases where the state has imposed Islam upon non-Muslims in Malaysia. It is on death that the implications of such actions have often been most upsetting, as evidenced by a series of “body-snatching” cases, in which government mortuaries have refused to release the bodies of individuals who have converted away from Islam to their families for burial.<sup>290</sup> In the *Moorthy* case, for example, the family of a deceased man by the name of Moorthy was forbidden to bury him according to non-Muslim rites. The Federal Territory Religious Department obtained an order from the Syariah court, arguing that Moorthy was Muslim, having converted to Islam several years earlier but without informing his family. The High Court refused to entertain a suit from Moorthy’s family challenging the conversion of Moorthy to Islam and declared they should go to the Syariah court. However, Moorthy’s widow was not a Muslim and could

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288 Asia News, “A Hindu Lina Joy, subjected to Islamic ‘re-education’”, *Asia News*, 15 June 2007. Revathi was later reunited with her daughter and husband, but was placed in the custody of her Muslim parents and required to undergo weekly religious counselling. (See comment in Marshall, P. and Shea, N., *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide*, Oxford University Press, 2011, p. 168.)

289 Shah Yakob, I.I., “Doing the impossible: leaving Islam in Malaysia”, *Asia Sentinel*, 27 April 2007. According to another interpretation, Nyonya Tahir did not convert to Buddhism in 1936 – she was born a Muslim but raised a Buddhist and married a Buddhist in 1936. Her application to have her Chinese name, Wong Ah Kiu, formally recognised in 1986 was refused, and the status of her religion became a point of contention as the state religious authorities obtained an order to postpone her burial, objecting at a Buddhist burial. The court eventually held in 2006 that the conversion to Buddhism was valid. (See Bernama, “Syariah Court Decides Nyonya Tahir Not a Muslim”, *Bernama.com*, 23 January 2006; see also Al Jazeera, “Malaysian allowed non-Muslim burial”, 25 January 2006.) Another relatively high profile conversion was that of Tan Ean Huang, who converted from Buddhism to Islam to marry her former Muslim husband, but petitioned to officially return to Buddhism after he left her. The Penang Syariah Court granted her application. (See Marshall, P. and Shea, N., above note 286, pp. 167-169.)

290 Agence France-Presse, “Malaysian Sikh family in new ‘bodysnatching’ case”, 1 June 2009.

not bring a case in the Syariah court. Therefore, she was denied a right of hearing – as well as inheritance rights.<sup>291</sup>

The HRC has highlighted the obligation of states to prohibit any “coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert”.<sup>292</sup> The severe restriction on conversion from Islam in Malaysia therefore represents a violation of the right to equality in relation to the freedom of religion recognised by international human rights law.

### ***Financial Assistance to Religious Institutions***

In the field of education, the Education Act 1996 contains provisions which favour the religion of Islam over other religions. Section 52 of the Education Act 1996 provides for the possibility of governmental financial assistance to be given to non-state schools which are Islamic educational institutions, while section 34 provides only a general abstract possibility for the Minister to establish and maintain “any other educational institution, the establishment or maintenance of which is not provided for under this Act or the Universities and University Colleges Act 1971”.<sup>293</sup>

The singling out of one particular religion (Islam) creates a presumption that funding educational institutions associated with this particular religion is a

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291 *Dalam Perkara Permohonan Perisytiharan Status Agama Si Mati Mohammad Abdullah @ Moorthy a/l Maniam, Permohonan Ex-Parte Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* (2006) 21 JH 210. Despite repeated outcries in recent years over “body-snatching” cases, there has been no clarification by the authorities on the guidelines or procedure or criteria for determining religion that should be followed by all parties in these situations. The lack of guidance is evident also in a recent case in which the Penang Religious Affairs Department (JAIPP) seized the cremated remains of another person, over family protests. (See Cheah, B., “Outcry over seizure of woman’s cremated remains by JAIPP”, *The Sun Daily*, 22 August 2012.) JAIPP claimed that the deceased had converted after marrying a Muslim and consequently had Muslim children, while her family, led by her eldest son, insisted on performing Hindu rites. (See also a more detailed account of the case by an advisor to the Hindu rights group Hindraf: Ganesan, N., “No dignity in life or death”, *FMT News*, 20 August 2012.)

292 See above, note 258, Para 5.

293 Education Act 1996, sections 52 and 34.

priority over any other religiously-associated schools. On such a normative basis, there can hardly be any equality in practice when it comes to funding educational institutions in Malaysia.

Similarly, Section 50(1) of the Education Act states that:

*Where in an educational institution there are five or more pupils professing the Islamic religion, such pupils shall be given religious teaching in Islam by teachers approved by the State Authority.*<sup>294</sup>

There is no corresponding provision to mandate the requirement to provide religious instruction in respect of any other religion. However, the Education Act 1996 does allow for the teaching of religions other than Islam provided that government funds are not used to cover the cost. Section 51 states as follows:

*The governors of a government-aided educational institution may provide for religious teaching in a religion other than Islam to the pupils of the educational institution or to any of them but—*

*(a) no such provision shall be defrayed from moneys provided by Parliament; and*

*(b) no pupil shall attend teaching in a religion other than that which he professes, except with the written consent of his parent.*<sup>295</sup>

Non-Muslim students are, therefore, denied equal access to religious education, or education in a religious school, compared to Muslim students. The HRC has said:

*If the state chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of*

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294 Ibid., section 50(1).

295 Ibid., section 51.

*one religious group and not for another must be based on reasonable and objective criteria.*<sup>296</sup>

The preferential treatment granted to Muslims under the Education Act 1996, through the provision of state-funded religious education, and state-funded religious schools, which is not provided to adherents to other religions, is, therefore, likely to constitute a violation of the right to equality.

Similarly, while Article 11(2) of the Federal Constitution provides that no person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own, in practice the authorities fund Islamic religious activities from the general budget of the Federal Government. Additionally, Muslims are subject to religious taxes<sup>297</sup> which can only be used for Islamic religious activities. However, only Muslims are able to claim a deduction of these religious taxes against any taxes due under income tax legislation to the Federal Government.

### ***Access to Justice under Syariah Law***

Syariah law can on occasion impact on the lives, rights and freedoms of non-Muslims, for instance on issues such as inter-religious marriages, divorce and inheritance. Where Syariah court decisions affect a non-Muslim, he or she can seek recourse in the secular courts that, in theory, can overrule the Syariah courts. The Committee on the Elimination of Discrimination against Women has specifically expressed its concern regarding the lack of clarity on whether the Syariah Law is applicable to non-Muslim women whose husbands convert to Islam.<sup>298</sup> Any restriction of an individual's ability to access justice, in order to resolve an issue relating to their fundamental rights and freedoms, on the basis of their religion is direct discrimination on the ground of religion and as such should be prohibited. Malaysia's failure to

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296 *Arieh Hollis Waldman v Canada*, Communication No. 694/1996, UN Doc. CCPR/C/67/D/694/1996 (Human Rights Committee), 5 November 1999.

297 *Zakat* is the Muslim religious duty of giving a proportion of one's wealth to the poor and needy, which in Malaysia is collected through a system of Zakat Collection Centres (PPZ).

298 See above, note 140, Para 13.

ensure equal access to justice within its dual legal system represents a violation of the right to equality.

### ***Discrimination against Malay Muslims in their Enjoyment of Other Rights***

Malay Muslims are subject to the restrictions of their rights imposed by Syariah law, while others are not. Muslims face additional restrictions in some areas, such as, for example, in relation to their private and family life. Sexual intercourse outside marriage, for instance, is prohibited by Syariah law. On 4 January 2010, it was reported that the Selangor Islamic Religious Department arrested 52 unmarried couples in hotels in Selangor for violating *khalwat* – the offence of being in close proximity with a person of the opposite sex who is not a relation. This practice, known as “moral policing”, has become more prevalent. Further, the government refuses to recognise marriages between Muslims and non-Muslims, thus preventing those involved in such relationships from enjoying, without discrimination, their right to marry.<sup>299</sup> ERT and Tenaganita’s research has documented numerous cases of discriminatory interference with private life in respect to Muslims (see Box 5).<sup>300</sup>

#### **Box 5**

#### **Nabila’s Testimony 2**

I am a Malay Muslim. About five years ago, I was in a park with my ex-boyfriend who was Chinese. We were eating ice cream together and kissing each other on the cheek. We were approached by three officers, and one of them told us that he was from the Religious Office. They separated me and my boyfriend, and then took my boyfriend’s identity card. They made us follow them to the police station. We did this because they still had the identity card. When we arrived there, they started to grill my boyfriend asking if he was serious about me, and saying that if

299 See above, note 53, p. 16.

300 See above, note 240.

he was, he needed to get circumcised. They then turned to me, and asked me:

“Are there no Malay men left in the world? Is Chinese penis really that good?”

We eventually paid a bribe of 500 ringgit to the police. I did not want to pay any money but my boyfriend wanted to do this. We were lucky. I know others who have paid thousands. Another Malay friend was caught in a car with her non-Malay boyfriend, and she was made to pay 1500 ringgit. This was a race thing, but also a gender thing.

After the incident, I gave an interview to The Nutgraph (which is an online media magazine) which was running a series of articles on “moral policing”. I gave my name and photograph in support of the article, which was entitled “Is Chinese penis really that good?”. I experienced a significant backlash after the article was published.

### ***Discrimination on the Basis of Belief through Restrictions of Expression***

Freedom of expression in Malaysia is significantly limited by the public interest of the protection of religion. Theatre plays, films and books have been banned on the basis of containing content that is offensive to Islam and/or Muslims.

Providing examples of banned plays, including the political satire “The 2nd First Annual Bolehwood Awards” and “The Vagina Monologues”,<sup>301</sup> Malaysian playwright Shanon Shah commented:

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301 Shah, S., “Freedom of Expression and Religious Harassment: An Artist’s Perspective”, *The Equal Rights Review*, Vol. 2, December 2008, pp. 28-31. In the first play, an Islamic leader said that the Islamic state was not to be feared – the Islamic state promised a kind of paradise on Earth. “A paradise”, replied a character, “where our hands and heads would grow back if chopped off”. The second play was banned for critically examining, in the Malaysian version, verses of the Qur’an and Hadith.



*Apart from the fact that there are several secular laws that restrict freedom of expression and information in Malaysia, the self-designated custodians of Islam in Malaysia do not tolerate views on Islam that differ from those of the state. It is not only "liberal" titles that get banned – books by hard core fundamentalist or conservative Muslim authors are also routinely banned. (...) Even if we were to say that some speech or idea is a harassment of Islam, whose and which Islam are we talking about?*

*Is it the "Islam" of those in positions of social and political power? (...)*

*Is it textual Islam we are talking about? Textual Islam in all its wonderful diversity and pluralism of ideas?*

*Is it Islam as defined by forces that hold deep and irrational prejudices against Islam, for example the Jerry Falwells, Pat Robertsons and the Hindutva fundamentalists of the world?*

*Is it the lived experiences of Muslims we are talking about? Muslim women who wear the hijab? Muslim women who do not wear the hijab? Gay Muslims? Devout Muslims who pray five times a day and fast faithfully every year? Relaxed Muslims who pray only occasionally and fast only when the fancy takes them? Muslims who drink alcohol but do not eat pork? Muslims who refrain from drinking alcohol but have romantic relationships with non-Muslims?*

*Or is it political Islam we are talking about? Specifically, is it an authoritarian, chauvinistic political Islam we are talking about?<sup>302</sup>*

It appears that the restricted "speech" has been that which has been deemed contrary to the official line of the "custodians of Islam" in Malaysia. These restrictions, apart from affecting the enjoyment and exercise of the right to freedom of expression, are also discriminatory on grounds of belief. They interfere out of proportion with the right of persons having beliefs different from the official version of Islam recognised by the state to participate in cul-

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302 Ibid., pp. 29-30.

tural life, be it as creators of artistic works or as consumers of such works, on an equal basis with persons who have beliefs fully in line with the official version of Islam endorsed by the government.

### ***Summary***

Discrimination on the grounds of religion and belief in Malaysia affects members of all religious groups, including members of the majority Muslim community and the minority religious communities such as Hindus and Christians. However, Article 3(1) of the Constitution of Malaysia places Islam in a privileged position, which is reflected in other provisions of the Constitution. Restrictions have been placed on the religious freedoms of adherents to minority religions, which are considered to be “threatening” to the position of Islam, in order to protect the integrity of the official religion. Non-Muslims are also disadvantaged with respect to the financing of religious schools and religious education. Given the strong relationship between race and religion in Malaysia, such actions further compound the challenges identified above in relation to race discrimination. On the other hand, Muslims face restrictions which do not apply to other groups, including, most notably, their right to change religion and their freedom to engage in sexual relationships. Finally, there is belief-based discrimination against all Muslims who express beliefs not approved by official interpreters of Islam in respect of their right to participate in cultural life on an equal basis. Malaysia has therefore been unable to reconcile the position of Islam as the official religion with its obligation to protect the right to equality for members of all religions.

## **2.5 Discrimination Based on Sexual Orientation and Gender Identity**

While the right to be free from discrimination on the grounds of sexual orientation or gender identity is not explicitly set out in any of the United Nations human rights treaties, the HRC has confirmed that the prohibition of discrimination in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) should be treated as including “sexual orientation” within the ground of “sex”.<sup>303</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has also interpreted the International Covenant on

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303 *Toonen v Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (Human Rights Committee), 31 March 1994, Para 8.7.

Economic, Social and Cultural Rights (ICESCR) as prohibiting discrimination on the grounds of sexual orientation and gender identity.<sup>304</sup> In addition, the Committee on the Elimination of Discrimination against Women has referred to “sexual orientation and gender identity” as grounds of discrimination.<sup>305</sup> Further, the Committee of the Rights of the Child, which is responsible for monitoring the effectiveness of the CRC to which Malaysia is a state party, has stated that the rights of children under the CRC should be guaranteed without discrimination on the ground of, *inter alia*, sexual orientation.<sup>306</sup> As recognised in the concluding observations of the CRC Committee, international human rights law also recognises gender identity as a prohibited ground of discrimination.<sup>307</sup> The rights of individuals to be free from discrimination on the grounds of both sexual orientation and gender identity have also been set out by the Yogyakarta Principles, which are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity.<sup>308</sup>

In contravention of this right, same-sex sexual conduct is considered to be criminalised in Malaysia, as is cross-dressing, placing profound restrictions on the human rights of gay, lesbian, bi-sexual, transgender and intersex (LGBTI)

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304 Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 10 June 2009, E/C.12/GC/20, Para 32.

305 Committee on the Elimination of Discrimination against Women, *General recommendation No. 27: Older women and protection of their human rights*, UN Doc. CEDAW/C/GC/27, 2010, Para 13; Committee on the Elimination of Discrimination against Women, *General recommendation No. 28: The core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010, Para 18.

306 Committee on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the rights of the child*, UN Doc. CRC/GC/2003/3, 17 March 2003, Para 8; Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/4, 1 July 2003, Para 2.

307 See, for example, Committee on the Rights of the Child, *Concluding Observations on New Zealand*, CRC/C/NZL/CO/3-4, 11 April 2001, Paras 25-26.

308 *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Principle 2, available at: [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf).

persons. Further, the provisions interpreted as criminalising same-sex sexual behaviours, which, in effect, criminalise the fact of being gay or transgender, create an environment in which gay and transgender persons are exposed to a range of human rights violations. The perceived criminalisation of same-sex sexual conduct increases the social stigmatisation of these persons, which in turn makes them more vulnerable to violence and other abuse of their rights. By legitimising prejudice and stigma, the criminal provisions targeting gay, transgender and transsexual persons perpetuate discrimination against gay and bisexual people in all areas of life. In furthering patterns of discrimination against LGBTI persons, in July 2012 media reported that the government was planning to introduce a Social and Reproductive Health Education scheme in schools which, among other things, aims to create awareness about the “dangers and threats of lesbian, gay, bisexual and transgender (LGBT) activities to the country”.<sup>309</sup> On 19 July 2012, the lesbian, gay, bisexual and transgender (LGBT) community along with liberalism and pluralism were branded as enemies of Islam by Prime Minister Datuk Seri Najib Razak in front of a crowd of over 11,000 imams and mosque committee members from across the nation. “LGBTs, pluralism, liberalism — all these ‘isms’ are against Islam and it is compulsory for us to fight these,” he said.<sup>310</sup>

There are no reliable statistics available regarding the number of LGBTI persons in Malaysia, or which indicate the extent to which LGBTI persons participate on an equal basis with others in economic, social, political, cultural and civil life. This lack of data was highlighted by the Coalition of Malaysian NGOs in its submission to the Universal Periodic Review. The submission explained that information on sexual and reproductive health, especially in respect to lesbian and gay persons, has been suppressed under the Official Secrets Act.<sup>311</sup> The Coalition also noted that a report commissioned by the Women’s Ministry in February 2006 had acknowledged that the lack of statistics on

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309 Bernama, “Social and Reproductive Health Education Introduced in Schools Soon”, *Cernama.com*, 5 July 2012; Potts, A., “Malaysian school children to be indoctrinated against being LGBT”, *GayStarNews*, 8 July 2012.

310 Baharom, H., “Najib: LGBTs, liberalism, pluralism are enemies of Islam”, *The Malaysian Insider*, 19 July 2012.

311 See above, note 54, Para E.

issues affecting gay persons is a matter of concern, and suggested that this resulted from societal attitudes and government censorship.<sup>312</sup> Nevertheless, testimony collected by ERT and Tenaganita pointed to many forms of disadvantage faced by LGBTI persons in Malaysia.

### ***Criminalisation of Same-sex Sexual Conduct***

Although the Malaysian Penal Code does not directly criminalise homosexuality, it does criminalise, in section 377A-377B, “carnal intercourse against the order of nature” and in section 377D, “gross indecency” and these provisions are in practice used to penalise gay men and lesbians.

#### *377A – Carnal intercourse against the order of nature*

*Sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Penetration is to be sufficient to constitute the sexual connection necessary to the offence described in this section.*

#### *377B – Committing carnal intercourse against the order of nature*

*Whoever voluntarily commits carnal intercourse against the order of nature shall be subjected to punishment. (Maximum penalty: 20 years imprisonment, liable to fine and whipping)*

*(...)*

#### *377D – Gross indecency*

*Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term*

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312 University of Malaya Consultancy Unit, *Experiences of non-heterosexual persons in Klang Valley, Malaysia: An Exploratory Study*, Ministry of Women, Family and Community Development, 2006.

*which may extend to two years. (Maximum penalty: 2 years imprisonment).*<sup>313</sup>

This law is enforced in a discriminatory way, and in practice is used to prosecute gay people who engage in same-sex sexual conduct. Police raids are regularly conducted in clubs and private homes in the context of a general "Operation Clean"<sup>314</sup> in order to arrest people engaging in homosexual activities. While female-female sexual behaviour is not specifically mentioned in the penal code, it is documented that lesbians also suffer discrimination; in 2011, for example, state authorities in Tawau arrested two young women for kissing in public.<sup>315</sup>

Apart from secular criminal law, homosexual conduct is also subject to punishment under sections 25 and 26 of the Syariah Criminal Offences (Federal Territories) Act 1997 which prohibit *liwat* (male homosexual intercourse) and *musahaqah* (sexual act between two women) respectively.<sup>316</sup> Both offences can be punished by a fine, imprisonment of up to three years, or whipping not exceeding six strokes.

Trans persons are also targeted by discriminatory provisions under Syariah law. Section 28 of the Syariah Criminal Offences (Federal Territories) Act 1997 prohibits any male person from wearing a woman's attire in a public place and posing as a woman for immoral purposes. The penalties under the Syariah criminal legislation are far higher than those under civil law: they can

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313 Malaysian Penal Code, Incorporating All Amendments up to 1 January 2006, published by the Commissioner of Law Revision, 2006, Articles 377A, 377B and 377D. It is noteworthy that section 377C which formulates the same offence as in 377B, but "without the consent or against the will of the other person" (the one who is penetrated), makes the penalty harsher by providing for a minimum prison term of five years.

314 Williams, W., "Strategies for Challenging Homophobia in Islamic Malaysia and Secular China", *Nebula* 6, No. 1, March 2009, p. 14.

315 For an overview, see Williams, W.L., "Islam and the Politics of Homophobia: The Persecution of Homosexuals in Islamic Malaysia compared to Secular China", in Habib, S. (ed.), *Islam and Homosexuality*, California: Greenwood Publishing, 2010, p. 1-23. On the arrest of women kissing in public, see The Star, "Smooching girls held by Tawau authorities", *The Star*, 28 July 2011.

316 See above, note 229, sections 25-26.

be up to RM 5,000 or 6 months in jail for those who violate the prohibition of cross-dressing. The prohibition on cross-dressing is used to target transgender persons within Muslim Malay society.

The criminalisation of sex between people of the same sex constitutes a severe violation of their right to equality, by restricting gays' and lesbians' ability to freely express themselves in a fundamental area of human experience. The Constitutional Court of South Africa has said:

*Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity...*<sup>317</sup>

The HRC has repeatedly expressed its concern that laws criminalising same-sex relations between consenting adults constitute both a violation of the right to privacy and the right to non-discrimination as provided in the ICCPR.<sup>318</sup> These views are shared by the CRC and the CEDAW Committees which interpret human rights Conventions to which Malaysia is a party.<sup>319</sup> The Yogyakarta Principles, which articulate how international human rights

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317 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15 (9 October 1998) (Constitutional Court of South Africa), p. 28.

318 See for example, Human Rights Committee, *Concluding observations of the Human Rights Committee: Barbados*, U.N. Doc. CCPR/C/BRB/CO/3, 11 May 2007, Para 13: "The Committee expresses concern over discrimination against homosexuals in the State party, and in particular over the criminalizing of consensual sexual acts between adults of the same sex (art. 26). The State party should decriminalize sexual acts between adults of the same sex and take all necessary actions to protect homosexuals from harassment, discrimination and violence." See also Human Rights Committee, *Concluding Observations of the Human Rights Committee: Cyprus*, CCPR/C/79/Add.88, 6 April 1998, Para 11.

319 Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Kyrgyzstan*, U.N. Doc. A/54/38, 5 February 1999, Para 127: "The Committee is concerned that lesbianism is classified as a sexual offence in the Penal Code." See also Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Chile*, U.N. Doc. CRC/C/CHL/CO/3, 23 April 2007, Para 29: "the Committee is concerned that homosexual relations, including those of persons under 18 years old, continue to be criminalised, indicating discrimination on the basis of sexual orientation".

law applies to sexual orientation and gender identity issues, provide that states must:

*Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.*<sup>320</sup>

Further, the Yogyakarta Principles call on states to:

*Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity.*<sup>321</sup>

It should be noted that the provisions used to criminalise homosexual conduct in the Malaysian secular criminal law were introduced by the British during the colonial period, first in India and then – with identical wording about “carnal intercourse” or “carnal knowledge” against “the order of nature” – across the former British Empire. In June 2009, the Delhi High Court, benefiting from South African and Canadian jurisprudence as well as the Declaration of Principles on Equality and the Yogyakarta Principles, “read down” section 377 of the Indian Penal Code, which had been previously interpreted as criminalising homosexuality, and declared that it did not apply to consenting same-sex adults. In the case of *Naz Foundation v Government of NCT of Delhi and Others* the Court held that the discrimination perpetuated by section 377 severely affected the rights and interests of homosexuals and deeply impaired their dignity. It found that the inevitable conclusion was that the discrimination inflicted on the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India.<sup>322</sup> The

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320 See above, note 308.

321 See above, note 308, Principle 6.

322 Article 14 of the Constitution of India states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” (Constitution of India 1949 as amended, Article 14.)



High Court also found that section 377 violated Article 15 (right to non-discrimination) of the Constitution and concluded “that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15”.<sup>323</sup>

It remains to be seen if Malaysian courts will follow suit and read down the respective provisions of section 377 of the Malaysian Penal Code in a similar way as the Delhi High Court.

### ***Discriminatory Ill-treatment***

On the basis of the criminal provisions referred to above, persons suspected of being gay have been subjected to harassment and physical abuse at the hands of the authorities. Victims of such discrimination recall being threatened and beaten by Malaysian police for just sitting in a car at night with another male person.<sup>324</sup> In a late 2010 campaign action which consisted of a video series on Youtube as part of an annual human rights festival on sexuality, Azman Ismail, a gay man from Malaysia, confessed his sexual orientation and spoke about how it is very difficult being gay in Malaysia because of religious and cultural norms that criminalise LGBT behaviour. It was reported that, after posting of the video, Ismail received death threats. Instead of protection of his personal safety, however, government officials went on to condemn his actions. Cabinet Minister for Islamic Affairs, Jamil Khir Baharom, stated on national television that “appropriate action” would be taken against gay activists who were trying to promote homosexuality.<sup>325</sup> Gay persons are also vulnerable to attack at the hands of private individuals. Transgender people are reportedly also often subjected to hate crime.<sup>326</sup>

Other forms of degrading treatment have been reported to affect those perceived to be gay. In 2011, 66 schoolboys in the state of Terengganu, identi-

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323 *Naz Foundation v Government of NCT of Delhi and Others*, 160 Delhi Law Times 277, 2 July 2009 (High Court of Delhi, India), Para 104.

324 See above, note 314, p. 15.

325 Yoong, S., “Malaysia gay man gets threats”, *Edge New England*, 21 December 2010; Kuppusamy, B., “Muslim Gay Faces Govt Wrath”, *Inter Press Service*, 15 January 2011.

326 See Alphonsus, A., “Treat Transgenders Positively”, *Free Malaysia Today*, 4 August 2011.

fied by teachers as “effeminate”, were sent to what activists called “corrective boot camps” in order to receive religious and physical education for four days, and to be taught how to behave “properly” as men. Over the years, Terengganu’s officials have held programmes aimed at promoting Muslim morality. According to the state’s education director, the camp is meant “to guide them back to the right path in life before they reach a point of no return”.<sup>327</sup> Gay rights groups have severely criticised this action as promoting the homophobia which is already deep-rooted within Malaysian culture. In a positive sign, Women’s Minister, Shahrizat Abdul Jalil, opposed those camps and called them illegal.<sup>328</sup>

The problems faced by LGBTI persons in Malaysia have attracted international attention. In 2010, both the UK and Australia recognised Malaysian transgender asylum-seekers as refugees, in recognition of the persecution and discrimination which they face in their country of origin.<sup>329</sup> Concern has been raised in Australia over the potential risks faced by LGBTI persons sent to Malaysia under the “refugee swap” deal between the two countries, given that they would face dual discrimination both as asylum-seekers, with limited access to a process according to which they may be formally recognised as refugees, and persons who may be prosecuted on the basis of their sexual orientation or gender identity.<sup>330</sup> However, in June 2012 the Australian Senate voted against the controversial bill which had been passed by the lower chamber and which would have allowed the government to send asylum-seekers to Malaysia for processing.<sup>331</sup>

ERT has documented the testimony of transgender women in Malaysia, who provided a useful overview of the discriminatory ill-treatment faced by

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327 Associated Press, “Malaysia sends 66 boys to anti-gay camp”, *CBS News World*, 2011.

328 BBC, “Malaysia’s anti-gay camp violates law says minister”, *BBC News*, 20 April 2011.

329 See International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Trans Woman Wins Asylum Claim*, 27 July 2010; Fridae, “Malaysian transsexual given refugee status in Australia”, *Fridae*, 4 May 2010.

330 SX News, “Gays Warn on Aussie Refugee Deal”, *dragoncastle.net*, 5 July 2011.

331 BBC, “Australia asylum bill voted down”, *BBC News*, 28 June 2012.

transgender persons in several areas of life in Malaysia. Transgender women in Malaysia are also known as *mak nyah*. The name derives from *mak*, meaning “mother”.<sup>332</sup> The term arose in the late 1980s, as an attempt by male-to-female transgender women to distinguish themselves from other minorities. As Khartini Slamah explains, this arose:

*[F]irst, [as] a desire to differentiate ourselves from gay men, transvestites, cross dressers, drag queens, and other “sexual minorities” with whom all those who are not heterosexual are automatically lumped, and second, because we also wanted to define ourselves from a vantage point of dignity rather than from the position of derogation in which Malaysian society had located us.*<sup>333</sup>

Slamah goes on to clarify that in order to be identified as a *mak nyah*, an individual does not need to have undergone gender reassignment surgery:

*Mak Nyahs define themselves in various ways along the continuums of gender and sexuality: as men who look like women and are soft and feminine, as the third gender, as men who dress up as women, as men who like to do women’s work, as men who like men, etc.*<sup>334</sup>

The *mak nyah* community in Malaysia faces many forms of discrimination in all areas of life, including employment, housing and health care.<sup>335</sup> Malaysian law contains several provisions which are used to discriminate against individuals of the *mak nyah* community. In 1983, the Malaysian Conference of Rulers issued a fatwa which prohibited sex-reassignment surgery, except for intersex people, on the basis that such surgery was against the Islamic religion. While sex-reassignment surgery remains legal for non-Muslims, the Malaysian courts have sent ambiguous messages as to whether an individual who has undergone

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332 Tan Lay Ean, H., *Jeffrey Jessie: Recognising Transsexuals*, The Malaysian Bar, 17 November 2005.

333 Slamah, K., “The Struggle to Be Ourselves, Neither Men Nor Women: Mak Nyahs in Malaysia”, in Misra, G. and Chandiramani, R. (eds.), *Sexuality, Gender and Rights: Exploring Theory and Practice in South and South East Asia*, SAGE, 2005, p. 99.

334 Ibid., p. 100.

335 Koon, T.Y., *The Mak Nyahs: Malaysian Male to Female Transsexuals*, Eastern Universities Press, 2002, Chapter 4.

such a procedure is entitled to have their acquired gender officially recognised through an amendment to their identity card. In the *Wong* case, the judge of the High Court of Ipoh upheld the refusal of the National Registration Department to amend or correct the birth certificate and national registration identity card of the claimant who was a transsexual man.<sup>336</sup> However, in *J-G.* case, a judge of the High Court of Kuala Lumpur, in dealing with very similar facts to those in the *Wong* case, decided that the claimant's identity card should be amended to acknowledge her acquired gender.<sup>337</sup>

For the individuals interviewed by ERT, the most significant discrimination issue arises from the fact that most *mak nyah* are Malay Muslims, and are therefore subject to the provisions of the Syariah criminal legislation. Syariah law is enacted at the state and not the federal level, and most of the state criminal law enactments contain a prohibition of "cross-dressing". For example, Section 28 of the Syariah Criminal Offences (Federal Territories) Act 1997 prohibits any male person from wearing a woman's attire in a public place and posing as a woman for immoral purposes. Such provisions have been used by the Malaysian religious authorities (the *Jabatan Hal Ehwal Agama Islam Negeri Sembilan*) to persecute the *mak nyah* community, through the use of raids, interrogation, violence and detention. The *mak nyah* ERT interviewed in June 2011 had each been arrested, detained and charged for offences under Section 66 (see Box 6).<sup>338</sup>

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336 *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabata Pendaftaran Negara* [2005] 1 CLJ 622 (High Court).

337 *J-G. v Pengarah Jabatan Pendaftaran* [2005] 4 CLJ 710 (High Court).

338 ERT has published this testimony in 2011 – see The Equal Rights Trust, "The *Mak Nyahs* of Malaysia: Testimony of Four Transgender Women", *The Equal Rights Review*, Vol. 7 (August 2011), pp. 145-153. This material is based on ERT interviews with transgender women in Seremban, Negeri Sembilan state, on 27 June 2011. Due to concerns for their safety, they have assumed alternative names. ERT has provided support to the lawyers representing the interviewees in their judicial review claim. The claim is founded on the argument that Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (Enactment 4 of 1992) (Section 66), which criminalises any male person who "wears women's attire" or "poses as a woman", is inconsistent with various fundamental liberties guaranteed by the Federal Constitution of Malaysia, including: (i) Article 5(1) which protects the right to live with dignity, the right to work and livelihood and the right to privacy; (ii) 8(1) which guarantees the right to equal protection of the law; (iii) Article 8(2) which prohibits discrimination on a number of grounds, including "gender"; (iv) Article 9(2) which protects the right to freedom of movement; and (v) Article 10(1)(a) which protects the right to freedom of expression. In October 2012, the four transgender women lost their case at the High Court in Seremban. (BBC, "Malaysia transsexuals lose cross-dressing court case, *BBC News*, 11 October 2012.)

**Box 6****Testimony of Transgender Women**

**Kay:** I am a 27 year old Malay Muslim. I was born in Pahang and moved to Seremban about eight years ago. When I was about ten years old, I began to feel confused about my identity. I began to dress as a woman whilst I was at high school, when I was probably about 15 years old. I also started to take hormone pills at that same time. I would use my pocket money to buy birth control pills from the pharmacy, or otherwise I would ask my mother for her pills. My family had no problem with the decisions I made because they understood me. I currently work in various jobs. I work as an administrative assistant in a Chinese herbal tea shop. I also assist my friend in her bridal make-up shop and I work as a part-time model. I also work as a sex worker in Seremban when I need extra money.

Women like me regularly face trouble from other people in the community. I often meet people who are not happy with the way that I live, and they choose to pick a fight with me. I have been in fist fights with people who try to cause trouble for me. Often it is women who are the worst in this respect.

The biggest challenge which we face is from the religious authorities in Malaysia. They arrested me once. On that particular night, I was not working, so I went to my friend's bridal boutique. I was just sitting on the steps outside, waiting for my friend to come with me to get some food. A group of guys on motorbikes suddenly appeared and took me by surprise. They came up to me and grabbed me – I thought they were robbers trying to steal from me, so I tried to shut the outside gate of the shop. They stopped me, and pushed me against the wall. I asked why they were doing this, and what was happening to me. I asked them who they were and what they wanted, but they just told me to be quiet. They started to grope me, and I tried to push them away but I did not manage because they were too big. I looked across the road

and saw another friend of mine being beaten up by some other guys. At that point, the men holding me identified themselves as representatives of the Religious Department. I was then told that I must wait for a van to arrive. While I was waiting, they continued to beat up my friend. It was very bad – I saw it all. While I was sitting waiting for the van, one of the men sat next to me and started to grope me once again. The van finally arrived and took me to the Religious Department in Seremban. When we got there, I was put in a room, and they told me to take off my clothes which they wanted as “evidence”. I did not want to do this because I had nothing else to wear. Other staff from the Religious Department kept coming into the room. They touched my face and commented on my breasts. Eventually I was given the opportunity to telephone a friend to come and offer bail for me. She arrived with a spare set of clothes for me to change into. My friend gave a verbal assurance for me, and I was then allowed to leave.

I have chosen to take the legal case against Section 66 because I do not agree with the law and I want to change the perception of transgender women in Malaysia. As it stands, the law means that I can be arrested for simply being myself in public. I want to be free to go outside during the day time without feeling scared. I am not doing all of this for a show – this is who I am for real.

Members of the Religious Department continue to hunt us down. They continue to search for trans women in Seremban. They know who we are, and they have now recruited the police officers to assist them. So we now face problems from both the Syariah authorities and the civil police as well.

I want to live a good life. I want to find a good job through legal channels. I am prevented from doing the jobs I would like to do – like being a model or a singer – because I am a trans-woman in a Muslim country where there are laws which stop me from being who I want to be.

**Zura:** I am a 24 year old Malay Muslim. I was born in Kelantan, but I moved to Seremban ten years ago. I moved to Seremban when I was only 14 years old because I had been orphaned when I was seven, and I was forced to remove myself from my remaining family seven years later because no-one accepted me. From the age of 12, I realised that I liked to wear female clothes and to do the jobs which are traditionally done by women, like cooking and cleaning, and I enjoyed wearing make-up. I had been living with my foster father and my brother in Terengganu but this was no longer possible for me. I came to Seremban because this is where my mother was from, and I therefore felt a connection to this place. I wanted to start a new life here.

Last year, I was arrested on four separate occasions by representatives from the Religious Department. On the first occasion, I was not working, but I was in AST, the area where we usually work. I was just hanging around, wearing a nightgown. I was picked up by the religious officers who charged me for wearing a nightgown. Apparently, as no man in their right mind would wear a nightgown, I was accused of impersonating a woman. I was taken to the offices of the Religious Department and forced to undress. Even though the officers were not in the room with me, I know that they were watching me through a one-way mirror. I was only just recovering from my breast augmentation surgery, so it was very embarrassing for me to have to change whilst they could see me. My friend brought spare clothes for me, as the officers wanted to keep my nightgown as evidence against me. I was kept in the office overnight, and then taken to court at 2 pm the following day. I was fined 700 ringgit and then released.

On the second occasion, I was subjected to severe violence during the arrest. Once again, I was in AST. I had driven there to give some make-up to a friend of mine. As I was just about to give her the make-up, a raid began during which representatives from the Religious Department were rounding people up. Everyone

was running everywhere. I was very shocked so I began to run as well. I was chased into a hotel. I was wearing a nightgown again, but I had no make-up on my face. I took refuge in a small store in the hotel. It was a karaoke lounge. After I ran in, I managed to lock the door behind me and I hid behind the counter. Three men began to pound on the door. They told the bouncer that if he did not open the door, they would break it down and he would have to pay for it to be fixed. They identified themselves as representatives from the Religious Department so the bouncer immediately opened the door. They came after me. I resisted at first, but eventually surrendered. At first, they held me by my neck against the wall, and then they punched me in the nose until I was defenceless. I was slipping in and out of consciousness. They then threw me to the floor, stepped on my chest and kicked me. There was a real danger that they could have hit the silicone implants in my chest which could have been very dangerous. After being physically abused in the karaoke-lounge, I was taken to the Religious Department with a few other people. This was the most violent raid I had ever experienced. Almost all of the people who were taken there with me had been beaten. I was asked to remove my clothes as evidence, but they did not take a photo of me because I was not wearing make-up this time. The following day, I was taken to court again. I was forced to plead guilty to an offence under Section 66, saying that if I did not, I would prolong the situation and I would have to go to jail. I therefore followed their advice and also paid a 1,000 ringgit fine.

On the third occasion, I was picked up once again by the same man from the Religious Department who had punched and kicked me on the previous occasion. I was just standing in AST, wearing a nightgown and waiting for friends to go for food. A man standing behind me grabbed my hair, and without showing me any form of identification, told me to follow him. I was taken to the offices of the Religious Department once



again, and the following day I went to court. On this occasion, I did not plead guilty, and as a result, I was given a date for trial. There is a three strike rule, and as this was the third time I was arrested, I was forced to have a full trial. I paid a bond and was then released.

On the fourth occasion, I was arrested at the same time as Miss Kay. She was picked up in the first batch, and I was in a second batch. On that evening, I was wearing a big t-shirt and football clothes. These were not female clothes! The representatives from the Religious Department, however, said that my physical appearance was that of a woman. They lifted up my shirt without my consent, and I asked them why they had done that because I was not wearing a bra. We do not wear bras, as this would be very obvious evidence to be used against us by the Religious Department. As they did not find the evidence they were looking for, they took my flip flops and my hair band as evidence. I was taken to the office, and again in court the following day, I did not plead guilty but I was told that there would have to be a trial in relation to this incident, in addition to the trial relating to my third arrest.

By this time, I was in communication with KRYSS (an NGO working with the LGBTI community in Malaysia) having met them only a few days earlier. They found a Syariah lawyer to represent me at the trial relating to the third arrest. The Syariah lawyer convinced the court to combine the trials for the third and fourth arrests, and then sought a postponement. Our strategy is to postpone my trial in the Syariah court until after the leave hearing for the judicial review case has taken place.

**Linda:** I am a 25 year old Malay Muslim. I was born in Ipoh but I have lived in Seremban for the last seven years. Since I was 16 years old, I started to identify as a woman. I started to take hormones which I bought from the pharmacy. My siblings had

no problem with me dressing as a woman, but my father did not like it. He used to scold me and beat me, so I was forced to run away on two occasions to the house of a friend. After I completed my high school education, I moved to Seremban in order to study architecture at the college here.

I have been arrested twice. The first time was in 2005. It was night-time in the AST area and I was caught by three men. I was with another friend and they started to chase both of us. I tripped, but my friend managed to run. I fell down, but instead of helping me up, they stepped on me to keep me on the ground. They acted like they are above God. In Islam, there should be no compulsion. You should only provide advice, but not force people to do things. I was taken to the office of the Religious Department. They did not take a statement from me straight away, but they kept me and another three of my friends in overnight. Only in the morning did they take our statements. It seemed that they were not carrying out the proper process, but rather they were just making fun of us and ridiculing us. They did not seem to want to teach us a lesson, but rather to mock us.

On the second occasion, I was picked up by three religious officers in a white van. They just picked me up from the street and took me on a joyride, asking me questions the whole time. They asked me to remove my clothes and they tried to grope my breasts. After some time, they dropped me off at the top of a hill and I was forced to walk home alone in the dark. The officers who picked me up were not actually on duty, which was why they did not arrest me. They just took me for a ride to mock me and to take advantage of their position of authority.

I have become involved in the legal case because having been arrested on two separate occasions I believe that it is wrong that it should be a criminal offence for me to wear whatever I want to wear. I want to fight for my rights, and the rights of my friends.

These people arrest us, beat us up and break into our properties. They hunt us down as if we are the biggest murderers, when the only “offence” we are “guilty” of is wearing female attire.

**Fifi:** I am a 25 year old Malay Muslim. I was born in Seremban and I have been working as a sex worker for two years. I have been dressing as a woman, and taking hormones, for only three years. I have known that I was different since I was 13 or 14, and I have always been sexually attracted to men, but I did not start to identify as a woman until I was 22. I became a sex worker because I am not from a very well-off family, and I am able to make good and easy money in this job.

I am treated very differently during the day time to how I am treated at night. During the day, people make fun of me. People talk down to me and ridicule me. They just do not understand what it is like to be a trans-woman. They do not understand it at all. My family seems to accept me dressing as a woman, but if they knew the line of work I am in, they would probably kill me.

The first time I was arrested was in 2009. I was picked up on the street and taken to the offices of the Religious Department. I was asked to take off my clothes, which I did, and they then asked me to wash off my make-up. I was interviewed by a female religious leader, who told me that I am a very handsome boy. They did not press any charges against me. Whilst they were not violent towards me, I did feel very uncomfortable because they made me remove all of my clothes.

The second time I was arrested was in November 2010. I was on the pavement in the AST area. I was wearing leggings, a white singlet top and I was holding a clutch bag. I was wearing my hair down, and I had only eye make-up on. Two men came out

of the pub near where I live, and one of them approached me and started to flirt with me. He asked my name, and seemed to want to get to know me. Things progressed quite quickly, and I was swept away by this guy. Eventually I touched him, and I thought that if he was from the Religious Department, he would not have let me do that. After I did that, however, he took my arm and told me not to resist because he was from the Religious Department. After five minutes, a van arrived and I was taken to their office. I was put into a detention room, and they told me to call someone who could provide bail on my behalf and bring some spare clothes for me. They asked me to remove my clothes, which I did. They confiscated them. They did not take a statement from me, but just took my clothes as evidence. They then told me that I would be taken to court the following morning.

The following morning, they took me to court, but then realised that they did not have a statement from me, so they had to postpone my hearing so that we could go back to the office and I could give them a statement. The hearing was delayed until after Friday prayers. The officers were scolded by the judge because my case should have been heard between ten and eleven o'clock in the morning. I was not treated well during my time in detention at the Religious Department. I was arrested at 10pm in the evening, and by the time I was released after my court hearing at 3 pm, I had still not been given any food. In court, I was charged with an offence under Section 66, and I was made to pay a fine of 1,000 ringgit.

I have become involved in this legal case against Section 66 because I want to change the law. The religious authorities are the biggest problem facing trans-women like myself and I want this to stop.

## ***Restrictions on Freedom of Expression***

Restrictions imposed on the freedom to discuss LGBTI issues in Malaysia serves to sustain other forms of discrimination that LGBTI persons systematically experience. A fatwa has been issued by Muslim leaders stating that homosexuality is a sin. As anyone who gives, propagates, and/or disseminates any opinion contrary to any fatwa in force commits a criminal offense,<sup>339</sup> anyone in Malaysia who says the contrary is therefore subject to arrest simply for stating their opinion.<sup>340</sup> Therefore, no public discourse on the subject of equal rights for homosexuals is allowed. As a consequence, the press and media are censored and no person known to be LGBTI is allowed to appear on television shows.<sup>341</sup> Freedom of expression through internet is also curtailed, as illustrated in the case of Azman Ismail mentioned above, who received death threats and accusations by authorities on the basis that he had insulted Islam by appearing on an internet video speaking about his experience as being gay.<sup>342</sup> LGBTI characters are also prohibited in the media – unless they show repentance, as in the 2011 movie “Dalam Botol”.<sup>343</sup> Explicitly gay pop song “Born this way” by American singer Lady Gaga was also banned by censors in March 2011.

There have also been reports of homophobic attacks in the media on the LGBTI community. Following the publication of a “Memorandum on the Ill Representation and Discrimination of the Queer Community in Malaysian Media”, which expressed concern about the lack of action by SUHAKAM on the matter,<sup>344</sup>

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339 See above, note 314, p. 12.

340 Zaltun, M.K., “Sexuality Under Attack: The Political Discourse of Sexuality in Malaysia”, paper submitted for the Sexuality and Human Rights in Muslim Societies in South/Southeast Asia Conference, Jakarta, September 23-26, 2004, reprinted in *Isis International*, October 16, 2007, p. 1.

341 See above, note 314.

342 See above, note 325.

343 The Guardian, “Malaysian first gay film is a controversial hit”, *The Guardian*, 30 March 2011.

344 Tilted World, *Memorandum on the Ill Representation and Discrimination of the Queer Community in Malaysian Media*, June 2010.

SUHAKAM filed the memorandum as a complaint against the media and promised investigation and a study of Malaysian law on the subject.<sup>345</sup> Later, in its 2011 annual report, SUHAKAM urged the government to enact laws aimed at the protection of sexual minorities, namely the LGBT community.<sup>346</sup>

### ***Identity Documents***

One of the major challenges faced by transgender persons in Malaysia is the inability to have their gender officially recognised, including following sex reassignment surgery. States are obliged to “take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person’s gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person’s profound self-defined gender identity.”<sup>347</sup> However, as mentioned above, there are conflicting court decisions on the extent to which this right is enjoyed in Malaysia.

In the case of *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara*, the High Court refused the application of the claimant, who had undergone sex reassignment surgery from female to male, to have his birth certificate and national registration identity card amended to reflect this change in gender. The original application for amendment, made to the Register General of Births and Deaths, stated that there was an error in the entry of the register book and was rejected. The High Court upheld the decision of the Registrar, stating that the birth register may only be amended if an error is made upon original registration, and that no such error had been present in this case. Further, the judgment confirmed that a person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken. The High Court relied

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345 International Gay and Lesbian Human Rights Commission, *Progress Seen after Protest against Media Discrimination of LGBT People in Malaysia*, 21 September 2010.

346 Human Rights Commission of Malaysia (SUHAKAM), *Annual Report 2011*, 2011, pp. 76-77.

347 See above, note 308, Principle 3; see also *B. v France*, (Application No. 13343/87) (European Court of Human Rights), 25 March 1992; *I. v the United Kingdom* (Application No. 25680/94) (Grand Chamber of the European Court of Human Rights), 11 July 2002; *Christine Goodwin v the United Kingdom* (Application No. 28957/95) (Grand Chamber of the European Court of Human Rights), 11 July 2002.

upon the provisions of the Births and Deaths Registration Act 1957 and the National Registration Act 1959, stating that a positive decision in response to this application would conflict with the spirit and intention of the legislature expressed in such legislation and determining that this was a matter for Parliament rather than the courts.

In the case of *J-G. v Pengarah Jabatan Pendaftaran Negara*, however, the High Court reached a different conclusion, and granted the two requests of the male to female transsexual applicant that (1) the court declare her to be a female, and (2) the Registration Department be directed to amend her identity card to reflect her female gender. In the more recent case of Aleesha Farhana Abdul Aziz,<sup>348</sup> a male to female transsexual woman, whose application to adopt a female name was rejected by the court, subsequently died of a heart attack less than 2 weeks after the decision was handed down.

### ***Economic, Social and Cultural Rights***

There is also evidence to suggest that LGBTI persons suffer discrimination in relation to employment. As an August 2011 article argues, transgender people are “routinely targeted for work place discrimination” and “there are few transgender people who have not experienced loss of employment, denial of employment, or underemployment solely because of their transgender status”. The result is that members of the transgender community are “disproportionately driven into poverty and/or unwanted dependence on public assistance”, a situation which is further compounded by “denial of basic civil rights and protections in housing, public accommodations, and health care”.<sup>349</sup> ERT interviews with *mak nyah* revealed blatant discrimination in employment, healthcare and education experienced on grounds of gender identity (see Box 7).<sup>350</sup>

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348 Mustafa Kamal, S., “Transgender ‘Aleesha’ dies of heart attack, depression”, *The Malaysian Insider*, 30 July 2011.

349 See above, note 326.

350 The Equal Rights Trust, above note 338, pp. 145-153.

**Box 7**

**Testimony of Transgender Women –  
Socio-economic Rights**

**Kay:** I have faced many problems as a result of being a transgender woman. I have found it very difficult to get jobs since I started to wear trans clothing because people have very negative perceptions. I once applied for a job in a factory in Sunway City which is not far from Kuala Lumpur. I attended an interview for a job as an Operator, but they never called me back and I am sure it was because of who I was. I know this because of the way they looked at me during the interview. I have also found it very difficult to find places to rent. When I first arrived in Seremban, I was urgently looking for a house. I picked up a flier advertising accommodation for rent. I contacted the person, but when we met up, he told me that he could not rent the place to me because he had decided to sell the house instead. I know that this was not true, as two months later I found out that someone else was renting the place. This same experience has happened to me many times. Eventually I was able to find someone who did understand me. She is happy for me to rent her property as long as I pay the rent on time.

I also experienced problems in the hospital in Seremban. I was there recently, and although I am a trans-woman, I was put into a male ward. I was unconscious for five days after a car accident in which I hurt my head very badly. When I woke up, I was surrounded by men, and I freaked out. Eventually, the doctor agreed to put me in a different room so that I had a room to myself, but I should have been there from the beginning of my stay. I also found that many of the hospital workers shouted “pondan” at me, which is a very disrespectful name used interchangeably for homosexuals and transgender people.

**Zura:** I felt responsible for providing financial support to my foster father and my younger brother, so I needed to earn money as soon as possible. My family was so poor, and my foster father was also



sick and in need of medication which we were struggling to afford, so I was forced to finish school and start work. I tried working in other jobs first, but I faced too many problems. For example, when I worked in a restaurant, they told me that with a face like mine, I could only work at the back of the restaurant and only deserved five ringgit a day whilst the other workers were earning 50 ringgit a day. I did not want to continue living with this injustice so I decided it would be better for me to be a sex worker, and I have remained in that work since I was 15 years old.

I very much hope that as a result of our legal challenge, the situation facing trans-women in Malaysia will change. I am prepared to die for this cause, because there is such a lot of discrimination against us. I found it so difficult to find a job when I was younger. The Malaysian people do not allow trans-women to be anything other than sex workers. This really is the only work that we can do because when we look for work elsewhere, we are ridiculed. But we also have people to feed, and responsibilities to manage. We should be able to make money safely, and take care of our people like everyone else.

**Linda:** I found it incredibly difficult to study at college as a trans-woman. Firstly, I had no other trans-women friends on the campus. Secondly, I was forced to share a room (as were all of the other students) with a member of the same sex as me. Because my identify card says that I am male, I was made to share a room with a guy. I asked the Principal of the college if he could make an exception for me. I felt that they should demonstrate some flexibility in my situation. I should have been allowed either to share a room with other female friends, or to rent accommodation outside of the campus. As the college rules did not permit students to rent elsewhere, I was forced to stay on campus. I also found the studying very difficult as there was a tendency to separate the college classes according to gender. This did not work out at all for me, and I found being forced to study alongside only men very

uncomfortable. I also faced dilemmas every day, such as which toilet I should use on campus. Eventually, the campus environment became so uncomfortable for me that I was no longer able to continue with my studies. I had completed two years of the three year course, but I could not face it any more.

Very soon after I left college, I met new trans-friends, and became a sex worker. I have been doing that work for four or five years now. I was very much influenced by the choices which my trans-friends had made. If you look around other places of employment, like shops or restaurants, you do not see any trans-women working there. Being a sex worker is the only job which gives me freedom – I am able to wear what I like and I can do what I like. Apart from when the representatives of the Religious Department cause problems for me.

In respect to health rights, the PT Foundation, a charity based in Kuala Lumpur which focuses on the rights of persons living with HIV/AIDS, explained to ERT that the stigmatisation of LGBTI persons in Malaysia makes it very difficult to reach out to this community in order to raise awareness of HIV and provide appropriate health care to those living with HIV. The PT Foundation spoke of a network of underground venues catering to gay men and other men who have sex with men (MSM), especially in Kuala Lumpur and Penang, which operate under the guise of clubs, saunas and massage centres. Such venues require annual renewal of their business licensing and the PT Foundation explained that enforcement officers use the presence of safe sex posters, condoms and lubricants as evidence that these sites are used for illegal and immoral purposes. According to the PT Foundation, these establishments are threatened with closure on this basis and threats are accompanied by harassment and extortion from the venue operators. The PT Foundation stated that the risks associated with having items at a venue make it very difficult to carry out effective HIV prevention work.<sup>351</sup> The PT Foundation also com-

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351 Email from an employee of the PT Foundation to ERT, 8 August 2011.

mented on its work amongst the transgender community in Malaysia. They explained that many transgender sex workers are reluctant to obtain or ask for condoms from outreach workers, thereby increasing their vulnerability to HIV transmission, because they have in the past received threats from the religious authorities for possession of condoms.<sup>352</sup>

## **Summary**

The equal rights of LGBTI persons are not protected in Malaysia and the offences found in both civil and Syariah law create an environment in which these rights are violated regularly. Most notably, LGBTI persons face legal insecurity, harassment and physical abuse as a result of these provisions. Difficulties faced by trans persons in obtaining official documents recognizing their gender identity create a range of obstacles to their full participation in society. There is also evidence that LGBTI persons face discrimination in relation to economic and social rights. Restrictions on the discussion of LGBTI rights and a lack of statistical evidence combine to present significant hurdles for those wishing to challenge discrimination on the basis of sexual orientation and gender identity.

Malaysia was one of the 19 states which in June 2011 voted against the adoption of the UN Human Rights Council resolution condemning human rights violations of LGBTI persons and requesting the High Commissioner on Human Rights to conduct a study on violations of human rights suffered by persons of different sexual orientation or gender identity.<sup>353</sup> An explicit commitment to the protection of such persons against discrimination is absolutely necessary if the problems described above are to be effectively addressed.

## **2.6 Disadvantages Suffered by Persons Living with HIV/AIDS**

Since the adoption of the General Assembly Declaration of Commitment on HIV/AIDS, members of the United Nations have worked to eliminate discrimi-

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352 Ibid.

353 United Nations Human Rights Council, *Resolution: Human rights, sexual orientation and gender identity*, UN Doc. A/HRC/17/L.9/Rev.1, 15 June 2011. Out of the 47 states which were the current members of the Human Rights Council, 23 voted in favour of the resolution and 5 abstained or were absent.

nation and marginalisation of people living with HIV/AIDS.<sup>354</sup> Principle 5 of the Declaration of Principles on Equality also lists “health status” as one of the grounds in relation to which discrimination should be prohibited.<sup>355</sup> While there is limited information available regarding the extent to which persons with HIV/AIDS enjoy equality in all areas of life, this section endeavours to highlight some of the problems faced by this category of persons as a result of their health status.

Statistics provided by the Malaysian Ministry of Health indicate that the total number of HIV cases between 1986 and 2010 was recorded as 91,362, and the number of AIDS cases for the same period was 16,352. Of the HIV cases, 82,603 were men and 8,759 are women. Malays had the highest HIV infection rates – 65,235 cases, while 13,283 persons with HIV were of Chinese ethnic origin and 7,190 of Indian ethnic origin. The vast majority (63,680) were believed to have contracted HIV through intravenous drug use.<sup>356</sup>

A study carried out by the United Nations Country Team in 2007 concluded that people living with HIV/AIDS in Malaysia faced widespread discrimination. The majority of male drug users who participated in the study confirmed that they had experienced some form of discrimination, mostly at the hands of healthcare staff and prison officials. The effects of this were serious. The study found that fear of stigma caused persons with HIV to avoid seeking treatment, to engage in only limited social interactions and to live in secrecy.<sup>357</sup>

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354 United Nations General Assembly Special Session on HIV/AIDS, *Declaration of Commitment on HIV/AIDS*, 25-27 June 2001, Para 37; see also United Nations General Assembly, *Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*, UN Doc. A/65/L.77, 2011.

355 See above, note 47, Principle 5, p. 6.

356 Ministry of Health of Malaysia, AIDS/STI Unit, *Number of New HIV Infections, AIDS Cases and AIDS Deaths by Gender Per Year Reported in Malaysia*, PFT Malaysia, 2010.

357 Zulfiki, S.N., Huang, M., Low, W.Y. and Wong, Y.L., *Impact of HIV on People Living with HIV, Their Families and Community in Malaysia*, United Nations Country Team, 2007. According to 2012 data, up to 54% of respondents in Malaysia reported discriminatory reactions from employers once they became aware of the respondents' HIV status, while also 54% reported discriminatory reaction from co-workers once they learned of their colleagues' HIV status. (See International Labour Organisation, “HIV still a major obstacle to employment security”, 24 July 2012.)

In a January 2011 report, Professor Dr Adeeba Kamarulzaman, director of the Centre of Excellence on Research in AIDS (CERiA) and the head of University Malaya Medical Centre Infectious Diseases Department, highlighted the discrimination faced by people living with HIV/AIDS in relation to health care. She explained that patients are often refused treatment, and stated that “[t]here are several (cases) where patients have been refused procedures such as cardiac catheterisation on the basis of his HIV status”. She also explained that “although things have been improving, providing access to treatment, particularly in closed settings such as in prisons and detention centres, is still challenging due to the lack of human resource”.<sup>358</sup>

An ERT interview with a person living with HIV/AIDS provides an example of the challenges faced by this category of persons in Malaysia (see Box 8).<sup>359</sup>

### Box 8

### W.M.’s Testimony

In 2002, I started working in restaurant, in one of the East coast states. In December 2009, I resigned from that job in order to join another company in Kuala Lumpur. After two weeks at my new job, I was asked to do a medical test. They took a blood sample from me, but I did not realise that they would be testing me for HIV. The clinic subsequently informed me that I was HIV positive. I did not know about it before. I asked them whether I should tell my employers, and they advised me to inform my boss, as it would be best for me to give them the news. The next day, I told my boss that I’m HIV positive, and he said that he had never encountered this kind of case before. He asked me to take leave from work, and told me that he would call me in two days’ time. After three days, I had not received a call so I called him. They told me that I was still

358 Wen, L.W., “Human rights in HIV”, *The Star*, 9 January 2011.

359 ERT Interview with W.M., 28 June 2011, Kuala Lumpur.

considered to be on leave. It was frustrating as I did not receive any salary while I was on leave.

After three days, I contacted my former boss in the East coast area and asked if I could have my job back. He said that I could so I returned to join them. After six months, somebody informed the managing director at the company that I work with about my HIV status. This information had previously been known to my employers in Kuala Lumpur. When I confirmed with my boss that I was HIV positive, he told me that I must leave. I asked whether they could transfer me to an office job, as I already had eight years of experience. He said he can't do that. I took two weeks of leave, and contacted the PT Foundation (an NGO working with people with HIV/AIDS). They suggested that I should contact the Legal Aid Centre or the Labour Office to see if I could get legal aid in order to fight my case. I visited the Labour Office in Kuala Lumpur, and they said that my previous employers in the East coast could not terminate my employment on this basis. They suggested that I should return to work and make a police report if I encountered any problems. I went back to work and spoke to my Area Manager. I suggested again that they could move me to another department, but he said that they could not, and that the best thing would be for me to leave and they would pay me compensation. Therefore I submitted my letter of resignation, and they paid me three months' salary.

I have not taken any further action about this, as I was informed by a lawyer at the PT Foundation that without knowing who gave the information about my HIV status to my employer, it would be difficult to fight the case. I wish, that I could have done something more to take action against the company, but I am also very worried about my name being exposed. When people hear about my status, they often run away from me because they don't understand about HIV and AIDS. I had lost all my confidence in applying for jobs. I felt that everyone in the food industry knows

each other and that they would all know about me. This made me too scared to apply for other jobs.

But now I'm working in one of the NGOs in Kuala Lumpur that deal with AIDS programmes. I feel at home here. Most of the people around me understand the virus, my status and accept me as I am.

Malaysia has special provisions in the Immigration Act 1959/63 Section 8(3)(b) which denies entry to people with HIV, on grounds that their presence in Malaysia is “dangerous to the community”. Migrant workers (low-skill workers and domestic staff) seeking a work permit in Malaysia must first carry out a HIV-test in their home country. If positive, entry will automatically be denied whilst a negative test must be repeated in Malaysia, and a work permit will only be authorised once a second negative-test result has been produced.

### ***Summary***

The evidence suggests that the impact of the HIV/AIDS epidemic in Malaysia is worsened by the discriminatory attitudes and actions taken towards persons living with HIV/AIDS, which hinders access to effective treatment, and can lead to economic and social isolation.

## **2.7 Inequalities Affecting Children**

The Convention on the Rights of the Child (CRC) is one of the few international human rights treaties ratified by Malaysia. However, Malaysia has made several reservations to the treaty, and the application of the CRC in Malaysia is subject to its compatibility with the Malaysian Constitution. Children across Malaysia experience discriminatory violence and sexual abuse. Social attitudes, as well as barriers in access to justice, prevent children from accessing those mechanisms which exist to protect them. Child labour, trafficking and prostitution are also deeply concerning. Particular groups of children, such as stateless children, asylum seeking children, and the children of migrant workers, experience specific and additional forms of discrimination.

### ***Discriminatory Violence and Ill-treatment***

The four main forms of discriminatory violence and ill-treatment against children in Malaysia are: (i) violence and sexual exploitation; (ii) immigration detention, as well as abuse in detention; (iii) child labour; and (iv) child marriages.

Malaysia is a country where the corporal punishment of children is legal. In March 2012 a teacher was jailed for 18 years for killing a pupil at his Islamic boarding school by beating and strangling him. The judge said he hoped the sentence would serve as a deterrent for teachers.<sup>360</sup>

In 2007, the CRC Committee noted with grave concern that domestic violence, including violence against children in the family, remains a serious human rights problem in Malaysia, and also noted that victims and witnesses fail to report instances of domestic abuse owing to social and cultural taboos around doing so.<sup>361</sup> According to data from the Malaysian Department of Social Welfare, in 2008 child abuse reports rose to 2,780 from 2,279 in 2007 and 1,999 in 2006. This means that an average of seven children in Malaysia were reported to be victims of child abuse every single day in 2008. According to the 2008 report, neglect was the most common form of child abuse (952 cases), followed by physical abuse (863 cases), sexual abuse (733 cases), of which 529 (72%) were incest cases. 58 cases of babies having been abandoned were also reported that same year.<sup>362</sup>

The sexual exploitation of children continues to be a significant problem in Malaysia. It has been reported that, according to Social Welfare Department's statistics, 4,315 children below the age of 19 were involved in prostitution between 1995 and 1999. More than 70% were from broken families or were exposed to sex by people they knew. More than 60% had taken alcohol and drugs or did not use contraceptives when having sex with their clients, while

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360 BBC, "Malaysia jails teacher who killed pupil", *BBC News*, 7 March 2012.

361 See above, note 215, Para 57.

362 UNICEF Malaysia, *Child Abuse in Malaysia: Fact Sheet*, September 2010.



between 40% and 60% admitted to having served between six and ten men each day.<sup>363</sup> The latest report of the Committee on the Rights of the Child on Malaysia stated that child prostitution and the state's treatment of street children were still problematic in Malaysia.<sup>364</sup>

Child trafficking continues to be a source of concern in Malaysia. Children victims of trafficking are often detained and subsequently deported. They are not provided with adequate specialist support for social reintegration and recovery.<sup>365</sup> There are suggestions that babies are trafficked from neighbouring countries for sale to childless couples in Malaysia.<sup>366</sup>

Malaysia has made a reservation on Article 37 of the CRC (stating that the detention of a child shall only be used as a last resort and for the shortest period of time). According to this reservation, Article 37 only applies if it is in conformity with the Constitution, national law and national policies.<sup>367</sup> A report of the International Detention Coalition released in March 2012 revealed cases of severe abuse of children in immigration detention. It tells the story of Kumar, Mahela and Lasith, all below the age of 11, who have fled Sri Lanka with their parents and were detained in terrible conditions in Malaysia. In the detention camp, they were made to strip naked and squat and stand repeatedly while they were checked for unauthorised possessions. If they stopped squatting and standing, they were hit with a stick.<sup>368</sup>

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363 The Star, "4000 children in flesh trade", *The Star*, 27 November 2006. See also Ramakrishnan, M., "Malaysia haven for child prostitution", *Press TV*, 18 February 2011.

364 See above, note 215, Para 93.

365 Ibid., Para 95.

366 Ibid.

367 See United Nations Treaty Collection, Convention on the Rights of the Child, Status as at 11 July 2012.

368 International Detention Coalition, *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum Seeker and Irregular Migrant Children Affected by Immigration Detention*, 2012, p. 49.

Although child labour is forbidden for children under the age of 14, the problem persists, largely in palm-oil plantations, the agricultural sector, family food businesses, night markets, and small-scale industries.<sup>369</sup> The CRC Committee has also expressed its alarm at the high number of child domestic workers who work under conditions that are hazardous and interfere with the child's education, and are harmful to the child's health and physical, mental, spiritual, moral or social development.<sup>370</sup>

Although public opinion seems to be changing in relation to child marriages,<sup>371</sup> this practice continues. Under Syariah law, girls can marry only from the age of 16, but may do so before if specifically approved by a Syariah court. In 2009, the State of Malacca turned this religious custom into law when it allowed under-aged marriage, allegedly to reduce the number of abandoned babies and unwed pregnancies. The law allows Muslim girls under 16 and Muslim boys under 18 to wed on a case by case basis before a Syariah court.<sup>372</sup> The Malaysia Country Progress report to the United Nations on HIV shows that in 2009, 477 girls and 2 boys under the age of 14 were subjected to an obligatory premarital HIV test, implying that they were married at that age.<sup>373</sup> In 2010, an 11 year old child girl was reportedly married to a 41 year old man. While this marriage was annulled by the Syariah court, this was not because of the age of the child, but because it appeared that the child's father had been coerced and had in fact had no intention to marry off his daughter.<sup>374</sup> Another child marriage took place in December 2010, when a 14 year old girl married her sibling's 23 year old religion teacher.<sup>375</sup>

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369 See above, note 53, p. 52.

370 See above, note 215, Para 91.

371 The Malaysian Mirror, "Child marriages: a life of misery and pain", *The Malaysian Mirror*, 18 July 2010.

372 BBC, "Malaysian state chided for allowing under age marriage", *BBC News*, 4 August 2010.

373 United Nations General Assembly Special Session, *Malaysia 2010 UNGASS Country Progress Report*, March 2010, p. 42.

374 BBC, "Malaysia court rules child marriage 'illegal'", *BBC News*, 23 December 2010.

375 The Straits Times, "Malaysian child bride defends marriage", *The Straits Times*, 13 December 2010.

## ***Access to Justice***

Article 12(1) of the Convention on the Rights of the Child requires that:

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

Article 12(2) specifies that this applies to any judicial proceedings affecting the child. The CRC Committee has elaborated on this provision:

*The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration.<sup>376</sup>*

In Malaysia the testimony of children is only accepted where there is corroborating evidence.<sup>377</sup> In this regard, in its concluding observations, the Committee on the Rights of the Child recommended that “children’s views be systematically heard and taken into consideration in all judicial, administrative and other decisions affecting them, in accordance with the child’s age and

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<sup>376</sup> Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard*, UN Doc. CRC/C/GC/12, 2009, Para 32.

<sup>377</sup> See above, note 53, p. 39.

maturity”.<sup>378</sup> Section 133A of the Evidence Act 1950 makes it very challenging to obtain a conviction in child abuse cases where a child victim is the only witness,<sup>379</sup> which of course constitutes, by itself, a separate failure to fully implement other Articles of the Convention.

This failure to respect the right of the child to be heard in an administrative or legal proceeding involving the child was highlighted by SUHAKAM in a recent child-custody dispute before the Court of Appeal. For the first time, the Court of Appeal granted SUHAKAM permission to hold a watching brief in a child-custody case, and counsel representing SUHAKAM were permitted to address the court on the obligation of Malaysia under the CRC in this regard. In its decision, the Court of Appeal took notice of the fact that the judge at first instance had not granted the child an opportunity to be heard and to have her views on her custody taken into consideration.<sup>380</sup>

### ***Particularly Vulnerable Groups of Children***

Another key concern relating to children in Malaysia is the high number of children rendered stateless by citizenship laws. In its last report on Malaysia of June 2007,<sup>381</sup> the Committee on the Rights of the Child expressed its concern over the discrimination faced by: (i) the Orang Asli, the indigenous and minority children living in Sabah and Sarawak; (ii) asylum-seeking and refugee children, who are not registered by the authorities and are therefore denied entry into schools; (iii) children born out of wedlock; and (iv) children of migrant workers, and highlighted the high number of child migrant domestic workers working under hazardous conditions. Non-Malaysian children born in Malaysia, such as asylum-seeking and refugee children, as well as children of undocumented migrant workers, children of single mothers and children born in remote areas of the country, are at risk of not being registered at birth.<sup>382</sup>

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378 See above, note 215, Para 43.

379 Evidence Act 1950, section 133A.

380 *Low Swee Siong v Tan Siew Siew* [2011] 2 MLJ 501 (High Court, Kuala Lumpur).

381 See above, note 215.

382 *Ibid.*, Para 44.

In December 2010, the Asia Foundation published a report which revealed the high numbers of stateless children in the state of Sabah, the poorest state in Malaysia, with a GDP of half the national average.<sup>383</sup> Sabah has a largely non-Malaysian population, which includes many Indonesian and Filipino migrants who work within the palm oil sector. Many migrants start families after arrival in Malaysia and the result is that there are in the region of 52,000 stateless children in Sabah.<sup>384</sup> The United States Department of State suggests that 10 to 20% of the 60,000 illegal immigrants and persons of concern living in Sabah were stateless children born in Sabah.<sup>385</sup> Whichever figure is more accurate, it is clear that a significant number of children are born into statelessness in Malaysia. The reasons for this are a combination of legal and practical hurdles facing immigrants in Sabah. Children born in Malaysia whose parents are not Malaysians do not acquire citizenship by birth alone. In order to obtain paperwork confirming the citizenship of a child's parents' country of origin, they must be registered at the relevant foreign consulate which is difficult for Indonesian migrants in Sabah due to the costs involved in travelling to the consulate in Kota Kinabalu, and for Filipino migrants in Sabah due to the fact that there is no consulate within the state. The CRC Committee has raised concerns in relation to the fact that delays in birth registrations, which are likely to affect those who are unaware of the necessary procedure, or are unable to access registration centres in a timely manner, are subject to additional fees.<sup>386</sup>

The United States Department of State has noted that some persons were stateless due to the restrictions on birth registration resulting from either inadequate proof of the parents' marriage or the parents being in an interfaith marriage which is not recognised by the government.<sup>387</sup> Foreign migrants cannot get married legally in Malaysia, so they rely on customary rituals which are not recognised as satisfactory to enable a child to be registered.

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383 Mulakala, A., *Sabah's Stateless Children*, Asia Foundation, 8 December 2010.

384 Ibid.

385 See above, note 53, p. 29.

386 See above, note 215, Paras 31-32.

387 See above, note 53, p. 29.

In its concluding observations on Malaysia, the CRC Committee has raised concerns about discrimination against children born out of wedlock.<sup>388</sup> Under Malaysian law, in cases of a child born out of wedlock, any reference to a father or a parent is to be interpreted as a reference to that person's mother.<sup>389</sup> This was done in the case of *Tara Anne Gonzales Yutiampo v Yuen Hoong Kin and 3 Others*, in a decision of the High Court of Malaya at Shah Alam, Selangor (unreported).<sup>390</sup> In this case, the judge gave legal custody of a child born out of wedlock to the mother, a Philippine national, and treated the child for all intents and purposes as a Philippine national. The possible right of the child to have Malaysian citizenship by operation of law by virtue of her father being a Malaysian citizen was not considered.

While the broader issue of discrimination on the ground of statelessness is discussed further in this report, it is raised here so as to acknowledge the multiple discrimination faced by stateless children, both on the grounds of age and (lack of) citizenship. The impact of statelessness upon a child within Malaysia is extensive, as a stateless child has no access to education, health care and other government services. The result is that many stateless children are forced into child labour. The Asia Foundation has reported that non-governmental organisations, such as the Borneo Child Aid Society Sabah, provide education to stateless children in collaboration with the Ministry of Education and with some financial support from the palm oil companies.<sup>391</sup> While such programmes are a positive step towards equal access to social rights including education, for stateless children, the involvement of the state and federal governments is required in order to resolve this continuing inequality.

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388 See above, note 215, Paras 31-32.

389 See above, note 242, Second Schedule, Part II, Para 17.

390 *Tara Anne Gonzales Yutiampo v Yuen Hoong Kin and 3 others*, unreported (High Court). SUHAKAM was belatedly invited to hold a watching brief in this case, on behalf of the child seeking not to be separated from her Malaysian father and his extended family. However, the decision as to custody had already been made. SUHAKAM hoped to hold a watching brief at the appeal stage.

391 See above, note 383.

## Summary

Malaysia's ratification of the Convention on the Rights of the Child and its enactment of the Child Act 2001 has not been sufficient to eradicate patterns of discrimination against children in Malaysia. Children's rights are breached in patterns of discriminatory violence and abuse, in the form of child labour, child marriages, sexual exploitation and trafficking. The provisions of the Evidence Act 1950 are discriminatory against children on the ground of their age by failing to attach due weight to the testimony of children. Further, children who are members of disadvantaged groups, such as indigenous communities, asylum-seekers and migrants, suffer enhanced disadvantage by virtue of their age.

## 2.8 Inequalities Based on Disability

The latest figures obtained by the United Nations Economic and Social Commission for Asia and the Pacific from the Department of Social Welfare on 31 March 2011 show that there are 301,346 persons with disabilities in Malaysia.<sup>392</sup> The accuracy of this figure is, however, questionable, given that this would represent just over 1% of the population. In its latest report on Malaysia, the Committee on the Rights of the Child expressed its disappointment at the inadequacy of official data on the number of children with disabilities.<sup>393</sup> There is also a lack of up-to-date statistics regarding the participation of disabled persons in different areas of life, for example education and employment. Despite the lack of statistical data available, patterns of discrimination in relation to access of persons with disabilities to education and employment have been identified. Persons with disabilities in Malaysia "continue to face real difficulties in accessing employment, education, housing, and public spaces and facilities",<sup>394</sup> and public perceptions of disability are unfavourable and biased, leading to stigmatisation and exclusion. It is also noteworthy that Malaysia has

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<sup>392</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Overview: Malaysia Disability*, 2 June 2011.

<sup>393</sup> See above, note 215, Para 60.

<sup>394</sup> See above, note 54, Para C6.

special provisions in the Immigration Act 1959/63 Section 8(3)(b) which denies entry to people with a mental illness, on the ground that they may be “dangerous to the community”, thus discriminating directly on the basis of disability.

## **Education**

Malaysia’s obligations under the CRPD require it to “ensure an inclusive education system at all levels,” specifically requiring states to “ensure that persons with disabilities are not excluded from the general education system on the basis of disability and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability”.<sup>395</sup> Children with disabilities are given the opportunity to participate in a special education programme within mainstream schools. Special education schools do exist in Malaysia, but they are not sufficient to meet the needs of the population with disabilities.<sup>396</sup> The Education Act 1996 (Special Education Regulations) 1997 makes a distinction between children who are “educable” and children who are “non-educable” in order to determine whether a “pupil with special needs” is to be accepted to attend a special education programme in government schools. “Pupils with special needs” are defined as “pupils with visual impairment or hearing impairment or with learning disabilities”. A “pupil with special needs” is determined to be “educable” if:

*“[H]e is able to manage himself without help and is confirmed by a panel consisting of a medical practitioner, and officer from the Ministry of Education and an officer from the Department of Welfare, as capable of undergoing the national educational programme.”*

The following are automatically excluded from participation in the “special education programme”:

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<sup>395</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006, Articles 24(1) and 24(2)(a).

<sup>396</sup> See above, note 53, p. 40.



- (i) “physically handicapped pupils with the mental ability to learn like normal pupils”; and
- (ii) “pupils with multiple disabilities or with profound physical handicap or with severe mental retardation”.<sup>397</sup>

Children deemed to be non-educable are excluded from the special education regime established under the regulations and then face challenges in finding alternative options, being forced to rely on private institutions or individuals which are inevitably costly. The Special Rapporteur on Education noted that, while there is a special education programme in place to enable children with disabilities to attend mainstream schools, these children are often taught in separate special classes within those schools. He therefore emphasised “the need for more thorough and rapid progress in the construction of educational systems in which pupils with special educational needs have access to the general education system”.<sup>398</sup> Further, the Special Rapporteur noted the lack of statistics identifying the number of children with disabilities in the country, and the number of such children who were in schooling.

### ***Employment***

There are no statistics which confirm the number of persons with disabilities in employment in Malaysia. The government has committed, however, to ensuring that persons with disabilities fulfil 1% of the labour force. The Department of Labour does offer support to persons with disabilities in finding employment through a registration and job-finding service, but it has not been possible to find evidence of whether this process is successful at ensuring equal access to employment for persons with disabilities in Malaysia. However, ERT and Tenaganita have gathered some testimony providing an insight into the challenges faced by persons with disabilities in Malaysia (see Box 9).<sup>399</sup>

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397 Education (Special Education) Regulations Act 1997, section 3.

398 See above, note 63, Paras 41-42.

399 Tenaganita Interview with Mr R., 11 August 2011, Kuala Lumpur.

### Box 9

### Testimony of Mr R.

I was born in 1953 in Machang, Kelantan. At the age of two, I suffered from an eye infection that resulted in the loss of my eyesight. In the 1960s, there were no special schools for the blind in Kelantan. So in 1962, at the age of nine, I was sent to a special residential school for the blind, Princess Elizabeth School in Johor, where I received my elementary education. I continued my secondary education at Sultan Ismail College in an Integrated Programme in Kota Bharu, Kelantan until I completed the High School Certificate in 1973. I pursued my tertiary education at the University of Malaya in 1974 and graduated with a B.A. (Hons.) in Malay Studies in 1977 and acquired a Diploma in Education from the same university the following year.

I became a teacher in 1978 until my retirement in April this year. I taught for 33 years in the same school in Kelantan. I regret that my school authorities never appreciated my services as I never received an excellence award from them. I got an excellence award from the state education department but not from the school authorities.

The school where I used to teach did not have good facilities for the blind such as tactile flooring. Sometimes the drains did not have proper covers. It's worse outside the school. Travelling is a hazard for people like me. Without a guide, it is very difficult. Some people are fond of making fun of me or trying to fool me. So I do not travel much. Access to public buildings is a pain for us. It is very tedious to have to move around without a guide. Going to hospitals and government departments is a "hit and miss" affair; we have to "explore" and ask around. Public buildings have staircases without tactile or rubberised flooring. So we can fall easily.

We also need more educational and job opportunities for the disabled. If the government can satisfy even the 1% quota for employment of disabled in the public sector, it will be very good.

We need better training opportunities for the disabled. In my 33 years as a teacher, I was offered the opportunity to attend only four or five training courses. I installed a JAWS screen reader for my computer with money out of my own pocket. So, we disabled people spend more money than our colleagues to equip ourselves for our jobs.

In May this year, I opened an account with a commercial bank in Kota Bharu but they refused to give me an automated teller machine (ATM) card. I requested one but they agreed to issue the ATM card to me only if I signed an indemnity letter. I refused and I told them this is a gross injustice against the blind. I also showed them the ATM and credit cards issued to me by another bank without me having to sign an indemnity letter. They still refused to issue me the ATM card. I refused to sign the indemnity letter so I don't have an ATM card from that bank.

We want and require the same kind of treatment and facilities as provided by the government for able-bodied citizens.

### ***Public Services***

The Care Centres Act of 1993, along with the Care Centres Regulations 1994, provides that:

*The Director General, when registering a care centre, may impose such conditions as he thinks fit and proper, including conditions (...)*

*(c) to ensure that the care centre will be adequately staffed by a sufficient number of persons with suitable qualifications or experience.*<sup>400</sup>

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400 Care Centres Act 1993, section 7.

The Care Centre Regulations Act 1994 further requires that:

*The operator shall ensure that the minders employed to care for the residents or persons received for care are trained or experienced in the aspect of care-giving.*<sup>401</sup>

The Schedule to the legislation sets out a ratio of care attendants to residents in care centres which is considered to be insufficient to provide adequate care to persons with intellectual disabilities in such centres. The failure to provide adequate care attendants in care centres is arguably a violation of Malaysia's obligation under Article 25(b) of the CRPD, which requires the provision of "those health services needed by persons with disabilities specifically because of their disabilities". Further, persons with disabilities in Malaysia face varying levels of disadvantage depending on their place of residence. For example, the Committee on the Rights of the Child has noted that children with disabilities living in remote areas do not have access to the same level of services as children with disabilities living in other parts of the country.<sup>402</sup> While the government does provide financial aid to persons with disabilities who earn less than a certain threshold, the sum is inadequate.<sup>403</sup>

## **Summary**

The absence of data relating to the participation of persons with disabilities in Malaysia in areas of economic, social, political or cultural life has made it difficult to identify the patterns of discrimination which are understood to be faced by this disadvantaged group. The authors' research has, however, identified patterns of discrimination faced by persons with disabilities in the fields of education and employment. Children with disabilities are often segregated and taught in separate special classes within mainstream schools. Further, in the absence of official statistics, field research has uncovered testamentary evidence of the discrimination faced by persons with disabilities in the field of employment and the accessibility of the built environment. The failure of

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401 Care Centre Regulations Act 1994, Regulation 5(1).

402 See above, note 215, Para 60.

403 Thanasayan, A.S.B., "RM 300 a month inadequate for disabled", *Malaysiakini*, 30 June 2008.

the government to collate data regarding the participation of persons with disabilities in various areas of life represents, in and of itself, a process by which persons with disabilities are further disadvantaged, as without such evidence, it is very difficult to advocate or plan for improvements.

## 2.9 Discrimination against Non-citizens

Non-citizens can be divided into asylum-seekers who come to Malaysia to seek protection, and migrant workers who come to Malaysia to seek employment. This second group is dominated by domestic workers. It has been estimated that in 2010 there were around four million immigrants in Malaysia of whom nearly two million were illegal and undocumented.<sup>404</sup> In April 2012, there were 98,100 refugees and asylum seekers registered with the Office of the United Nations High Commissioner for Refugees (UNHCR). The 2012 UNHCR breakdown of the registered refugee community according to nationality and ethnicity was as follows: 89,900 were from Myanmar, comprising some 34,430 Chin, 22,840 Rohingya, 10,480 Myanmar Muslims, 3,780 Mon, 3,250 Kachin and small numbers from other ethnicities from Myanmar. There were some 8,200 refugees and asylum-seekers from countries other than Myanmar, including 4,480 Sri Lankans, 1,090 Somalis, 790 Iraqis and 440 Afghans, and small numbers from other countries. 71% of all refugees and asylum-seekers were men and 29% were women. There were around 20,000 children (below the age of 18). There were also a large number of persons of concern to UNHCR who remained unregistered. Refugee communities themselves estimated that the population of unregistered refugees and asylum-seekers was approximately 10,000 persons.<sup>405</sup>

In examining the situation of non-citizens in Malaysia, this section will first discuss the context in which each of the three main groups – refugees and asylum seekers, migrant workers generally, and the specific sub-group of migrant domestic-workers – tend to come to Malaysia, their legal status and rights, and the most immediate consequences of this legal status, or lack of it. It will go on to discuss the problems which are experienced by all three

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404 See above, note 53, p. 27.

405 United Nations High Commission for Refugees Malaysia, *Figures at a Glance*, April 2012.

groups as non-citizens, though to differing degrees, given the relative precariousness of their situation.

### 2.9.1 Asylum-Seekers and Refugees

Asylum-seekers and refugees come to Malaysia to seek protection from the persecution which they suffer in their countries of origin. The patterns of discrimination described below indicate that far from obtaining protection, asylum-seekers and refugees are subjected to discriminatory ill-treatment and sometimes deportation in violation of the customary international law principle of *non-refoulement*.

The poor treatment of refugees and migrants by Malaysia was highlighted in the international media due to the “refugee swap” deal, known in Australia as the “Malaysia solution”, agreed between Australia and Malaysia on 25 July 2011.<sup>406</sup> Under the deal, the Malaysian government agreed to receive 800 asylum-seekers from Australia, in return for Australia resettling 4,000 registered refugees who were currently residing in Malaysia. Australia’s plan to enter into this agreement was criticised by Navi Pillay, UN High Commissioner on Human Rights, on the basis that sending asylum-seekers to Malaysia would potentially violate international refugee law.<sup>407</sup> There were also concerns that the guarantees of the rights to work, education and health care, which the Australian government had promised would be granted to the 800 asylum-seekers sent to Malaysia, would create a two-tiered system of refugee management in Malaysia, which itself would create inequality within the migrant community. The Australian High Court subsequently ruled that the “Malaysia solution” would be unlawful, given that Malaysia has not signed or ratified the 1951 Refugee Convention or the UN Convention against Torture, and therefore the adequate protection of those transferred under the “swap” could not be guaranteed.<sup>408</sup> Despite the continued efforts of the Australian Prime Min-

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406 Associated Press, “Australia to send child asylum seekers to Malaysia”, *The Guardian*, 3 June 2011; see also Davis, F., “The failure of Australia’s ‘Malaysia Solution’ is a positive step for refugees”, *The Guardian*, 4 September 2011.

407 Bryant, N., “Australia: UN Chief Navi Pillay attacks asylum policy”, *BBC News*, 25 May 2011.

408 Malkin, B., “Australia’s ‘Malaysia Solution’ blocked by the High Court”, *The Telegraph*, 31 August 2011.

ister to pursue the deal with Malaysia,<sup>409</sup> in June 2012 the Australian Senate defeated the bill that had been passed by the lower chamber.<sup>410</sup>

### ***Refugee Status Determination***

The main cause of the discrimination and inequality faced by asylum-seekers and refugees in Malaysia is the difficulty they face in obtaining legal recognition as a refugee and the corresponding rights. Malaysia is not a signatory to the 1951 Convention relating to the Status of Refugees, and does not recognise refugees as such. The Malaysian Immigration Act does not distinguish asylum-seekers and refugees from other migrants without papers, and anyone who is considered to be in Malaysia illegally may face imprisonment for up to five years and mandatory caning. The CEDAW Committee has drawn attention to Malaysia's failure to adopt laws on the status of asylum-seekers and refugees and the fact this means they have been prosecuted for immigration-related offences, and called for comprehensive regulations in this regard.<sup>411</sup> According to Ishak Muhammed, Enforcement Director of the Malaysian Immigration Department, "[e]very foreigner in our country must have a proper passport. As far as immigration is concerned there are no refugees in my country. That is quite clear. Period."<sup>412</sup>

The UNHCR performs functions related to reception, registration, status determination and protection under its mandate, but thousands of individuals remain unregistered and outside of UNHCR's protection. Both UNHCR-registered and unregistered asylum-seekers, refugees and stateless persons are considered irregular migrants by most government agencies. Government policy dictates that the following should recognise the rights of UNHCR-registered refugees: (i) the police, who are, according to the Home Ministry policy,

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409 BBC, "Australia migrants: Gillard to pursue Malaysia swaps", *BBC News*, 12 September 2011.

410 See above, note 331.

411 See above, note 140, Paras 27-28.

412 Zusman, K., "Background – Malaysia: Overview", *Please Don't Say My Name*, available at: <http://www.pleasedontsaymyname.org/overview.html>.

directed to release anyone arrested on immigration offences who is able to provide evidence of UNHCR registration; (ii) the Attorney-General who has issued instructions not to initiate prosecution for immigration-related offences against UNHCR-registered persons; and (iii) the Ministry of Health, which provides UNHCR-registered individuals with a 50% discount off foreigner rates in government hospitals.<sup>413</sup> In practice, however, Tenaganita frequently encounters cases where registered refugees are arrested and detained by immigration officers and then fined the maximum amount under immigration legislation. Further, the police do still routinely arrest refugees, even when they hold UNHCR cards, and such detainees must subsequently wait, often for months, for UNHCR to facilitate their release.<sup>414</sup>

Section 55(1) of the Immigration Act provides the legal basis to issue groups or individuals with a temporary residence permit called the IMM13, but in practice it is rarely issued. IMM13 holders are allowed to remain legally in Malaysia, engage in lawful employment, register their children in government schools and access public services. The permit is temporary but renewable on an annual basis. It can, however, be cancelled at the Minister's discretion.<sup>415</sup> In 2006, there was an attempt to introduce IMM13 permits for Rohingya refugees in recognition of their special circumstances as stateless persons from Burma who cannot be returned to their country of origin. The registration process, which was administered without coordination with UNHCR, was flawed and was abandoned after 17 days amid allegations of corruption and fraud. Subsequently, a further study has been commissioned by the government on residence and work permits for Rohingya refugees but there are no immediate plans to resume the process. There are calls from NGOs to extend the issuance of IMM13 permits to other refugees beyond the Rohingya community.<sup>416</sup>

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413 Migration Working Group and Northern Network for Migrants and Refugees, *A joint submission by members of the Migration Working Group (MWG) and the Northern Network for Migrants and Refugees (Jaringan Utara Migrasi dan Pelarian, JUMP) for the 4th Session of the Universal Periodic Review, February 2009, 2009, Para 3.*

414 Email from Katrina Maliamauv of Tenaganita, 22 August 2011.

415 The Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, London 2010, Para 105.

416 Refugees International, *Malaysia: Invest in Solutions for Refugees*, 19 April 2011.



There is no legal recognition that refugees cannot return to their country of origin and thus government policy provides no protection from *refoulement*. As a result, refugees still live in a state of insecurity and fear of arrest, detention and deportation and are subjected to exploitation as a result. Malaysia has made some progress over the last years regarding the rights of refugees.<sup>417</sup> The arrest of UNHCR-registered refugees on immigration-related offences has decreased, state authorities are increasingly recognising UNHCR-issued cards for refugees and asylum-seekers and the practice of deporting Burmese refugees to the Thai border has ceased.<sup>418</sup> However, these changes to state practice have not been cemented in domestic law. Indeed, representatives of Tenaganita have noted their concern that despite the cessation of deportations of registered Burmese refugees to the Thai border, those refugees who do not have a UNHCR card are still deported directly to Burma, and refugees entering Malaysia are often detained at the Thai-Malaysia border.<sup>419</sup>

### ***Employment***

Unrecognised refugees in Malaysia are denied the right to safe and sustainable livelihoods. There is no system in place to provide either residence or work permits to refugees, who are reliant on low paid jobs for their economic survival. The most generous statement from the authorities in this respect was issued by the Home Ministry Secretary General, Mahmood Adam, who said that refugees “cannot work here, but they can do odd jobs”.<sup>420</sup> As a result of their economic insecurity, refugees and asylum seekers are left vulnerable to arrest and exploitation in the work place without recourse to justice.

One of the most serious consequences of being unable to legally work in Malaysia is that refugees are often hired by employers to work in dangerous and abusive conditions. Many refugees work as “general workers” in the construction and plantation sectors, or as servers and dishwashers in the service

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417 Ibid.

418 Ibid.

419 See above, note 414.

420 Associated Press, “Malaysia plans IDs for refugees to prevent arrest”, *The Jakarta Post*, 1 February 2010.

industry, often hidden at the back of restaurants. In some of the communities that Tenaganita has met outside of the Klang Valley, the refugees work as fishermen – often staying in unsanitary and hazardous conditions on the boat, not only when they are away at sea for days, but also when the boat docks. The hours of work are long, with refugees often stating that they work between 12 and 15 hours per day. For jobs that typically require protective gear (i.e. construction, spraying of chemicals, etc.), employers cut costs when it comes to their refugee employees, often failing to meet even the minimum standards for safety. When accidents occur in the workplace, refugees are often dismissed as they have become a “liability” (see Box 10).<sup>421</sup> There is no monitoring to ensure that employers compensate refugees whose health has been compromised as a result of the work they do.<sup>422</sup> Female refugees and asylum-seekers are at a particular risk of abuse and exploitation when forced to work within the informal economy in Malaysia.

### **Box 10**

### **Case Study: Mohammad Ali**

Mohammad Ali is a Rohingya refugee. He is 34 years old and his wife and children are still in Myanmar. He sought asylum in Malaysia in 2007.

In 2010, Mohammad Ali was working as a metalworker, when he was left blind in one eye from a piece of shrapnel that flew into his eyes. His right eye is now completely blind, while he experiences blurriness of vision in his left eye. He also suffers from chronic headaches, and has strong painful reactions to changes in the weather.

After the accident, Mr Ali was admitted to the hospital, where he was told that he needed to have surgery to remove the shrapnel

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421 Case on file with Tenaganita.

422 Email from Katrina Maliamauv of Tenaganita, 12 August 2011.

from his eye and that the operation would cost him around RM 15,000. His employer at the time promised to cover his medical bills, but has failed to do so. The only sum which the employer has paid was 50% of the RM 2,600 in emergency hospitalisation fees. Mr Ali was given a 50% discount as he is a UNHCR-registered refugee. The piece of metal shrapnel remains lodged between his left eye and his brain.

Mr Ali was dismissed from work after being discharged from hospital, and no forms on compensation have been given to him. Due to his loss of vision and chronic pain, he has been unable to find another job. He currently moves from one friend's home to another, utterly dependent on their willingness to help.

In the months following the accident, he has been unable to consistently attend follow-up doctor's appointments, as the cost is too high to bear. As such, he has received basic pain medication from an NGO-run clinic in Kuala Lumpur. The doctors at this NGO-clinic, however, do not have the facilities to provide him with the treatment that he requires. In August 2011, the NGO doctors wrote him a referral letter to seek treatment at a government hospital in Kuala Lumpur.

When Mr Ali attempted to register himself at the hospital, he was told by the officers at the registration counter that he could not receive treatment at that hospital, as "they do not treat foreigners". They then gave him a name of a different hospital, and told him to seek treatment there.

Upon arrival at the second hospital, he discovered that it was a private hospital. The officers at the registration counter bluntly told him that the hospital fees were high, with the initial visit to the doctor costing RM 150, and similar rates would apply for

follow up visits. They then asked him if he had any money to pay those fees. When he told them he did not, they told him to go away as they would not be able to treat him.

At the time Mr Ali came to Tenaganita, he had still not received the treatment required for his condition.

Unpaid wages remain a primary concern for refugees. In 2010, 34% of refugee cases that came to Tenaganita related to unpaid wages. Without a legal framework through which due wages can be claimed, refugees are effectively denied the right to remuneration. Further, refugees are afraid to complain to the authorities in relation to unpaid wages, as the absence of “recognised” documentation by the state makes them susceptible to arrest, detention and deportation. The majority of refugees would therefore prefer to remain “under the radar”.

Many refugees and asylum-seekers are in situations of bonded labour. In interviews with refugee leaders who are based in states furthest from Kuala Lumpur, Tenaganita has also learned that in some areas, hundreds of refugees stay in “captivity” in small fishing villages. Plantation workers, completely under the control of their “employers”, are unable to leave even to seek medical attention. Employers also threaten refugees with arrest should they attempt to leave or file complaints.

## 2.9.2 Migrant Workers

Malaysia is highly dependent on foreign workers for its economic growth. In its 2009 report to the Human Rights Council, the government confirmed that the “employment of foreign workers is a measure to overcome the current shortage of labour in the country” and that it is “subjected to certain terms and conditions, such as, the responsibility of employer for the return of foreign workers to their countries of origin and the provision of suitable living condition and wages”.<sup>423</sup> Since 1985, Malaysia has officially recruited migrant

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423 United Nations Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Malaysia*, UN Doc. A/HRC/WG.6/4/MYS/1/Rev.1, 19 November 2008, Para 27.

labour through signing Memoranda of Understanding with countries of origin within the region. Today, it also recruits from 12 countries where there is no clear Memoranda of Understanding, nor standard contracts. Many of the migrant policies have been ad hoc with arbitrary solutions applied to emerging problems. While irregular immigrants are not authorised to work, this prohibition is not enforced, and there are approximately 2.2 million documented foreign workers in Malaysia and about the same number are undocumented.<sup>424</sup> Migrant domestic workers make up the majority of Malaysia's immigrant population.

Although Malaysia has pledged to suppress forced labour, slavery and trafficking in persons, migrant workers in Malaysia face appalling conditions and enforcement of Malaysia's international commitments<sup>425</sup> is yet to be seen. The conditions of migrant workers often amount to forced labour. Many are victims of human trafficking and have been recruited by fraud or deception for purposes of exploitation. Recruitment agents do not check the age of workers and many are below the age of 18. Further, recruitment agents require fees which often result in foreign workers being subject to debt bondage, and being forced to work in very harsh conditions.<sup>426</sup> The United States Department of State has reported forced labour conditions in "palm oil and rubber plantations, factories manufacturing computer components, garment production, restaurants, and in domestic households".<sup>427</sup>

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424 Amnesty International, *Trapped: The Exploitation of Migrant Workers in Malaysia*, 2010, p. 6.

425 International Labour Organization, Forced Labour Convention, C029, adopted 28 June 1930, entered into force 1 May 1932; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, 1956; United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, GA Res. 55/25, 2000; International Labour Organization, Minimum Age Convention, C138, adopted 26 June 1973, entered into force 19 June 1976; International Labour Organization, The Worst Forms of Child Labour Convention, C182, adopted 17 June 1999, entered into force 19 November 2000; and Convention on the Rights of the Child, G.A. Res. A/RES/44/25, 1989.

426 See above, note 53, p. 50.

427 Ibid.

In practice, workers are subject to unreasonable working hours and conditions, such as, for example, standing for eight to twelve hours while working in line at factories, often without toilet breaks.<sup>428</sup> In addition, the accommodation provided to migrant workers by their employers is usually very poor.<sup>429</sup> Migrant workers are often excluded from employees' provident funds, and where included, the employer is only required to make a very minimal contribution of RM 5 per worker per month, rather than the expected employer contribution of 12% of a Malaysian worker's salary.

Workers who do not manage to fulfil the work quotas imposed by their employers or who commit mistakes get penalties deducted from their salaries. Some employers deduct "levies", taken from the salary to cover the cost of the work permit – although most workers have already paid for the work permit in their country of origin.<sup>430</sup>

Employers rarely put in place safety measures to protect workers, and workers often have to work with dangerous chemicals and pesticides, for example, without any safety equipment. In the event of a work-related accident, the employer, although legally obliged to have proper insurance to cover the medical costs of work place accidents, usually deducts the medical costs from the worker's wages.<sup>431</sup>

The Immigration Act of 1959/63 hinders migrant workers from escaping abusive situations. According to this Act, migrant workers can only be employed subject to a work permit that can only be obtained by the employer. The worker can only work for the enterprise or company stated in the work permit. For these reasons, the work permit system operates as a form of bonded contract. If migrant workers want to change their employer, they must return to their country of origin and come back to Malaysia with a new work permit. This policy makes it almost impossible for migrant workers to change jobs,

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428 See above, note 424, p. 38.

429 See above, note 413, Para 39.

430 See above, note 424, p. 23.

431 Ibid., p. 45.

even if this is necessary in order to escape an abusive work situation. But this policy does not apply to professional foreign workers. CEDAW has expressed its concerns about such laws, which prevent women from seeking redress:

*These include laws on loss of work permit, which results in loss of earnings and possible deportation by immigration authorities when a worker files a complaint of exploitation or abuse and while pending investigation. States parties should introduce flexibility into the process of changing employers or sponsors without deportation in cases where workers complain of abuse.*<sup>432</sup>

The situation of bonded employment created by the work permit system, which leaves migrant workers vulnerable to serious forms of abuse and exploitation, is exacerbated when employers take possession of workers' passports. Reportedly, many migrant workers see their passports confiscated by their employer, exposing them to the risk of arrest, ill-treatment and extortion by the Malaysia People's Volunteer Corps, or Ikatan Relawan Rakyat Malaysia (RELA), a voluntary body of citizens who enforce local security alongside law enforcement authorities and assist the Immigration Department in the arrest of illegal immigrants and in the administration of Immigration depots. The taking away of passports prevents migrant workers from leaving an abusive employer.

Depriving individuals of their passports is prohibited in Malaysia by the Passports Act 1966. However, Tenaganita has filed numerous police reports on behalf of migrant workers in relation to the unlawful holding of passports which has led to control and confinement of migrant workers. According to Tenaganita's documentation, no action has been taken by enforcement agencies, the immigration department or the police in relation to these contraventions.<sup>433</sup> Although the Passports Act criminalises the possession of someone else's passport without legal authority, the Memorandum

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432 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 26: Women Migrant Workers*, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008, Para 26(c)(ii).

433 Tenaganita has documented this on numerous occasions and has also noted the failure of authorities to respond to communications of 2008, 2009, and 2010.

da of Understanding between Malaysia and seven other countries require workers to hand over their passports to their employer.<sup>434</sup> This has been considered sufficient to create an exception to the Passports Act.<sup>435</sup> Many employers also do not renew the migrants' work permits, thereby depriving the migrants of their legal status.<sup>436</sup>

The work permit also contains other employment conditions which may perpetuate abuse. One such condition is that migrant workers cannot become a member of any association. This prohibition is interpreted by employers to include the joining of trade unions. Consequently, in many places of work, migrant workers have been warned not to join the trade union movement. The Trade Union Act 1959 is silent on the issue. However, it contains a clause stating that foreigners cannot hold office or take on leadership role as executive members of a Union. Section 28(1) of the Trade Union Act 1959 states:

*A person shall not act as a member of the executive of a trade union or any branch thereof, or of the federation of trade unions, and shall be disqualified for election as such member, if he is not a citizen of the Federation.*<sup>437</sup>

Thus, while migrant workers are not prohibited by the law from becoming members of trade unions or participating in trade union activities, many standard employment contracts prohibit migrant workers from engaging in such activity.<sup>438</sup> In a number of factories or work places, migrant workers form the large majority of workers but are unable to form a union, nor take leadership within the union to demand their rights.

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434 See above, note 424, p. 23.

435 See above, note 53, p. 50.

436 See above, note 424, p. 7.

437 Trade Union Act 1959, section 28(1).

438 See above, note 413, Para 29.



One of the key problems leading to discrimination has been the use of “outsourcing” as a means of recruitment of migrant workers. Under this system of recruitment, which was introduced by the Malaysian government in August 2006, outsourcing companies are authorised to recruit and manage migrant workers, and thereby assume the role of employers. They then supply businesses that require less than 50 workers with the number of workers required for a specified period. The effect of this outsourcing model is that employers become unaccountable for the way in which their workers are treated. This has had a negative impact on the rights of migrant workers, who are often required to perform work different from that which they were promised, left without work and pay, and given inadequate food and shelter. In some cases, outsourcing agents physically abused their recruits when recruits complained about conditions.<sup>439</sup> In an interview with the *Malaysian Digest*, Charles Hector Fernandez, a human rights advocate, stated:

*Sadly, what has been practiced by these “outsourcing” agents and some employers is an attempt to avoid employment relationships, and the obligations that come with it that will ensure worker rights and benefits as guaranteed by Malaysian law. A lack of enforcement contributed to this problem, and some employers have wrongly treated workers supplied by outsourcing agents as not their workers, and this has resulted in discrimination in terms of wages and other benefits.*<sup>440</sup>

Migrant workers are also harassed by RELA and other immigration authorities who regularly patrol in areas with a preponderance of migrant workers, extorting money from those without papers,<sup>441</sup> and confiscating mobile phones and cigarettes. One undocumented worker stated:

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439 Ibid., Para 30.

440 Yutim, H., “Charles Hector: Lack of Law Enforcement Main Cause of Workers Rights’ Violation”, *Malaysian Digest*, 21 April 2011.

441 See above, note 413; see also Santhiago, A., “Human Smuggling, Migration and Human Rights: A Malaysian Perspective”, Working Paper commissioned by the International Council on Human Rights Policy, 2005, Paras 46-51.

*I was working on a construction site when suddenly the police arrived and surrounded the place. The police chased me and I tried to run away. I fell down from the 3<sup>rd</sup> floor to the ground. I did not remember anything. I later realised that someone had dragged me into a palm-oil plantation. My friends took me to Penang hospital. The X-ray showed that my spine was fractured. I was hospitalised for 15 days. Now I am a disabled man. What will happen to me when I get old?<sup>442</sup>*

On 1 August 2011, Malaysia began registering foreign workers in an amnesty programme aimed at managing undocumented foreign workers. The government has expressed hopes that absorbing irregular migrant workers into the mainstream would help fill labour gaps and improve security. However, the scheme has been largely criticised by Malaysian NGOs as failing to tackle the root causes of labour exploitation in Malaysia, including the unaccountability of agents and employers and corruption in the process of approving work permits. The companies appointed by the government to facilitate the worker registration process, which is being rolled out side-by-side with the amnesty process, are charging exorbitant fees.<sup>443</sup> It is also feared that the amnesty would hurt workers who entered the country legally but overstayed because their work permits were not renewed by their employers. It would also leave those migrants who are unable or unwilling to register vulnerable to further immigration crackdowns.

### 2.9.3 Migrant Domestic Workers

Migrant domestic workers are a sub-population of migrant workers in Malaysia who suffer particularly severe forms of discrimination. The majority of the approximately 400,000 migrant domestic workers are live-in maids who come mainly from Indonesia, Cambodia, Philippines, Sri Lanka, Thailand and India. The volume of complaints about the treatment of this group has been so high and the abuses so severe that Indonesia suspended the migration of domestic workers to Malaysia in June 2009. A June 2011 report of the death

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442 See above, note 415, Para 35.

443 Ng, E., "Activists Fear Abuse in Malaysian Labour Amnesty", *newsvine.com*, 29 July 2011, quoting Irene Fernandez, Director of Tenaganita.

of an Indonesian migrant domestic worker, in relation to which her employers have been charged with murder, has highlighted the on-going nature of this problem.<sup>444</sup>

In June 2011, ERT spoke with a Cambodian domestic worker who provided testimony on the severe inequalities of rights that this category of persons experiences in Malaysia (see Box 11).<sup>445</sup>

### **Box 11**

### **Testimony of a Cambodian Domestic Worker**

I am 22 years old and I come from Cambodia. I came to Malaysia two years ago to work as a domestic worker. In Cambodia, I lived with my grandmother, my grandfather, my brother and my uncle. My grandparents are farmers. My mother left when I was very little, and my father remarried. A distant relative went to Malaysia some time ago, and when she returned to Cambodia, she said that I should go and work there also.

First of all, I went to a training centre still in Cambodia. I stayed there for five months and 15 days. I was not allowed to leave, although I wanted to go home. There was sometimes not enough food in the training centre, and there were about 600 people living there. There was a lot of fighting because there were so many people, and we all had to sleep on the floor with one pillow and one blanket.

I left the training centre after five months and 15 days and flew to Malaysia. Eight or nine of us travelled together, and the people at the training centre paid for our flights. I stayed with an agent

444 BBC, "Malaysia couple charged over Indonesian maid's death", *BBC News*, 16 June 2011.

445 ERT Interview with a domestic worker from Cambodia, 28 June 2011, Kuala Lumpur.

in Malaysia for three days when I arrived. Then my new boss' sister came to collect me, and we travelled together back to my boss' house.

I worked for my boss for two years. For one and a half years, she did not touch me, but then we moved to a new house, and she changed. She used to get very angry with me. She would slap me and scold me every day. She never used to beat my body. She only beat me in the face. I was very scared of her, so I did not ask her why she was beating me. Sometimes she would tell me to sit on the floor, and she would kick me in the face. My face got very sore, and sometimes I could not open my mouth. Eventually, my boss' husband made her buy me some medicine, but she said she would deduct the money from my salary.

I used to sleep in the house, but sometimes when my boss was angry with me, she would make me sleep outside without any shade even when it rains. She said if my work was good, I could sleep in the house, but otherwise I must sleep outside. I used to get very cold when that happened. I often did not get enough sleep. I used to get up at 4:45 am., so I would feel very sleepy during the day. There was a lot of work to do. I had to sweep and mop the floor, fold all the clothes, do the ironing and make the food. I used to eat the leftovers which the family did not eat. Often I did not have lunch and dinner, but when she scolded me, I did not want food because I missed my family.

I used to work seven days a week. I never had a day off. My boss never gave me any money. She told me that she was keeping it in the bank for me. To this day, I have not received any money from her. She has never even shown me the money.

One night, my boss made me pack up all my clothes. She then threw them away because she was angry with me. I got some clothes from the children, but there was not much, so they were always dirty. The boss threw them out and said that she would buy me new clothes

and deduct the cost from my salary. She then said she didn't have time to buy clothes, so she gave me her children's old clothes and charged me 20 ringgit for each t-shirt, and 20 ringgit for the trousers. She gave me 20 t-shirts and seven pairs of trousers.

I never planned to run away, because I didn't know where to run because it was my first time in Malaysia and I was very scared. My boss also had my passport and she would not let me have it. The agents in Cambodia had not told me anything about the problems I could expect from my employer. I had no contact with anyone outside the house, other than my boss' neighbour whom I saw when I was outside drying the clothes. I think the neighbour saw me crying because my boss had beaten me. Eventually, the neighbour made a phone call and I was rescued on 2 June 2011 by the team of Tenaganita and taken to the shelter which is run by the Good Shepherd Sisters. Together with Tenaganita we have had negotiations with my employer and we are awaiting a settlement. Once I receive compensation from her, I will return to Cambodia.

The Malaysian government has shown a lack of commitment to safeguarding the rights of domestic workers, who are overwhelmingly migrant women. Domestic workers receive minimal protection under the Employment Act 1955, which does not confer the same level of protection on them as is enjoyed by other workers. For example, the Employment Act 1955 expressly excludes domestic workers' rights in relation to, *inter alia*, termination notice periods and benefits, maternity protection, rest days, annual leave and working hours.<sup>446</sup> Consequently, they are not entitled to a day of rest per week or to a limit in the number of hours that they can be compelled to work. This contravenes CEDAW, as explained by the CEDAW Committee:

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446 See above, note 197, Schedule 1, Para 2(5).

*States parties should ensure (...) that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations.*<sup>447</sup>

Migrant domestic workers are excluded from the protection relating to a safe working environment and insurance covering work injuries.<sup>448</sup> In the case of *Lee Seng Kee v Sukatno and Ong Thean Soo*, the High Court of Malaya ruled that an irregular migrant worker could not receive compensation for loss of income on the basis that he did not have legal status in Malaysia.<sup>449</sup>

Those sections of the Employment Act 1955 which do apply to domestic workers are not well monitored or enforced. For example, Sections 18 and 19 of the Act state that workers should be paid no less regularly than monthly, and they should be paid by the seventh day after the end of the first month. There is evidence showing that many employers do not pay wages on time, if they are paid at all.<sup>450</sup> In the case of domestic workers, they are usually not paid until the end of their employment contract, if at all. Further, Section 24 states that lawful deductions from a salary should not exceed 50% of the wages earned. The reality for many domestic workers is that they are not paid at all for the first six months of work as their salaries are deducted *in toto* to defray the agency fees paid by the employer.

In 2011, employers were paying recruitment fees of between RM 9,000 and RM 10,000 in order to recruit a worker, which often led them to deduct nine months full salary from the domestic worker. This places the worker in a debt bondage situation. The situation is further aggravated by the fact that over 90% of foreign domestic workers worked without a day off for a whole year. While migrant domestic workers have been granted one day off each week

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447 See above, note 432, Para 26(b).

448 Workmen's Compensation Act 1952, § 2(1)(c).

449 *Lee Seng Kee v Sukatno and Ong Thean Soo* [2008] 1 L.N.S. 226 (High Court, Ipoh).

450 See above, note 424, p. 33.

under the new Memorandum of Understanding signed with the government of Indonesia in respect of Indonesian domestic workers to be employed in Malaysia, which was signed on 30 May 2011 – which drew Indonesia to resume sending domestic workers to Malaysia – there is still no legal provision for a minimum wage or maximum working hours. Domestic workers have been excluded from the scope of new legislation announced by the Prime Minister in April 2012, providing for minimum wages in the private sector.<sup>451</sup> Nor is there a system for inspecting labour standards for domestic workers, leaving women working in the isolation of private homes particularly vulnerable to exploitation regardless of the legal standards in place.

Migrant domestic workers are often subjected to physical and sexual abuse, including rape. Many report having been beaten, sexually assaulted, or being subjected to other forms of inhuman and degrading treatment such as being stripped naked in front of other workers, being burnt with cigarettes, being forced to drink other workers' urine, or to eat live cockroaches, by their employers or recruitment agents.<sup>452</sup>

In cases of abuse, when the domestic worker runs away, the employer immediately reports to the police and the immigration department and cancels her work permit. Upon cancellation of her work permit, the domestic worker loses her legal status. This makes it difficult to seek redress. She has to legalise herself in order to claim her rights. In order to remain legal and pursue her redress, she needs to apply for a Special Pass on a monthly basis and to pay RM 100 each time. The Special Pass can only be renewed three times. The Special Pass holders are not allowed to work. This system forces domestic workers to remain undocumented and many of them return home without justice.

The CEDAW Committee has raised concerns about the lack of legislation and policy protecting migrant domestic workers in particular and called on Malaysia to “enact comprehensive laws and establish procedures to safeguard the rights of migrant workers, including migrant domestic workers”, to pro-

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451 Ariffin, L.J., “MTUC welcomes minimum wage announcement”, *The Malaysian Insider*, 1 May 2012.

452 See above, note 424, p. 42.

vide to migrant workers viable avenues of redress against abuse by employers and permit them to stay in the country while seeking redress.<sup>453</sup>

The issue of migrant workers is so sensitive in Malaysia that a human rights activist, Charles Hector, criticising the working conditions of migrant workers has been sued for “civil defamation” by a Japanese company employing Burmese workers.<sup>454</sup> The lawsuit has ended in a settlement in August 2011, raising questions about the freedom of human rights defenders to do their work in Malaysia.<sup>455</sup>

#### **2.9.4 Fundamental Rights**

Non-citizens in Malaysia are excluded from the protections contained in Article 8(2) and 12 of the Federal Constitution, which prohibit discrimination. This leaves them open to discrimination in a range of fields. Discriminatory differentiation in the rights accorded to non-citizens runs right throughout the Constitution. Article 5 of the Constitution contains the right to be brought before a magistrate without unreasonable delay, and in any case within twenty-four hours of arrest. For non-citizens this period is extended to fourteen days. Article 9 (Prohibition of banishment and freedom of movement) and Article 10 (Freedom of speech, assembly and association) contain similar distinctions between citizens and non-citizens.

#### ***Gender-based Violence***

It is reported that gender-based violence is significant amongst non-citizens with irregular status as perpetrators of such violence are aware that their victims will be reluctant to report the incidents out of fear of arrest or deportation.<sup>456</sup> The Women’s Commission for Refugee Women and Children found

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453 See above, note 140, Para 19.

454 Human Rights Watch, *Malaysia: lawsuit against human rights defender impedes public debate*, 22 June 2011.

455 The Observatory for the Protection of Human Rights Defenders, “Defamation case against human rights defender Charles Hector ends in a settlement”, *No Sweat*, 30 August 2011.

456 See above, note 413, Para 23.



that migrant women's limited economic opportunities and lack of legal status make them more vulnerable to domestic abuse, abuse at the workplace and abuse while in detention. Claims of gender-based violence were widespread, particularly regarding employers sexually harassing women on the job and firing them if they protested.<sup>457</sup> The UNHCR and partner NGOs have developed programmes to protect registered women from gender-based violence, but their resources are limited and accessing vulnerable women from migrant communities remains difficult.

### ***Detention and Deportation***

Without legal recognition of their position, asylum-seekers, refugees and irregular migrants are vulnerable to arrest, punishment (including imprisonment and caning) and deportation as Malaysia persistently attempts to reduce the number of irregular migrants in the country. Immigration detention of children is common.<sup>458</sup> Children are arrested and detained together with adults and sometimes deported. UNHCR is given access to children in detention and is able to secure release for many. Statistics for the number of children detained in immigration detention centres (IDCs) between 2004 and 2008 were released by the Home Ministry in a written reply to a parliamentary question during the June-July 2009 parliamentary session.<sup>459</sup> A total of 3,675 migrant children had been detained during that period, of whom 1,583 were Indonesian and 1,061 were Burmese.

There are three authorities under the Ministry of Home Affairs which are primarily responsible for "cracking down" on irregular migration in Malaysia. These are the Immigration Department, the Royal Malaysia Police and RELA, the Malaysia People's Volunteer Corps. RELA personnel assist the Immigration Department in the arrest of illegal immigrants and in the administra-

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457 Women's Commission for Refugee Women and Children, *Desperate Lives: Burmese Refugee Women Struggle to Make a Living in Malaysia*, May 2008.

458 Fédération Internationale des Ligues des Droits de l'Homme and SUARAM, *Submission to the Universal Periodic Review of Malaysia*, September 2008, Para 4.3.

459 SUARAM, *Arbitrary Detention of Migrant and Refugee Children*, Press statement, 28 August, 2009.

tion of Immigration depots.<sup>460</sup> RELA, which is empowered to carry out such actions under section 51 of the Immigration Act 1959/63,<sup>461</sup> was originally established in 1966 under the Emergency Ordinance, but its continued existence and enhanced powers rest on the enactment of the Emergency (Essential Powers) Act 1979 and the Essential (Amendment) Regulations 2005, and its primary task is to assist in the control of illegal migration.<sup>462</sup> Under the 2005 Regulations, RELA members are authorised to carry arms and to arrest anyone who they reasonably believe to be “a terrorist, undesirable person, illegal immigrant or an occupier”. They are entitled to question suspects and search their premises without a warrant. RELA personnel have powers of arrest which may be exercised when a suspect does not cooperate. There have been many reports of the Immigration Department and RELA using unwarranted and excessive violence during their raids, and in some cases, these have resulted in death or serious injury.<sup>463</sup> RELA’s membership in December 2010 reached 2,042,215, almost double that of 2009.<sup>464</sup> While RELA volunteers receive some training,<sup>465</sup> of the more than 10,000 people arrested by the RELA in one action in August 2009, only 500 were actually illegal immigrants.<sup>466</sup> The government has not released information on how complaints against RELA members are investigated, or how disciplinary action is administered. Pursuant to the Public Authorities Protection Act 1948 (section 2) and the Essential (Ikatan Relawan Rakyat) (Amendment) Regulations 2005, until June 2012 RELA members had immunity for official acts committed in

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460 See above, note 415, Para 28.

461 Immigration Act 1959/63, section 51.

462 Human Rights Watch, *UPR Submission: Malaysia*, September 2008.

463 United Nations Human Rights Council, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Summary of cases transmitted to Government and replies received*, UN Doc. A/HRC/4/20, 12 March 2007, p. 202.

464 See above, note 53, p. 8.

465 See Training, Official Portal of RELA, available at: [http://www.rela.gov.my/index.php?option=com\\_content&view=article&id=114&Itemid=151&lang=en](http://www.rela.gov.my/index.php?option=com_content&view=article&id=114&Itemid=151&lang=en).

466 Amnesty International, *Malaysia Report 2009*, 2009.

good faith.<sup>467</sup> On 6 March 2006, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the human rights of migrants sent a communication to the government concerning the alleged killing of five migrant workers by RELA as a result of a raid, but the government has provided no response.<sup>468</sup> However, in June 2012, the Essential (Ikatan RELAWan Rakyat) (Amendment) Regulation 2005 ceased to apply as the statute under which it was enacted – the Emergency (Essential Powers) Act 1979, a.k.a. the Emergency Ordinance, was repealed. It was replaced with the Malaysia Volunteers Corps Act 2012 which received the Royal Assent on 22 June 2012. According to the new Act, the nearly three million members of RELA have been stripped of their power to carry firearms and arrest individuals without permit.<sup>469</sup>

The conditions in the IDCs are harsher than in prisons in Malaysia.<sup>470</sup> The United States Department of State has highlighted the poor conditions in IDCs, referencing reports that most of Malaysia's 16 IDCs were at or beyond capacity.<sup>471</sup> The report states that there is "overcrowding, inadequate food, lack of regular access to clean water, poor medical care, poor sanitation and lack of bedding in IDCs" and that on 24 August 2010, the secretary general of the Ministry of Home Affairs acknowledged that conditions at all the IDCs were deficient and failed to meet international standards.<sup>472</sup> Former detainees in 2008 described the conditions in IDCs regarding overcrowding, food and health care as follows:

*In Semenyih camp, there are five blocks numbered A-E. Block E is for women. The place was very overcrowded. At night, I could not*

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467 Public Authorities Protection Act 1948, section 2.

468 See above, note 463.

469 Malaysia Volunteers Corps Act 2012.

470 See above, note 415, Para 44.

471 See above, note 53, p. 6.

472 Ibid.

*lie on my back, only on my side against another prisoner. Sometimes it was only possible to sit throughout the night. We had to sleep on the concrete floor and we did not receive any bedding.*<sup>473</sup>

Another former detainee said to ERT:

*Food was the main problem. It was not enough and often Indonesians stole our share. We received two meals a day of fish soup, dried fish powder and rice. We did not receive any vegetables. In addition they gave us one roti and three biscuits.*<sup>474</sup>

And according to another respondent who was interviewed by ERT:

*During the three months I spent in Juru camp in 2007, many people fell ill but they seldom sent for a doctor. Only those who were severely sick were taken to the hospital with guards. Six prisoners died. Some were detained for a long time and many suffered from swelling.*<sup>475</sup>

There were no full-time doctors or clinics in IDCs. In the Semenyih detention camp, one medical doctor visited up to 1,500 detainees per week. The availability of drugs was insufficient, and medicines provided to detainees by their relatives were often confiscated by the camp authorities.<sup>476</sup> In its 2008 Human Rights Report on Malaysia, SUARAM stated that according to the Home Ministry, there were 1,535 cases of deaths in prisons, rehabilitation centres, and immigration detention centres in the period between 2003 and 2007, while 85 cases of deaths in police custody were recorded in official statistics in the same period.<sup>477</sup> In May 2009, two Myanmar de-

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473 See above, note 415, Para 50.

474 Ibid., Para 53.

475 Ibid., Para 58.

476 Ibid., Para 56.

477 SUARAM, *Malaysian Human Rights Report 2008*, 2009, p. 44.

tainees died from leptospirosis – a bacterial infection transmitted through contaminated water.<sup>478</sup>

In January 2008, the government granted RELA members responsibility for security in IDCs. Human Rights Watch reported that migrant workers had informed them of a range of abuses perpetrated by RELA members within IDCs, including “physical assault, intimidation, threats, humiliating treatment, forced entry into living quarters, extortion, theft, restricted communications with friends or family, disregard and destruction of identity or residency papers, and sexual abuse”.<sup>479</sup> Further, Human Rights Watch reported as follows:

*An asylum seeker held in Lenggeng Immigration Detention Center in March-April 2008 told how he witnessed routine beatings late at night to randomly chosen inmates. He described how RELA personnel woke him late one night and took him to the yard with three others. For over an hour, eight or ten RELA personnel punched and kicked them on their backs and in their stomach about 20 or 30 times and slapped their faces until they bled from the mouth. The RELA personnel told the four detainees to slap each other, perform “squats”, and tell jokes. If they refused, the RELA staff hit them some more.<sup>480</sup>*

Caning is used as a punishment for at least 40 crimes in Malaysia including immigration offences. Prisoners have been stripped naked, strapped to an A-frame and thrashed with a rattan cane. Caning is not intended to be used on women or men over 50. Sometimes caning is used on boys. Between 2002 and 2008, 34,923 irregular migrants were reportedly caned.<sup>481</sup> Caning has been condemned by Amnesty International, Human Rights Watch, The Equal

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478 Memorandum to SUHAKAM on Poor Conditions of Immigration Detention Centres Contributing to the Outbreak of Leptospirosis, 27 May 2009, on file with ERT.

479 See above, note 462, p. 3.

480 Ibid.

481 Malaysian Home Minister cited in Amnesty International, *Malaysia: End caning as a punishment against immigrants*, 2 July 2009 (ASA 28/004/2009).

Rights Trust and Malaysian NGOs, among others, as cruel, inhuman and degrading treatment.<sup>482</sup> A 38 year old male stated to ERT:

*After three months and 20 days, a jail warden came with a list and called my name. 31 people were called altogether. They told us to get ready for the next morning caning session. The following morning they brought us to an office inside the jail. We were called one by one. They said: "You entered Malaysia without documents and the court has sentenced you with three strokes of the cane. We will now carry out that sentence." I replied that I would take the caning. They took me inside a separate room. They strapped me to an A-frame which looks like a ladder. They tied my two hands, my waist and my two legs to the frame. We had to take off all our clothes and we only kept one cloth in front of our private parts. Then, one man kept my head against the frame so that I could not see anything. The other man gave me three strokes with a cane on my buttocks: the first stroke, one minute, another stroke, one minute, and then the third stroke. The waves of the strokes went through my head. Each lash brought some blood. It was very painful. I felt excruciating pain in my chest, in my brain, throughout my whole body. I cried. Some people screamed but many remained silent during the caning. Then one guard untied my hands and legs from the frame. I could not walk after they freed me. They then took me to a place to rest and asked me to lie face down. They cleaned my wounds and put some medicine on it. It did not lessen the pain. After caning all 31 people, they allowed us to get dressed again and we were sent back to our respective prison cells.<sup>483</sup>*

There have been a series of reports of forced deportations of irregular migrants, including refugees and asylum seekers. Burmese have made up the

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482 See, for example, Amnesty International, *A Blow to Humanity: Torture by Judicial Caning in Malaysia*, 2010; The Equal Rights Trust, above note 415; Human Rights Watch, *Letter to Prime Minister Najib Razak regarding the Refugee/Asylum Seeker exchange with Australia*, 13 June 2011; Asian Correspondent, "Thousands of Foreigners Caned in Malaysia", *Asian Correspondent*, March 11 2011.

483 See above, note 415, Para 42.

vast majority of migrants at risk of persecution on return to their country of origin. Some have been deported to Burma whilst others have been deported to Thailand. Deportation to Thailand has taken the form of handovers to Thai immigration officials or has been part of informal “push-backs” into the hands of human traffickers operating in Thailand.<sup>484</sup> There is plenty of evidence pointing towards collusion between immigration official and traffickers.<sup>485</sup> Amnesty International referred to a dozen cases in which Malaysian authorities delivered immigration detainees to traffickers operating on the Thai border between 2006 and 2009.<sup>486</sup> It has been reported that when handed over to smugglers and traffickers at the border, deportees were held for ransom and required to pay a significant sum for release. Those unable to pay such sums were sold to Thai fishing boats, brothels or “private owners”.<sup>487</sup> According to a 21 year old Rohingya who was arrested in Penang in 2007:

*Every month, some of us were deported to Kolok at the Thai border from Juru detention camp. I was deported to Kolok with 28 other detainees. We were handcuffed in the immigration bus. It started from Penang at 5 pm. and reached Kolok in the early morning. The immigration counted us and handed us over to agents. These agents took us to their jungle camp on the Thai side of the border. There were many makeshift tents: a space open on all sides with plastic sheeting for a roof. The agents had walkie-talkies, mobile phones and guns. Twenty guards working for them were also present. They demanded 1,650 ringgit to release me. We could use a mobile phone and call whoever we wanted. I rang my village people in Malaysia and begged them to rescue me from there. They gathered money for me. But those who failed to pay the ransom within six days were beaten by the agents’ men. In total, there were 45 deportees detained there. I stayed about five days in the*

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484 Ibid., Para 70.

485 Ibid., Para 73.

486 Amnesty International, *Malaysia must end abuses of immigrant workers*, 24 March 2010.

487 See above, note 413, Para 21.

*agents' camp. We got released, except for 15 of us. I don't know what happened to them. These agents have contacts with Thai fishing trawlers. If detainees cannot secure the money, they are sold to work on boats.*<sup>488</sup>

While the network engaged in the trafficking of refugees was believed to be substantial, very few people have been prosecuted in connection with this practice on labour trafficking offences. During 2011, the government convicted 17 sex trafficking offenders but did not convict any perpetrators of forced labour; this compares with 14 convictions for both sex and labour trafficking in 2010.<sup>489</sup>

### ***Access to Justice***

In their submission to the Universal Periodic Review of Malaysia, Fédération Internationale des Ligues des Droits de l'Homme and SUARAM made the following comment on the Immigration Act:

*The Immigration Act raises a number of concerns with regard to the administration of justice: the length of time a migrant arrested under the Act may be held before being brought before a Magistrate is overly long (14 days); detention may even be indeterminate pending removal; the possibility to sentence undocumented migrants to whipping; the exclusion of the right to challenge decisions under the Act on a number of grounds; and the absence of specific protection for migrants in case of abuse by employers or unpaid wages.*<sup>490</sup>

The Malaysian Bar Council has also highlighted that “[m]igrant workers, refugees, asylum-seekers and stateless persons charged with offences under the Penal Code rarely enjoy the privilege of legal representation and are often induced into pleading guilty, purportedly in their own interest as trials often

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488 See above, note 415, Para 78.

489 United States Department of State, above note 171, p. 235.

490 See above, note 458, Para 4.5.



take several months/years to be concluded during which time the migrant worker's pass may expire and deprive him of any work opportunity".<sup>491</sup>

A lawyer named Latheefa Beebi Koya described the process in Semeniyh Special Immigration Court as follows:

*The scene at the court is like an auction of slaves, only that no slaves are actually traded. The end result is the same: marks of whipping are left on the poor migrant, not unlike the black slaves of old America who are hotstamped on their backs.*

*Mitigation takes an all new meaning in the court at Semeniyh. A judge once retorted when told that a group of asylum seekers would like to prepare mitigation: "You can give me ten pages of mitigation, I will still whip them!" This court is, after all, designed for that and judges only care about answering their most important question of the day: "How many whips do I give today?"*

*If a detainee claims trial, he or she only invites further scorn from the judge – "Don't waste my time... how do you propose to prove your case?"*

*I have seen how the judge, seeing that a detainee claims trial, would briefly stand down, during which the prosecution officer has a word or two with the detainee in the absence of his/her lawyer. Ten minutes later, the poor detainee would suddenly change his plea to "guilty" and succumb to sentencing. The judge doesn't care even to ask, even for procedural sake, whether the detainee – who comes from a place where even the word "coca-cola" is unheard of, let alone the phrase "right to a trial" – knows the consequences of a guilty plea.<sup>492</sup>*

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491 Malaysian Bar Council, *Submission to Universal Periodic Review*, September 2008, Para 3.6.

492 Koya, L.B., "Comment: A court within a camp – Malaysia welcomes the world", *The Malaysian Bar*, 14 March 2007.

Tenaganita has documented that refugees face various disadvantages within the Malaysian court system. They have often been forced to attend hearings without any lawyers or translators present to assist them. Further, they have frequently been deprived of the right to be informed of the charges against them in a language which they understand. Finally, they have mostly been denied bail given their inability to provide the necessary assurances.<sup>493</sup>

Migrant workers also face significant challenges in seeking redress based on the statutory protections which should benefit them. Often, when cases are filed against employers, the employer is able to cancel the work permit which then makes the worker vulnerable to arrest and deportation. This fear is not unfounded. SUARAM has also reported that arrests of irregular migrants do take place on completion of treatment in government hospitals, highlighting cases where women were arrested immediately after delivery of their baby, without being given the necessary post-natal care.<sup>494</sup>

### ***Family Life***

In their joint submission to the Universal Periodic Review which took place in February 2009, the Migration Working Group and the Northern Network for Migrants and Refugees highlighted the barriers faced by foreign spouses of Malaysian citizens in relation to obtaining: (i) a legal basis to remain in Malaysia; (ii) the right to work; and (iii) permanent residence and citizenship status. They also reported that foreign spouses are required to pay higher fees (i.e. foreigner rates) for public services, such as health and education. They are also under continual threat of arrest as irregular migrants.<sup>495</sup>

In relation to obtaining a legal basis to remain, foreign spouses are dependent upon their Malaysian partners in order to renew their immigration passes as both parties must be present when renewal applications are made. This makes female foreign spouses particularly vulnerable when sponsorship is unilaterally withdrawn by their partners due to marriage

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493 See above, note 422.

494 See above, note 413, Para 35.

495 Ibid., Para 11.

disputes.<sup>496</sup> Further, non-professional foreign husbands who marry Malaysian women risk losing their work permits and visas.<sup>497</sup> Foreign wives are entitled to apply for permanent residency after five years of continual residence in Malaysia on immigration passes but they are, as above, dependent on the support of their husbands in order to make the application. Applications are often not taken for extended periods, leaving the applicants with a status that makes them vulnerable to domestic abuse and exploitation within the family.

In its submission to the Universal Periodic Review dated September 2008, the Malaysian Bar Council reported that “temporary employment visit passes are issued with conditions prohibiting marriage during tenure of employment and deportation upon pregnancy”.<sup>498</sup> Migrant workers cannot, therefore, get married. If a migrant worker wishes to marry a Malaysian citizen, he/she must give up their job, return to their country of origin, get married and then return to Malaysia on a spousal visa. Should a migrant worker wish to marry another migrant worker, both must give up their jobs and return to their country of origin to get married. Where migrants do marry in Malaysia, their marriage is not recognised and their children become stateless. This is the case for over 40,000 stateless children in the oil palm plantations in the state of Sabah, who are left without access to education and health care services and are frequently forced into child labour.

Domestic workers, too, are prohibited from getting pregnant. If they do become pregnant, they would be deported and may also lose the migration costs paid to the agencies, thus losing their employment. Tenaganita has handled cases of domestic workers who have been forced to have sex with their employer, have become pregnant as a result, and have then been forcibly deported because of the pregnancy. In view of all the restrictions of rights de-

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496 Joint Action Group for Gender Equality, *Memorandum to The Ministry of Women, Family & Community Development by Women's Aid Organisation on behalf of Joint Action Group for Gender Equality*, Issue 2.2.

497 Immigration (Prohibition of Entry) Order 1983, Section 3(1).

498 See above, note 491.

scribed above, it is very difficult for domestic workers to bring cases of sexual assault against their employers.

### ***Access to Health Care***

Following advocacy carried out by UNHCR and subsequent negotiations, the government now provides access to healthcare for refugees with UNHCR cards at a discounted foreigners' rate. While some government hospitals appear to have good practices where this policy is concerned, other public health facilities do not implement the policy fully. In these facilities, the ability to obtain a 50% discount, or even to be able to see a doctor, seems to be entirely at the discretion of the officer at the registration counter.<sup>499</sup> It is unclear whether this "understanding" between UNHCR and the Ministry of Health has been officially formalised, and the administration and staff of these public health facilities have been notified, or if it remains a vague understanding between the two parties.<sup>500</sup>

Even where the policy is implemented fully, the costs remain prohibitively high and therefore access to health is limited for migrants.<sup>501</sup> In addition, migrants are afraid to seek medical treatment for fear of arrest.<sup>502</sup> As stated above, there is very limited access to healthcare in IDC, and there are many reports of health deterioration within IDCs, particularly in respect to mental health. Pregnant women, children and babies are not provided with special care in IDCs.<sup>503</sup> Migrant workers are also submitted to mandatory medical testing for various conditions, including HIV, and if found positive, they are often deported without treatment. Further, such tests are carried out without regard for best practices relating to consent, confidentiality, counselling, or treatment referral.<sup>504</sup>

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499 See above, note 422.

500 Ibid.

501 See above, note 53, p. 28.

502 See above, note 413, Para 35; Médecins Sans Frontières, *"We are Worth Nothing" – Refugee and asylum seeker community in Malaysia*, 2007.

503 See above, note 413, Para 36.

504 Ibid., Para 40.

## ***Access to Education***

Migrants have limited access to education in Malaysia. The Special Rapporteur on the right to education identified “the lack of access to education, at all levels, for children lacking Malaysian citizenship status, including refugee children, asylum-seekers, children of migrant workers, and stateless children, possibly as well as street-children” to be “one of the most serious education-related problems in Malaysia”.<sup>505</sup> Asylum-seeking children, refugee children, stateless children and children of migrant workers are not entitled to primary education in government-run schools due to the lack of a birth certificate and/or residence permit. While some migrant communities and NGOs have established their own schools, most migrant children do not receive education.<sup>506</sup> In the refugee community and NGO-run migrant schools the lack of resources, the frequent inexperience of teachers, the poor standards of education and lack of recognition of the qualifications attained do not equip them to enter the labour market on equal terms with those who have been through the formal education system. Further, retention rates at refugee schools are low, as school age boys are frequently required to earn money for their family’s economic survival, particularly as children are less likely to be arrested. Some girls are kept from school due to the distances that need to be travelled to reach school, which lead to concerns over their physical safety and reputation.<sup>507</sup>

The further refugee communities live outside the Klang Valley, the bleaker the scenario is. There is minimal support directly from their own community organisations, and virtually no NGO support. As a consequence, refugee children living outside of the Klang Valley have virtually no access to education. This is also true for refugee communities that do not have “formalised” community organisations – either due to their small numbers, or relatively recent arrival in Malaysia.

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505 See above, note 63, Para 34.

506 See above, note 413, Para 41.

507 See above, note 416.

## *Access to Housing*

Lack of legal status is a serious factor when attempting to rent houses or rooms in Malaysia. Landlords and banks require legal identity documents and proof that the individual will be able to pay, usually in the form of pay slips or proof of savings. While UNHCR documents are sometimes accepted as proof of identity, there still remains widespread lack of awareness among Malaysians over the rights of refugees. Negative attitudes to foreigners (and specifically “illegal foreigners”) as, for example, disease-carrying, crime-causing and untrustworthy individuals has also led to a reluctance among locals to rent premises to refugees. Landlords also capitalise on the fact that refugees are “undocumented” to charge them higher rental rates than they would Malaysian nationals – knowing that there would be effectively no means for the refugees to challenge the difference in treatment.<sup>508</sup>

In a June 2010 report by Health Equity Initiatives, Afghan refugees stated as follows:

*We had to vacate our house once because we could not pay rent. (...) We have many problems in renting houses because we are refugees (...). We face stigma from local people who think we are terrorists because we are from Afghanistan. (...) It is difficult to rent a house because we lack documents.*<sup>509</sup>

The high living costs, particularly in the Klang Valley (which has the highest concentration of refugees), coupled with low wages means that many refugee families live together in small flats or houses in order to alleviate the financial burden. Tenaganita has reported that they encountered many instances where 15-20 individuals (of mixed sexes and ages) lived together in a small one-room flat.<sup>510</sup> Tenaganita noted that such crowded living conditions are frequently insanitary, and present a heightened risk of gender-based vio-

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508 See above, note 422.

509 Health Equity Initiatives, *Between a Rock and a Hard Place: Afghan Refugees and Asylum Seekers in Malaysia*, Kuala Lumpur, June 2010.

510 See above, note 422.

lence. Further, such living conditions often have effects on the mental health of the inhabitants.

Outside of the Klang Valley, there are refugee communities who live in what is often referred to as “jungle-sites”. Alice Nah described such sites as follows:

*These are plantations or pockets of jungle scattered in and around urban areas, a result of uneven urban development. In these jungle sites, refugees typically construct their own huts, made of plastic sheeting, wooden planks, trees and leftover construction materials. In areas more prone to sudden immigration raids, they avoid constructing even semi-permanent structures in order to reduce the likelihood of detection and instead sleep in the jungle.<sup>511</sup>*

The challenges faced by asylum-seekers, refugees and migrants were described in numerous testimonies collected by ERT and Tenaganita, in particular from Rohingya refugees (see Box 12).<sup>512</sup>

## Box 12

## Testimony of a Rohingya Refugee

I am a Rohingya from Myanmar. My parents took me to Thailand when I was little. My mother told me that my grandfather had been killed by the Burmese soldiers. After a few years in Thailand, we faced the same problems as in Myanmar. I got married when I was 12 years old and then I came to Malaysia because my father had been injured by the military. I was 14 years old when I came into Malaysia in 1982. I stayed in a remote place near Kuantan, Pahang. I stayed there until all my children were born. We had to run and

511 Nah, A., “Refugees and Space in Urban Areas in Malaysia”, *Forced Migration Review*, Vol. 34, 2010, p. 29.

512 Tenaganita Interview with a female Rohingya refugee, 11 August, Kuala Lumpur.

hide in the jungle whenever the police came. Sometimes, I hid in my neighbour's house if the police came.

In 1992, I went to Kuala Lumpur to get a refugee status letter from UN. I had six children then. My children and I got the card in 2003. My husband had been detained by the police in 2003 at Semenyih camp, so he did not have the UN card. He was deported to Sg. Golok, near the Thai border, and he fell sick. But after one year, he came back to Kuala Lumpur. The hospital fees are different from the fees that the Malaysians have to pay, we have to pay many times more. For emergency cases the fee is RM 50 in government hospital. My husband had suffered chest pains. Burmese people always suffer gastric and chest pains as we don't have enough food to eat and are always in fear.

Between 1992 and 2001, police raids on refugees were very frequent. Sometimes my Refugee Status Letter from the UN was torn up by the police and they detained us. The police chewed the letter up as well. This is because they did not want any evidence. This happened to my neighbour's daughter's UN letter.

My children cannot go to school now. During the Mahathir era, my children went to school but the fees were twice the amount. We cannot get any free school books from the government. We had to borrow from friends. When Hishamuddin was made Minister of Education, my children were not allowed to go to government schools anymore. My children have Green ID. My children could not finish their schooling. This is because neither my husband nor I had a Malaysian ID. My children were, however, born in Malaysia.

My children were very sad and felt embarrassed in front of their friends and cried a lot. I was afraid that if my children did not go to school, they will do bad things. So I sent them to private religious schools. Some of them went far away to other States and stayed in religious school hostels. My children's education in the private



religious schools was sponsored by some kind Muslims. As my children were studying as far away as Johor and Penang, I did not get to see them for two or three years.

My husband died in 2006. Four of my children did not get to see my husband before he died and were not at his funeral. After that, my children did not want to finish their schooling as it was too far away. They did not want to be far away from me.

Two of my children are working. My children sometimes have jobs and sometimes do not have jobs. In the last two months they have worked for only three days, doing some electrical wiring work.

I have tried to get a blue identity card (IC) for my children as in their IC it is stated that they are non-citizens of Malaysia, even though they were born here. I know there are laws, but I have lived here for 29 years and still the Government has not given me any documents.

In 2001, my house in Ampang, in the squatter area, caught fire and all my documents, including my children's birth certificates, were destroyed in the fire. I made a police report and went to the National Registration Department (NRD) to get new documents for my children because the police told me to go there. But when I went to the NRD, the clerk said so many awful things – this was during the fasting month. She said, "These Rohingya come to Malaysia, sleep with men and keep on having babies one after another."

The clerk then called the Immigration office and three officers came there and asked me questions. I explained to them and showed the police report. The officers looked at the police report but then they called the clerk and asked her, "Why did you call us to come here? She should have been given the documents because she has the photocopies of the birth certificates and

IC of her children.” I managed to get the photocopies from my children’s school.

The clerk said she had already read the police report but said that I am an illegal. As soon as the Immigration officers left, she threw the documents on the floor. She also said she is not going to process the document. I could not take it anymore. I picked up my documents from the floor and only then did I open my mouth and I told the clerk: “The officers had told you to give me the documents as it was under the law. I know I am in the wrong as I had entered the country illegally but I just didn’t want to create a scene as I respect you. I understand whatever you had said. If you do not want to process my application, I can go somewhere else to get it done.” All the others who were at the office at that time clapped their hands. The clerk then pulled the documents from my hands and said that she will do it for me. She also apologised and asked me to come and collect my documents the next day.

This was very embarrassing but this has also happened to me many times before. In 1993, I was admitted in the hospital after I had suffered a miscarriage. One of the nurses there called the police, and reported that I had aborted my baby and not suffered a miscarriage. Finally my doctor came and explained to the police that I had indeed suffered a miscarriage. The doctor scolded the nurse and asked why she called the police. The nurse said that it was because I had no documents. The doctor asked the nurse why she told the police that I had aborted my baby. The doctor then scolded the nurse and warned her that she will be dismissed if she does this again in the future. The doctor was very caring towards my health.

I just want to say that we are of the same religion which is Islam. Malaysia is a Muslim country. If possible, please treat us well, the same as brothers and sisters and do not discriminate against us.

## ***Summary***

As stated above, non-citizens are excluded from those provisions in the Constitution which enshrine the rights to equality and non-discrimination. This unprotected status is reflected throughout Malaysia's legal framework, which does not contain the legal recognition of refugees, does not accord migrant workers key rights under employment legislation, and, through its immigration rules, creates a situation of extreme vulnerability amongst migrant workers. As a result of this discrimination in the legal system, migrant workers are exposed to discrimination in all areas of life. Asylum seekers and others found to have committed immigration offences are subject to detention in appalling conditions. Migrant workers are vulnerable to inhuman and degrading treatment owing to their situation of bonded labour. All non-citizens face insurmountable hurdles to accessing economic and social rights, and significant restrictions on their ability to enjoy a family life. Finally, their lack of rights under the law means that non-citizens are deprived of any meaningful redress.

## **2.10 Discrimination on the Basis of Political Opinion**

Discrimination on the grounds of political opinion and affiliation is widespread, with severe restrictions placed upon the activities of those who are seen to challenge the political status quo. In some instances, relevant laws and procedures are enforced and implemented selectively, resulting in critics of the government being harassed, victimised, prosecuted or punished whilst others are let off the hook. The most obvious victims of this form of discrimination are leaders of opposition parties such as the Democratic Action Party (DAP), the People's Justice Party (PKR), the Islamic Party of Malaysia (PAS) and the Socialist Party of Malaysia (PSM). However, outspoken critics of the government, including NGO leaders, lawyers, journalists, bloggers, academics and even cartoonists, have also suffered the consequences of political discrimination in Malaysia. Others have been discriminated against because, rightly or wrongly, they have been perceived as "anti-government" or opposition sympathisers. Given the strong alignment of political parties with race and religion, this form of discrimination intersects and overlaps with ethnic or religious discrimination, which makes it difficult to disentangle the causal strands of the patterns of discrimination discussed below. The main patterns of discrimination discussed in this section include discrimination in relation to voting rights and political participation, arbitrary detention on political

grounds, and discrimination in respect to the rights to freedom of assembly and freedom of expression.

### ***Discrimination in Relation to Voting Rights and Other Political Participation***

It has been shown in a number of academic and other studies that Malaysians do not enjoy equal rights in the vote. There are numerous in-built legal and administrative biases in the Malaysian electoral system that have prevented, for over five decades, opposition parties from competing on equal terms with the ruling BN coalition.<sup>513</sup> The usually rural constituencies won by BN are the least populated ones, while the opposition parties are strong in the larger urban constituencies. The electoral system has been modified from time to time to a degree that it allows BN to win elections with just 15-20% of the votes. Most countries which, like Malaysia, operate first-past-the-post systems, have limits on the variation in constituency sizes so that each person's vote has roughly the same weight. In Malaysia, however, such limits were abolished in 1973, allowing huge disparities to occur.

The independence of the Electoral Commission has been questioned on many grounds, including the suspected re-delineation of electoral boundaries where there is a high imbalance in the number of voters per constituencies in favour of the ruling BN coalition. The exercise of the vote on an equal basis has also been severely affected by restrictions on campaigning, freedom of assembly and association, and access to the media.<sup>514</sup> The mainstream media have been under the control of political parties within the ruling BN coalition, resulting in either minimal coverage of opposition candidates or intensely negative reporting of key opposition party leaders. Furthermore, there have been numerous complaints from opposition parties about the use of phantom voters, money politics and abuse of government

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513 Puthucheary, M. and Othman, N. (eds.), *Elections and Democracy in Malaysia*, Penerbit Universiti Kebangsaan Malaysia, 2005. For example, section 2(c) of the Thirteenth Schedule of the Federal Constitution permits weighting for rural constituencies over urban electoral districts. Historically, this provision was intended to empower rural Malay votes, but today – due to a high rate of Malay migration from villages to metropolitan areas, this rule has lost its justification.

514 See above, note 53, p. 29.

resources during elections.<sup>515</sup> Despite the success of the opposition political parties in the March 2008 elections, which saw the majority of the ruling coalition fall below two thirds for the first time since it came into power, there were concerns as to the discrimination faced by political opponents throughout the political process.

Another area of political discrimination is in the allocation of development funds to elected representatives, as illustrated in the testimony of an opposition Member of Parliament (MP) provided to Tenaganita (see Box 13).<sup>516</sup> The BN-controlled federal government has long practised this kind of discrimination where opposition MPs have been denied the special constituency allocation. On 26 February 2011, MP Dr. Michael Jeyakumar Devaraj was granted leave by the High Court to hear his case that the special constituency allocation should be made available to all MPs. He had made applications for funds from the allowance since 2008 but did not receive a satisfactory response from the authorities. He claimed the allocation utilised public monies from the Federal Consolidated Fund and sought an order to compel the respondents to specify the kinds of projects and activities for which application for funds from the allocation would be granted.<sup>517</sup> However, BN MPs have also been the victims of political discrimination in at least one instance. This was when the Chief Minister of the Selangor State Government which was controlled by the PR coalition made an announcement in early 2011 that since the Federal Government discriminated against opposition MPs, the state government would also only give allocations to state elected representatives from its own PR coalition.<sup>518</sup>

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515 Malott, J.R., "American view of Malaysia outdated", *Malaysiakini*, 24 July 2011.

516 Tenaganita Interview with Charles Santiago, 29 July 2011, Kuala Lumpur.

517 Mageswari, M., "Judge allows Jeyakumar's application for allocation case to be heard", *The Star*, 26 February 2011.

518 The Star, "Selangor PKR reps to get RM1 mil for upgrading works", *The Star*, 13 January 2011.

### **Box 13**

### **Testimony of an Opposition MP**

I am the Vice-Chairman of Selangor State DAP and MP of Klang. I have been active in party politics since March 2008. Before that, I was an NGO activist working on issues relating to free trade agreements, the WTO, privatisation of public services, and labour issues.

In general, one can say that if one belongs to the opposition in Parliament, one faces discrimination. We don't get development funding that is given to BN members of Parliament. They get RM 1 million per MP as minimum support for their constituency. If you are opposition MP, the money goes to the leader of BN in that constituency. In Klang, for example, the constituency allocation of RM 1 million goes to the BN Chairman in Klang, not to the elected representative. Dr. Jeyakumar has brought this to court for judicial review.

In terms of policies of government, it always goes towards supporting BN MPs. They receive the briefings before the bills are presented in Parliament. Opposition MPs do not receive this briefing. In Parliament, there is a tendency for the Speaker to overlook opposition MPs and play to the tune of BN backbenchers. The development fund is very important. The money can be used to bring about change to people's lives. As opposition MPs, we have to raise our own funds and that is not easy. The state government in Selangor gives RM 150,000 to Pakatan Rakyat (PR) MPs and RM 500,000 to PR state assemblymen. The Selangor state government was willing to give money to the opposition state assemblymen if the Federal government gave RM 1 million to all opposition MPs as well.

Mainstream media always gives coverage to BN MPs. Only if it's something controversial or negative about the opposition do they get any coverage. Chinese media is quite fair to all. Alternative media gives fairer coverage to oppositions MPs – you get to hear both sides of the story.

There have also been examples of opposition politicians having their activities and participation restricted even once elected. In December 2010, Anwar Ibrahim and three other parliamentarians were suspended from Parliament for six months. Mr Ibrahim's suspension resulted from him allegedly making misleading statements to Parliament, whilst the other three were suspended because they opposed the suspension of Mr Ibrahim.<sup>519</sup>

In April 2012, the Election Offences (Amendment) Bill 2012, possibly the most controversial among eight bills rushed through parliament, which would remove, among other measures, a political candidate's right to have his agents monitor the process of voter identification, was blocked. A motion to retract the bill was tabled, which many interpreted as the result of the hostile response to it shown by the public.<sup>520</sup> The bill was later aborted due to the public outcry.<sup>521</sup>

### ***Arbitrary Detention on Political Grounds***

The Malaysian government has long used the Internal Security Act 1960 (ISA) to suppress the development of political opposition and civil society. The Act was initially intended to be a temporary measure to address specific circumstances, but was made permanent under Article 149 of the Federal Constitution. It was initially justified as necessary to overcome the communist threat within the country, but was increasingly used to suppress critics and opponents of the ruling parties. Individuals detained under the ISA were frequently denied a range of rights, including access to lawyers and freedom from torture and inhuman and degrading treatment or punishment.<sup>522</sup> While there has been an Advisory Board with responsibility for reviewing detention cases governed by ISA, the appointments to that body have been made by the King on

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519 See above, note 53, pp. 13-14.

520 See, for example, Freemalaysiakini, "Election amendment Bill a fraudster's charter", *Freemalaysiakini*, 25 April 2012.

521 Carvalho, M., "Nazri: Amendment to Election Offences Bill to be withdrawn," *The Star*, 9 May 2012.

522 See above, note 458, Para 2.4.

the advice of the Prime Minister and therefore its independence was arguably compromised. The authorities could detain a person who posed a threat to national security for 60 days without a trial, and the Home Minister could extend that period indefinitely via sets of two year detention periods.<sup>523</sup> Available figures placed the number of ISA detainees as at July 2010 to be 18 persons.<sup>524</sup>

In August 2011, the Association for the Promotion of Human Rights (Proham), made up of mostly former SUHAKAM commissioners, expressed concern over the apparent increase in the government's use of preventive laws such as the ISA and, more recently, the Emergency Ordinance (EO). Referring to the detention of opposition MP Dr Michael Jeyakumar and five other PSM members under the EO in June 2011, Proham chairperson Simon Sipaun said: "But if you look at what happened, instead of repealing the laws, they have strengthened the laws and used them against their political opponents." The opposition politicians were held for 28 days without trial under the Emergency Ordinance 1969.<sup>525</sup>

In September 2011, Prime Minister Najib Razak pledged to repeal the Internal Security Act, while a November 2011 report by Human Rights Watch charged that a number of people had been arbitrarily arrested under the Act, which permits indefinite detention without charge or trial.<sup>526</sup> In April 2012, rapid new developments took place in a burst of legislative activity in the Malaysian parliament. The Internal Security Act 1960 was abolished and replaced with the Security Offences (Special Measures) Bill, which was passed by the Dewan Rakyat (House of Representatives) after one and a half days of debate. Although the new bill incorporated some of the suggestions of the Bar Council and SUHAKAM, including a 28-day detention period,<sup>527</sup> the Bar Coun-

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523 Keng, Y.P., "ISA – To Review or To Repeal?", *Praxis*, 25 February 2010.

524 Aliran, *Aliran's ISA Watch*, 17 July 2010.

525 Sipalan, J., "Lift four states of emergency, urges Proham", *Malaysiakini*, 4 August 2011.

526 Human Rights Watch, *Malaysia: End Use of Internal Security Act*, 21 November 2011.

527 The Star, "President: Detention period under replacement Act is consistent with our stand", *The Star*, 12 April 2012.



cil, SUHAKAM and Human Rights Watch have warned that the bill contained provisions which may set the stage for future violations of civil liberties and urged for a longer deliberation period.<sup>528</sup>

### ***Discrimination in Respect to Freedom of Association and Assembly***

The government has banned membership of unregistered political parties and organisations.<sup>529</sup> Some NGOs and political parties, such as PSM, had to wait for years to be registered. As a result, some NGOs were forced to register as business entities in order to function and carry out human rights work. One NGO, HINDRAF Makkal Sakthi, submitted its application for registration to the Registrar of Societies (ROS) in October 2009. In April 2011, it filed a suit against ROS for failing to register the non-governmental organisation despite being given 14 days to provide an answer to the status of the application. On 30 June 2011, the Kuala Lumpur High Court dismissed HINDRAF Makkal Sakthi's application to quash the Putrajaya and Federal Territories ROS decision not to allow the registration of HINDRAF Makkal Sakthi, on the basis that the ROS was yet to make a decision on the registration and there was, therefore, no case against it.<sup>530</sup>

Regarding freedom of association, two of the eight bills galloped through parliament in April 2012 – the Universities and University Colleges (Amendment) Bill 2012 and the Private Higher Educational Institutions (Amendment) Bill 2012, have amended provisions in previous legislation that had made student membership in a political party illegal. However, the Bar Council warned that, while permitting students to be members of a political party, the bills placed restrictions on the rights of association, speech and expression that render the improvement illusory.<sup>531</sup> The

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528 Shukry, A, "Suhakam joins call for review of ISA replacement law", *The Malaysian Insider*, 16 April 2012; see also Human Rights Watch, *Malaysia: Security Bill Threatens Basic Liberties*, 10 April 2012.

529 See above, note 53, p. 16.

530 Vinod, J., "Hindraf fails in suit against ROS (FreeMalaysiaToday)", *Human Rights Party Malaysia*, 30 June 2011.

531 Malaysian Bar Council, *Press Release: Bills relating to students' freedoms inconsistent with constitutional guarantees*, 13 April 2012.

Educational Institutions (Discipline) (Amendment) Bill 2012 would have a similar effect.<sup>532</sup>

A ban on political gatherings was imposed by the government in July 2001.<sup>533</sup> However, opposition political parties have found ways to work around the law in order to gather and mobilise support, for example, by organising fundraising dinners. In response, the Police Act 1967 has been used to prevent public assemblies by political opponents. The Police Act requires licences to be obtained for any public assembly, and such licences may be refused if the assembly may be “prejudicial to the interest of the security of Malaysia or any part thereof, or to excite a disturbance of the peace”.<sup>534</sup> Further, the police have powers to disperse activities in private places if the activity is “prejudicial to the interest of the security of Malaysia” or “excite[s] a disturbance of the peace”.

The detention of the leaders of the HINDRAF, an NGO defending the rights of the Indian minority in Malaysia, in December 2007 provides an example of discrimination on the grounds of political opinion (alongside religion and race) in relation to freedom of assembly. Racial profiling was also used in the case of the HINDRAF rally to stop people who appeared to be of Indian descent.<sup>535</sup>

In 2008, the Coalition of Malaysian NGOs in the UPR Process highlighted a “new trend” whereby court orders were obtained to bar individuals from places surrounding venues of planned assemblies, and gave the following examples:

- i) The HINDRAF rally in November 2007;
- ii) The handing over of the Bersih memorandum in December 2007; and

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532 See A Bill intituled An Act to amend the Educational Institutions (Discipline) Act 1976, available at: [http://www.cjljlaw.com/membersentry/bills/MY\\_FS\\_BIL\\_2012\\_10.asp](http://www.cjljlaw.com/membersentry/bills/MY_FS_BIL_2012_10.asp).

533 SUARAM, *Malaysia: Human Rights Report 2005*, SUARAM Komunikasi, 2007, p. 80.

534 Police Act 1967, Sections 27, 27A, 27B and 27C.

535 See above, note 54, Para F3.

iii) The prohibition of opposition leader Anwar Ibrahim and his supporters from being within five kilometres of the Parliament building to restrain them from attending a parliament debate session on a non-confidence motion by the Opposition against the Prime Minister.<sup>536</sup>

A further trend identified in the submission by the Coalition of Malaysian NGOs in the UPR Process was the erection of “roadblocks at the outer periphery and roads leading into the venues of public assemblies both a few days before and after the events” which creates fear and intimidation and prevents supporters from accessing the event.<sup>537</sup>

On 27 February 2011, HINDRAF Makkal Sakthi, a regrouping of the HINDRAF that had been banned after 2007, organised a demonstration in Kuala Lumpur to call for an end to “UMNO’s racism” as well as seeking a ban on the use of the controversial textbook *Interlok* in the school curriculum as compulsory reading in Malay literature for students in secondary school. The group alleged that *Interlok* contained disparaging remarks against Malaysian Indians and is deemed racist. In this incident 109 people were arrested for allegedly taking part in an illegal demonstration. They succeeded in banning *Interlok* in December 2011.<sup>538</sup>

The authorities’ reaction to the Bersih 2.0 Walk for Democracy which took place on 9 July 2011 provides a further example of how discriminatory restrictions on freedom of assembly operate. The rally was part of a campaign by a coalition of more than 80 NGOs, named Bersih (which means “clean” in Malay) calling for free and fair elections in Malaysia. The campaign, which began in 2007, was premised on the belief that the country’s election laws and electoral process had serious gaps and flaws which gave the incumbent party and its candidates an undue advantage and denied other candidates a level playing field during elections. The coalition demanded that the Electoral Commission clean up the electoral roll, reform postal voting, use indelible ink, introduce a minimum 21-day campaign period, allow all parties free access

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536 Ibid., Para F2.

537 Ibid., note 54, Para F3.

538 Bernama, “Interlok should be banned instead making amendments: Karpal”, *New Strait Times*, 17 December 2011.

to the media, and put an end to electoral fraud. The police arrested activists a week before the planned rally for wearing Bersih T-shirts and subsequently the Home Minister declared Bersih an illegal organisation as it had not been registered,<sup>539</sup> even though it was a grouping of registered organisations and as such did not need any registration. On 9 July 2011, police used tear gas and water cannon against Bersih protesters and made hundreds of arrests.<sup>540</sup> In August 2011, it was announced that a parliamentary system would be formed to review the electoral system.<sup>541</sup>

In November 2011 the Malaysian parliament passed a new law on street protests, the Peaceful Assembly Act, which the government said was meant to ease regulations but according to critics it has done exactly the opposite. At least 500 lawyers protested against the Peaceful Assembly Act in a street march just before the bill was voted into law, warning that the new law would effectively further curtail freedom of assembly, by removing the possibility of demonstrating in the open public spaces of the streets and limiting them within stadiums and halls.<sup>542</sup>

In January 2012 Anwar Ibrahim, the leader of the Malaysian opposition, was acquitted of the charges of sodomy that had been brought against him in a trial that started after his strong performance at the 2008 election and lasted two years. This was the second time Mr Ibrahim had been tried for sodomy, after spending six years in prison in 1999-2004 after he had been found guilty of sodomy and misuse of power. He has always denied the charges and maintained that they were politically motivated as a result of him falling out of favour with the ruling party after he occupied the post of Deputy Prime Minister during the 1990s.<sup>543</sup>

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539 The Star, "Najib: Unregistered Bersih remains an illegal entity", *The Star*, 7 July 2011.

540 BBC, "Malaysia: Police fire tear gas at banned rally", *BBC News*, 9 July 2011.

541 Mustafa Kamal, S., "In nod to Bersih, PM announces vote system relook", *The Malaysian Insider*, 15 August 2011.

542 BBC, "Malaysia passes street protest ban as lawyers march", *BBC News*, 29 November 2011.

543 BBC, "Anwar Ibrahim acquitted of sodomy in Malaysia", *BBC News*, 9 January 2012.

On 28 April 2012, over 100,000 people took to the streets in Bersih 3.0, the biggest mass opposition rally in Malaysia's history. The protests organised by the Bersih coalition demanded changes to Malaysia's electoral system to end the privileges of the BN coalition that has been in power since independence. The protests turned violent as the police beat protesters, used water-cannon, fired teargas at them and put up barricades. A number of arrests were made.<sup>544</sup> The Bar Council, among others, condemned police brutality and the use of excessive and indiscriminate force against protesters in Kuala Lumpur.<sup>545</sup> In the aftermath of the protest opposition leader Anwar Ibrahim was charged with violating the laws on street protests. He denied the charges and claimed that they were part of a politically motivated campaign against him, which also included the charges of sodomy of which he was acquitted in January 2012.<sup>546</sup> Some of the leaders of Bersih have received credible death threats, and an effigy of Ms Ambiga Sreenevasan, one of the co-chairs of the coalition, has been burned in a rally of government supporters. Ms Sreevasan together with other organisers of the rally has also been sued by the federal government, for alleged damage of property during the rally. It must be noted that holding assembly organisers liable for damages caused by alleged unlawful conduct of event participants is incompatible with the right to peaceful assembly.<sup>547</sup> In July 2012 SUHAKAM launched a public inquiry into Bersih 3.0, and accounts of police brutality have been flooding in since then.<sup>548</sup>

### ***Discrimination in Respect to Freedom of Expression***

The HRC has stressed that any laws restricting freedom of speech must "not violate the non-discrimination clauses of the Covenant" which include dis-

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544 Fisher, J., "Could street protests herald a Malaysian spring?", *BBC News*, 15 May 2012.

545 Chooi, C., "Bar EGM denounces police brutality at Bersih 3.0", *The Malaysian Insider*, 11 May 2012.

546 BBC, "Malaysia's Anwar Ibrahim denies protest offences", *BBC News*, 22 May 2012.

547 Office of the High Commissioner for Human Rights, *Malaysia: UN rights experts call for the protection of NGOs working for free and fair elections*, 7 June 2012.

548 Arukesamy, K., "DBKL men also assaulted people during Bersih 3.0, Suhakam told", *The Sun Daily*, 11 July 2012.

crimination on the basis of political opinion.<sup>549</sup> Article 10 of the Federal Constitution protects freedom of speech, assembly and association. In particular, Article 10(1)(c) protects the right of all citizens to form associations. Article 10(4) provides, however, that discussion of certain topics may be prohibited. These include: (i) the national language (Article 152); (ii) the reservation of quotas in respect of services, permits, etc. for Malays and natives of any of the States of Sabah and Sarawak (Article 153); and (iii) the sovereignty of the Malay Rulers (Article 181). Article 10(4) permits laws prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogatives established or protected by the provisions of Articles 152, 153 and 181 save for the right to question their implementation. Given the highly political nature of the “topics” in relation to which freedom of expression is restricted, Article 10(4) can be seen as discriminating against those whose opinion is viewed as a challenge to the ruling elite and the status quo.

The BN-controlled Federal Government has also practised selective prosecution of opposition leaders and those perceived as critics by resorting to restrictive laws such as the Sedition Act, the Internal Security Act, the Official Secrets Act and the Printing Presses and Publications Act. These laws allowed the government wide discretion in determining what can be construed as seditious, threat to national security or public order or incitement to public hatred. In 2007, a government agency issued a directive to all private television and radio stations to refrain from broadcasting speeches made by opposition leaders, a move condemned by politicians from the opposition parties. The government has been perceived as quick to use laws to silence, intimidate or punish its critics while those from the BN coalition or aligned to it are often let off scot-free. Thus, when inflammatory remarks were made by Ibrahim Ali from the UMNO-aligned Malay-rights NGO, PERKASA, or unsubstantiated allegations published by UMNO-controlled Malay daily, Utusan Malaysia, police investigations dragged on inconclusively. This was also pointed out by the president of the Catholic Bishops Conference of Malaysia, Bishop Dr Paul Tan Chee Ing, when he was quoted as saying in reference to the Utusan Malaysia report:

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549 Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, 21 July 2011, Para 26.

*How is it the authorities are seemingly lax in their investigative and preventive ardour when irresponsible and wild allegations are made against law-abiding individuals and groups but appear to move with alacrity against people engaged in the exercise of their rights...Why this disparity in the discharge of solemn duty?*<sup>550</sup>

In its 2011 report on Malaysia, the United States Department of State provided a number of examples of how the government has restricted the freedom of expression of its political opponents, using the legal framework prohibiting sedition and defamation. For example, on 18 August 2010, the Chinese-language radio station – 98.8 – terminated the employment of a Chinese-speaking ethnic-Malay announcer (Jamaluddin Ibrahim) in response to a letter from the Malaysian Communications and Multimedia Commission which stated that the announcer's comments on race relations were unacceptable.<sup>551</sup> On 1 July 2010, the Home Ministry did not renew the publishing permit for the newspaper *Suara Keadilan*, the newspaper of the opposition party PKR. Similarly, it refused to renew the permits of two other opposition political party newspapers – the Islamic Party of Malaysia's *Harakah* and the DAP's *Rocket*. In response to the appeals of both of these parties, the permits for *Harakah* and *Rocket* were renewed, but on the condition that they would be sold only at the party's headquarters and offices, and only to members.<sup>552</sup> On 22 September 2010, the daughter of Anwar Ibrahim – Nurul Izzah – was questioned in relation to a charge of sedition after she authored an article entitled "Malaysia or Malaysaja" (Malaysia or Malay Only) in August 2010. In this article, she questioned the "special position" of the Bumiputera in Malaysia.<sup>553</sup> The government has also banned numerous publications on the basis

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550 See above, note 525. It should also be noted that the authorities have failed to sanction frequent anti-Semitic speech, or do anything at all about a persisting anti-Semitic discourse in Malaysia. For example, the former Prime Minister, Mahathir Mohamad, has made numerous anti-Semitic statements in his speeches with full impunity to date. (See, for example, Khan, M.A., "Anti-Semitic Fever Rages in Moderate Islamic Malaysia", *Malaysia Today*, 31 January 2012; Fulford, R., "Anti-Semitism without Jews in Malaysia", *National Post*, 6 October 2012.)

551 See above, note 53, p. 17.

552 Ibid.

553 Ibid., p. 18. No further information is available on developments in this case.

that they could “jeopardise public order” or were obscene. This included a magazine of political cartoons, *Issues in Cartoons*, which was banned because its contents “could influence people to revolt against the leaders and government policies”.<sup>554</sup>

Further, numerous bloggers have been persecuted in an attempt to control political expression on the internet. One famous case was that of Raja Petra Kamaruddin, who was charged under the Sedition Act 1948 and the Penal Code for criminal defamation based on an article which he posted on his blog, *Malaysia Today*, in which he alleged that the Deputy Prime Minister and his wife had been involved in the murder of a Mongolian national two years previously.<sup>555</sup> In August 2008, his blog was blocked by internet service providers on the instruction of the Malaysia Communications and Multimedia Commission.<sup>556</sup> The Coalition of Malaysia NGOs in the UPR Process contrasts the treatment of bloggers such as Mr Raja Petra Kamaruddin with the failure to prosecute members of the UMNO for hate speech.<sup>557</sup>

Discrimination on the grounds of political opinion is also found in the world of academia, as documented in ERT interview with a retired female academic, Mrs X. (see Box 14).<sup>558</sup> The United States Department of State reported that the government continues to require all civil servants, university faculty members, and students to sign a pledge of loyalty to the king and the government, and that claims have been made that this loyalty pledge had been used to restrain political activity amongst these social groups. Further, it reported evidence that public university academics, whose career advancement and funding depended on the government, exercised self-censorship. This practice was most likely compounded by the announcement in 2010 by the dep-

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554 Ibid., p. 19.

555 See above, note 54, Para D3.

556 Hamdan, N. and Cheok, L.P., “ISPs ordered to cut access to Malaysia Today website”, *The Star*, 28 August 2007.

557 See above, note 54, Para D4.

558 ERT Interview with Mrs X., 28 June 2011, Kuala Lumpur.



uty Prime Minister that he wanted “tighter screening for university lecturers to keep extremist ideology out of the university system”.<sup>559</sup>

#### Box 14

#### Testimony of a Retired Academic

I was a lecturer in a public university in Malaysia for 30 years. My students were all Bumiputra and I used to teach courses in Malaysian politics, public policy, industrial relations and human resource management. I have also been involved in CSOs and trade unions, both in leadership positions and as a volunteer. I am not a member of any political party.

Over the last 30 years in the university, I have observed party politics and political considerations become more salient in decision-making in the university, resulting in the university being openly partisan, i.e. pro-UMNO, in some instances. In my view, the “culture of fear” is very strong within the ivory tower. This is due to the existence of many restrictive laws, policies and circulars by the government and university management, often couched in language that allows the authorities to construe almost anything as a “threat to national security” or “tarnishing the good name of the university”.

Many lecturers who teach about Malaysian laws, politics and public policies, played it safe by giving students the “sanitised” government version. Lecturers who questioned or criticised the laws and policies were labelled as “anti-government” or “anti-Malay”. I was told “off the record” by a top officer that this was used against me during my applications for promotion and a PhD scholarship. Malay lecturers who were critical of certain policies and practices of the BN government and the university were even labelled as “traitors to the race”. In the 1990s, the then Vice-Chancellor was quoted in the newspapers as saying that lecturers

559 See above, note 53, p. 23.

who supported Anwar Ibrahim's "Reformasi" movement were "rehabilitated" by being transferred out from the main campus to branch campuses in other states.

When I taught Malaysian politics, I always endeavoured to expose the students to the views of all the stakeholders related to the issue being discussed. This was accepted and even supported by my superiors in the early years, but was increasingly frowned upon as time went by. In early 2005, I was suddenly directed to go on transfer to one of the branch campuses in Sarawak because, according to the Dean, "We need someone senior and I think you are the most suitable". He also said it will be for at least 5 years. My colleagues and I were shocked because this was against the normal practice in the faculty.

However, I heard whispers through the grapevine that it was because the university management believed I had tried to influence my students to be anti-government through my criticism of government policies during my lectures and my involvement in certain CSO activities. So, I proceeded to appeal against the transfer to the Vice-Chancellor and then the Minister of Higher Education but despite numerous letters and phone calls, there was no change in the decision.

This was the first time I was separated from my family. My husband was working in a private hospital in the Klang Valley and could not follow me to Sarawak unless he resigned from his job. Both my children were also due to sit for major public examinations in school. I went through so much emotional distress and sleepless nights, especially seeing that the university management could do this to me and get away with it. Finally, fearing that I may have a nervous breakdown, I went to see a doctor who prescribed tranquilisers that I took every day for a few months. I was also fortunate to have the support of family and friends during this very difficult period.

When I reported for duty at the branch campus, circumstances there strengthened my belief that I was being victimised. I also met two other lecturers there who were in the same position as me and they told me of others who were also “banished” and “cold-storaged” in other branch campuses. I then wrote to the Public Complaints Bureau (PCB) and SUHAKAM, claiming victimisation by the university management. I did not get any official response from SUHAKAM despite numerous phone calls, but the PCB immediately acted on my complaint. However, when they investigated the case, the university authorities stated that my transfer was just a “normal administrative decision” so the PCB could not do anything more about my complaint.

In late 2005, I applied for a transfer back to the main campus and this was supported by the new Dean and my superiors in the branch campus who were sympathetic to my situation. However, the university authorities in the main campus were dragging their feet on my application.

But God is great! In early 2006, the newly appointed multi-party Parliamentary Select Committee on Integrity (PSCI) began holding its public hearings. I applied for emergency leave and took a flight to Kuala Lumpur to attend the public hearing there. At that hearing, I was the only civil servant who made a submission to the Committee and I was guaranteed immunity. I highlighted what I believed to be unethical practices in the university, including the victimisation of lecturers labelled as “opposition sympathisers”. In mid-2006, the PSCI investigated my case and two days after they had a meeting with the university authorities, I received a fax from the university authorities directing me to report for duty back in the main campus by the following Monday! Sadly, the PSCI is no longer in existence today.

After I came back to the main campus, I was not given the opportunity to teach any courses on Malaysian politics until 2009,

when I was asked to tutor two groups of students for a politics course on the policies and leadership styles of the different prime ministers of Malaysia – something that I used to lecture on for many years prior to my transfer to Sarawak. However, mid-way through the semester, I received a letter from the Dean informing me of a reshuffle in the timetable affecting a few lecturers including me, resulting in another lecturer taking over my politics tutorials. Again, I later found out through the grapevine that some of my students had sent a petition to the Dean after attending just two tutorial classes.

Their complaints included: that my teaching method, i.e. the Socratic Method, is not appropriate; that I touched on sensitive issues related to race, e.g. Malay Supremacy, and religion, e.g. the “Allah” issue, which the students said, being a civil servant, I should not; that I had asked the students to read articles from “opposition and leftist sources” like *Harakah*, *Malaysiakini* and *Aliran Monthly*; that I said that the Malays were migrants (as stated in the text book for this course). I pointed out to the Dean that she had set an unhealthy precedent by giving in to the demands by the students and denying me due process. I was deeply disappointed by the way the issue was handled.

After this incident, I decided to take a break from teaching and go on a one year sabbatical. I had secured a research grant from the university as well as from the trade unions to do research related to income security among low income workers in West Malaysia. However, the university authorities rejected my application for sabbatical leave. Among the reasons given was that I was biased against the government as I had questioned the reliability of government statistics in my research proposal and that my research would only benefit the trade unions.

This was the final straw and I decided to opt for early retirement and left the university in mid-2010.

A further case demonstrates the willingness of the government to interfere with the ability of civil society to criticise its migration policies. On 16 October 2003, migrant rights activist Irene Fernandez was sentenced to 12 months imprisonment, after a seven year trial, having been charged under Section 8A(1) of the Printing Presses and Publications Act 1984 for maliciously publishing false news after releasing a memorandum entitled “Abuse, Torture and Dehumanized Treatment of Migrant Workers at Detention Camps”. An appeal was made and Fernandez was eventually acquitted in 2008, thirteen years after she was first charged.<sup>560</sup> The trial of Irene Fernandez under the Printing Presses and Publications Act 1984 reflected the government’s strategy of criminalisation of whistle-blowers and suppression of freedom of speech. One concerning result is not only the violation of the rights of individuals such as Ms Fernandez, but also the impact on state accountability, and the consequential ability of the state to continue violating rights with impunity. The restriction of the freedom of expression of seemingly anyone who seeks to question or challenge the status quo places a very concerning restriction on the ability of, primarily, civil society to address issues such as those outlined in this report.

In April 2012, the Printing Presses and Publications (Amendment) Bill 2012 was passed by the Dewan Rakyat. It aimed to remove the Home Affairs Minister’s “absolute discretion” under section 3(3) of the Printing Press and Publications Act 1984 to grant or refuse printing press licences, and enables publishers to challenge such a decision in court.<sup>561</sup> However, as this bill was one of eight bills passed in one day in what an unprecedented rush to pass bills in Dewan Rakyat despite outcry from the opposition, it was feared that there were further provisions in the bill which, similar to the Security Offences (Special Measures) Bill, may create additional restrictions on human rights.<sup>562</sup>

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560 See above, note 413, Para 8.

561 Bernama, “Greenlight for Printing Presses and Publications (Amendment) Bill 2012”, *New Straits Times*, 20 April 2012; Meikeng, Y., “Dewan Rakyat passes Printing Presses and Publications (Amendment) Bill 2012”, *The Star*, 20 April 2012.

562 Chooi, C., “BN not ‘bulldozing’ laws, says deputy minister”, *The Malaysian Insider*, 19 April 2012; *idem*, “As polls loom, Parliament’s last session ‘suspends’ time to approve laws”, *The Malaysian Insider*, 20 April 2012.

## Summary

This sub-section on discrimination on the ground of political opinion has identified the extreme lengths to which the government will go in order to suppress opinions which are seen as “opposing” it, or which are viewed as “seditious”, through raising obstacles to equal political participation, using arbitrary detention, and curtailing freedom of association and assembly. Un-registered political parties and organisations have been banned, along with political gatherings. Domestic legislation, such as the Police Act 1967, has been enforced in a discriminatory manner so as to prevent public assemblies by political opponents of the government. In addition to the repression of freedom of association and assembly, the Malaysian government has also used the Internal Security Act to detain political opponents in a discriminatory manner. The Sedition Act, the Official Secrets Act and the Printing Press and Publication Acts have been used to silence, intimidate and punish critics of the government. Finally, opposition parties have been unable to participate in the political process on an equal basis with the ruling party due to a series of in-built and administrative biases in the Malaysian electoral system, and due to the discriminatory allocation of development funds to elected representatives which favours members of the BN coalition. Such discriminatory practices on the grounds of political opinion present a fundamental challenge to principles of both equality and democracy, and also create an environment in which it is difficult to challenge the status quo and undo the disadvantage faced not only by political opponents but other groups discussed in this report.

### 2.11 Other Patterns of Discrimination and Disadvantage

While discrimination and inequalities affecting children have been discussed above, the preceding sections of this report do not make reference to discrimination and inequality on the basis of **age** as such, because the research did not find significant evidence on this issue. But it appears that age discrimination against both young and older persons exists and is taken for granted in Malaysia, as illustrated by the passing of a law in December 2011 prohibiting anyone below 21 from organising an assembly and anyone under the age of 15 from participating in an assembly.<sup>563</sup>

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563 Peaceful Assembly Act 2012, section 4(1)(d) and 4(1)(e).

With regard to older persons, like in many Asian cultures, taking care of one's elderly parents is an accepted part of life. However, according to retired Court of Appeal judge Datuk Mahadev Shankar, speaking in the framework of the First World Congress on Healthy Ageing in Kuala Lumpur (19-22 March 2012), the abandonment of elderly parents is a serious matter that has to be looked into. Under current Malaysian law, children are not required to care for their parents. Singapore has addressed this by introducing the Maintenance of Parents Act that allows elderly parents who are unable to fend for themselves to claim maintenance from their children. Datuk Mahadev Shankar has stated that while Malaysia could introduce similar legislation, enforcement would be much more challenging, due to the much larger population. In his view, while children shouldn't be forced to provide luxuries for parents, there is certainly a case for making them provide the basic necessities of life should their parents become unable to fend for themselves: "The keyword is necessities just as the law now stipulates that parents must provide basic necessities for their young children."<sup>564</sup> The issue is however controversial – some societies, including Britain and the United States, have moved away from filial duty toward public duty solutions, but the debate on filial legal responsibility for covering the costs of care for elderly parents may be coming back.<sup>565</sup>

Two important issues that Malaysian society is facing are how to modify medical care to adapt to an ageing population, and how to better regulate nursing homes. Further, following a global pattern in the world of work, older workers are thought to have physical and attitude limitations as well as technology illiteracy.<sup>566</sup>

The research for this report has found isolated cases of discrimination on other grounds or combinations of grounds, for example the combination of **place of residence and occupation** in respect of political rights. In Janu-

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564 Meera, "Providing for the elderly", *Spotlight on Elder Abuse* (blog), 2 March 2012.

565 Pakula, M., *The Legal Responsibility of Adult Children to Care for Indigent Parents*, National Centre for Policy Analysis, 12 July 2005; International Debate Education Association, "This house believes children should have legal obligations towards parents after adulthood"; Kirby, J., "Should a law force families to care for aged parents?", *Express.co.uk*, 3 February 2010.

566 Yip, C., "Time to redefine Malaysia's work culture", *The Star*, 24 April 2010.

ary 2012 the Malaysian High Court ruled against a claim brought by overseas Malaysian citizens who alleged that they are being discriminated against by not having the right to vote. Malaysian law permits only certain categories of workers – government employees, army personnel and students, and their spouses – to vote from overseas. The claim was brought by six Malaysian citizens living in the UK, who claimed that the law is unfair towards the more than one million Malaysians living outside the country. Although the case was rejected by the court, which called it “ludicrous”, it forms part of on-going debates about Malaysia’s electoral system, which was the subject of mass protests in spring 2012.<sup>567</sup>

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567 BBC, “Malaysian court rejects overseas voting rights case”, *BBC News*, 6 January 2012.



### **3. THE LEGAL AND POLICY FRAMEWORK RELATED TO EQUALITY**

This part of the report describes and analyses the legal and policy framework governing discrimination and equality issues in Malaysia, in order to assess its adequacy to address the patterns of discrimination identified in the preceding part. It addresses both the international legal obligations of the state, and the domestic legal and policy framework which protect the rights to equality and freedom from discrimination. In respect of domestic law, it examines the Federal Constitution of Malaysia, specific anti-discrimination laws and non-discrimination provisions in other areas of law. It also refers to government policies which have an impact on equality. Finally, this part examines the implementation and enforcement mechanisms of the law, both through the courts and through specialised institutions. In order to assess the full picture of the legal framework as it relates to equality in Malaysia, this part should be read together with the previous part which examined laws which discriminate, or which are open to discriminatory interpretation.

#### **3.1 International and Regional Law**

##### **3.1.1 Major United Nations Treaties Relevant to Equality**

Malaysia has a poor record of participation in major international human rights and other legal instruments. It has committed itself to just three of the major United Nations human rights treaties, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). Calls have been made on Malaysia to join the remaining international human rights instruments and to remove the reservations it has attached to the Conventions it has ratified. At Malaysia's Universal Periodic Review by the Human Rights Council in February 2009, two recommendations, which had Malaysia's support, highlighted the need to join the remaining international human rights instruments, including those which the government in its State Report claimed to be considering: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention against Torture (CAT). Malaysia is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and to the International Convention for the Protection of All Persons from Enforced Disappearances.

<b>Instruments Relevant to Equality</b>	<b>Signed</b>	<b>Ratified/ Acceded</b>
International Covenant on Civil and Political Rights (1966)	No	No
Optional Protocol I to the International Covenant on Civil and Political Rights (1966)	No	No
International Covenant on Economic, Social and Cultural Rights (1966)	No	No
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)	No	No
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	No	No
Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)	No	No
Convention on the Elimination of All Forms of Discrimination against Women (1979)		05/07/1995 acceded
Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999)	No	No
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	No	No
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	No	No
Convention on the Rights of the Child (1989)		17/02/1995 acceded

Optional Protocol I to the Convention on the Rights of the Child (2000) – involvement of children in armed conflict		12/04/2012 acceded
Optional Protocol II to the Convention on the Rights of the Child (2000) – sale of children, child prostitution and child pornography		12/04/2012 acceded
Optional Protocol III to the Convention on the Rights of the Child (2011) – communicative procedure		
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	No	No
Convention on the Rights of Persons with Disabilities (2006)	08/04/2008	19/07/2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	No	No
International Convention for the Protection of All Persons from Enforced Disappearances (2006)	No	No
Forced Labour Convention, 1930 (ILO Convention No. 29)		11/11/1957
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)		18/11/1957 acceded
UN Convention against Transnational Organized Crime	26/09/2002	24/09/2004
Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000)		26/02/2009 acceded
Worst Forms of Child Labour Convention (ILO Convention No. 182) (1999)		10/11/2000

While Malaysia has only joined three of the core UN human rights treaties – CEDAW, CRC and CRPD, this section draws upon a range of international human rights law obligations pertaining to discrimination in analysing the compatibility of Malaysian law with the rights to equality and non-discrimination as recognised in international law. The human rights treaties to which Malaysia is not a party and their respective treaty bodies should be used to elucidate: i) Malaysia's obligations under the treaties to which it is a party, to the extent that the treaties to which it is not a party can explain concepts which are also found in those treaties to which it is a party; ii) the content of the right to equality and non-discrimination for persons covered by CEDAW, CRC and CRPD who are vulnerable to multiple discrimination on grounds which include those protected by other treaties; iii) Malaysia's obligations under customary international law.

In relation to the latter, it is widely accepted that the right to non-discrimination on grounds of race, sex and religion is a principle and a peremptory norm of international customary law.<sup>568</sup> Malaysia is required to abide by the Universal Declaration of Human Rights (UDHR), including its equality provisions, especially Article 2 which prohibits discrimination on an open list of grounds. Recognition of the binding nature of the UDHR can be inferred from Article 4(4) of the Human Rights Commission of Malaysia Act 1999, which makes reference to the UDHR stating that “regard shall be had to the UDHR 1948 to the extent that it is not inconsistent with the Federal constitution”.<sup>569</sup> This implies that if there were any conflict between the two, the human rights provisions would be inferior to the Constitution. However, as the Inter-American Court of Human Rights has stated, “the principle of non-discrimination is a peremptory international norm”, or a norm of *jus cogens*, and as such, no derogation is permitted.<sup>570</sup>

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568 Shaw, M., *International Law*, Fifth edition, Cambridge University Press, 2003, p. 267 and notes 117-118; Tanaka, J., (in dissent) *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ Rep (International Court of Justice), pp. 293, 299-300; *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 (International Court of Justice), p. 32.

569 Human Rights Commission of Malaysia Act 1999, Article 4 (4).

570 Advisory Opinion OC-18/03 - Juridical Condition and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), (Inter-American Court of Human Rights), 17 September 2003, p. 23.

Consequently, despite not having ratified some of the important treaties providing the right to non-discrimination, the terms of those treaties, and the views of their respective treaty bodies, are relevant to understanding the nature of Malaysia's obligations under customary international law, as well as under CEDAW, CRC and CRPD.

### **3.1.1.1 Convention on the Elimination of All Forms of Discrimination against Women**

Malaysia acceded to CEDAW in 1995, with reservations on a number of Articles. On 6 February 1998, it withdrew its reservation in respect of Articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h), and declared its intention to modify the reservation made upon accession as follows: with respect to Article 5(a) of the Convention,<sup>571</sup> the provision would be subject to the Syariah law on the division of inherited property; with respect to Article 7(b),<sup>572</sup> the application of this Article would not affect appointment to certain public offices like the Mufti Syariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic law; with respect to Article 9.2,<sup>573</sup> the reservation would be reviewed if the Government amended the relevant law; and with respect to Article 16.1(a) providing for women and men the same right to enter into marriage, and paragraph 2, requiring a minimum age of marriage, that under the Syariah law and the laws of Malaysia the age limit for marriage for women is sixteen and for men is eighteen. In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure

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571 Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 1979, Article 5 (a). It provides: "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

572 Ibid., Article 7(b). It provides: "To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."

573 Ibid., Article 9.2. It provides: "States Parties shall grant women equal rights with men with respect to the nationality of their children."

envisaged, within a period of 90 days from the date of its notification (21 April 1998), i.e. on 20 July 1998. However, the Secretary-General received from the Governments of France and the Netherlands objections to the proposed modification. France considered that the reservation made by Malaysia, as expressed in the partial withdrawal and modification of 6 February 1998, was incompatible with the object and purpose of the Convention. Consequently, the proposed modification was not accepted. The Netherlands declared that it assumed that Malaysia would ensure implementation of the rights enshrined in the above Articles and would strive to bring its relevant national legislation into conformity with the obligations imposed by the Convention. On 19 July 2010, Malaysia withdrew its reservations in respect of Articles 5(a), 7(b) and 16(2) of the Convention.<sup>574</sup>

As of 28 July 2012, Malaysia considered itself bound by CEDAW subject to the understanding that the provisions of CEDAW do not conflict with the provisions of the Islamic Syariah law and the Federal Constitution of Malaysia; and it did not consider itself to be bound by the provisions of Articles 9(2), 16(1)(a), 16(1)(f) – same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, and 16(1)(g) – same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation. In relation to Article 11 of CEDAW, Malaysia declared that it would interpret the provisions of this Article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

All the reservations made by Malaysia which remain in place are related to the bestowment of equal rights: Article 9(2) provides for equal rights for women with respect to the nationality of their children; Article 16(1)(a) provides that men and women have the same right to enter into marriage; Article 16(1)(f) provides for the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; and Article 16(1)(g) provides for the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation. The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has urged Malaysia “to review all its remaining reservations with a view to withdraw-

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574 United Nations Treaty Collection, Status as at: 28-07-2012 05:06:13 EDT.

ing them, and especially reservations to Article 16, which are contrary to the object and purpose of the Convention”.<sup>575</sup>

Malaysia has not ratified the Optional Protocol to CEDAW which means that individuals in Malaysia are currently unable to take complaints to the CEDAW Committee.

It is recommended that Malaysia withdraws its remaining reservations to its obligations under CEDAW in order to give full effect to the Convention, and that it joins the Optional Protocol to CEDAW.

### 3.1.1.2 Convention on the Rights of the Child

Malaysia ratified the CRC in February 1995 subject to a number of reservations, which were rejected by Belgium and Denmark as incompatible with the object and purpose of the Convention and some of which were subsequently withdrawn by the Government of Malaysia. As of 28 July 2012, the reservations in force included the following: Malaysia did not consider itself bound by Articles 2, 7, 14, 28(1)(a) and 37, and declared that the said provisions shall be applicable only if they are in conformity with its Constitution, national laws and national policies. On 19 July 2010 Malaysia made the following Declaration:

*With respect to article 28 paragraph 1 (a) of the Convention, the Government of Malaysia wishes to declare that with the amendment to the Education Act 1996 in the year 2002, primary education in Malaysia is made compulsory. In addition, the Government of Malaysia provides monetary aids and other forms of assistance to those who are eligible.*<sup>576</sup>

The reservation made to Article 2 is of particular concern in the context of this report, since this Article provides for the equal enjoyment of the rights

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<sup>575</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia*, UN Doc. CEDAW/C/MYS/CO/2, 31 May 2006, Para 10.

<sup>576</sup> See above, note 574, Status as at: 28-07-2012 05:06:13 EDT.

under the CRC by every child without discrimination of any kind, on an open list of grounds (irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status). The reservations made to Article 7, which provides for the child's right to a name and nationality, and to Article 14, which provides for the child's right to freedom of thought, conscience and religion are also very concerning. The reservation to Article 37, which provides for freedom from torture or cruel, inhuman or degrading treatment or punishment, could be seen as Malaysia's reluctance to commit itself to the prohibition of torture in general terms, as evidenced by its non-participation in CAT. The CRC Committee has recommended that Malaysia "expedite its ongoing efforts to review the nature of its reservations with a view to withdrawing them".<sup>577</sup>

In April 2012 Malaysia acceded to both the First (involvement of children in armed conflict) and Second (sale of children, child prostitution and child pornography) Optional Protocols to the CRC. This is a positive step forward for the protection of children in Malaysia, especially with regard to the high levels of sexual exploitation of children. It has not yet ratified the Third Optional Protocol to the CRC which allows children to bring complaints to the United Nations Committee on the Rights of the Child. Recognizing that children, just like adults, have access to international human rights bodies, this new instrument would reinforce the international system of accountability for human rights, and would be a major step forward in the protection of children in Malaysia from discrimination.

It is recommended that Malaysia withdraws its remaining reservations to its obligations under CRC, and in particular its reservation to the fundamental non-discrimination principle enshrined in Article 2, in order to give full effect to the purpose of the Convention. It is further recommended that Malaysia ratifies the Third Optional Protocol to the CRC.

### **3.1.1.3 Convention on the Rights of Persons with Disabilities**

In 2010, Malaysia ratified the CRPD subject to the reservation that it did not consider itself to be bound by Articles 15 (freedom from torture or cruel, in-

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<sup>577</sup> Committee on the Rights of the Child, *Concluding Observations, Malaysia*, UN Doc. CRC/C/MYS/CO/1, June 2007, Para 12.



human or degrading treatment or punishment) and 18 (liberty of movement and nationality). Malaysia has also made the following declaration:

*Malaysia acknowledges that the principles of non-discrimination and equality of opportunity as provided in articles 3 (b), 3 (e) and 5 (2) of the said Convention are vital in ensuring full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity, which shall be applied and interpreted on the basis of disability and on equal basis with others. Malaysia declares that its application and interpretation of the Federal Constitution of Malaysia pertaining to the principles of non-discrimination and equality of opportunity shall not be treated as contravening articles 3 (b), 3 (e) and 5 (2) of the said Convention. Malaysia recognizes the participation of persons with disabilities in cultural life, recreation and leisure as provided in article 30 of the said Convention and interprets that the recognition is a matter for national legislation.<sup>578</sup>*

Malaysia's reservation relating to Article 15 would appear to be related to the reluctance of Malaysia to commit itself to the prohibition of torture in general terms, as evidenced by its failure to ratify CAT. However, Article 15 is central to the object and purpose of CRPD and reservation to this Article should be unacceptable. Likewise, the reservation to Article 18, which provides for freedom of movement and nationality rights, has particularly severe implications for persons with disabilities. While the declaration on the equality provisions of CRPD places the interpretation of the rights to equality and non-discrimination in the framework of national definitions of these rights, including in respect to positive action, the declaration on Article 30 makes the enjoyment of the right to participate in cultural life, recreation and leisure subject to the enactment of national legislation. These declarations potentially limit the rights of persons with disabilities under CRPD.

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<sup>578</sup> See above, note 574, Status as at: 28-07-2012 05:06:13 EDT. Article 3 states: "The principles of the present Convention shall be: (...) (b) Non-discrimination; (...) (e) Equality of opportunity." Article 5(2) provides: "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds." (Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106, 2006).

As Malaysia has not joined the Optional Protocol to CRPD, Malaysian citizens are unable to bring a case before the CRPD Committee if they feel their rights have been violated by the Malaysian government.

It is recommended that Malaysia withdraws its remaining reservations to its obligations under CRPD, and as signs and ratifies the Optional Protocol to the RPD in order to give full effect to the rights of persons with disabilities provided in the Convention.

### **3.1.2 Other Treaties Related to Equality**

Malaysia signed Convention No. 100 of the International Labour Organisation (ILO) on Equal Remuneration in September 1997. However, Malaysia is not a party to the important 1958 ILO Convention No. 111 (Discrimination (Employment and Occupation) Convention), nor to the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples, which is of particular concern given the disadvantaged position of many of Malaysia's indigenous groups. Nor has Malaysia become a party to ILO Convention No. 189 on Domestic Workers (2011). Malaysia has not joined the 1960 UNESCO Convention against Discrimination in Education which seeks to combat discrimination and segregation in education and which is highly relevant in the Malaysian context as it would provide guidance on criteria to assess when favouring of Bumiputera over Indian and Chinese students would constitute discrimination. Finally, Malaysia is not a party to either the UN Convention relating to the Status of Refugees 1951 or the UN Convention relating to the Status of Stateless Persons 1954. This is particularly concerning given the significant number of refugees living in Malaysia, and also the extensive presence of stateless persons within its territory.

In relation to domestic workers, the Malaysian government did not vote in favour of the ILO Convention No. 189 on Domestic Workers. This Convention was adopted on 16 June 2011 and represents a new comprehensive set of international labour standards for domestic workers. Malaysia tends to deal with the abuse of migrant domestic workers on a case-by-case basis by forming bilateral agreements with governments of origin countries, including the bilateral agreement with Indonesia discussed above in section 2.9.

These agreements have been criticized for not going far enough in ensuring worker rights.<sup>579</sup>

It is recommended that Malaysia ratifies those remaining international treaties which would better protect the rights to equality and non-discrimination, including the ILO Conventions listed above, the UNESCO Convention against Discrimination in Education and the UN Conventions on refugees and stateless persons.

### 3.1.3 Status of Treaties in National Law

The Federal Constitution of Malaysia does not provide for the automatic incorporation of international law into domestic law. The parliament of Malaysia must enact specific legislation in order for international obligations to be incorporated into domestic law. As will be discussed further below, while the Child Act 2001 and the Persons with Disabilities Act 2008 represent attempts to incorporate Malaysia's obligations under CRC and the CRPD, respectively, into domestic law, there has as yet been no move to incorporate CEDAW into domestic legislation. In a 2011 judgment in the case of *Noorfadilla*, however, the High Court of Kuala Lumpur clearly stated that CEDAW should be treated as having direct effect in Malaysia, so that individuals can rely upon the obligations of the state under the Convention as causes of action in the Malaysian courts.<sup>580</sup> It is hoped that future jurisprudence develops this approach in relation to CEDAW as well as other international treaties to which Malaysia is a party.

It is recommended that Malaysia reviews its international law obligations, and the extent to which they have been adequately incorporated into domestic law in order to ensure that it is complying with its obligations to give full effect to the rights under the instruments to which it is a party.

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579 See, for example, Leone, E.A., "Cambodian Domestic Workers in Malaysia: Challenges in Labour Migration Policy and Potential Mechanisms for Protection", Paper prepared for the International Organisation for Migration, Phnom Penh, 15 January 2012.

580 *Noorfadilla Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 AMR 839; [2012] 1 CLJ 769, 12 July 2011 (*High Court of Malaya*), p. 12.

### 3.1.4 Regional Instruments

Malaysia is a founding member of the Association of Southeast Asian Nations (ASEAN), and adheres to the ASEAN Charter, which has in effect become binding for its members. The fundamental principles proclaimed by the Charter include “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”. The Charter also states that members shall uphold the United Nations Charter.<sup>581</sup> Article 14 of the Charter foresees the establishment of an Intergovernmental Commission on Human Rights. The Commission was inaugurated in 2009. The Commission is, however, a new body, with a limited mandate, inadequate resources and insufficient political support. It currently has no mandate to investigate human rights abuses but this did not stop NGOs from submitting reports of rights violations to the Commission during its meeting in March-April 2010. The Commission is reportedly drafting an ASEAN Human Rights Declaration which is expected to be published in late 2012. However, even before its release, the Declaration has sparked controversy due to its secrecy, lack of civil society input and apparent focus on limiting rather than promoting and protecting human rights.<sup>582</sup>

Malaysia is also a founding member of the Organisation of Islamic Cooperation (OIC), and a member of Asia-Pacific Economic Cooperation, the Commonwealth of Nations, and the Non-Aligned Movement. It has certain commitments related to equality under the OIC Covenant on the Rights of the Child in Islam (2004), the Singapore Declaration of Commonwealth Principles (1971) and the Harare Commonwealth Declaration (1991).

#### **Summary**

Malaysia has a poor record of participation in UN human rights treaties. It is also notable that it has yet to ratify any of the associated Optional Protocols of the major human rights treaties to which it is a party – i.e. CEDAW, CRC and CRPD, therefore making it impossible for individuals to file individual

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581 Charter of the Association of Southeast Asian Nations, ASEAN Secretariat, Jakarta, 2007, Articles (2)(i) and (2)(j).

582 Human Rights Watch, *Betraying human rights, ASEAN style*, 14 May 2012.

complaints and seek remedy via the relevant complaint mechanisms. Further, the treaties to which Malaysia is a party have no direct application but rather must be implemented through domestic legislation. That said, the courts have recently shown willingness to apply Malaysia's international law obligations in reaching decisions in fundamental rights cases, such as in *Noorfadilla*.

The forthcoming ASEAN Declaration on Human Rights could prove to be a pivotal step forward in the promotion and protection of human rights in the region. Malaysia is urged to ratify any future regional treaties and protocols which serve to enhance the protection of the right to equality and to take an active part in strengthening the regional human rights system at the ASEAN level.

## 3.2 National Law

This section examines the national law as it relates to discrimination and equality. It analyses the Federal Constitution as well as other national legislation and policies in order to identify those provisions which protect the rights to equality and non-discrimination.

### 3.2.1 The Federal Constitution

The Federal Constitution is the supreme law of Malaysia (Article 4) and as such is the source of executive and legislative power in Malaysia. Part II of the Federal Constitution sets out the fundamental liberties of citizens/persons (as the case may be). It should be noted that the Apex Court of the Federation has reiterated that the "fundamental liberties guaranteed under Part II must be generously interpreted and that a prismatic approach to interpretation must be adopted".<sup>583</sup> To this end, the court has further observed that the "duty of a court interpreting these concepts (or fundamental liberties) is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept".<sup>584</sup> In the same vein, the court has

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583 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 (Federal Court); cf. *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521, [2008] 2 MLJ 285 (Federal Court); *Lee Kwan Woh v Public Prosecutor* [2009] 5 CLJ 631 (Federal Court).

584 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*, above note 583.

underscored that concepts of fundamental liberties are to be understood in their wider sense.<sup>585</sup>

The Constitution is the key instrument through which Malaysia can comply with its international human rights law obligations to protect all people against discrimination and promote equality. This is particularly important given the absence of any comprehensive anti-discrimination legislation in the country. The Constitution contains two main provisions which protect the rights to equality and non-discrimination, Articles 8 and 12. However, as is set out below, these provisions do not satisfactorily implement Malaysia's obligations under CEDAW, CRC, CRPD and customary international law. Of further concern is the existence of affirmative action provisions within the Constitution, many of which are at odds with international criteria and generate direct or indirect discrimination.

It must be noted that certain inequalities in Malaysia are sustained by the parallel existence of the Federal Constitution and Syariah Law and the lack of clarity on the relationship between the Federal Constitution, the State constitutions, and Syariah law. Syariah law in Malaysia applies to Muslim citizens only and governs matters specified in the State List of the Federal Constitution.<sup>586</sup> Muslim personal laws as well as offences that are not governed by the federal law, including offences against religion, are enumerated in the State List.<sup>587</sup> In Malaysia, each State has independent jurisdiction over religion. This leads to inconsistency and contradictions across States in the provisions of law, in interpretation and in implementation.<sup>588</sup>

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585 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, [1996] 2 CLJ 771 (Court of Appeal); *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289, [1998] 3 CLJ 85 (Court of Appeal). The current legal position with regards to the inconsistencies found in both those cases has been clarified in *Sivarasa Rasiah* (above note 583).

586 Federal Constitution of Malaysia 1957 as amended, The Commissioner of Law Revision, Malaysia, in collaboration with Percetakan Nasional Bhd, 2006, Articles 74(2), 76(1) and List II (State List) of the Ninth Schedule. See also Abiad, N., *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study*, British Institute of International and Comparative Law, London, 2008, p. 49.

587 Abiad, N., above note 586.

588 *Ibid.*, p. 54.

### 3.2.1.1 Article 8 of the Federal Constitution

Article 8 is the cornerstone of Constitutional protection of the rights to equality and non-discrimination in Malaysia. Article 8(1) states that: “All persons are equal before the law and entitled to the equal protection of the law.”<sup>589</sup>

Article 8(2) states that:

*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.*<sup>590</sup>

Article 8(2) offers a limited protection from discrimination, in terms of the types of individuals which it seeks to protect, and the scope of protection it offers to those it does protect. Firstly, Article 8(2) applies only to “citizens”. This restriction of the constitutional guarantee of equality to citizens of Malaysia is contrary to international human rights law which firmly establishes that the right to the equal protection of the law applies to all persons subject to a state’s jurisdiction or within its territory, not just its citizens.<sup>591</sup> In effect, this right must be guaranteed irrespective of the citizenship status of an individual. This basic principle of international law has been reiterated by the UN Human Rights Committee in General Comment No. 15:

*Reports from States parties have often failed to take into account that each State party must ensure the rights in the Cov-*

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589 Federal Constitution of Malaysia, above note 586, Article 8(1).

590 Ibid., Article 8(2).

591 See, for example, Universal Declaration of Human Rights, GA Res. 217 A (III), 1948, Article 7, which provides: “All are equal before the law and are entitled without any discrimination to equal protection of the law.” See also International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 1966, Article 26, which provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

*enant to “all individuals within its territory and subject to its jurisdiction”. (...) In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.*<sup>592</sup>

The UN Committee on Economic, Social and Cultural Rights has also affirmed that:

*The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*<sup>593</sup>

Thus the Committee has set out that the principle of non-discrimination in relation to economic, social and cultural rights applies equally to citizens and non-citizens. Although Malaysia has ratified neither ICCPR nor ICESCR, this interpretation of the personal scope of human rights law is nonetheless well established. The constitutional guarantee of Article 8(2) falls short of this fundamental international principle.

It is therefore recommended that Article 8(2) of the Malaysian constitution be amended so as to protect from discrimination all persons within the territory of Malaysia or subject to its jurisdiction.

Secondly, Article 8(2) prohibits discrimination on the grounds only of religion, race, descent, place of birth or gender. This list of prohibited grounds of discrimination is closed and extremely inadequate. In compliance with its obligations under CEDAW, Malaysia did amend Article 8(2) in 2001 to add “gender” as a protected ground. But it has yet to amend the constitutional protection to include discrimination based on disability in order to reflect its obligations under Article 5(2) of CRPD which states:

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592 Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/Rev.6, 1986, Para 1.

593 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art.2 para. 2)*, 25 May 2009, Para 30.



*States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*<sup>594</sup>

Further, Art 8(2) fails to comply with Malaysia's obligations under CEDAW, CRC and CRPD which require Malaysia to protect women, children and disabled persons from discrimination on any other ground as well as on more than one ground (multiple discrimination). Both CEDAW and CRC recognise the particular impact of multiple discrimination on women and children respectively. In General Recommendation 28 the CEDAW Committee states:

*The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.*<sup>595</sup>

In its General Comment 9 the CRC Committee states:

*In many cases forms of multiple discrimination – based on a combination of factors, i.e. indigenous girls with disabilities, children with disabilities living in rural areas and so on – increase the vulnerability of certain groups.*<sup>596</sup>

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594 Convention on the Rights of Persons with Disabilities, above note 578, Article 5(2).

595 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, Para 18.

596 Committee on the Rights of the Child, *General Comment No. 9: The Rights of Children with Disabilities*, UN Doc. CRC/C/GC/9, 27 February 2007, Para 8.

Principle 5 of the Declaration of Principles on Equality provides a comprehensive list of the grounds which should be covered by national law provisions on prohibition of discrimination. It states:

*Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.*<sup>597</sup>

Given the patterns of discrimination which have been identified in Part 2 above, the “grounds” listed in Principle 5 should be included in Article 8(2) to ensure protection for all disadvantaged members of Malaysian society. Malaysia should outlaw discrimination, at minimum, on the grounds of pregnancy, maternity, civil, family or carer status, language, belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, and genetic or other predisposition toward illness. It should also prohibit discrimination based on a combination of any of the prohibited grounds, or on the basis of characteristics associated with any of these grounds.

Article 8(2) of the Constitution adopts a closed-list approach to protected grounds of discrimination, implying that expanding the scope to prohibit emerging forms of discrimination on further grounds is not possible. Under international law, Article 2(1) of the ICCPR and Article 2(2) of the ICESCR prohibit discrimination on “any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. In contrast, the closed list in Article 8(2) of the Constitution may prevent the inclusion of additional grounds which arise as a basis of discrimination over the passage of time and through social change. Principle 5 of the Declaration of Principles on Equality proceeds to state:

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597 Declaration of Principles on Equality, The Equal Rights Trust, London 2008, Principle 5, p. 6.

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.*<sup>598</sup>

This flexible approach is important because it recognises that people can experience discrimination on grounds which have not previously been a cause of discrimination, as a result of social changes or evolving attitudes. Individuals can be victims of discrimination on grounds which are not necessarily linked to historical oppression, victimisation or marginalisation. A more open approach allows courts and other judicial bodies to expand the list of prohibited grounds of discrimination to cases in which individuals experience discrimination on grounds which are analogous to those previously protected. Consequently, those who are disadvantaged by emerging forms of discrimination would be able to exercise their right to non-discrimination through demonstrating that the new ground on which they have experienced discrimination meets one of the three conditions stated above.

It is therefore recommended that Malaysia reconsiders the list of protected grounds in Article 8(2), and considers making amendments necessary to: (i) ensure compliance with its obligations under international law; and (ii) ensure the protection of all individuals who are subject to discrimination within Malaysian society, as evidenced in Part 2 of this report.

Thirdly, Article 8 fails to specify what the prohibition of discrimination actually entails, as it does not provide any definition of the concept of “discrimination”. The international conventions to which Malaysia is a party provide guidance on how “discrimination” against women should be defined. Article 1 of CEDAW defines it as follows:

*[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and wom-*

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598 Ibid.

*en, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*<sup>599</sup>

In its concluding observations, CEDAW has expressed concern about the failure of Malaysia to provide a definition of discrimination in accordance with Article 1 of the Convention. It has called on Malaysia to incorporate a definition, in line with Article 1, into national law either through the Constitution or specific enabling legislation.<sup>600</sup>

Article 2 of CRPD provides a definition similar to the above. The Declaration of Principles on Equality identifies three main behaviours which fall within the category of discrimination which should be covered by any protection of the right to non-discrimination. These are set out in Principle 5 as follows:

*Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.*

*Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

*Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of*

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599 See above, note 571, Article 1.

600 See above, note 575, Para 7-8.

*creating an intimidating, hostile, degrading, humiliating or offensive environment.*<sup>601</sup>

The absence of a legal definition of discrimination has led to interpretation by the courts, which is often at odds with the internationally well-established legal definitions of discrimination. For example, the decision in *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*, discussed below, illustrates that the courts have, in some cases, fundamentally misunderstood concepts of inequality and discrimination against women. This decision highlights the limits to the protection from discrimination offered by Article 8(2) of the Federal Constitution. Beatrice Fernandez was a stewardess working for the national airline carrier – Malaysia Airlines System. In accordance with the provisions of the 1988 collective agreement at Malaysia Airlines System, Beatrice Fernandez’s employment was terminated after she refused to resign on becoming pregnant. She filed a complaint in 1991, seeking a declaration that the provisions of the 1988 collective agreement which required a female stewardess to resign on becoming pregnant or face dismissal were unlawful. The High Court dismissed her application in 1996, and her appeal to the Court of Appeal was dismissed in October 2004. The Court of Appeal had rejected Ms Fernandez’s complaints in respect of a collective agreement which provided that a female air stewardess must resign on becoming pregnant or face dismissal.<sup>602</sup> In refusing Ms Fernandez’s application for leave to appeal the Federal Court held, *inter alia*, that:

- (i) there was no definite special clause in the collective agreement that discriminated against the applicant for any reason which would justify judicial intervention;
- (ii) the equal protection afforded in Article 8(1) extended only to persons in the same class. All persons by nature, attainment, circumstances and the varying needs of different classes of persons often required separate treatment; and

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<sup>601</sup> See above, note 597, Principle 5, p. 6-7.

<sup>602</sup> *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2004] 4 CLJ 403 (Court of Appeal).

(iii) unless and until the Employment Act 1955 was amended to expressly prohibit any term and condition of employment that required flight stewardesses to resign upon becoming pregnant, such clauses were subject to the Contracts Act 1950 and continue to be valid and enforceable.<sup>603</sup>

The Employment (Amendment) Act 2012 did not amend the Employment Act 1955 in a way that would explicitly prohibit discrimination on the ground of pregnancy.<sup>604</sup>

The reasoning applied by the Federal Court is contrary to the principle of substantive equality entrenched in CEDAW and in interpretations of the right to non-discrimination elsewhere in international law. The definition of discrimination found in CEDAW focuses on differential treatment, detriment and disadvantage as the key to understanding whether a provision is discriminatory. Had the Court in *Fernandez* focused on determining whether Ms Fernandez had been subjected to detriment and disadvantage, as set out in a definition of discrimination within the Federal Constitution, they could not have failed to find that she had experienced discrimination.

It is recommended that Article 8(2) is reviewed and amended to include a definition of discrimination and to expand the scope of the protection. This would bring it in line with the requirements of international law and would help to prevent erroneous interpretations of discrimination by the courts.

Fourthly, the protection from discrimination set out in Article 8(2) has a very limited scope in terms of the areas of life to which it applies. Article 8(2) prohibits discrimination:

- (i) in any law;
- (ii) in the appointment to any office or employment under a public authority; or
- (iii) in the administration of any law relating to: (a) the acquisition, holding

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603 *Beatrice Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681, Para 1.3 of "Articles 1-4: Definition of Discrimination, Law, Policy and Measures to Implement the Convention".

604 Employment (Amendment) Act 2012.

or disposition of property; or (b) the establishing or carrying on of any trade, business, profession, vocation or employment.

An analysis of Malaysia's obligations under CEDAW demonstrates that the prohibition of discrimination in relation to women, and therefore arguably across all protected grounds, should be more extensive than the protection provided in Article 8(2) of the Constitution. Article 2 of CEDAW requires that states parties should "refrain from engaging in any act or practice of discrimination against women and (...) ensure that public authorities and institutions shall act in conformity with this obligation" and should "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". It is clear that the prohibition of discrimination should apply beyond the public sector. Further, Article 3 of CEDAW states that:

*States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*<sup>605</sup>

This broad approach to the scope of the rights to equality and non-discrimination is reflected in the Declaration of Principles on Equality, which states at Principle 8 that "[t]he right to equality applies in all areas of activity regulated by law" and at Principle 11(g) that states must take "all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation".

In the above *Fernandez* case, the reasons of the Court of Appeal to dismiss the complaint were, among others:

- (i) Constitutional remedies under Article 8(2) only protect individuals from violations of rights by state or public authorities. Malaysia Airlines was not deemed to be a public authority.
- (ii) Although Article 8 provides for equality before the law, it did not apply in this case because a collective agreement was not considered to be "law".

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<sup>605</sup> See above, note 571, Article 3.

Ms Fernandez sought leave to appeal to the Federal Court but this was dismissed in May 2005. In refusing to grant leave, the Federal Court upheld the decision of the Court of Appeal.<sup>606</sup>

Article 8(5) of the Federal Constitution sets out a list of exclusions from the protections of the rights to equality and non-discrimination set out in Articles 8(1) and (2). It states as follows:

*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;<sup>607</sup>*

*(f) any provision restricting enlistment in the Malay Regiment to Malays.<sup>608</sup>*

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606 See above, note 603.

607 The day on which Malaysia was granted independence from British rule.

608 Federal Constitution of Malaysia, above note 586, Article 8(5).



It is generally accepted in international law that there may be some permitted exceptions to the rights to equality and non-discrimination. Principle 5 of the Declaration of Principles on Equality provides, for example, that “[d]irect discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria” and indirect discrimination will not be deemed to have occurred where the “provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.<sup>609</sup> However, in order to be justified, exceptions to the principle of equality must be narrowly tailored and their application must be appropriate in individual circumstances.

The broad exclusion of “personal law” from the prohibition on discrimination provided by Article 8(5)(a) cannot be justified. This blanket exception, which, as has been shown above in Part 2, has negative implications for the rights of women and children, is not a proportionate means of achieving Malaysia’s legitimate objectives. This position is supported by the CEDAW Committee’s view, as expressed in its Concluding Observations in relation to Malaysia which states that Malaysia’s reservation in relation to Article 16 of the Convention is contrary to the object and purpose of the Convention.<sup>610</sup> The CEDAW Committee has often raised concerns about provisions which have the effect that “non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession”.<sup>611</sup>

The exceptions under Article 8(5)(b) and 8(5)(d) relating to religion and residence requirements in respect of local elections may be justifiable, provided they comply with strict criteria. The ILO Discrimination (Employment and Occupation) Convention 1958 sets out the notion of “genuine occupational requirements”. It states that:

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609 See above, note 597, Principle 5, p. 7.

610 See above, note 575, Para 10.

611 See, for example, Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women on Kenya*, UN Doc. ICEDAW/C/KEN/CO/6, 10 August 2007, Para 11.

*Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof should not be deemed to be discrimination.*<sup>612</sup>

To the extent that it is an inherent requirement of employment positions relating to religious institutions that the person fulfilling the role should be a member of that religion, the exception under Article 8(5)(b) would be justified. Further, to require an individual taking political office within a State to be resident in that State is open to justification.

The exception in Article 8(5)(c) relating to aboriginal people is intended to make clear that “positive action” in favour of Malays should not be considered to conflict with the right to equality. Principle 3 of the Declaration of Principles on Equality defines positive action as including “a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups” and makes clear that positive action “is a necessary element within the right to equality”. However, in order to be a legitimate form of “positive action”, such measures must comply with strict criteria. The legitimacy of Article 8(5)(c) as well as Article 153 of the Federal Constitution, which contains the positive action provisions themselves, are discussed further below.

Article 8(5)(e) prevents Article 8 from having retrospective effect in relation to laws in place before Merdeka Day, thus excluding a broad range of unspecified laws and possibly custom from the remit of the Article 8 protection. Such an exclusion is unlikely to be justifiable as it is difficult to think of a legitimate aim which the exclusion is pursuing in a proportionate way.

In respect to Article 8(5)(f), while restricting registration to the national army on the basis of nationality, namely to citizens of a state, may be deemed justifiable on the basis of requirements of loyalty and commitment, a restriction which is based on ethnicity – such as that set out in Article 8(5)(f) – and thus excludes some citizens cannot be justified in this way.

It is recommended that Article 8 be amended to include provisions permit-

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<sup>612</sup> International Labour Organization, Discrimination (Employment and Occupation) Convention, C111, adopted 25 June 1958, entered into force 15 June 1960, Article 1(2).

ting “positive action” to take place in specifically defined circumstances, and permitting exceptions to the prohibition of discrimination in accordance with more strictly defined criteria. The list of exceptions in Article 8(5) should therefore be removed, on the basis that they will continue to apply provided they meet the requirements for either positive action or permitted exceptions.

### 3.2.1.2 Article 12 of the Federal Constitution

In view of the fact that the scope of protection offered by Article 8 of the Federal Constitution is not sufficiently extensive, it is notable that Article 12 serves to expand the protection from discrimination, in relation to certain protected grounds, to the area of education.

Article 12(1) states 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 educational institution maintained by a 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).<sup>613</sup>*

Only citizens benefit from the prohibition of discrimination in Article 12(1). The Committee on the Rights of the Child, in its 2007 concluding observations on Malaysia, noted “with concern that non-citizen children have to pay a school fee and that they are accepted in schools only if they have adequate

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613 Federal Constitution of Malaysia, above note 586, Article 12(1). Implementing legislation in Regulation 5 of the First Schedule of the Universities and University Colleges Act 1971 requires that, subject to Article 153, membership of the universities, whether as an officer, teacher or student shall be open to all persons irrespective of sex, race, religion, nationality or class.

documents and if places are available”.<sup>614</sup> The personal scope of the right established by Article 12(1) should be expanded to include both citizens and non-citizens.

It should be noted that the stipulated grounds of non-discrimination are not the same as those set out in Article 8(2), as the list does not include gender or disability. It is therefore recommended that, at the very least, amendments should be made to Article 12(1) to reflect Malaysia’s obligations under both CEDAW and CRPD by including “gender” and “disability” as prohibited grounds of discrimination. Both CEDAW and CRPD include provisions regarding equal access to education. Furthermore, if Malaysia is to comply with current international equality standards, the list of protected grounds should be extended as set out in Principle 5 of the Declaration of Principles on Equality.<sup>615</sup>

Although disability is not a prohibited ground of discrimination under Article 12, the right of disabled children to access education was recognised in the Malaysian courts, even prior to the enactment of the Persons with Disabilities Act 2008. In the *Jakob Renner* case, the court issued an injunction to restrain the school from excluding a child with moderate spastic diplegia from attending school. Justice Low Hop Bing stated as follows:

*In my view, the principle is that where the overriding educational needs of children were likely to be threatened, this would necessitate the tilting of the balance of justice in favour of providing continuance of education for the affected children. This is particularly so in Malaysia which is already steadily moving towards a regional centre for educational excellence and is indeed a role model to the developing countries of the world (...) I agree with the submission advanced for the plaintiffs that to deny the plaintiff’s education because he is physically handicapped is undoubtedly running against the strong current of providing education to the younger generation, especially as we are moving towards the new millennium. A wheel chair bound child should not, ipso facto, be denied his basic rights to*

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614 See above, note 577, Para 74.

615 See above, note 597, Principle 5, p. 6.

*and needs for education. It is not out of place and indeed it is so often illustrated as a universally accepted example that one of the greatest living scientists of our age Professor Stephen Hawking owed his origin to the exercise of his basic rights to and the need for education. This has made it possible for him to occupy the Newton Chair as Professor of Mathematics at the University of Cambridge.*<sup>616</sup>

With regard to the impact of a child's religion on their education, Article 12(2) states that:

*Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.*

Article 2(b) of the UNESCO Convention against Discrimination in Education 1960 states that the following shall not constitute discrimination:

*The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.*<sup>617</sup>

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<sup>616</sup> *Jakob Renner v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur* [2000] 3 CLJ 569.

<sup>617</sup> United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education, 429 U.N.T.S. 93, 1960, Article 2(b).

It is clear, however, that the provision by the state of preferential treatment in the form of establishing and maintaining Islamic educational institutions is contrary to Article 3(d) of the UNESCO Convention which states that, in order to eliminate discrimination, states should not “allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group”.<sup>618</sup> The specific provision in Article 12(2) for the establishment and maintenance of Islamic institutions and for the teaching of Islam directly discriminates against organisations or individuals seeking to establish non-Muslim institutions by enabling the state to restrict its support to only Islamic institutions and teaching. It is highly likely that this will also result in discrimination against children on the grounds of religion, by impacting the availability of non-Muslim schools and teaching.

Further, this is likely to result in discrimination against children on the basis of ethnicity. Under the Federal Constitution, ethnic Malays are Muslims by definition:

*“Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and –*

*(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or*

*(b) is the issue of such a person.*<sup>619</sup>

Accordingly, children of Chinese, Indian and other ethnic groups are much more likely to be non-Muslims as compared to the Malays. This means they are likely to be exposed to indirect discrimination under Article 12(2).

For the same reason, beyond the field of education, any legislation or policy that privileges Muslims in Malaysia constitutes indirect racial discrimination as well as direct religious discrimination.

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618 Ibid., Article 3(d).

619 Federal Constitution of Malaysia, above note 586, Article 160.

It has been pointed out that the constitutional definition of “Malay” is defined in a liberal, broad and “non-ethnic” way, as “nowhere is it prescribed that a Malay must be of Malay ethnic stock”.<sup>620</sup> But this does not change the position with a view of qualifying the inadequacy of affirmative action in Malaysia as “racial discrimination”, as it is well established that the terms “racial” and “ethnic” in international human rights law have no essentialist biological or natural meaning and that “race” and “ethnicity” are socio-historical constructs and not phenomena of nature.

### 3.2.1.3 Affirmative Action under the Federal Constitution

Article 153 of the Constitution requires the King of Malaysia to “safeguard the special position of the Malays (as defined in Article 160) and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities”. He is also required to reserve for these groups<sup>621</sup> such proportion that he deems reasonable of:

*(iv) positions in the public service (other than the public service of a State);*

*(v) scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government; and*

*(vi) any permit or license for the operation of any trade or business as required by federal law, subject to the provisions of that law.*<sup>622</sup>

Priority in admission to the Malayan civil service, the grant of educational scholarships, business permits and licences and Malay reservation land were

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620 Faruqi, S.S., “Affirmative Action Policies and the Constitution”, *Kajian Malaysia*, Vol. XXI, Nos. 1 & 2, 2003, p. 44.

621 These groups are also described as “Bumiputera”, although the latter term has no legal meaning or definition in any law, and is a purely political term used for brevity. It is also in this popular sense that it is used to replace the legal term “Malays or natives of Sabah or Sarawak” throughout this report.

622 Federal Constitution of Malaysia, above note 586, Article 153(2).

already part of the colonial legal system before independence, and have been understood as “traditional elements” of the Malaysian Constitution.<sup>623</sup>

Article 153 is supplemented by Article 89, relating to “Malay reservation” lands, which are lands reserved for alienation to Malays or to natives of the state in which they lie.<sup>624</sup> Such lands cannot be alienated except by a state law that has been approved by qualified majorities in both the federal parliament and the state assembly. Article 90 of the Constitution further confers special protection on customary lands in Negeri Sembilan and Malacca and Malay holdings in Terengganu.

Further privileges for Malays are also created by a number of state constitutions. For example, all states’ constitutions except those of Malacca, Penang, Sabah and Sarawak require the Menteri Besar Chief Minister) to be a Malay.

Since its enactment, Article 153 has been extended to cover places in post-secondary education.<sup>625</sup> But it remains unclear what proportion of places in higher education institutions can be allocated on an ethnic basis and whether it is lawful to have a programme or an institution which caters exclusively to one ethnic group. It also remains unclear whether quotas apply at a micro or macro level, e.g. to specific courses of study, to a whole university, or to all universities taken together.<sup>626</sup>

Following the race riots of May 1969, in 1971, Article 153 of the Constitution was implemented by the government in the form of the explicit and wide-ranging pro-Bumiputera policies in the New Economic Policy (NEP). The Policy broadened the scope of preferential treatment for the Bumiputera even further. The NEP was intended to be a temporary measure “to reduce and

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623 bin Abas, M.S., “Traditional Elements of the Malaysian Constitution”, in Trindade, F.A. and Lee, H.P. (eds.), *The Constitution of Malaysia – Further Perspectives and Developments*, 1986, p. 1.

624 Federal Constitution of Malaysia, above note 586, Article 89(6).

625 Ibid., Article 153(8A).

626 Sinnadurai, V., “Rights in Respect of Education under the Malaysian Constitution”, in Trindade, F.A. and Lee, H.P. (eds.), above note 623, pp. 49-50.



eventually eradicate poverty” and to restructure “Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function”.<sup>627</sup> The key elements of the NEP were:

- Quotas for Bumiputera in admission to state universities and premier residential schools;
- Quotas for Bumiputera in the granting of scholarships;
- Quotas for Bumiputera in public employment positions;
- A statutory share of 30% of corporate equity for Bumiputera;
- Bumiputera employment quotas in the private sector aiming to ensure an increase in the number of Bumiputera businessmen;
- Bumiputera quotas in the tendering of government contracts and business licences;
- Preferential treatment of Bumiputera in the allocation of public low-cost housing;
- Bumiputera discounts for the purchase of residential properties.

In 1990, the NEP was replaced by the National Development Policy. While the two-pronged objectives of poverty eradication and economic restructuring remained, the 1990s saw the discontinuation of some pro-Bumiputera measures through the liberalisation of certain investment and education policies, for example in foreign equity ownership. Today, preferential treatment of Bumiputera continues in land ownership, employment, business permits and licences and education.

The privileges established for Malays and natives of Sabah and Sarawak are entrenched in the law in such a way as to make repeal difficult. For example, according to Shad Saleem Faruqi: (i) any Bill undermining Malay privileges would be caught by the law of sedition; (ii) under Article 159 of the Constitution, any amendment to Article 153 would require a special two-thirds majority of the total membership of each House of Parliament plus the consent of the Conference of Rulers; (iii) any change in policy affecting administrative action under Article 153 would require the government to consult with the

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<sup>627</sup> Government of Malaysia, *Second National Plan (1971–75)*, 1971.

Conference of Rulers (Article 38(5)); and (iv) Article 10(4) of the Constitution permits Parliament to prohibit the questioning of any matter, right, status, position or privilege protected by Article 153.<sup>628</sup>

Constitutional lawyers have always stressed that Article 153 does not give unrestricted freedom to the authorities to prefer Malays and natives of Sabah and Sarawak over other Malaysians. The major limitations to this freedom are set out below.

Firstly, affirmative action is limited within the areas explicitly referred to in the Federal (and State) Constitutions. At the federal level, these areas are: positions in the federal public service; scholarships, educational and training privileges or facilities accorded by the Federal Government; permits or licences under federal law; places in institutions of higher learning; and the Malay Regiment. As Faruqi notes, “[i]f the ethnic factor is taken note of in other areas that may well be outside Article 153 and in violation of Article 8’s promise of equality before the law.”<sup>629</sup>

Secondly, retroactive infringement of rights is prohibited: Article 153 clauses (4), (7) and (8) expressly state that in safeguarding the special position of Malays and natives, no person can be deprived of any public office, scholarship, educational or training privilege, special facility or of any right, privilege, permit or licence (including the renewal of permit or licence) that is already held by him/her. Article 153 has not intended redistribution of wealth and rights but has rather been based on the assumption of an expanding “economic cake”.<sup>630</sup> However, Article 153 has been interpreted by courts as not applying to cases of contractual rights. For example, the revocation of or refusal to renew the lease and the relevant permits to operate a hotel and its ancillary facilities does not offend Article 153 clauses (7) and (8).<sup>631</sup>

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628 See above, note 620, p. 35.

629 Ibid., pp. 36-37.

630 Ibid., p. 39.

631 *Station Hotels Bhd v Malayan Railway Administration* [1977] 1 MLJ 112 (Federal Court), p. 117.

Thirdly, Article 153(9) states that nothing in Article 153 permits Parliament to restrict business or trade solely to Malays or natives.

Fourthly, Article 153 is limited by Article 136 of the Federal Constitution, which provides protection from differential treatment within state employment on the ground of race:

*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.*<sup>632</sup>

Article 153(5) states that this Article does not override Article 136. Tun Suffian Hashim has interpreted the relationship between Articles 136 and 153 in the sense that quotas and reservations are permitted by Article 153 at entry point, but after that point ethnicity must give way to merit because of the requirement of Article 136.<sup>633</sup> However, Faruqi explains, some authors have argued that “entry point” need not mean the initial entry point at the time of joining a service but may also refer to entry points at all promotional levels. On this basis, reservations and quotas may be constructed at all rungs of the ladder. Such an interpretation deprives Article 136 of all meaning.<sup>634</sup>

Fifthly, Article 89(2) of the Federal Constitution requires that when any land is reserved for Malays, an equal area shall be made available for general alienation. Article 89(4) forbids non-Malay held land from being declared a Malay reserve. Faruqi comments: “Clearly, ameliorative measures for Malays and natives are not meant to extinguish vested rights and interests of the non-Malays.”<sup>635</sup>

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632 Federal Constitution of Malaysia, above note 586, Article 136.

633 Hashim, T.S., *An Introduction to the Constitution of Malaysia*, 2<sup>nd</sup> ed., 1976, p. 140.

634 See above, note 620, p. 39.

635 Ibid.

Affirmative/positive action is an important tool for accelerating progress towards substantive equality for particular groups. Where properly designed and implemented, it is entirely consistent with the right to be free from discrimination, and indeed required by the right to equality.<sup>636</sup> Article 2 of the ICERD states as follows:

*States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.*<sup>637</sup>

However, in order to be compatible with the right to equality, positive action must meet a number of conditions. The Committee on the Elimination of Racial Discrimination (CERD) states that any such measures must be:

*[A]ppropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.*<sup>638</sup>

Positive action must be undertaken for the sole purpose of ensuring the equal enjoyment of human rights and fundamental freedoms and must not lead to the maintenance of separate rights for different racial groups.<sup>639</sup> They shall “in no way entail as a consequence the maintenance of unequal or separate standards”.<sup>640</sup>

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636 See above, note 597, Principle 3, p. 5.

637 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Art. 2(2).

638 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, CERD/C/GC/32, August 2009, Para 16.

639 Ibid., Paras 21 and 26.

640 See above, note 637, Article 4.

Article 153 and Article 89 of the Constitution are intended to protect the Malays and indigenous persons of Sabah and Sarawak from the disadvantage which they were perceived to be experiencing as a result of Chinese advancement after independence. However, the privileges accorded to certain racial groups in the Constitution do not meet a number of the requirements set out by the treaty bodies in order for positive action to be legitimate. The proportionality of the measures taken under Article 153 is far from clear. The power of the Yang Di Pertuan Agong to reserve such proportion of employment, business and educational opportunities as he deems reasonable is very broad, and the discretionary nature of the provision leaves it open to arbitrary application. Article 153 contains some checks and balances,<sup>641</sup> but these are weak and ambiguous in a number of ways and have often been overlooked. For example, Article 153(9) provides that, “[n]othing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak”. However, it is well-known in Malaysia that “Class F” construction licences (which commission projects worth the smallest sums – up to RM 200,000) are only issued to Bumiputera contractors.<sup>642</sup> In order to be legitimate, positive action measures must not only be proportionate in their design, but also in their implementation.

While the Reid Commission that drafted the Constitution recommended that the provision on the special position of the Malays be reviewed after 15 years, Articles 153 and 89 have been enshrined in the Constitution as a permanent privilege enjoyed by Malays and indigenous persons of Sabah and Sarawak. They appear, therefore, to maintain unequal or separate standards, in contravention of the prohibition of discrimination.

Further, there is dispute as to whether the objectives of the “positive action” in Article 153 and Article 89 have been achieved. Government statistics suggest that the Malay majority in Malaysia remains in a disadvantaged position, whilst

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641 See for example Articles 153(4), 153(5), 153(7), 153(8) and 153(9) of the Federal Constitution of Malaysia, above note 586.

642 See Research for Social Advancement (REFSA), *Only 0.2% Class F contractors Managed to upgrade to a higher class*, Table 2, available at: <http://refsa.org/relevant-number/lessthan1percent-classcontractors-upgraded/>.

other studies indicate that the objectives of the NEP were met many years ago. To be legitimate, positive action, or affirmative action measures must be “designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned”.<sup>643</sup>

In sum, failing to meet the set of criteria defining positive/affirmative action, the privileges contained in Articles 153 and 89 are preferences within the meaning of “racial discrimination”, as defined in the ICERD:

*In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*<sup>644</sup>

In early 2010, Prime Minister Najib introduced his New Economic Model (NEM). Acknowledging growing intra-ethnic disparities, he said public spending on poverty should be needs-based, rather than ethnically oriented.<sup>645</sup> However, it remains to be seen whether the BN-controlled Federal Government will introduce significant reforms to ensure greater substantive equality in practice, and whether the problematic constitutional provisions will be amended.

## **Summary**

The Constitution of Malaysia contains two main provisions which go some way to protecting the rights to equality and non-discrimination in Malaysia. Articles 8 forms the cornerstone of the Constitutional protection of the rights to equality and non-discrimination, with Article 8(1) guaranteeing equality before the law and equal protection of the law, and with Article 8(2) prohibit-

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643 See above, note 638, Para 16.

644 See above, note 637, Article 1.

645 Gooch, L., “Malaysia Outlines New Growth Strategy”, *The New York Times*, 30 March 2010.

ing discrimination against citizens on the grounds of religion, race, descent, place of birth or gender. Article 12 expands the protection from discrimination in relation to certain protected grounds to the area of education. Article 136 of the Constitution provides protection from differential treatment within state employment on the ground of race, while Articles 89 and 153 create preferences on the ground of race which, failing to meet the criteria for positive action, amount to racial discrimination.

The constitutional protections of the rights to equality and non-discrimination are severely limited. It is therefore recommended that amendments are necessary in order for Malaysia to comply fully with its international human rights obligations. Such amendments include:

- (i) ensuring that both citizens and non-citizens benefit from the protections of the rights to equality and non-discrimination;
- (ii) broadening the list of grounds of discrimination found in Articles 8 and 12 so as to include all grounds referenced in Principle 5 of the Declaration of Principles on Equality, and allow for a test for the inclusion of additional grounds;
- (iii) providing a clearer definition of what behaviours are prohibited as discrimination;
- (iv) extending the protection of the rights to equality and non-discrimination to all areas of activity regulated by law;
- (v) ensuring that the rights to equality and non-discrimination are enjoyed in both the public and private sector;
- (vi) removing the exclusion of personal laws from the prohibition of discrimination;
- (vii) ensuring that any provisions permitting “positive action” meet criteria established in international law and best practice, such as time limits and proportionality;
- (viii) ensuring that exceptions to the prohibition of discrimination are only permitted to the extent that they accord with strictly defined criteria; and

(ix) removing the provision by the state of preferential treatment in the form of establishing and maintaining Islamic educational institutions.

It is further recommended that Malaysia should also consider strengthening the existing constitutional protections of the rights to equality and non-discrimination through the enactment of comprehensive equality legislation.

### **3.2.2 Specific Equality and Anti-discrimination Legislation**

Malaysia lacks a single comprehensive anti-discrimination law or single equality enforcement body. Given the limitations of the constitutional equality protections, the lack of legislation prohibiting all forms of discrimination by both the state and private actors represents a failure to give effect to the principles of equality embedded in CEDAW, CRC and CRPD, as well as international customary law. The only specific equality act as of July 2012 is the Persons with Disabilities Act 2008, which seeks to implement obligations under the CRPD. Although it is not without its shortcomings, particularly in relation to enforcement, it represents good progress in addressing the preceding lack of legal protection from discrimination on the ground of disability. Similar legislation on other grounds does not exist.

#### **3.2.2.1 Persons with Disabilities Act 2008**

In recognition of its obligations under CRPD, Malaysia enacted the Persons with Disabilities Act 2008 which states in its preamble that “persons with disabilities are entitled to equal opportunity and protection and assistance in all circumstances and subject only to such limitations, restrictions and the protection of rights as provided by the Federal Constitution”. The Act does not, however, include operative provisions setting out the rights to equality and non-discrimination of persons with disabilities, as is required under Article 5(2) of CRPD. Further, it does not include any general requirement to “ensure that reasonable accommodation is provided” but rather references the term only in relation to the right of persons with disabilities to education in Section 28.

The Persons with Disabilities Act 2008 does, however, incorporate some of Malaysia’s obligations under CRPD as follows:

(1) Under Part II, the Act establishes a National Council for Persons with Disabilities with a wide range of responsibilities for representing the interests



of persons with disabilities vis à vis the government and its activities.<sup>646</sup> This represents compliance with Malaysia's obligations under Article 33(1) of CRPD which states that states shall "designate one or more focal points within government for matters relating to the implementation of the present Convention".

(2) In Part III, the Act establishes a Registrar General and provides for the registration of persons with disabilities. Article 31 of CRPD requires states "to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention". Whilst the creation of a register of persons with disabilities is a basis for generating the relevant statistical information, there is a broader range of statistical data which would be required in order to fully inform the policies necessary to give effect to the obligations under CRPD and this is not provided for under Part III of the Act.

(3) Sections 26 and 27 provide that persons with disabilities shall have the right to access to and use of public facilities and buildings, and public transport facilities. These provisions also require the government to "give appropriate consideration and take necessary measures to ensure that [such facilities] conform to universal design in order to facilitate their access and use by persons with disabilities" (section 26(2)). These requirements fall short of the obligations set out in Article 9(2) of CRPD which refers to specific measures which are required in order to ensure accessibility for persons with disabilities, including the provision of minimum standards and guidelines, the imposition of obligations upon private entities regarding accessibility, the provision of training for stakeholders and public signage in Braille.<sup>647</sup>

(4) Section 28 provides that "[p]ersons with disabilities shall not be excluded from the general education system on the basis of disabilities", and that "reasonable accommodation" of the "requirement of persons and children with disabilities" must be provided. Section 28 goes a long way towards incorporating Malaysia's obligations under Article 24 of CRPD, covering "pre-school, primary, secondary and higher education" and "vocational training and life-long learning".

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646 Persons with Disabilities Act 2008, sections 3 and 9.

647 Convention on the Rights of Persons with Disabilities, above note 578, Articles 9(2)(a) - 9(2)(d).

(5) Section 29(1) provides that “[p]ersons with disabilities shall have the right to access to employment on an equal basis with persons without disabilities”. Whilst there is no prohibition of discrimination in employment on the ground of disability, Section 29(2) does require employers to “protect the rights of persons with disabilities, on equal basis with persons without disabilities” in terms of work conditions, equal opportunities, remuneration, protection from harassment and the redress of grievances. It is not clear, however, whether the rights of a job applicant would be protected under this provision, or whether this simply applies to employees. Section 29 falls short of the requirements under Article 27 of CRPD, given that it makes no reference, for example, to the requirement for employers to ensure “reasonable accommodation” in the work place as required by Article 27(1)(i), nor the that persons with disabilities are not required to engage in “forced or compulsory labour” as required by Article 27(2).

(6) Section 31 provides that “[p]ersons with disabilities shall have the right to access to cultural life on an equal basis with persons without disabilities” and Section 32(1) requires that “[p]ersons with disabilities shall have the right to participate in recreational, leisure and sporting activities on an equal basis with persons without disabilities”. Whilst these provisions go a long way to implementing Malaysia’s obligations under Article 30 of CRPD, it is notable that in Section 31, there is no obligation on the government or any other entity to “take all appropriate measures” to ensure that persons with disabilities are able to enjoy the rights confirmed within the provision.

(7) Section 33 relates to “habilitation and rehabilitation”, in recognition of Malaysia’s obligations under Article 26 of CRPD. This provision places significant responsibility on “the private healthcare service provider and non-governmental organisations” for the obligations assumed by the state under CRPD.

(8) Section 35 provides that “[p]ersons with disabilities shall have the right to the enjoyment of health on an equal basis with persons without disabilities” in recognition of Malaysia’s obligations under Article 25 of CRPD. This provision ensures only “access to health services”, rather than “the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability” which is set out in Article 25 of CRPD. Section 35 does not elaborate on the “right to the enjoyment of health” to the full extent required by Article 25 of CRPD, failing therefore to acknowledge Malaysia’s obligations to (i) provide free or affordable health care in the area of sexual

and reproductive health as required by Article 25(a); (ii) provide health services as close as possible to people's own communities including in rural areas as required by Article 25(c); (iii) prohibit discrimination against persons with disabilities in the provision of health insurance which, when provided, should be provided in a reasonable and fair manner, as required by Article 25(e); and (iv) prevent discriminatory denial of health care or health services or food and fluids, as required by Article 25(f) of CRPD.<sup>648</sup>

In addition to the Persons with Disabilities Act, there is a public sector regulation (Service Circular Letter 3/2008) which requires 1% of all public-sector jobs to be reserved for persons with disabilities. However, in 2011 this quota, which has also been extended to the private sector, had not yet been adequately filled.<sup>649</sup> Further, a code of practice serves as a guideline for all government agencies, employers, employee associations, employees and others to place suitable persons with disabilities in private sector jobs.<sup>650</sup>

While the Persons with Disabilities Act 2008 does go a significant way to incorporating Malaysia's obligations under CRPD into domestic law, there are many provisions in CRPD in relation to which the Persons with Disabilities Act 2008 is silent. Most notably, gaps include:

- (i) An operative provision prohibiting discrimination on the ground of disability – required by Article 5 of CRPD;
- (ii) Provisions relating to the specific needs of women and children with disabilities – required by Articles 6 and 7 of CRPD;
- (iii) Right to life – required by Article 10 of CRPD;
- (iv) Equal recognition before the law – required by Article 12 of CRPD;
- (v) Equal access to justice – required by Article 13 of CRPD;
- (vi) Liberty and security of person – required by Article 14 of CRPD;

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648 Ibid., Articles 25(a), 25(c), 25(e) and 25(f).

649 United States Department of State, *2011 Human Rights Report: Malaysia*, p. 42.

650 Ibid.

- (vii) Freedom from torture or cruel, inhuman or degrading treatment or punishment – required by Article 15 of CRPD;
- (viii) Freedom from exploitation, violence and abuse – required by Article 16 of CRPD;
- (ix) Protection of the integrity of the person – required by Article 17 of CRPD;
- (x) Liberty of movement and nationality – required by Article 18 of CRPD;
- (xi) The equal right to live independently and be included in the community – required by Article 19 of CRPD;
- (xii) Freedom of expression and opinion – required by Article 21 of CRPD;
- (xiii) Respect for privacy – required by Article 22 of CRPD;
- (xiv) Respect for home and family – required by Article 23 of CRPD; and
- (xv) Participation in political and public life – required by Article 29 of CRPD.

One of the most significant criticisms of the Persons with Disabilities Act 2008 is that it provides no mechanism through which persons with disabilities are able to enforce the rights established under the Act. It includes no complaints mechanism, nor has it any punitive or compensatory provisions for any infringements. This gives the impression that the Act is a policy document, rather than an enforceable piece of legislation, and renders the rights in the Act illusory rather than real and effective.

In January 2009, a public forum was organised by the Bar Council entitled “Persons with Disabilities Act 2008 – What Next?”<sup>651</sup> Following this, a series of further roundtable discussions were held, at the request of the participants in the public forum, in September and December 2010, on legislative shortcomings. Participants expressed concern that there are no penalties for people infringing the Persons with Disabilities Act.<sup>652</sup> Other issues discussed at the roundtables included the need to encourage the Malaysian Government

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651 Malaysian Bar Council, *Public Forum: Persons with Disabilities Act 2008 – What Next?*, 19 January 2009.

652 Malaysian Bar Council, *Roundtable Discussion on Persons with Disabilities Act – Right to Education*, 5 October 2009.

to sign and ratify the Optional Protocol of the CRPD; the desirability for the National Council for Persons with Disabilities to publish half-yearly progress reports; the need to improve monitoring and enforcement of the Uniform Building By-laws to provide for disabled persons' accessibility; the need for insurance companies to include cover for persons with disabilities, etc.

### ***Summary***

While Malaysia does not have a single comprehensive anti-discrimination law or equality enforcement body, the Persons with Disabilities Act 2008 represents a positive step towards the protection of the rights of persons with disabilities to equality and non-discrimination in domestic legislation. Regrettably, the Persons with Disabilities Act does not include operative provisions setting out the rights to equality and non-discrimination of persons with disabilities, but it does incorporate some of Malaysia's obligations under CRPD in a manner which arguably serves to overcome some elements of the disadvantage faced by persons with disabilities. In order for this Act to comply fully with Malaysia's obligations under the CRPD and to better protect the rights of persons with disabilities, it will require significant amendment. It is recommended that a thorough review of the Persons with Disabilities Act 2008 is carried out in order to bring it into line with Malaysia's obligations under CRPD. Further, the rights in the Act must be made enforceable, either through the civil courts, or through an enforcement mechanism designed for this specific purpose.

### **3.2.3 Non-discrimination Provisions in Other Legal Fields**

Legislation governing a number of different legal fields contains some protection for some groups vulnerable to discrimination. However, this protection is rarely rights based, and is limited, patchy and inconsistent. There is no prohibition of discrimination on any ground in legislation constituting the field of employment law, education law or health law in Malaysia. Protection from discrimination in these fields of law is thus possible only on the basis of the Constitution and international treaties. Overall, the normative framework is not sufficient to meet Malaysia's obligations under international human rights law.

#### **3.2.3.1 Criminal Law**

Rape is a form of "gender-based violence", which is defined in General Recommendation 19 of the CEDAW Committee as "violence that is directed against a

woman because she is a woman or that affects women disproportionately”.<sup>653</sup> In General Recommendation 19, the Committee stated that:

*States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.*<sup>654</sup>

Married women are not adequately protected from sexual violence including rape. The provisions of the **Malaysian Penal Code** regarding rape do not provide adequate protection for married women. While section 375 describes the unlawful acts constitutive of rape, it expressly provides for an exception applying to married women:

*Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in Malaysia as valid, is not rape.*<sup>655</sup>

The exception does not apply for separated couples under certain circumstances.<sup>656</sup> The Penal Code was amended in September 2007 by the Penal Code (Amendment) Act 2006 and Criminal Procedure Code (Amendment) Act 2006, to include Section 375A which states as follows:

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653 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38, 1992, Para 6.

654 Ibid., Para 24(b).

655 Penal Code, Incorporating All Amendments up to 1 January 2006, published by the Commissioner of Law Revision, 2006, section 375.

656 “*Explanation 1*—A woman—(a) living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or (b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section.

*Explanation 2*—A Muslim woman living separately from her husband during the period of ‘*iddah*, which shall be calculated in accordance with Hukum Syara’, shall be deemed not to be his wife for the purposes of this section.” (Ibid., section 375A. “*Iddah*” is the period a Muslim woman must observe after the death of her spouse or after a divorce, during which she may not marry another man.)

*Any man who during the subsistence of a valid marriage causes hurt or fear of death, or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years.*<sup>657</sup>

Despite this amendment, the exception to Section 375 remained. Therefore, this amendment does not constitute the criminalisation of marital rape as it is restricted to the causing of harm or fear of death by a husband in order to have sexual intercourse with his wife, rather than the recognition that any instance in which a man has sexual intercourse with his wife without her consent, irrespective of the causation of harm or fear of death, should fall within the definition of rape set out in Section 375 of the Penal Code. In its concluding comments, the CEDAW Committee requested that Malaysia “enact legislation criminalizing marital rape, defining such rape on the basis of lack of consent of the wife”.<sup>658</sup> It is also notable that the offence of rape is not gender neutral and therefore fails to provide any protection to male or transgender rape survivors.

Married women also lack protection in relation to other forms of domestic abuse. In certain types of divorce proceedings initiated by the wife (*fasakh* and *ta’liq*), the petitioner must produce eyewitnesses in order to prove misconduct on her husband’s behalf. This is unrealistic given that spousal abuse tends to occur in the privacy of the home. Further, Syariah-based criminal law regards the testimony given by family members or female witnesses as less valuable than that of other witnesses.

In a further limitation of protection from gender-based violence, the definition of rape excludes all sexual assault that does not involve penile penetration. For instance, it does not include penetration of the anus or vagina with other parts of the body or with objects. In September 2007, the Penal Code was amended to include Section 377CA (Sexual connection by object), but other forms of sexual assault are still not included. In a case from 2011, the Sessions Court acquitted a man of two counts of raping his step-niece after it

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<sup>657</sup> Ibid., section 375A.

<sup>658</sup> See above, note 575, Para 22.

could not establish that what had caused the victim's vaginal tears was penile penetration and not the use of a finger, as the man had claimed.<sup>659</sup>

Section 146A of the **Evidence Act 1950** sets out restrictions on evidence at rape trials. It states that "no evidence and no question in cross-examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any person other than the accused" but then sets out three exceptions relating to: (i) evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution; (ii) evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; and (iii) evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.<sup>660</sup> The main problem with this provision is that it has been used to justify arguments being made by the accused that the complainant did not protest or offer physical resistance to sexual intercourse, and judges have taken the absence of such evidence as determinative of consent being given. For instance, concerns have been expressed over a High Court case from 2009, in which a former Special Branch chief was acquitted of raping a woman with intellectual impairments because the Court ruled that the fact she continued to visit him after the rape had taken place did not match the conduct of someone who had just been raped.<sup>661</sup> In another recent case, a man who had been convicted of rape and sodomy won his appeal because the Court of Appeal found that the 17 year old girl could have called for help during her alleged confinement.<sup>662</sup>

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659 Mageswari, M., "Trader acquitted of raping step-niece", *The Star*, 24 March 2011.

660 Evidence Act 1950, section 146A.

661 Devaraj, P., "Concern over Rape Acquittal", Women's Centre for Change, 18 September 2009, available at: <http://www.wccpenang.org/media/archive/218/>.

662 Bernama, "Appeals court acquits man of rape, sodomy, wrongful confinement charges", *The Star*, 1 August 2012.



In addition, loopholes are found in Section 146A which allow the survivor's sexual history to be questioned, particularly in respect to the relationship between the survivor and the accused, and in respect to whether the survivor had intercourse with another during the time in question. A report by the All Women's Action Society has criticised such tactics which, whilst not breaching the Evidence Act requirements, still intend to cast doubt "on the 'morality' of the rape survivor in the hope of winning the case". Further, the All Women's Action Society has alleged that there is a practice of requiring a rape survivor to state her name, age and address in full view and hearing of the accused and the courtroom, thus allowing the accused to learn where she lives.<sup>663</sup> The provisions within the Evidence Act which do not prevent a survivor's sexual history from being questioned, and the practice of requiring a rape survivor to state her personal details in an open court room, demonstrate a failure to respect the integrity, dignity and safety of the survivor and, as such, are a violation of Malaysia's obligations under CEDAW. However, it should be noted that the procedural practice itself may have improved since this report. ERT has observed court proceedings in the course of the summer of 2012, in which witness testimonies in the Sessions Court (where rape cases are tried) usually involved the witness handing over their identification card to the judge before beginning their testimony, and confirming orally through an affirmative statement that their personal details are as stated on the identification card. Lawyers ERT has talked with have also confirmed that this is currently the usual practice.

With regard to Syariah, the evidential requirements relating to rape under Syariah procedure are so onerous and unrealistic that they fail to give "adequate protection" from rape to women, and they fail to "respect their integrity and dignity" as required by General Recommendation 19 of the CEDAW Committee. Section 41 of the Syariah Criminal Offences (Federal Territories) Act 1997 states that where rape is alleged without procuring four male witnesses or a confession (*iqrar*) from the accused person, the individual alleging the rape shall be guilty of an offence known as *qazaf*: false accusation of *zina* (i.e. of illicit intercourse) and potentially liable to

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663 All Women's Action Society (AWAM), *The Rape Report: An Overview of Rape in Malaysia*, 2002.

imprisonment for up to three years.<sup>664</sup> It should be noted, however, that apparently Deputy Public Prosecutors (since rape cases are prosecuted by the state and not filed by the victim) usually opt for a charge under the secular Penal Code, as the burden of proof is easier to discharge. There is no reliable information as to how often section 41 of the Syariah Criminal Offences (Federal Territories) Act has been applied, though some lawyers interviewed by ERT have stated that as far as they know the Syariah Criminal Offences Act is more commonly known to be utilised during and/or after raids by religious authorities.

Section 27 of the Syariah Criminal Offences (Federal Territories) Act prohibits khalwat, which is the offence of a man and woman being in close proximity when they are not married. Islamic law provisions which consider a Muslim girl to be an adult after her first menstruation complicate the prosecution of statutory rape. Such a girl may be charged with khalwat, even if she is under the age of 18 and her partner is an adult.<sup>665</sup>

The Evidence Act 1950 also contains provisions that allow persons with disabilities to be witnesses in court. Section 118 is accompanied by the following explanation:

*A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.*

Section 119 demonstrates compliance with “reasonable accommodation” requirements as follows:

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664 Section 41 of the Syariah Criminal Offences (Federal Territories) Act 1997 states: “Except in cases of *li’an*, any person who accuses another person of committing *zina* without procuring four male witnesses or an *iqrar* of the accused person in accordance with Islamic Law shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.” The first phrase – “except in cases of *li’an*” – means that if four witnesses cannot be procured, the accuser can swear a *li’an* oath that they are telling the truth (and that they would be condemned by Allah if they are not), and someone accused of *zina* can also swear an oath that they have not committed it.

665 United States Department of State, *2010 Human Rights Report: Malaysia*, 8 April 2011, p. 39.

*(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but the writing must be written and the signs made in open court.*

*(2) Evidence so given shall be deemed to be oral evidence.*<sup>666</sup>

The **Anti-Trafficking in Persons Act 2007**: (i) establishes the offence of trafficking in persons; (ii) provides support to victims of trafficking; and (iii) establishes a Council for Anti-Trafficking in Persons. This is a notably positive step in response to the concluding comment of the Committee on the Elimination of Discrimination against Women which in 2006 had expressed concern that Malaysia had not at that stage enacted legislation on trafficking.<sup>667</sup> This Act was amended by the **Anti-Trafficking in Persons (Amendment) Act 2010**. The latter, however, has been widely criticised by Human Rights Watch and others for a number of reasons, including:

(i) The definition of trafficking in the amended Act has been narrowed considerably and no longer complies with international law. The new definition limits the crime to those situations in which a person is exploited by means of “coercion”, defined as the use or threats of physical harm and “the abuse of the legal process.” This is inconsistent with the UN Trafficking Protocol, which states that trafficking includes not only cases of coercion, but also “of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”.<sup>668</sup>

(ii) While conflating the two different crimes of trafficking and smuggling, this Act excludes victims of smuggling from any protection or assistance guarantees unless the smuggled migrant is a trafficked person. Thus, the

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<sup>666</sup> See above, note 660, sections 118 and 119.

<sup>667</sup> See above, note 575, Para 23.

<sup>668</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, Article 3.

amended Act not only disregards the protection needs of smuggled persons, but allows law enforcement authorities to take measures unrelated to trafficking, such as to arbitrarily detain migrants, interrogate them about smuggling networks, and charge them with giving support to smugglers because they paid for their own journey.

(iii) The anti-smuggling amendments do not recognise the unique needs of refugees and asylum seekers. This omission, combined with Malaysia's non-participation in the 1951 UN Convention relating to the Status of Refugees, increasing the risk of arbitrary detention of refugees and their refoulement, in contravention of obligations under international law.<sup>669</sup>

The weaknesses of protection provided for by the anti-trafficking legislation are extremely relevant to equality: victims of trafficking and smuggling are among the most vulnerable people who are constantly at risk of discriminatory ill-treatment. Discrimination against such persons is more often than not dual or multiple, combining the grounds of gender, ethnicity, sexuality, disability, etc. with immigration status. The deplorable weaknesses in the protection regime are compounded by the inadequate enforcement resulting in the fact that trafficking and smuggling remain serious issues in Malaysia.

### 3.2.3.2 Family Law

Having acceded to CRC in February 1995, Malaysia took nearly seven years before passing and bringing into force the **Child Act 2001**. Unfortunately this legislation failed to incorporate many of the equality-related rights of children set out in CRC. This has been noted by the Committee on the Rights of the Child.<sup>670</sup> In particular, on the issue of respect for the views of the child, the Committee observed:

*Traditional perceptions of children as objects and as the “property” of parents and elders rather than as subjects of rights hinder their right to express their views and to participate in*

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669 Cf. Human Rights Watch, *Malaysia: Letter to the Prime Minister regarding amendments to the Anti-Trafficking in Persons Act*, 8 September 2010.

670 See above, note 577, Para 36.

*the family, schools and local communities. It also notes with concern that in legal and administrative proceedings it is in practice left to the discretion of the judge to decide whether the child is heard. The Committee regrets that the Child Act 2001 (Act 611) does not contain a specific provision on children's participation.*<sup>671</sup>

The Act does, however, seek to protect children from various forms of violence, ill-treatment and abuse. Chapter 3 of Part V proscribes "Offences in relation to the Health and Welfare of Children", including ill-treatment, neglect, abandonment or exposure of children,<sup>672</sup> using a child for begging,<sup>673</sup> and leaving a child without reasonable supervision.<sup>674</sup> Part VIII establishes offences relating to the trafficking in and abduction of children.<sup>675</sup> Chapter 2 of Part IX makes special provision for the detention of children in specified facilities.<sup>676</sup> The Child Act 2001 also provides protection, through problematic detention in a refuge, for children "in need of protection and rehabilitation", and a child is in such a need when it:

*(a) is being induced to perform any sexual act, or is in any physical or social environment which may lead to the performance of such act;*  
*(b) lives in or frequents any brothel or place of assignation; or*  
*(c) is habitually in the company or under the control of brothel-keepers or procurers or persons employed or directly interested in the business carried on in brothels or in connection with prostitution.*<sup>677</sup>

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671 Ibid, Para 42.

672 The Child Act 2001, section 31.

673 Ibid., section 32.

674 Ibid., section 33.

675 Ibid., sections 48-53.

676 Ibid., section 58.

677 Ibid., section 38. See also section 39 which provides the conditions of detention.

**The Guardianship of Infants Act of 1961** regulates the legal aspects of guardianship over minors. It provides for equality of parental rights between mothers and fathers. This applies to the administration of a minor's property, custody and upbringing rights.<sup>678</sup> The recognition of men and women as equal guardians was the result of an amendment to the Guardianship Act made by the government in response to its obligations under CEDAW (Article 16). However, while the Guardianship of Infants (Amendments) Act 1999 was intended to apply irrespective of religion, issues relating to guardianship fall within the realm of personal laws and can notably be regulated by Syariah family law which discriminates against women in this regard.

Inheritance for non-Muslims is governed by the **Inheritance (Family Provision) Act 1971** and the **Distribution Act 1958**. Their provisions were made gender-neutral in 1997, although they still require reasonable provision to be made for an unmarried daughter but not for an unmarried son.<sup>679</sup> The **Law Reform (Marriage and Divorce) Act 1976** establishes an offence of compelling an individual to marry against his or her will, which is punishable by a fine or up to three years in prison.<sup>680</sup> While this applies equally to both men and women, the protection offered is particularly significant in relation to protecting women and girls from the discriminatory practice of forced marriage.

Regarding Islamic family law, despite being considered a landmark piece of progressive legislation when first passed in 1984, subsequent amendments to the Islamic Family Law (Federal Territories) Act 1984 have been increasingly regressive. The first amendments took place in 1994, with the passing of the Islamic Family Law (Federal Territories) Amendment Act 1994 and then in 2005, Parliament passed the Islamic Family Law (Federal Territories) Amendment Bill 2005. At the time that this latter

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678 Guardianship of Infants Act 1961, section 5.

679 Inheritance (Family Provision) Act 1971, section 3(2)(b). However, under Syariah law, non-Muslims are prohibited from inheriting from a Muslim estate and vice-versa, and the portion for a female beneficiary is half the portion entitled to a male beneficiary.

680 Law Reform (Marriage and Divorce) Act 1976, section 37.

bill was passed, Sisters in Islam (SIS) – an NGO based in Kuala Lumpur which promotes the rights of Muslim women – began to work with other women’s organisations to advocate against its content, which resulted in the government deciding to delay the gazetting of this bill. SIS has criticised the regress in the 2005 bill from the Islamic Family Law (Federal Territories) Act 1984 in respect to gender equality. For example, section 23 of the latter previously stated that the proposed polygamous marriage must be “just and necessary”, but this has now been amended to “just or necessary”, significantly reducing the husband’s burden of proof to justify a polygamous marriage. He merely now has to tell the Syariah court that the marriage is necessary, the usual excuse being “to prevent *zina*”.<sup>681</sup>

In August 2006, a further bill was drafted by the Attorney General’s Chamber in consultation with the National Syariah Technical Committee. As a member of that committee, SIS considers the latest set of amendments to address the discriminatory provisions under the current legislation. Since the 2006 Amendment Bill was drafted, women’s groups have been advocating for its enactment. At the time this report was finalised, no steps to table the bill have been taken. As a result of this delay, SIS launched a new campaign which advocates for the reform of the entire Islamic family law framework, primarily through the introduction of a new comprehensive Muslim Family Law. This new campaign was borne from the view that there is a need for a new approach based on equality and that the piecemeal amendments which have been passed since 1984 have done little to promote gender equality. The campaign has, thus far, focussed on delivering training and awareness-raising sessions in order to mobilise a stronger network of organisations which is equipped to advocate for a revised Muslim Family Law framework.

### 3.2.3.3 Domestic Violence Law

**The Domestic Violence Act 1994** provides: (i) protection to victims of domestic violence through a “protection order” regime (sections 4-9); (ii) com-

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681 See Sisters in Islam, Memorandum to the Dewan Negara entitled “To Review the Islamic Family Law (Federal Territories) (Amendment) Bill 2005”, 8 December 2005. See also an article by Sisters in Islam’s Executive Director: Osman, R., “Islamic Family Law amendments still in limbo”, *Malaysiakini*, 8 March 2011.

pensation in respect of injury, damage or loss (section 10); and (iii) counseling for one or both of the parties involved (section 11). The Act also makes provision to protect those reporting suspected cases of domestic violence to an enforcement officer from claims of defamation (section 18) and it also sets out specific duties of enforcement officers in relation to assisting victims of domestic violence (section 19). The **Domestic Violence (Amendment) Act of 2012** has made slight improvements to the original act, for example by declaring that offences involving domestic abuse are deemed to be seizable offences (new section 18A), by expanding the concept of domestic abuse to include psychological, as well as physical, abuse (amendment of sections 2 and 10) and by extending conditions of restraint (amended section 6).

According to section 2, domestic violence:

*[M]eans the commission of any of the following acts:*

- 1. Wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury;*
- 2. Causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;*
- 3. Compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain;*
- 4. Confining or detaining the victim against the victim's will;*
- 5. Causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;*
- 6. Causing psychological abuse which includes emotional injury to the victim;*
- 7. Causing the victim to suffer delusions by using any intoxicating substance or any other substance without the victim's consent or if the consent is given, the consent was unlawfully obtained;*
- 8. In the case where the victim is a child, causing the victim to suffer delusions by using any intoxicating substance or any other substance,*

*by a person whether by himself or through a third party, against –*

- (i) His or her spouse;*



- (ii) *His or her former spouse;*
- (iii) *A child;*
- (iv) *An incapacitated adult;*
- (v) *One or more other member of the family.*<sup>682</sup>

Section 3 of the Domestic Violence Act 1994 states that: “[t]he provisions of this Act shall be read together with the provisions of the Penal Code [Act 574] or any other written law involving offences related to domestic violence”. Charges can only be brought against the abuser for crimes which are defined in the Penal Code – however not all instances of domestic violence are defined in the Penal Code. On the other hand, section 7 states that:

*(1)Where the court is satisfied that the person against whom a protection order or interim protection order is made is likely to cause actual physical injury to the protected person or persons, the court may attach a power of arrest to such protection order or interim protection order, as the case may be.*<sup>683</sup>

The Domestic Violence Act 1994 has been criticised by women’s groups who have claimed that the protection it seeks to provide is inadequate, given the onerous process which must be complied with before a restraining order can be issued, and also the evidential requirement of physical injury despite its interpretation to include sexual and psychological abuse.<sup>684</sup> However, the Domestic Violence (Amendment) Act 2012 classifies domestic violence as a seizable offence (new section 18A) thereby making it possible for a person to be arrested without a warrant and without order from magistrate, as per section 23 of the Criminal Procedure Code. In another positive step, the 2012 Act has redefined domestic violence to include psychological abuse, in amending sections 2 and 10.

Section 127 of the **Islamic Family Law (Federal Territories) Act 1984** states that:

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682 Domestic Violence Act 1994 read together with Domestic Violence (Amendment) Act 2012, section 2.

683 Domestic Violence Act 1994, section 7(1).

684 See above, note 665, p. 35.

*Any person who ill-treats his wife or cheats his wife of her property commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.*<sup>685</sup>

While this provision prohibits spousal abuse, its effectiveness is impeded by the Syariah laws which prohibit wives from disobeying the “lawful orders” of their husbands and which, therefore, present an obstacle to women pursuing claims against their husbands in Syariah courts.<sup>686</sup>

### 3.2.3.4 Employment Law

Malaysian employment law does not contain any explicit prohibition of discrimination on any ground. Both the **Employment Act 1955** and the **Industrial Relations Act 1967** cover migrant workers. Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers. However, there is no effective legal remedy if a migrant worker thinks they are discriminated against. The Workmen’s Compensation Act 1952 (which covers migrant workers) provides benefits and compensations that are by far inferior to those provided by the Social Security Act 1969 to local workers. Migrant workers should receive the same rights and protections as local workers. Given the patterns of discrimination against migrants set out in Part 2 of this report, however, it is clear that these provisions are not effectively enforced. There is discussion in Malaysia currently about the viability of a Foreign Workers Act which would, for example, introduce a minimum wage for foreign workers; however, there is concern about ensuring that the prospective law would not be discriminatory against local workers.<sup>687</sup>

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685 Islamic Family Law (Federal Territories) Act 1984, section 127.

686 See above, note 665, p. 36.

687 The Malaysian Insider, “Malaysia to explore possibility of having foreign workers act”, *The Malaysian Insider*, 17 May 2012.

Notwithstanding the lack of a constitutional guarantee in this regard, the **Trade Union Act 1959** permits migrant workers to become members of trade unions and take part in trade union activities but migrant workers are unable to hold an executive position. On the other hand, the Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organise a trade union.

The **Employment (Amendment) Act 2012** was passed in January 2012 has introduced a number of provisions relating to sexual harassment. Prior to this new legislation, Malaysia had no law governing sexual harassment, and victims could rely only on the 1999 **Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace**, whose stated aim was “to provide guidelines to employers on the establishment of in-house mechanisms at the enterprise level to prevent and eradicate sexual harassment in the workplace”.<sup>688</sup> The Code is not legally binding, but companies have been expected to adopt its recommendations. The Employment (Amendment) Act 2012 has introduced a legal definition of “sexual harassment”, and regulated the process which must be followed by employers in responding to a complaint of sexual harassment. “Sexual harassment” is defined as:

*[A]ny unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.*<sup>689</sup>

Section 81E provides that should the sexual harassment complained of be found to have taken place, the complainant is entitled to terminate his/her employment with no notice and receive wages for the period of any notice period that would otherwise have been given. Section 81F provides that any employer who fails to comply with the process of inquiry into a complaint of sexual harassment will be guilty of an offence for which he/she may be fined up to RM 10,000.<sup>690</sup>

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688 Ministry of Human Resources, *Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace*, 1999, Para 1.

689 See above, note 604, section 2(g).

690 Ibid., sections 81E and 81F.

It is a very positive step that the amendments to the Employment Act 1955 include a prohibition and create an offence of sexual harassment. However, the new legislation has several significant weaknesses:

(i) The definition of “sexual harassment” is not sufficiently clear. The definition of “sexual harassment” set out in Principle 5 of the Declaration of Principles on Equality provides a useful point of comparison. It states that:

*Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.*<sup>691</sup>

It is notable that the Employment (Amendment) Act definition fails to: (a) explicitly cover behaviour constituting harassment irrespective of the intent behind it; (b) acknowledge the importance of the dignity of the victim; and (c) provide that the creation of an environment which is offensive or humiliating is the key element of the definition of “harassment”.

(ii) Victims of sexual harassment are disempowered due to the discretion given to both employers and the Director General to make unilateral decisions as to whether sexual harassment took place, and to reject a claim on the basis that it is “frivolous, vexatious or is not made in good faith”.<sup>692</sup>

(iii) The Employment (Amendment) Act does not require employers to have a written workplace sexual harassment policy. The lack of the legal obligation to do so is regrettable given the practical need to make all stakeholders aware of the law of sexual harassment.

The Employment (Amendment) Act 2012 also acknowledges that the termination of service of a female employee during the time period for maternity leave is an offence (section 37(4)).

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<sup>691</sup> See above, note 597, Principle 5, p. 7.

<sup>692</sup> See above, note 604, sections 81B and 81D.

## ***Summary***

Legislation governing a number of different legal fields contains some protection for some groups vulnerable to discrimination. However, this protection is rarely rights based, and is very limited, patchy and inconsistent. There is no prohibition of discrimination on any ground in legislation constituting the fields of employment law, education law or health law in Malaysia. Protection from discrimination in these fields of law is thus possible only on the basis of the Constitution and international treaties. Overall, the normative framework is not sufficient to meet Malaysia's obligations under international human rights law.

Malaysian criminal law endeavours to provide protection for women from gender-based violence which has been defined by the Committee on the Elimination of Discrimination Against Women as a form of discrimination. Such provisions do not, however, provide adequate protection for married women who are excluded from the scope of the full definition of rape set out in the Malaysian Penal Code. In addition, the definition of rape in the Penal Code is not sufficiently broad to cover all forms of sexual assault and therefore leaves women unprotected from certain forms of gender-based violence. The protection from gender based violence is confounded by the provisions of the Evidence Act 1950 that limit protection offered to women under the Penal Code as a result of the restrictions which it imposes on evidence at trials for rape. Further, the evidential requirements relating to rape in Syariah law fail to give adequate protection to Muslim women who are raped. However, the Evidence Act 1950 goes some way towards reasonable accommodation for persons with disabilities. The Anti-Trafficking in Persons Act 2007 and its problematic amendment of 2010 contain a number of serious weaknesses, including an inadequate definition of human trafficking that does not comply with international criminal law, and the conflation of trafficking and smuggling in a way that deprives victims of smuggling from any protection rights, even if they are refugees. Malaysia ought to revise its anti-smuggling laws to protect the undocumented migrants from discriminatory ill-treatment.

Various provisions within Malaysian family law legislation serve to protect the rights to equality and non-discrimination. While falling short of implementing the full suite of obligations assumed by Malaysia un-

der the Convention on the Rights of the Child, the Child Act 2001 does seek to protect children from various forms of violence, ill-treatment and abuse which they suffer as a result of their age. The Guardianship of Infants Act 1961, after amendment by the Guardianship of Infants (Amendments) Act 1999, addresses the issue of potential inequality of parental rights by granting equal guardianship rights to mothers and fathers. Similar gender equality provisions are found in the Inheritance (Family Provision) Act of 1971 and the Distribution Act of 1958 which have both been made gender-neutral. Finally, the Law Reform (Marriage and Divorce) Act 1976 criminalises the act of compelling an individual to marry against their will. While each of these provisions is a small step towards greater equality for children and women within the realm of family law, the piecemeal and scattered approach to the protection of the rights to equality and non-discrimination is unfortunate.

Employment law also offers some protection. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organise a trade union. Both the Employment Act 1955 and the Industrial Relations Act cover migrant workers. Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers. Migrant workers should receive the same rights and protections as local workers. However, given the patterns of discrimination against migrants set out in Part 2 of this report, it is clear that these provisions are not being adequately implemented.

Legislation addressing specific violations of the equal right to personal security without any discrimination includes the Domestic Violence Act of 1994 and the Domestic Violence (Amendment) Act 2012. Whereas these statutes address significant issues of gender-based violence in Malaysia, they have been criticised both in relation to their content and their enforcement, which is viewed as inadequate.

### **3.3 National Policies Impacting on Discrimination and Inequality**

The Malaysian government has developed a number of national policies relevant to equality and non-discrimination, including both general policies which contain strong non-discrimination themes, such as the National Social

Policy and the National Social Welfare Policy, and policies designed to combat discrimination against, and accelerate the progress of, particular disadvantaged groups, such as the National Women Policy, National Policy for the Elderly, the Code of Practice on Prevention and Management of HIV/AIDS at the Workplace and the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace. However, policies such as the National Economic Policy continue to promote the privileged position of the Malay community in Malaysia, with the result that racial, ethnic and religious minorities face disadvantages in many areas of life.

### 3.3.1 Economic Policies

In 1971, the government launched a New Economic Policy (NEP) which had the twin goals of poverty reduction and restructuring of Malaysian society so that the identification of race with economic function and geographical location is reduced and eventually eliminated.<sup>693</sup> The NEP officially ended in 1990, after 20 years of existence, but the twin goals have remained at the core of subsequent economic policies. One of the key ways in which these two goals have been given effect has been through preferential policies for Malays and natives of Sabah and Sarawak, known collectively as “Bumiputera”. The legal justification for these policies has been Article 153 of the Federal Constitution.

An example of the impact of the NEP has been given by the Real Estate and Housing Developers’ Association (REHDA) of Malaysia:

*Housing developers in Malaysia are required to set aside at least 30% of their development housing for the bumiputera (the exact percentage varies from state to state, and also depends on the category of the land), as well as provide a discount of 5–15%. This has been in place since the introduction of the National Economic Policy in the 1970’s, which was implemented to balance out the socio-economic imbalances experienced by the bumiputera. This policy was set in place to encourage more bumiputera to own houses and to promote greater interaction among the various ethnic groups living in Malaysia.*

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693 Government of Malaysia, *The New Economic Policy: Goals and Strategy*, Para 27.

*The success of this policy in achieving a balance of socio-economic structure is obvious, 30 years down the road. The continued implementation of the policy has resulted in holding costs and inefficiencies in the delivery system. Although lots allocated for bumiputera ownership can be released to the open market upon approval by the State government, this only marginally reduces the inefficiencies. REHDA is currently advocating that the country move away from this requirement.*<sup>694</sup>

The current Malaysian national economic policy (the Tenth Malaysia Plan 2011–2015) has two objectives:

- (1) Enabling equitable opportunities for all Malaysians. This will enable all Malaysians to participate in the economy according to their requirements and needs. This involves stepping up capacity and capability building, enhancing access to employment opportunities and adopting a more targeted approach in encouraging innovation-driven entrepreneurship; and*
- (2) Providing a social safety net for disadvantaged groups. Equitable access to health, education and basic infrastructure will be emphasised, while mechanisms for targeted income support will be enhanced as general subsidies are phased out.*<sup>695</sup>

General strategies formulated by this policy include improving the bottom households' incomes, regardless of ethnicity; improving the education of children from the bottom households; and providing housing support, income support and improved access to healthcare.

The specific strategies formulated by the policy target groups considered to be particularly at risk of disadvantage. These include the Bumiputera in Sabah and Sarawak, particularly the ethnic minorities; Orang Asli communities in Peninsular Malaysia; residents of Chinese New Villages; and estate workers, a significant number of whom are Indians.

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694 Real Estate and Housing Developers' Association Malaysia, "Bumiputera housing", available at: <http://www.rehda.com/industry/bumiputra-housing/index.html>.

695 Government of Malaysia, *Tenth Malaysia Plan 2011–2015*, Chapter 4, p. 140.



These strategies aim at strengthening the capabilities of Bumiputera in Sabah and Sarawak and Orang Asli communities in Peninsular Malaysia; providing financial assistance to Chinese New Villages' residents to upgrade their homes and fund their business activities; and enhancing access to basic amenities and infrastructure for estate workers to improve their living standards. Other specific strategies aim at strengthening the Bumiputera's economic power, wealth ownership and representation in high remuneration jobs.

Chapter 4 of the Tenth Malaysia Plan further aims at improving inclusiveness in society for women, youth, children, older persons, and persons with disabilities. For example, the key programmes regarding women consist of:

- (1) Increasing women's participation in the labour force;
- (2) Increasing the number of women in key decision-making positions;
- (3) Improving provision of support for women in challenging circumstances such as widows, single mothers and those with lower incomes; and
- (4) Eliminating all forms of discrimination against women.<sup>696</sup>

The Plan also foresees programmes targeting youths and ensuring the protection and wellbeing of children, through enhancing the quality of child-care services, strengthening related support programmes including capacity building of caregivers, and upgrading existing welfare institutions such as rehabilitation centres and child welfare homes. In addition, the role of the community in protecting the best interest of the child will be enhanced through awareness programmes.<sup>697</sup>

Further the Plan affirms that continued emphasis will be placed on ensuring the health and well-being of older persons so that "they are able to age with dignity and respect as well as lead independent and fulfilling lives as integral members of their families, communities and country."<sup>698</sup> Finally, the

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<sup>696</sup> Ibid., Chapter 4, p. 180.

<sup>697</sup> Ibid., Chapter 4, p. 184.

<sup>698</sup> Ibid., Chapter 4, p. 185.

Tenth Malaysia Plan focuses on integrating disabled persons by providing better physical access to transportation and buildings and greater employment opportunities.

### 3.3.2 National Culture Policy

Malaysia's official National Culture Policy, which was introduced in 1971, is based on 3 principles:

- (i) the national culture must be based on the indigenous culture of the region (the Malay culture);
- (ii) suitable elements from the other cultures may be accepted as part of the national culture (cultural elements of the Chinese, Indians, Arabs, Westerners and others which are considered suitable and acceptable are included in the national culture); and
- (iii) Islam as an important aspect in the formation of national culture.<sup>699</sup>

The culture of non-Malay non-Muslim peoples is therefore only absorbed to the extent that it does not affect negatively the Malay culture. This policy arguably serves to perpetuate the privileged position of Muslim Malays in Malaysia, at the expense of non-Muslims, including Chinese, Indian and indigenous inhabitants of Peninsular Malaysia, Sabah and Sarawak, whose cultures are not promoted equally by the National Culture Policy.

### 3.3.3 National Women Policy

The main objectives of the National Women Policy (NWP),<sup>700</sup> adopted in 1989, are stated to be:

- To ensure an equitable sharing in the acquisition of resources, information, opportunities and benefits of development for men and women. The objectives of equality and justice must be made the essence of development policies which must be people oriented so women, who constitute half the nation's population, can contribute and realise their potentials to the optimum;

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699 Ministry of Information, Communications and Culture, *National Cultural Policy*, 3 October 2010. The document refers to the principles of the national culture policy formulated in 1971.

700 Ministry of Women, Family and Community Development, *National Women Policy*.

- To integrate women in all sectors of development in accordance with their capabilities and needs, in order to enhance their quality of life, eradicate poverty, ignorance and illiteracy, and ensure a peaceful and prosperous nation.

The NWP includes as one of its major principles the elimination of “all forms of adverse discrimination on the basis of gender” in “all matters of decision-making and subsequent action”. Another principle of the policy is that “the special needs and interests of women and the special virtues of femininity [sic] shall not be jeopardized”; the responsibilities of motherhood and family life shall neither be compromised nor neglected; and the dignity, morals and respect due to women shall not be sacrificed.<sup>701</sup>

The NWP requires that at least 30% of decision-making positions in the public sector should be held by women, and states that it aims to encourage private and third sector organisations to increase the participation of women in managerial and key positions.

The Third Outline Perspective Plan (2001-2010) (OPP3) was the operational aspect of the second phase of Vision 2020, the plan for Malaysia to become a fully developed country by 2020. The OPP3 recognised the importance of the role of women in development, stating:

*A resilient and competitive economy cannot be created unless the full potential of all its members is utilised. Towards this end, opportunities in employment, business and social activities will be made available without gender bias. Greater access to training and retraining will promote employment opportunities and greater occupational mobility. Information pertaining to the labour market and opportunities for advancement in education and business will be made more accessible through the use of ICT. At the same time, the participation of women, particularly those with family commitments will be enhanced by more extensive use of flexible*

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701 Ibid.

*working hours, the provision of crèches at workplaces as well as enabling them to work from home.*<sup>702</sup>

The Ministry of Women and Family Development was created in January 2001 with responsibility for implementing the National Women Policy. There has been a steady increase in staff capacity and budget for the Ministry,<sup>703</sup> which then merged with the Ministry of National Unity and Social Development to become the Ministry for Women, Family and Community Development. Some of the positive initiatives carried out by this Ministry included:

- (i) The formation of a Cabinet Committee on Gender Equality and Non-Discrimination in 2004;
- (ii) The appointment of Gender Focal Points in all government ministries and departments; and
- (iii) The implementation of a pilot project by the Ministry of Education, the Ministry of Higher Education, the Ministry of Health, the Ministry of Human Resources, and the Ministry of Rural and Regional Development, which looked at incorporating gender-sensitive budgets into the national budgeting systems.<sup>704</sup>

CEDAW has made a number of recommendations concerning state policy which should inform work under the NWP. In particular, these include accelerating the increase in the “representation of women, in elected and appointed bodies in all areas of public life, including at the international level” and promoting “change concerning the stereotypical expectations of women’s roles and the equal sharing of domestic and family responsibilities between women and men”.<sup>705</sup>

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702 Cited in NGO Shadow Report Group, *NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government’s Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 2005.

703 Ibid., p. 10, n. 13.

704 Ibid., p. 11.

705 See above, note 575, Paras 18 and 20.

### 3.3.4 National Social Welfare Policy

Adopted in 1990, the National Social Welfare Policy seeks to achieve “a contented and strong society for national development”, which is independent, “blessed with equitable opportunities”, and caring.<sup>706</sup> Its strategies for increasing equal opportunities are:

- *To upgrade, intensify and reinforce various skills for self-development and adaptation to environmental situations;*
- *To create social infrastructure and legislation to enable active and group involvement in community activities;*
- *To create various facilities in society for reducing obstacles to progress of specific groups;*
- *To create innovative policies and programmes to help every member of society to live more productively.*<sup>707</sup>

### 3.3.5 National Policy for the Elderly

The National Policy for the Elderly was adopted in 1995 to establish a “society of the elderly who are contented, dignified, possessed of a high sense of self-worth, and optimising their potential, as well as to ensure that they enjoy all opportunities besides being given the care and protection as members of a family, society and the nation”.<sup>708</sup> The policy contains a much more detailed Action Plan than other policies and it provides, in particular, that:

*For the success of the implementation of the National Policy for the Elderly, integrated and comprehensive efforts have to be taken by the concerned agencies, including:*

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706 Ministry of Women, Family and Community Development, *National Social Welfare Policy*.

707 Ibid.

708 Ministry of Women, Family and Community Development, *National Policy for the Elderly*.

- *Education – Education and training are to be made available for the elderly to develop their potential to the optimum. The school curriculum is to include education on the family to enable the younger generation to understand and appreciate the elderly.*
- *Employment – The elderly are encouraged to continue contributing to national development through employment according to their respective experience and skills. In this way, they are able to be independent with respect to income and their well-being.*
- *Participation in society – The elderly are encouraged to involve themselves in family and societal activities to enable them to play their role in their family and society besides interacting among themselves.*
- *Recreation – Suitable facilities are to be provided to the elderly to carry out recreational activities in housing areas, recreational parks and sports centres.*
- *Transport – The public transport system is to provide suitable facilities to enable the elderly to move comfortably from one place to another.*
- *Housing – Existing and future houses should include facilities suitable for the elderly to enable them to live comfortably.*
- *Support system for the family – To ensure that the elderly can continue to live with their family, a support system for the family needs to be established in housing areas to assist families in caring for the elderly. Certain incentives need to be introduced to enable family members to continue caring for their elderly members.*
- *Health – Health and medical facilities appropriate and specific to the elderly are to be provided to ensure that their health is well taken care of.*
- *Social security – A comprehensive social security scheme is to be provided to secure the future of the elderly.*
- *Media – The print as well as electronic media are to play active roles to increase the society's awareness of the elderly.*

- *Research and development – Studies are to be carried out to obtain information to enable better planning for the senior citizens. The Social Welfare Department under the Ministry of Women, Family and Community Development has been identified as the agency responsible for the coordination of the implementation of the action plan.*<sup>709</sup>

### 3.3.6 HIV/AIDS in the Workplace Code

The **Code of Practice on Prevention and Management of HIV/AIDS at the Workplace**<sup>710</sup> was issued by the Department of Occupational Safety and Health in the Ministry of Human Resources in 2001. One of its three objectives is to “[p]romote a non-judgemental, non-discriminatory work environment”. It contains a valuable definition of discrimination as follows:

*Discrimination means any distinction, exclusion or preference made on the basis of real or perceived HIV status that has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation. It covers access to training, access to employment and job security, and terms and conditions of employment. However, any distinction, exclusion or preference in respect of a specific job based on the inherent requirements of that job is not considered as discrimination.*<sup>711</sup>

The Code suggests that employers should have a workplace policy on HIV/AIDS which contains both a commitment to preventing the spread of HIV/AIDS, and to preventing discrimination or stigmatisation of HIV-positive employees in the workplace.<sup>712</sup> Paragraph 3.3.4 (Non-judgemental, Non-

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709 Ibid.

710 Ministry of Human Resources, *Code of Practice on Prevention and Management of HIV/AIDS at the Workplace*, 2001.

711 Ibid., Glossary, p. 3.

712 Ibid, Para 3.3.1.

discriminatory Employment Practices) requires an employer to ensure, *inter alia*, that “HIV-positive status should not be the sole criterion for disqualification from any form of employment”, and that employees are able to continue working, as long as they are able to do so without posing a danger to themselves or their colleagues. Further, employers should take “disciplinary action” against any employee who “discriminates or stigmatises” on the basis of HIV-positive status. Paragraph 3.3.5 requires employers to maintain confidentiality about an employee’s HIV/AIDS status and states that an employee is not required to declare their status to other employees. Paragraph 3.5 requires employers to develop a “Workplace HIV/AIDS Programme” which seeks to educate staff and create a non-discriminatory working environment through training, counselling and education as well as precaution and control measures. Paragraph 6.1 recognises the gender dimensions of the issue, and the particular challenges faced by women with HIV/AIDS and emphasises the need for gender equality and the empowerment of women.

The Code is not legally binding, but companies are expected to adopt its recommendations. There is no mechanism through which implementation of the measures set out in the Code can be enforced, and as such, there has been little improvement on the basis of its provisions.

### 3.3.7 National Social Policy

Officially adopted by the government in 2003, the National Social Policy<sup>713</sup> seeks to ensure that every individual, family and community within Malaysia is able to participate as well as contribute to national development and enjoy life, irrespective of their ethnic group, religion, culture, gender or political beliefs. The specific objectives outlined in the policy are:

- To ensure the basic necessities of the individual, family and community are provided for;
- To develop and empower humans for life;
- To consolidate and develop the social support system and services; and
- To generate synergy between different sectors.

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713 Ministry of Women, Family and Community Development, *National Social Policy*.



A new National Social Policy is currently being drafted by the Women, Family and Community Development Ministry in order to further strengthen the family and to make the policy more relevant in such a rapidly changing society.<sup>714</sup>

### 3.4 Enforcement and Implementation

#### 3.4.1 Enforcement

States do not meet their obligation to protect people from discrimination by simply prohibiting discrimination in the law. They must also ensure that the rights to equality and non-discrimination are effectively enforced in practice. This means that, in addition to improving legal protection from discrimination, Malaysia must also put in place mechanisms which guarantee victims of discrimination effective access to justice and appropriate remedies. Principle 18 of the Declaration of Principles on Equality states as follows:

*Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.*<sup>715</sup>

#### ***Access to Justice***

Access to justice will only be effective where victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Remedies must be “affordable, accessible and timely” and “legal aid and assistance” must be provided where necessary.<sup>716</sup> Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have

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714 Mokhtar, L., “Malaysia to have new social policy”, *New Straits Times*, 12 January 2012.

715 See above, note 597, Principle 18, p. 12.

716 See above, note 595, Para 34.

experienced similar discriminatory treatment to bring claims as a group, if the systemic nature of discrimination is to be effectively addressed.

The Malaysian Constitution itself does not provide for any mechanism whereby a person can bring a claim alleging a violation of a constitutional right such as the right to equality (Article 8) or the right to non-discrimination in education (Article 12). Similarly, although the Persons with Disabilities Act 2008 guarantees the right to equality for in a number of fields, and imposes a range of obligations on public and private actors in relation to these fields, it does not explicitly confer a right of action on or establish a complaints procedure for persons with disabilities who consider that their rights to equality have been denied.<sup>717</sup>

A person who has suffered discrimination must therefore seek redress through ordinary legal proceedings in one of two ways. The first way is simply to bring a claim against the perpetrator of the discrimination in civil proceedings. This requires the person to issue a writ or take out an originating summons in compliance with the Malaysian **Rules of Court 2012**. The available remedies for a person bringing a claim in this way are limited to damages to compensate them for their loss and/or a declaration (e.g. that a certain act was unlawful or unconstitutional).

The second way is through judicial review of the discriminatory decision. This is the mandatory option where the person seeks a prerogative writ such as mandamus, prohibition or certiorari.<sup>718</sup> An application for judicial review may seek as a remedy a declaration and/or any other relief.<sup>719</sup> Damages may also be awarded.<sup>720</sup> Applications for judicial review must be made in compliance with the Malaysian Rules of Court 2012 and may not be made without the leave of a judge.<sup>721</sup>

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717 Byrnes, A., "Disability discrimination law and the Asian and Pacific region", UNESCAP, 2012.

718 Rules of Court 2012, Order 53, Rule 1(1), *Federal Government Gazette*, 2 July 2012, P.U. (A) 205; and Courts of Judicature Act 1964 (Act 91 of 1964), Schedule, Para 1.

719 Rules of Court 2012, above note 718, Order 53, Rule 2(2).

720 *Ibid.*, Order 53, Rule 5.

721 *Ibid.*, Order 53, Rule 3.

As well as permitting individuals to bring a claim, Malaysian law permits “representative actions”, whereby a number of persons with the same interest in the proceedings can bring a claim collectively.<sup>722</sup> Permission for a representative action to be brought will generally be granted where: (i) the plaintiffs are all members of a class; (ii) they have a common grievance or interest; and (iii) the relief sought is beneficial in its nature to all of the parties represented by the plaintiffs.<sup>723</sup>

### ***Administrative Mechanisms***

In addition to judicial remedies, Malaysia is required to establish effective administrative mechanisms such as a National Human Rights Institution or an independent equality body. The HRC has noted that:

*Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.*<sup>724</sup>

Such mechanisms should also: promote respect for the enjoyment of human rights without any discrimination, review government policy, monitor legislative compliance, and educate the public.<sup>725</sup> The review of Malaysia’s record of giving effect to the right to equality should consider the extent to which Malaysia has complied with its obligation to make the rights enshrined in law effective.

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722 Ibid., Order 15, Rule 12.

723 See *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624; see also *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60.

724 Human Rights Committee, *General Recommendation No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 15.

725 See, for example, Committee on the Elimination of Racial Discrimination, *General Comment No. 17: Establishment of national institutions to facilitate implementation of the Convention*, UN Doc. A/48/18, 1993, Para 1; see also United Nations General Assembly, *Principles relating to the Status of National Institutions (the Paris Principles)*, adopted by General Assembly resolution 48/134 of 20 December 1993.

Both CEDAW and CRPD contain obligations regarding the provision of effective mechanisms through which victims of discrimination can seek redress. Article 2 of CEDAW refers to the obligation to “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” and “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. In relation to the situation in Malaysia, the NGO Shadow Report to CEDAW states that:

*One of the main reasons for the ineffectiveness to monitor discrimination is the absence of an effective mechanism to report, investigate and address discrimination against women. It is only when such mechanism is in place followed by proper implementation that the women will be empowered to act against discrimination.*<sup>726</sup>

By requiring that states parties “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention”, Article 1(a) of the CRPD, by implication, requires states to establish an effective enforcement mechanism. As stated above, the Persons with Disabilities Act 2008 does not provide for such a mechanism to be established.

### ***Legal Aid System***

The **Legal Aid Act 1971**, which applies to all courts, provides for a National Legal Aid Foundation and for legal aid for individuals in criminal proceedings (subject to a means assessment) and for civil proceedings in a very limited number of circumstances (also subject to a means assessment). The specified qualifying proceedings do not, however, include claims alleging discrimination.<sup>727</sup> Legal aid may alternatively be granted on a discretionary basis in any proceedings where the Minister is satisfied that in any particular case of hardship it is in the interests of justice to do so.<sup>728</sup>

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726 See above, note 702, n. 13.

727 Legal Aid Act 1971 as amended, section 12(1) and the Third Schedule.

728 Ibid., sections 12(3), 15(1) and 16(1). If the applicant possesses financial resources between twenty-five thousand and thirty-thousand ringgit per annum then they may have to make a partial contribution.

For cases in the Federal Court, the **Rules of the Federal Courts 1995 on Legal Aid** require that an unrepresented litigant be assigned a solicitor in any case where the Chief Justice considers it is in the interest of justice that legal aid should be given.<sup>729</sup>

It is of concern that claims alleging discrimination or violation of the constitutional right to equality are not included in the specified list of civil proceedings for which legal aid is available. The very limited circumstances under which legal aid can be granted for such proceedings therefore presents a fundamental obstacle to the ability of individuals to challenge violations of their rights to equality and non-discrimination in Malaysia.

### ***Remedies and Sanctions***

It is essential that remedies are designed so as not only to address the needs of the individual bringing the claim, but to address more structural causes of the discrimination experienced by the individual in the case, which are likely to affect others. In this respect, CEDAW has said:

*This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.*<sup>730</sup>

This approach should be applied to defining the available remedies in cases of discrimination not only on the ground of gender but on any protected ground. Principle 22 of the Declaration of Principles on Equality states that: “[s]anc-

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729 Rules of the Federal Courts 1995 on Legal Aid, Rule 9.

730 See above, note 595, Para 32.

tions for breach of the right to equality must be effective, proportionate and dissuasive”.<sup>731</sup> Importantly, they must serve to compensate not only material damage suffered by the victim, but also the injury to feelings caused by the particularly humiliating experience of discrimination.

As Malaysia is a common law state, the judicial remedies available for those who succeed in bringing a claim are reflective of those in the rest of the common law world, most evidently in that a successful party may claim damages for any loss suffered as a result of unlawful action. In addition, the **Courts of Judicature Act 1964** provides for additional remedies that may be granted only by the High Court including prerogative writs which may be relevant to those bringing claims of discrimination such as:

- Mandamus (mandating that the defending party take or refrain from taking a specific action);
- Prohibition (prohibiting the defending party from doing a specified thing); and
- Certiorari (sending the case to a lower court for review following the judgment of the High Court).

The Courts of Judicature Act 1964 specifies that such writs, and any others, may be issued for the enforcement of any rights conferred by Part II of the Constitution, including the right to non-discrimination under Articles 8 and 12, or for any other purpose.<sup>732</sup> The High Court may also make declarations either as the sole remedy (via declaratory judgments), or alongside any other remedy.<sup>733</sup>

Neither the Constitution, nor the Persons with Disabilities Act 2008 provides for any sanctions, other than those available in ordinary legal proceedings, that can be imposed on those that violate the right to equality.

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731 See above, note 597, Principle 22, p. 13.

732 Courts of Judicature Act 1964, above note 718, section 25(2) and Schedule, Para 1.

733 Rules of Court 2012, above note 718, Order 15, Rule 16.

## ***The Human Rights Commission of Malaysia***

Principle 23 of the Declaration of Principles on Equality highlights the important role for specialised bodies in the protection of the right to equality:

*States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.*<sup>734</sup>

While Malaysia has not established a specialised body focussed on protection and promotion of the right to equality, it does have the Human Rights Commission of Malaysia (SUHAKAM) established by Parliament under the **Human Rights Commission of Malaysia Act 1999**. Its functions include:

- (a) to promote awareness of and provide education relating to human rights;*
- (b) to advise and assist Government in formulating legislation and procedures and recommend the necessary measures to be taken;*
- (c) to recommend to the Government with regard to subscription or accession of treaties and other international instruments in the field of human rights;*
- (...)*
- (f) to inquire into complaints regarding infringements of human rights referred to in section 12.*<sup>735</sup>

The Commission is further empowered to: (a) promote awareness of human rights and undertake research by conducting programmes, seminars and workshops and disseminate and distribute the results of such research; (b)

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734 See above, note 597, Principle 23, p. 13.

735 See above, note 569, section 4(1). The reference to section 12 provides for the exclusion from the Commission's powers of cases that are pending under any court, have been finally determined by any court, or if proceedings on them begin in any court while they are being considered by the Commission.

advise the Government and/or relevant authorities of complaints against them and recommend appropriate measures to be taken; (c) study and verify any infringement of human rights; (d) visit places of detention in accordance with procedures as prescribed by laws relating to the places of detention and make necessary recommendations; (e) issue public statements on human rights as and when necessary; and (f) undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.<sup>736</sup>

Although SUHAKAM initially received a Grade A status by the Subcommittee on Accreditation of the International Coordinating Committee of National Human Rights Institutions (ICC) in 2002, it was criticised from several quarters for its lack of independence and effectiveness. It was suggested that SUHAKAM did not fully comply with the Paris Principles<sup>737</sup> as it was under the jurisdiction of the Prime Minister's Department and was therefore not autonomous from the Executive branch of the government.<sup>738</sup> Further, the appointment process of Commissioners was conducted by the King, based on the Prime Minister's recommendations, and subsequently was non-transparent and was carried out without public consultation.<sup>739</sup> The selection criteria were unclear, with the Act stating only that Commissioners shall be appointed from amongst prominent personalities including those from "various religious and racial backgrounds".<sup>740</sup> The Malaysian Bar Council also highlighted the fact that none of SUHAKAM's reports had been debated in Parliament, and none of its proposals had been acted upon by the government.<sup>741</sup>

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736 Ibid., section 4(2).

737 United Nations General Assembly, *Principles relating to the Status of National Institutions (the Paris Principles)*, above note 725.

738 Fédération Internationale des Ligues des Droits de l'Homme and SUARAM, *Submission to the Universal Periodic Review of Malaysia*, September 2008, Para 5.2.

739 Ibid., Para 5.3.

740 Ibid., Para 5.4. See also above note 569, section 5(3).

741 Malaysian Bar Council, *Submission to Universal Periodic Review*, September 2008, Para 7.



In 2008, the Sub-Committee of the ICC recommended that SUHAKAM be downgraded to B status and gave Malaysia one year to provide the necessary evidence that SUHAKAM conformed to the Paris Principles.<sup>742</sup> The Sub-Committee noted in particular that the independence of the Commission needed to be strengthened by a clear and transparent appointment and dismissal process, that the terms of office of the members of the Commission – two years – was too short, that the Commission failed to sufficiently represent different segments of society and should involve them in suggesting or recommending candidates to the governing body of the Commission, and that it needed to better interact with the international human rights system.

In response to this criticism, the Parliament of Malaysia passed two Acts in 2009 which amended the original Human Rights Commission of Malaysia Act 1999. The first Act (i) created a selection committee headed by the Chief Secretary to the Government and also comprising the Chairman of the Commission and three “eminent persons” appointed by the Prime Minister which the Prime Minister would have to consult before recommending members of the Commission to the King; (ii) extended the term of office of a Commissioner from two to three years with a maximum of two terms in office; and (iii) enabled the Prime Minister to determine suitable mechanisms, including key performance indicators, to assess the performance of Commissioners in carrying out their functions and duties.<sup>743</sup> The second Act (i) required that the three persons appointed to the selection committee by the Prime Minister should be “members of civil society who have knowledge or practical experience in human rights matters” as opposed to merely “eminent persons”; and (ii) removed a provision stating that any opinion, view or recommendation of the selection committee would not be binding upon the Prime Minister.<sup>744</sup>

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742 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Report and Recommendations of the Sub-Committee on Accreditation, 21-23 April 2008, Para 3.4.

743 Human Rights Commission of Malaysia (Amendment) Act 2009, Act A1353.

744 Ibid.

As a result of these amendments, the Sub-Committee of the ICC recommended in October 2010 that SUHAKAM retain its Grade A status.<sup>745</sup>

### 3.4.2 Jurisprudence on Equality and Non-discrimination

The Malaysian courts' early jurisprudence on Article 8 of the Constitution was heavily influenced by case-law in other jurisdictions from whose constitutions the Malaysian Constitution had drawn inspiration, particularly the USA whose constitution had guaranteed "equal protection of the laws" via the Fourteenth Amendment since 1868, and India, where Article 14 of the Constitution guaranteed "equality before the law [and] the equal protection of the laws".

The Federal Court did not address the right to equality under Article 8 until 1976 in what is now the leading case, *Datuk Haji Harun Bin Haji Idris v Public Prosecutor*<sup>746</sup> (hereafter *Harun bin Idris*). The court was tasked with determining the constitutionality of Section 418A of the Criminal Procedure Code which permitted the Public Prosecutor to transfer cases from the subordinate courts to the High Court. The Federal Court accepted its lack of jurisprudential experience in the right to equality stating:

*[W]hile we are all familiar with the idealistic concept of equality, Indian – and Malaysian judges – are not familiar with it as a legal concept, having been introduced in India only in 1949 and in Malaysia in 1957.*<sup>747</sup>

As a starting point, the Court stated that the concept of equality was difficult to apply given the inherent inequalities in society and provided a number of examples where laws treated different groups differently with minimal dissent.

*As a legal concept [equality] is easy to state, but difficult to apply – because, first, equality can only apply among equals*

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<sup>745</sup> See above, note 742, Para 5.4.

<sup>746</sup> *Datuk Haji Harun Bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155.

<sup>747</sup> *Ibid.*, p. 165.

*and in real life there is little equality and, secondly, while the concept of equality is a fine and noble one it cannot be applied wholesale without regard to the realities of life. While idealists and democrats agree that there should not be one law for the rich and another for the poor nor one for the powerful and another for the weak and that on the contrary the law should be the same for everybody, in practice that is only a theory, for in real life it is generally accepted that the law should protect the poor against the rich and the weak against the strong. Thus few quarrel with the law prescribing different criteria of criminal and civil liability for infants as compared to adults, or with the law for the protection of women and children against men, for the protection of tenants against landlords and of borrowers against moneylenders, for the imposition of higher rates of quit rent on rubber estates compared to rice fields and on higher rates of income tax on millionaires compared to clerks.*<sup>748</sup>

After analysing case law from other jurisdictions, particularly India, the court extracted a number of principles which, it stated, applied to Article 8 and which included:

- 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.*
- 2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.*
- 3. The prohibition of unequal treatment applies not only to the legislature but also to the executive – this is seen from the use of the words “public authority” in clause (4) and “practice” in clause (5)(b) of Article 8.*
- 4. The prohibition applies to both substantive and procedural law.*

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748 Ibid.

5. Article 8 itself envisages that there may be lawful discrimination based on classification – thus Muslims as opposed to non-Muslims (para. (b) of clause (5) of Article 8); aborigines as opposed to others (para. (c)); residents in a particular State as opposed to residents elsewhere (para. (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153).

6. (...) [T]he first question we should ask is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

7. (...) [L]aw is good law if it is based on “reasonable” or “permissible” classification, provided that (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

(...) We adhere to what was said in *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166 at page 170:

“The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it ‘must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation’, *Kedar Nath v State of West Bengal* (AIR 1953 SC 404 406).

*... [T]he law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on."*

*As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.*

*(...)*

*9. In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.*

These principles have since governed the courts' approach to Article 8. In the more recent case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*,<sup>749</sup> the Federal Court elaborated slightly on its approach towards Article 8(1):

*What Article 8(1) means is that there must be a subjection to equal laws applying alike to all persons in the same situation (...) The validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group. This can only be ascertained by the application of the doctrine of classification (...) [T]he doctrine of reasonable classification is the only method of determining whether a law applies alike to all persons who are similarly circumstanced. It is therefore an integral part of Article 8(1).<sup>750</sup>*

The court concluded its discussions as follows:

*Where therefore the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law there will be no violation of Article 8(1). Thus if a law deals equally with all persons of a certain well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals. A law would be regarded as discriminatory only if it discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter. (...) [I]t is only when a law is without any reasonable basis can it be termed as arbitrary. It must be noted that there is always a presumption that Parliament understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its*

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<sup>749</sup> *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257.

<sup>750</sup> *Ibid.*, Para 36.

*discriminations are based on adequate grounds. A Court cannot, in the nature of things, be a better judge than Parliament itself in a matter of this kind. Equal protection violations are always examined with the presumption that the State action is reasonable and just, and unless it can be shown that the discrimination that has been resorted to or the power to discriminate that has been given is without reason, it cannot be said that there is unequal treatment.*

*It is thus manifestly patent that a law can be struck down as being discriminatory, arbitrary or unfair only if it is not based on a reasonable or permissible classification.*<sup>751</sup>

As can be seen from above, the Federal Court in *Harun bin Idris* made references only to Article 8 in its entirety and without any apparent distinction between Articles 8(1) (which provides that “All persons are equal before the law and entitled to the equal protection of the law”) and Article 8(2) (which prohibits discrimination on certain grounds in certain fields). However, by the time of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* in 2004, the Federal Court was making its decision solely based on its interpretation of Article 8(1). It appears to be the case that the principles laid out in *Harun bin Idris* now apply only to Article 8(1) and not to Article 8(2). This can perhaps be explained by the fact that although the Federal Court made no distinction between Articles 8(1) and 8(2) in its judgment in *Harun bin Idris*, a distinction was drawn by the High Court in the case before it reached the Federal Court. In elaborating on the relationship between Articles 8(1) and 8(2), the High Court stated:

*Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in Article 8(1). Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under Article 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by Article 8(1). (...)*

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751 Ibid., Para 39-40.

*In cases not covered by Article 8(2), the general principle of equality embodied in Article 8(1) is attracted whenever discrimination is alleged, and if accordingly discrimination is alleged on a ground other than those specified in Article 8(2), the case must be decided under the general provisions of Article 8(1). Article 8(1) and (2) must be read together, their combined effect is not that the State cannot discriminate or pass unequal laws, but that if it does so, the discrimination or the inequality must be based on some reasonable ground (Article 8(1)), and that, due to Article 8(2), religion, race, descent or place of birth alone is not and cannot be a reasonable ground of discrimination against citizens. The word “discrimination” in Article 8(2) involves an element of unfavourable bias.<sup>752</sup>*

The distinction between Article 8(1) – where “reasonable” or “permissible” classifications are allowed – and Article 8(2) – which prohibits any classification based on the protected grounds mentioned therein – is one that the courts continue to make.<sup>753</sup>

The case of *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*<sup>754</sup> (hereafter *Beatrice Fernandez*) demonstrates the courts’ approach to Article 8 in the context of discrimination on grounds of gender. The appellant, a flight stewardess, sought a declaration that a collective agreement dating from 1987 requiring female employees to resign if they became pregnant contravened Article 8 of the Constitution as discrimination on grounds of gender. The Court of Appeal dismissed the appellant’s claim for a number of reasons. The Court first examined Article 8(1) and held that a collective agreement was not “law” within Article 8(1), but a contract which could be enforced by a party. The Court went further and stated that even a court order would not be “law” as it would only be binding on the parties involved.

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752 *Public Prosecutor v Datuk Haji Harun Bin Haji Idris & Ors* [1976] 2 MLJ 116, section 3.

753 See, for example, the recent case of *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors*, above note 580.

754 See above, notes 602 and 603.



The second reason was that Article 8(2) was only amended to include gender as a protected ground in 2001, whereas the collective agreement dated from 1987. Despite the fact that the effects of the agreement were ongoing, the Court held that the relevant date for analysing the agreement was 1987, i.e. when gender was not a protected ground. On that basis, Article 8(2) offered the appellant no protection.

The third reason was that the action of the appellant's employer, the court held, was not even discriminatory in and of itself. The Court analogised the provision in the collective agreement with a provision that women receive maternity leave, holding that such a provision would similarly not be discriminatory against men.

The fourth and final reason was based on references cited with approval by the Court of Appeal from a textbook entitled "Comparative Constitutional Law" written by Dr. (Justice) Durga Das Basu on the nature of constitutional law. The references cited included commentary that "in Constitutional law, as a branch of Public law, either or both the parties must be the State". On that basis, the Court held that the defendant would have to be a public authority in order for the claim to be brought within the ambit of Article 8. As the defendant was not a public authority, Article 8 was not engaged.

On an application to appeal, the Federal Court refused permission, confirming that guarantees in the Constitution did not extend to acts of private individuals and that the collective agreement was not "law" within Article 8.<sup>755</sup> The Federal Court also referred to the interpretation of the right to equality in Malaysian case-law, stating:

*[I]n construing Article 8 of the Federal Constitution, our hands are tied. The equal protection clause in Clause (1) of the Article 8 thereof extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret Article 8 (...) we*

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755 *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713, Para 13.

*could only come to the conclusion that there was obviously no contravention.*<sup>756</sup>

The restrictive interpretation of the prohibition on discrimination has been criticised, in the context of discrimination on grounds of gender, by the Committee on the Elimination of Discrimination against Women<sup>757</sup> as well as other organisations for a number of reasons.

First, and perhaps most fundamentally, the courts' interpretation of the right to equality misunderstands the nature of the comparator when establishing the existence of direct discrimination. The well-established principle, as summed up in the Declaration of Principles on Equality, is that the correct comparator is "another person or another group of persons (...) in a comparable situation".<sup>758</sup> The courts, however, compare the individual only with others in the same class (in this case, other women) as opposed to all people in a comparable situation (i.e. all other employees of the company regardless of gender). As stated by the Malaysian National Council for Women's Organisations:

*This reasoning does not accord with the developments in the legal doctrine of equality nor the principles of substantive equality as entrenched in the CEDAW Convention. A law which applies uniformly to all within a class may still violate a claimant's equality rights by discriminating against the whole class. Equality is a comparative concept and identical treatment of all within a certain category does not mean that the whole category is not being discriminated against.*<sup>759</sup>

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756 Ibid., Para 18.

757 See above, note 575, Para 7.

758 See above, note 597, Principle 5, p. 7.

759 National Council for Women's Organisations in collaboration with the Women's Aid Organisation, *NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 2005, Para 1.3.

Second, the courts have limited the application of Article 8 to the state and public bodies. In drawing a distinction between the acts of public and private organisations, the courts have significantly limited the scope of protection provided in Article 8.

Third, the language used by the court indicates a pre-modern understanding of sex and gender in society. In *Public Prosecutor v Khong Teng Khen*, the Federal Court stated that “the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class”.<sup>760</sup> In *Beatrice Fernandez*, the Court of Appeal rejected the idea that a provision permitting a company to dismiss a woman on becoming pregnant could be discrimination “just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men”.<sup>761</sup> The language of the courts in these cases suggests that men and women are inherently different, have different roles and statuses, have different rights and liabilities, and that, therefore, differential treatment is readily justifiable. Such a retrograde approach is a serious obstacle to the genuine protection from discrimination that Article 8 should afford.

A recent judgment which provides some cause for hope, however, has come with the decision of the High Court of Malaya in *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors.*<sup>762</sup> The plaintiff applied to the Education Office in her local district to become a “Guru Sandaran Tidak Terlatih” (GSTT) (a temporary teacher who has not received formal training). After interview, she was offered the position, but the offer was withdrawn when the plaintiff informed the Education Office that she was pregnant. The policy of the Education Office was not to employ pregnant women as GSTTs. The plaintiff brought a claim against the Education Office claiming violation of the right to non-discrimination under Article 8(2) of the Constitution.

The Court noted that the prohibition of discrimination on grounds “gender” had been made by way of amending Article 8(2) of the Constitution in 2001

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<sup>760</sup> *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166, p. 170.

<sup>761</sup> See above, note 602.

<sup>762</sup> See above, note 580.

with the purpose of ensuring that Malaysia complied with its obligations under the Convention on the Elimination of All Forms of Discrimination against Women. The Court then examined Articles 1, 11(1)(b) and 11(2)(a) of CEDAW which define discrimination against women, provide for equality between men and women in the field of employment, and require states to prohibit dismissal on grounds of pregnancy. The Court held that the Convention had the force of law and was binding on states, and that the Court itself had an obligation under the Convention to interpret Article 8(2) of the Constitution by reference to it. As a result, the Court held – by reference to Articles 1 and 11 of CEDAW – that discrimination based on pregnancy was a form of discrimination on grounds of gender and that the Education Office had violated the plaintiff’s right to non-discrimination under Article 8(2) of the Constitution.

In addition, the judge referred – redundantly – to the Bangalore Principles as imposing an obligation to courts to have regard to Malaysia’s obligations under CEDAW when interpreting the Constitution. Further, the judge also referenced not only on the Principles themselves, but also the Chairman’s Concluding Statement in Bangalore and the Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement. Given that the government has appealed the decision, it should be pointed out that the unnecessary references to non-binding instruments of best practice in this case should not be allowed to obscure the judicial reliance on CEDAW which is binding on courts and tribunals of the state party.<sup>763</sup>

Malaysian law contains no enforceable legislative protection in relation to sexual harassment, only a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace which was introduced in 1999. It is non-binding, but companies are expected to accept and implement it. In *Sitt Tatt Sdn Bhd v Flora Gnanapragasam*,<sup>764</sup> for example, the Industrial Court stated that the failure of two senior managers of a company to take action against sexual harassment complaints was a serious dereliction of their duties.<sup>765</sup>

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763 Syukri, A., “Govt’s Appeal against Gender Equality Cases an Insult to M’sian Women”, *Malaysian Digest*, 31 January 2012.

764 *Sitt Tatt Sdn Bhd v Flora Gnanapragasam* [2002] 1 ILR 98 (Award No. 998 of 2001).

765 Jothy, L. “Sexual Harassment as Discrimination”, [2010] 3 *Industrial Law Reports* (A) i.

With no provision for its enforcement in the Code of Practice, victims are therefore forced to pursue redress through other pieces of legislation which were not designed for combating sexual harassment. Section 20 of the Industrial Relations Act 1967,<sup>766</sup> for example, provides for a remedy of reinstatement where an employee has been dismissed without just cause or excuse. The courts may also award compensation in lieu of reinstatement.<sup>767</sup> The courts in Malaysia have recognised the concept of constructive dismissal in cases brought under section 20;<sup>768</sup> and, in 1997, recognised for the first time that a victim of sexual harassment could bring a claim under section 20. In *Jennico Associates v Lillian Therere De Costa*,<sup>769</sup> the complainant was a director of operations of a hotel. Her immediate superior had made attempts to kiss and fondle her and, when she failed to respond to his advances, he harassed her further by finding fault with her work. Although the complainant resigned, the Industrial Court found that she was forced to do so by the behaviour of her employer. The Court stated:

*It cannot be emphasised strongly enough that sexual harassment of an employee by an employer would constitute repudiatory conduct on the part of the latter such as would entitle the former to bring the contract of employment to an end. This principle is not restricted to the case of an employee who is sexually harassed by an employer who is a natural person and therefore it applies with equal force to the case where the alleged harasser is not only the chief executive of the business entity who is the employer of the harassed employee but also its alter ego.*

Section 20 of the Industrial Relations Act 1967 is not, however, an ideal vehicle for bringing claims of sexual harassment. First, the primary rem-

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766 Industrial Relations Act 1967, section 20.

767 Ibid., section 30.

768 See, for example, *Wong Chee Hong v Cathay Organisations (M) Sdn Bhd* [1988] 1 CLJ 298 (Rep); [1988] 1 CLJ 45.

769 *Jennico Associates v Lillian Therere De Costa* [1996] 2 ILR 1765 (Award No. 606 of 1996).

edy available under section 20 is reinstatement which will not always be suitable for a victim of sexual harassment as they may not wish to return to the place of work where they were so harassed. Second, the principle of constructive dismissal requires there to be a fundamental breach of the contractual relationship between the employee and the employer such that the complainant leaves their employment. Many victims of sexual harassment, however, would prefer the sexual harassment to cease rather than to have to leave their employment. Third, the High Court in *Jennico Associates v Lilian Therera De Costa* held that evidence of sexual harassment should generally be corroborated and that “to rely on the uncorroborated evidence of the complainant alone will be very dangerous”. As sexual harassment usually occurs when the perpetrator and the victim are alone, it will be rare that there will be independent witnesses able to corroborate the victim’s evidence. Civil cases are decided on the balance of probabilities, and although it is for the claimant to prove – on that balance of probabilities – that the sexual harassment occurred, in establishing whose evidence is to be preferred where the court only has the evidence of the two parties to base its decision upon, the credibility of the parties and their testimony should be the determinative factor in establishing whose evidence is to be preferred. That the court generally requires corroboration from the claimant and not the defendant puts the victim at a disadvantage in proving a case of sexual harassment.

In *Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan*<sup>770</sup>, the High Court examined a claim of discrimination on grounds of religion. The applicant was an advocate and solicitor who applied to be a Peguam Syarie (Islamic lawyer) of the Syariah courts in Kuala Lumpur and was refused on the basis that she was not a Muslim. She sought judicial review of that decision and argued, amongst other things, that the refusal on the basis of her religion constituted religious discrimination in violation of Article 8 of the Constitution. The High Court dismissed her claim saying that discriminatory classifications will be reasonable and, thus, constitutional where there is a nexus between the classification and a reasonable objective. In the present case, the object of the legislation was to administer Islamic law in Syariah courts in Malaysia. Requiring a Peguam Syarie to be Muslim would more easily achieve that object given that faith was a relevant dimension to the legisla-

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770 *Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan* [2011] 1 LNS 483.

tion. As such, there was a nexus between the classification and that objective and the discrimination was not unlawful.

The basis on which the court reached its conclusion in the case is not clear from the short judgement itself. In many jurisdictions, anti-discrimination laws provide specific exceptions which permit religious institutions to specify the religion of appointees to positions which are essential to the religious nature of the work, in particular those positions involved in the ministry of the religion in question. It may be that the court was attempting to create or define a similar exception in favour of Muslims, stating in effect that the religious nature of practice before the Syariah courts necessitates adherence to the Islamic faith. However, to the extent that the court was also taking into account other factors which were not directly associated with the religious nature of the position itself – such as assumptions about the knowledge which a non-Muslim might have of Syariah law – then the judgement could be open to question.

Despite the constitutional recognition of the customary laws which govern native land rights in Articles 160(2) and 150(6A), as section 2.2 of this report demonstrates, these rights have been challenged by commercial activities such as logging. The Malaysian courts have been effective in protecting these groups, albeit not from an equality perspective. In *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors*,<sup>771</sup> for example, the plaintiffs were orang asli of the Temuan tribe who were told by the Sepang Land Administrator to vacate their land within 14 days, failing which enforcement action would be taken. One of the arguments of the plaintiffs was that the Selangor State government and the Federal government were under a positive duty under Article 8(5) of the Constitution to take appropriate steps to protect the land rights of the orang asli including to positively discriminate in their favour if necessary. Although the Court ultimately found in favour of the plaintiffs and awarded them compensation for the land, as well as granting them a declaration that “it is the duty of the [Selangor State government and the Federal government] to protect the rights of the plaintiffs in the land under the Aboriginal Peoples Act 1954 read with Articles 8(5) and 162 or separately under Article 8(5) of the Constitution”, the Court made no reference to the rights to equality or

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771 *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors* MTI-21-314-1996 (Unreported) (High Court of Malaya, Shah Alam), 12 April 2002.

non-discrimination in its judgment, and only referred to Article 8 inasmuch as it provided for an exception to the right to equality in respect of any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land). Similar conclusions have been reached by the High Court in similar cases, such as *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*<sup>772</sup> and *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors*.<sup>773</sup>

The jurisprudence of the courts in Malaysia in respect of the right to equality and non-discrimination presents a mixed picture. There are isolated incidents of the lower courts in effectively protecting against discrimination on grounds of gender in the context of sexual harassment at work and discrimination on grounds of pregnancy. The willingness of the High Court in the recent case of *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors*<sup>774</sup> to refer to and use the Convention on the Elimination of All Forms of Discrimination against Women in interpreting the right to non-discrimination in Article 8 of the Constitution of Malaysia is particularly welcome. However, these isolated incidents are starkly contrasted by the restrictive approach that has been adopted by the Court of Appeal and the Federal Court. Through a narrow interpretation of the right to equality, a willingness to justify differential treatment, and deference to policy makers, the constitutional protection from discrimination has been generally weak.

### 3.4.3 Implementation Practices

The government of Malaysia has taken certain measures to eliminate discrimination in certain fields, most notably through the use of positive action and reasonable accommodation. The government's quota of at least 30% of decision-making positions in the public sector to be held by women was

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<sup>772</sup> *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (High Court, Johor Bahru).

<sup>773</sup> *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 2 CLJ 769 (High Court of Sabah and Sarawak, Kuching).

<sup>774</sup> See above, note 580.



achieved in 2011.<sup>775</sup> The proportion of women increased from 18.8% in 2004 to 32.3% in 2011. In the same year, the Prime Minister announced that the policy would be extended to the private sector and that by 2016 representation at boardroom level must be at least 30%, although no legislation would be introduced to enforce a quota.<sup>776</sup>

Part IV of the Persons with Disabilities Act 2008 requires that persons with disabilities have the a right to access public facilities, amenities, services and buildings open or provided to the public; public transport; education; employment; information, communication and technology; cultural life; and recreation, leisure and sport on an equal basis with persons without disabilities. Similarly, by-law 34A of the Uniform Building (Amendment) By-laws 1991 requires all buildings to be provided with access for persons with disabilities and for future buildings to be designed with facilities for persons with disabilities. Despite the legislation being in place to enable persons with disabilities to access public amenities on the same basis as persons without disabilities, a lack of monitoring and enforcement means that there has been little to no change.<sup>777</sup> Many buildings remain inaccessible and even walkways that have been adapted so as to incorporate ramps are frequently dangerous and unusable as they do not comply with relevant Malaysian safety standards.<sup>778</sup> In the capital Kuala Lumpur, public transport whether by bus or by train remains largely inaccessible; taxi drivers will sometimes refuse to pick up persons with disabilities, or charge them extra for storing wheelchairs or providing assistance.<sup>779</sup>

In recent years, the government has undertaken initiatives to promote public

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775 Chooi, C., "Compulsory 30pc women stake in top-level posts by 2016", *The Malaysian Insider*, 27 June 2011.

776 Ibid.

777 Ding J.-A., "A disabled-friendly Malaysia?", *The Nut Graph*, 19 February 2010.

778 Maidan, A.J., *Legal Framework Regulating for Improving Accessibility to Built Environment for Disabled Persons in Malaysia*, International Islamic University of Malaysia (IIUM), 26 January 2012.

779 Zoldak, A., "Disabled tourism in Malaysia", *eHow*, available at: [http://www.ehow.com/about\\_5432583\\_disabled-tourism-malaysia.html](http://www.ehow.com/about_5432583_disabled-tourism-malaysia.html).

acceptance of persons with disabilities. It has tried to make facilities more accessible and increase the budgets of programmes aimed at aiding persons with disabilities.<sup>780</sup> A 50% reduction on the excise duty on locally made cars and motorcycles that are adapted for and purchased by persons with disabilities was increased to 100% in October 2010.<sup>781</sup> In 2008, Service Circular Letter 3/2008 required all public sector employers to ensure that at least 1% of their staff were persons with disabilities.

A 1999 amendment to the Guardianship of Infants Act is an example, however, of the fundamental problem with enforcement of provisions intended to protect individuals from discrimination. Whilst the amendment provides for equal guardianship rights to all Malaysian women, an NGO Shadow Report Group reported that “bureaucratic red tape still prevents mothers from exercising this right”, due to application forms for passports and travel documents, for example, still requiring the father’s signature.<sup>782</sup>

### ***Summary***

Despite the necessity of effective legal redress and remedies in order to ensure that the rights to equality and non-discrimination are effective, the enforcement mechanisms available to victims of discrimination in Malaysia are inadequate. In the absence of a single equality body with responsibility for overseeing the enforcement of the rights to equality and non-discrimination set out in the Federal Constitution, the Human Rights Commission of Malaysia arguably has a role to play in this regard. This body has, however, been criticised for its lack of independence and effectiveness. Further, victims of discrimination face additional obstacles in seeking legal redress and remedies as a result of legal aid provision being unavailable for claims of discrimination, a very narrow interpretation of the right to equality by the Federal Court and Court of Appeal, and a lack of sanctions which can be imposed upon discriminators.

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780 See above, note 665, p. 41.

781 Ministry of Finance, Budget of Malaysia, 2011 (delivered on 15 October 2010).

782 See above, note 702.

## 4. CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusions

The study of the prevailing patterns of inequality and the legal and policy frameworks in Malaysia has identified several **cross-cutting issues** specific to the Malaysian context: The first is the pervasive **importance of ethno-religious identity** which impacts upon all areas of life, not least as a result of the close alignment between race, religion and politics. The second is the role played by the **dual legal system**, according to which civil law and Syariah law operate in parallel and Muslims and non-Muslims are subject to different laws, particularly in the areas of family and criminal law. Furthermore, **Syariah law**, although enacted at state rather than federal level, creating different treatment of Muslims living in different Malaysian states, on the whole exerts a conservative influence on social attitudes and practices, particularly on the role of women in society and in the family, the freedom to choose one's sexual partners, or the upbringing of children. Conservative attitudes provide a context in which discrimination against non-conforming individuals occurs in all areas of life. The third cross-cutting issue is the determinative **role of poverty** as a factor reinforcing or underlying the experience of most of the patterns of discrimination identified. The severity of discrimination experienced by individuals and groups is usually directly related to their socio-economic standing or power position. For example, poverty among migrant workers is both a cause and a consequence of their disadvantaged, powerless status. Finally, the patterns of **political discrimination** typical of Malaysia reveal a strong democratic deficit that sets this country apart from societies in which equality is integral to a democratic political framework.

The main **patterns of inequality and discrimination** described in this report affect large sections of the population in Malaysia, defined by characteristics such as race and ethnicity, indigenous status, gender, religion or belief, sexual orientation, gender identity, health status, age, disability, citizenship and political opinion. The inadequate protection against discrimination in Malaysia is compounded by the existence of many discriminatory provisions within the country's legislation.

Some patterns of discrimination on the grounds of race and ethnicity which are endemic to Malaysia are interwoven with, or arise from controversial affirmative action policies developed with the purpose to empower the Ma-

lay and certain natives, but having long outlived their justification. Racially discriminatory practices have been observed in a number of areas, in particular education, employment, housing, and political participation. Articles 153 and 89 of the Malaysian Constitution establishing a privileged position for the Bumiputera fall short of the international law standards for legitimate positive action established under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). These provisions are not time-limited or function-limited. Continuing favourable treatment of the Bumiputera under these provisions means that race continues to be a key determinant of a person's life experiences and of disadvantage in Malaysian society.

Under Malaysia's Constitution, indigenous people are not only protected against discrimination, but are also accorded the special privileges of Article 153. In spite of this, indigenous people continue to experience disadvantage and discrimination across the full spectrum of economic, social, cultural, civil and political rights. Discrimination against indigenous groups persists in the areas of land entitlement, personal security, education, citizenship and birth registration, employment, health, political participation, and freedom of religion. The most important conclusion to be drawn from the research for this report regarding the discrimination affecting indigenous persons is the interconnectedness of their experiences in different areas of life, underpinned by issues of indigenous peoples' land rights.

Gender discrimination is widespread in respect to marriage and family relations, personal safety and security, education, employment, health, political participation, matters of criminal law, freedom of movement and expression, and citizenship rights. Discrimination against rural and indigenous women is particularly concerning. Despite Malaysia's accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995, the Committee on the Elimination of Discrimination against Women and the Gender Gap Index have highlighted that there is still a lot of progress to be made before Malaysia can confidently state compliance with its obligations under the Convention. Traditional customs and attitudes are partly responsible for maintaining a disadvantaged position in society for women in general. Gender-based violence, including domestic violence, rape, sexual harassment, and trafficking remains widespread, and female genital mutilation may also be found. Despite significant progress regarding gender equality in education, some categories of women have been left behind. Indigenous

women, for example, continue to face disadvantage in accessing education. The progress made with regard to access to education has not translated into improved equality for women in employment. There continue to be low levels of female participation in the labour force, particularly in high income and decision-making roles. Women face discrimination with regard to promotions and salary, and also in relation to health and safety in the workplace. Women also face unequal access to healthcare. The unequal participation of women in the political process serves to sustain their unequal position in other areas of life. Women are discriminated against in their ability to pass on citizenship and residence rights to their children and spouses.

Particular challenges are faced by Muslim women and women who live and work in the rural areas of the country. As a result of Syariah law in Malaysia, Muslim women face multiple discrimination in some areas of life on the combined grounds of gender and religion. Such discrimination is most evident in the context of marriage and family life, which for Muslim women are governed by the provisions of Islamic family law. These provisions in their present form, and in the absence of long due reform, serve to sustain the subordinate position of women within the Muslim family. Further, many provisions of Syariah criminal law discriminate against Muslim women on the ground of gender, in relation to the particular crimes for which a Muslim woman may be punished and the form of punishment to which she may be subjected. Finally, the freedom of Muslim women to move around and dress as they choose is also restricted by locally imposed Syariah laws.

Inequality based on religion or belief is another big issue for Malaysian society. This is a complex area ranging from discriminatory limitations of the freedom to manifest, practise and change one's religion, to financial assistance for religious institutions and unequal access to justice under Syariah law. Article 3(1) of the Constitution of Malaysia places Islam in a privileged position, which is reflected in other provisions of the Constitution. Despite the dominance of Islam in Malaysia, there is discrimination not only against Hindus, Christians and other non-Muslims, but also against Malay Muslims, who are discriminated in the enjoyment of certain human rights. For example, discrimination on the basis of religion or belief is practiced through restrictions of expression. Restrictions have also been placed on the religious freedoms of adherents to minority Islam religions, which are considered to be "threatening" to the position of Islam, in order to protect the integrity of the official religion. Non-Muslims are particularly disadvantaged with respect to the financ-

ing of religious schools and religious education. Given the strong relationship between race and religion in Malaysia, such actions further compound the challenges identified above in relation to race discrimination. On the other hand, Muslims face restrictions which do not apply to other groups, including, most notably, their right to change religion and their right to engage in sexual relationships. Finally, there is belief-based discrimination against all Muslims who express beliefs not approved by official interpreters of Islam in respect of their right to participate in cultural life on an equal basis. Malaysia has therefore been unable to reconcile the position of Islam as the official religion with its obligation to protect the right to equality for members of all religions.

Malaysia was one of the 19 states which in June 2011 voted against the adoption of the UN Human Rights Council resolution condemning human rights violations of LGBTI persons and requesting the High Commissioner on Human Rights to conduct a study on violations of human rights suffered by persons of different sexual orientation or gender identity. This position reflects the lack of recognition of the equal rights of LGBTI persons in Malaysia. The most severe form of discrimination based on sexual orientation in Malaysia is the criminalisation of same-sex sexual conduct. The offences found in both civil and Syariah law create an environment in which the rights of LGBTI persons are violated systematically. In a society that persecutes and excludes them, members of the LGBTI community suffer discriminatory ill-treatment and restrictions on freedom of expression, as well as the denial of equal enjoyment of their economic, social and cultural rights. Trans persons face daunting problems related to their identity documents. Difficulties faced by trans persons in obtaining official documents recognizing their gender identity create a range of obstacles to their full participation in society. Restrictions on the discussion of LGBTI rights and a lack of statistical evidence combine to present significant hurdles for those wishing to challenge discrimination on the basis of sexual orientation and gender identity. An explicit commitment to the protection of such persons against discrimination is absolutely necessary if the problems described above are to be effectively addressed.

Discrimination against persons living with HIV/AIDS has not been successfully eliminated from Malaysian life. The evidence suggests that the impact of the HIV/AIDS epidemic in Malaysia is worsened by the discriminatory attitudes and actions taken towards persons living with HIV/AIDS, which hinders access to effective treatment, and can lead to economic and social isolation.

Discrimination against children takes the forms of violence and ill-treatment, as well as inadequate access to justice, and is most concerning in respect to particularly vulnerable groups of children, including indigenous and migrant children. Malaysia's ratification of the Convention on the Rights of the Child and its enactment of the Child Act 2001 has not been sufficient to eradicate patterns of discrimination against children in Malaysia. Child labour, child marriages, sexual exploitation and trafficking have been documented. The provisions of the Evidence Act 1950 are discriminatory against children on the ground of their age by failing to attach due weight to the testimony of children.

Discrimination against persons with disabilities is far from being relegated to the past, despite the state's obligation under the Convention on the Rights of Persons with Disabilities (CRPD), the strong performance of the economy and the availability of resources. The absence of data relating to the participation of persons with disabilities in Malaysia in areas of economic, social, political or cultural life has made it difficult to identify the patterns of discrimination which are understood to be faced by this disadvantaged group. The authors' research has, however, identified patterns of discrimination faced by persons with disabilities in the fields of education and employment. Children with disabilities are often segregated and taught in separate special classes within mainstream schools. Further, in the absence of official statistics, field research has uncovered testamentary evidence of the discrimination faced by persons with disabilities in the field of employment and the accessibility of the built environment. The failure of the government to collect data regarding the participation of persons with disabilities in various areas of life represents, in and of itself, a denial of equality and a perpetuation of disadvantage for disabled persons, as without such evidence, it is very difficult to advocate or plan for improvements.

Non-citizens suffer discrimination in respect to their fundamental rights, the patterns of which include violence, discriminatory detention and deportation, lack of access to justice, deprivation of family life, limited or non-existent health care, education and housing. Discrimination against non-citizens affects several categories within the non-citizen population, including asylum-seekers and refugees, who experience discrimination and disadvantage in the process of refugee status determination and employment, as well as migrant workers, of whom domestic workers are a particularly vulnerable section. Non-citizens are not covered by those provisions in the Constitution which

enshrine the rights to equality and non-discrimination. This unprotected status is reflected throughout Malaysia's legal framework, which does not contain the legal recognition of refugees, does not accord migrant workers key rights under employment legislation, and, through its immigration rules, creates a situation of extreme vulnerability amongst migrant workers. As a result of this discrimination in the legal system, migrant workers are exposed to discrimination in all areas of life. Asylum seekers and others found to have committed immigration offences are subject to detention in appalling conditions. Some migrant workers are vulnerable to inhuman and degrading treatment owing to their situation of bonded labour. All non-citizens face insurmountable hurdles to accessing economic and social rights, and significant restrictions on their ability to enjoy a family life. Finally, their lack of rights under the law means that non-citizens are deprived of any meaningful redress.

The picture of inequalities in Malaysia would be strongly distorted without an understanding of discrimination based on political opinion. The main patterns of politically-based discrimination are related to voting rights and other political participation, arbitrary detention on political grounds, freedom of association and assembly, and freedom of expression. This report has revealed the extreme lengths to which the government will go in order to suppress opinions which are seen as "opposing" it, or which are viewed as "seditious", through raising obstacles to equal political participation, using arbitrary detention, and curtailing freedom of association and assembly. Domestic legislation, such as the Police Act 1967, has been enforced in a discriminatory manner so as to prevent public assemblies by political opponents of the government. In addition to the repression of freedom of association and assembly, the Malaysian government has also used the Internal Security Act to detain political opponents in a discriminatory manner. The Sedition Act, the Official Secrets Act and the Printing Press and Publication Acts have been used to silence, intimidate and punish critics of the government. Finally, opposition parties have been unable to participate in the political process on an equal basis with the ruling party due to a series of in-built and administrative biases in the Malaysian electoral system, and due to the discriminatory allocation of funds to elected representatives which favours members of the BN coalition. Such discriminatory practices on the grounds of political opinion present a fundamental challenge to principles of both equality and democracy, and also create an environment in which it is difficult to challenge the status quo and undo the disadvantage faced not only by political opponents but other groups discussed in this report.



Other patterns of discrimination and disadvantage that have not been well studied in Malaysia and have been only briefly referenced in this report include discrimination of grounds of age, place of residence, and occupation.

Malaysia has a relatively **weak legal and policy framework related to equality**. One aspect of this weakness is its poor participation in the major United Nations treaties relevant to equality rights; it is a party to only three of the major human rights treaties: CEDAW, CRC, and CRPD. Malaysia has not yet joined crucial international human rights treaties and, most significantly, is not yet a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, ICERD, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons, and the ILO Convention No. 169 on Indigenous and Tribal Peoples, among others. Further, Malaysia's participation in CEDAW, CRC and CRPD is subject to significant declarations and reservations. It is also unfortunate that Malaysia has not signed up to the Optional Protocols to CEDAW and CRPD to which it is a party, making it impossible for persons under its jurisdiction to file individual complaints and seek remedy via the relevant complaint mechanisms. A further limitation is that the treaties to which Malaysia is a party have not been broadly understood to have direct application but rather must be implemented through domestic legislation. That said, the courts have recently created a precedent of direct application of international treaties to which Malaysia is a party in reaching decisions in fundamental rights cases, as demonstrated in the pregnancy discrimination case of *Noorfadilla* in which CEDAW has been applied.

The forthcoming ASEAN Declaration on Human Rights could prove to be a pivotal step forward in the promotion and protection of human rights in the region. Malaysia should ratify any future regional treaties and protocols which serve to enhance the protection of the right to equality, and take an active part in strengthening the regional human rights system at the ASEAN level.

The national legal framework related to equality includes protection provisions in the Federal Constitution, particularly Articles 8, 12 and 136, as well as affirmative action provisions. Article 8 forms the cornerstone of the constitutional protection of the rights to equality and non-discrimination, with Article 8(1) guaranteeing equality before the law and equal protection of the law, and Article 8(2) prohibiting discrimination against citizens on the grounds of religion, race, descent, place of birth or gender. Article 12 expands

the protection from discrimination in relation to certain protected grounds to the area of education. Article 136 provides protection from differential treatment within state employment on the ground of race. While the Federal Constitution contains some protection of the right to equality, its provisions are inadequate in a number of ways, most notably in relation to the restricted list of protected grounds, the failure to protect both citizens and non-citizens, and the breadth of exceptions which means that matters of personal law (which has been interpreted to include the majority of Syariah law) are not subject to the prohibition on discrimination contained in the Constitution. Among the strongest causes for concern is the continued existence of Articles 89 and 153 creating ethnic preferences which, failing to meet the criteria for positive action, amount to racial discrimination.

Malaysia **lacks comprehensive equality legislation** and equality enforcement bodies across all grounds. Given the limitations of the constitutional equality protections, the lack of legislation prohibiting all forms of discrimination by both the state and private individuals represents a failure to meet obligations under CEDAW, CRPD, CRC and international customary law.

The only specific equality and anti-discrimination Act in Malaysia is the Persons with Disabilities Act 2008. This Act represents a positive step towards the protection of the rights of persons with disabilities. Regrettably, however, the Persons with Disabilities Act does not include operative provisions setting out the rights to equality and non-discrimination of persons with disabilities, but it does incorporate some of Malaysia's obligations under CRPD in a manner which arguably serves to overcome some elements of the disadvantage faced by persons with disabilities. In order for this Act to comply fully with Malaysia's obligations under the Convention, it will require significant amendment.

Some non-discrimination provisions are found in legislation governing other legal fields: criminal law, family law, and law related to domestic violence. However, this protection is rarely rights based, and is very limited, patchy and inconsistent. There is no prohibition of discrimination on any ground in legislation constituting the fields of employment law, education law or health law in Malaysia. Protection from discrimination in these fields of law is thus possible only on the basis of the Constitution and international treaties. Overall, the normative framework is not sufficient to meet Malaysia's obligations under international human rights law.

Malaysian criminal law endeavours to provide protection for women from gender-based violence which has been defined by the Committee on the Elimination of Discrimination against Women as a form of discrimination. It does not, however, provide adequate protection for married women as they are not covered by the anti-rape provisions set out in the Malaysian Penal Code. In addition, the definition of rape in the Penal Code is not sufficiently broad to cover all forms of sexual assault and therefore leaves women unprotected from certain forms of gender-based violence. The protection from gender based violence is confounded by the provisions of the Evidence Act 1950 that limit protection offered to women under the Penal Code as a result of the restrictions which it imposes on evidence at trials for rape. Further, the evidential requirements relating to rape in Syariah law fail to give adequate protection to Muslim women who have been raped. On the positive side, the Evidence Act 1950 goes some way towards reasonable accommodation for persons with disabilities. The Anti-Trafficking in Persons Act 2007 and its problematic amendment of 2010 contain a number of serious weaknesses, including an inadequate definition of human trafficking that does not comply with international criminal law, and the conflation of trafficking and smuggling in a way that deprives victims of smuggling from any protection rights, even if they are refugees. Malaysia ought to revise its anti-smuggling laws to protect undocumented migrants from discriminatory ill-treatment.

Various provisions within Malaysian family law legislation serve to protect the rights to equality and non-discrimination. While falling short of implementing the full suite of obligations assumed by Malaysia under the CRC, the Child Act 2001 does seek to protect children from various forms of violence, ill-treatment and abuse which they suffer as a result of their age. The Guardianship of Infants Act 1961, after amendment by the Guardianship of Infants (Amendments) Act 1999, addresses the issue of potential inequality of parental rights by granting equal guardianship rights to mothers and fathers. Similar gender equality provisions are found in the Inheritance (Family Provision) Act 1971 and the Distribution Act 1958 which have both been made gender-neutral. Finally, the Law Reform (Marriage and Divorce) Act 1976 criminalises the act of compelling an individual to marry against their will. While each of these provisions is a small step towards greater equality for children and women within the realm of family law, the piecemeal and scattered approach to the protection of the rights to equality and non-discrimination is unfortunate.

Legislation addressing specific violations of the equal right to personal security without any discrimination includes the Domestic Violence Act 1994 and the Domestic Violence (Amendment) Act 2012. Whereas these statutes address significant issues of gender-based violence in Malaysia, they have been criticised both in relation to their content and their enforcement, which is viewed as inadequate.

Employment law also offers some protection. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organise a trade union. Both the Employment Act 1955 and the Industrial Relations Act cover migrant workers. Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers. Migrant workers should receive the same rights and protections as local workers. Notwithstanding the lack of a constitutional guarantee in this regard, the Trade Union Act permits migrant workers to become members of trade unions and take part in trade union activities, but they cannot hold executive positions. However, given the patterns of discrimination against migrants set out in Part 2 of this report, it is clear that these provisions are not being adequately implemented.

National policies impacting on discrimination and inequality include policies related to the economy, the national culture, women, social welfare, the elderly, HIV/AIDS in the workplace, and social policies. But despite the written policies, Malaysia has a rather poor record of implementation and enforcement of equality rights, including in respect to access to justice, administrative mechanisms, legal aid, and remedies and sanctions. Jurisprudence on equality and non-discrimination is weak, as is the implementation of existing law and policies. Despite the necessity of effective legal redress and remedies in order to ensure that the rights to equality and non-discrimination are effective, the enforcement mechanisms available to victims of discrimination in Malaysia are inadequate. In the absence of a single equality body with responsibility for overseeing the enforcement of the rights to equality and non-discrimination set out in the Federal Constitution, the Human Rights Commission of Malaysia arguably has a role to play in this regard. This body has, however, been criticised for its lack of independence and effectiveness. Further, victims of discrimination face additional obstacles in seeking legal redress and remedies as a result of legal aid provision being unavailable for claims of discrimination, a very nar-

row interpretation of the right to equality by the Federal Court and Court of Appeal, and a lack of sanctions which can be imposed upon discriminators.

## 4.2 Recommendations

In the light of the foregoing conclusions, The Equal Rights Trust and Tenaganita offer to the government of Malaysia a set of recommendations, whose purpose is (i) to strengthen the protection from discrimination and the entire legal and policy framework in respect to equality in Malaysia; and (ii) to enable Malaysia to meet its obligations under international law to respect, protect and fulfil the rights to non-discrimination and equality. All recommendations are based on international law related to equality, and on the Declaration of Principles on Equality, a document of international best practice which sums up the most essential elements of international law related to equality.

**Central among the recommendations are those related to (i) the need to amend discriminatory provisions, particularly those related to “positive action” favouring the Bumiputera, and (ii) the need to develop comprehensive equality legislation reflecting the current international understanding of the principles of equality.**

The recommendations to the Government of Malaysia are presented below:

### (1) Strengthening of International Commitments

(1)(a) Malaysia is urged to join the following international treaties and other instruments which are relevant to the rights to equality and non-discrimination:

#### ***United Nations Instruments:***

- Convention relating to the Status of Refugees (1951);
- Convention relating to the Status of Stateless Persons (1954);
- International Convention on the Elimination of All Forms of Racial Discrimination (1965), additionally making a Declaration under its Article 14 allowing individual complaints;
- UNESCO Convention against Discrimination in Education (1960);
- International Covenant on Civil and Political Rights (1966) and Optional Protocol I to the International Covenant on Civil and Political Rights (1976);

- International Covenant on Economic, Social and Cultural Rights (1966) and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
- Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999);
- International Convention for the Protection of All Persons from Enforced Disappearances (2006);
- Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006);
- Optional Protocol III to the Convention on the Rights of the Child (2011).

***International Labour Organisation Conventions:***

- ILO Convention No. 111 on Discrimination in Employment and Occupation (1958);
- ILO Convention No. 169 on Indigenous and Tribal Peoples (1989);
- ILO Convention No. 189 on Domestic Workers (2011).

(1)(b) Malaysia is urged to review and remove its reservations to the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

**(2) Repeal of Discriminatory Legislation and Policies**

(2)(a) There are a significant number of directly discriminatory provisions in Malaysian legislation, and a number which – while they do not appear to discriminate directly – are either indirectly discriminatory or open to discriminatory application. The existence of this legislation is in breach of Malaysia's international human rights obligation to respect the right to be free from discrimination. Moreover, the existence of such legislation can serve to legitimise stigma and stereotyping of vulnerable groups, which can have direct im-

pact in perpetuating the patterns of discrimination identified in Part 2 above. Malaysia is urged to undertake a review of all federal and state legislation and policies in order to: (i) assess compatibility with the right to equality; and (ii) amend, and where necessary, abolish existing laws, regulations, and policies that conflict or are incompatible with the right to equality. This process should include the repeal of all discriminatory laws, provisions and policies. In particular, the following discriminatory provisions should be repealed or amended to remove discriminatory elements:

***Constitutional Provisions:***

- All provisions in the Federal Constitution which offer protection of the rights of only citizens rather than of the rights of all persons within the territory or under the jurisdiction of Malaysia, including Articles 5(4), 8(2), 9, 10 and 12(1);
- Article 9, which is discriminatory on the grounds of place of residence;
- Article 10, which is discriminatory on the grounds of political opinion;
- Article 11, which is discriminatory on the ground of religion;
- Articles 14, 15, 24 and 26, which discriminate against women in relation to citizenship rights;
- Articles 89, 153 and 161 which discriminate on the basis of race or ethnicity.

(2)(b) Malaysia is urged to amend its Syariah law legislation, fatwas and policies in order to remove those aspects which are discriminatory, particularly on the grounds of gender, sexual orientation and gender identity. Malaysia is urged to adopt progressive interpretations of Syariah law which respect the right to equality. In particular, the following discriminatory provisions should be amended or repealed:

***Syariah Law:***

- Syariah criminal legislation, including sections 23, 25, 26, 27, 28, 41 and 56 of the Syariah Criminal Offences (Federal Territories) Act 1997 and the equivalent criminal legislation in all other states;
- Syariah family law, including sections 8, 10, 13, 14, 23, 47, 49, 50, 52, 59, 83, 84 and 88 of the Islamic Family Law (Federal Territories) Act 1984 and the equivalent family law legislation in all other states.

(2)(c) Malaysia is urged to amend its criminal law to remove discriminatory provisions, in particular:

***Criminal Law:***

- Sections 376 and 377 of the Penal Code regarding whipping;
- Sections 375 and 375A of the Penal Code regarding marital rape;
- Section 377A of the Penal Code regarding “carnal intercourse against the order of nature”;
- Section 21 of the Minor Offences Act 1955 which should not be used to prosecute transgender individuals or anyone else for simply expressing their gender identity;
- Section 133A of the Evidence Act 1950 regarding evidence provided to court by children;
- Section 146A of the Evidence Act 1950 regarding evidence during a rape trial.

(2)(d) Malaysia is urged to amend its education law to remove discriminatory provisions, in particular:

***Education Law:***

- Those provisions of the Education Act 1996 which privilege Malay Muslim students over students belonging to other ethnic groups and religions, for example sections 50 and 52;
- The Education (Special Education) Regulations) 1997 should be amended to remove the distinction between “educable” and “uneducable” children with disabilities;
- Any provisions and policies which prevent non-citizen children from attending primary and/or secondary school.

(2)(e) Malaysia is urged to amend its employment law to remove discriminatory provisions, in particular:

***Employment Law:***

- The protections under the Employment Act 1955 must be extended to all workers, including domestic workers, as a bare minimum level of protection which can be improved upon but not reduced in employment contracts;



- Sections 34 and 35 of the Employment 1955, which are discriminatory against women;
- The Workmen's Compensation Act 1952 should be amended to remove provisions which are discriminatory against women, and to include protection for all migrant workers.

(2)(f) Malaysia is urged to amend its family law to remove discriminatory provisions, in particular:

***Family Law:***

Sections 10, 49 and 77 of the Law Reform (Marriage and Divorce) Act 1976, which are discriminatory on the ground of gender.

(2)(g) Malaysia is urged to amend its nationality and immigration law to remove discriminatory provisions, in particular:

***Nationality and Immigration Law:***

- Section 12 of Immigration Act 1959/1963 should be amended to allow women equal rights to endorse the name of their spouse and children on their passport;
- The Immigration Regulations 1963 should be amended to ensure that a foreign husband of a Malaysian woman is entitled to a dependant's pass on an equal basis as a foreign wife of a Malaysian man.

(2)(h) Malaysia is urged to amend its tax law to remove discriminatory provisions, in particular:

***Tax Law:***

- Section 47(1) of the Income Tax Act 1978 should be amended so as to remove discrimination on ground of gender;
- Those provisions which permit Muslims to benefit from tax deductions in relation to the religious taxes which they pay whilst members of other religions are entitled to no such deductions.

(2)(i) Malaysia is urged to review its **economic policies** to ensure that any privileges which are granted on the ground of race and ethnicity, or any other protected characteristic, with the intention of overcoming past disadvantage, are kept under regular review so as to ensure the continued legitimacy of purpose and proportionality.

### **(3) Laws Protecting the Rights to Equality and Non-discrimination**

(3)(a) Malaysia is urged to adopt appropriate constitutional and legislative measures for the implementation of the right to equality. Such measures should ensure comprehensive protection across all grounds of discrimination and in all areas of activity regulated by law. The constitutional protections of the rights to equality and non-discrimination are currently severely limited. It is therefore recommended to **amend the Federal Constitution** in order for Malaysia to comply fully with its international human rights obligations. Such amendments should include:

- (i) ensuring that both citizens and non-citizens benefit from the protections of the rights to equality and non-discrimination, through amendment of Article 8(2) of the Federal Constitution, among others;
- (ii) broadening the list of grounds of discrimination found in Articles 8 and 12 so as to include all grounds referenced in Principle 5 of the Declaration of Principles on Equality – including political opinion, sexual orientation, gender identity, age, disability, health status and nationality; and allow for a test for the inclusion of additional grounds, so that such grounds could be incorporated as necessary over time without requiring constitutional amendments;
- (iii) providing a clearer definition of what behaviours are prohibited as discrimination;
- (iv) extending the protection of the rights to equality and non-discrimination to all areas of activity regulated by law;
- (v) ensuring that the rights to equality and non-discrimination are enjoyed in both the public and private sector;
- (vi) removing the exclusion of personal laws from the prohibition of discrimination;

(vii) ensuring that any provisions permitting positive action in order to overcome past disadvantage and to accelerate the progress towards equality of particular groups meet criteria established in international law and best practice, such as time limits and proportionality;

(viii) removing from Article 8(5) of the Federal Constitution the list of exceptions to the prohibition on discrimination or ensuring that any exceptions to the principle of equality are only permitted to the extent that they accord with strictly defined criteria, and are justified as a proportionate means of achieving a legitimate objective;

(ix) removing the provision by the state of preferential treatment in the form of establishing and maintaining Islamic educational institutions.

(3)(b) It is further recommended that Malaysia should also consider strengthening the existing constitutional protections of the rights to equality and non-discrimination through the **enactment of comprehensive equality legislation**.

(3)(c) The enactment of comprehensive equality legislation should give effect to the principles of equality under international law and ensure the expanded constitutional protection against discrimination and the promotion of the right to equality. Equality legislation should aim at eliminating direct and indirect discrimination and harassment in all areas of life regulated by law; cover all prohibited grounds listed in Principle 5 of the Declaration of Principles on Equality; and attribute obligations to public and private actors, including in relation to the promotion of substantive equality and the collection of data relevant to equality.

(3)(d) Comprehensive equality legislation could either take the form of:

(i) A single Equality Act, which offers consistent protection against discrimination across all grounds of discrimination and in all areas of life regulated by law; or

(ii) A coherent system of Acts and provisions in other legislation which together address all grounds of discrimination in all areas of life regulated by law.

(3)(e) Members of groups who may be distinguished by one or more of the prohibited grounds should be given the opportunity to participate in the decision-making processes which lead to the adoption of such legislative measures.

(3)(f) It is recommended that a thorough review of the Persons with Disabilities Act 2008 is carried out in order to bring it into line with Malaysia's obligations under CRPD. Most importantly, the rights enshrined in the Act must be made enforceable, either through the civil courts, or through an enforcement mechanism designed for this specific purpose.

(3)(g) In order to ensure that the right to equality is effective in Malaysia, the government is urged to consider taking positive action, which includes a range of legislative, administrative and policy measures, in order to overcome past disadvantage and to accelerate progress towards equality of particular groups, including women and persons with disabilities.

#### **(4) Ensuring Consistency between Syariah and Secular Law Provisions**

Malaysia is urged to take all necessary steps to remove discriminatory effects of the legal dualism arising from the co-existence and unclear relationship between secular and Syariah legislation at the national as well as the state level. It must be ensured that, especially in family and religious matters, for which Muslims are subject to Syariah law and to the jurisdiction of Syariah courts and for which non-Muslims are subject to the provisions of secular law and to the jurisdiction of the secular courts, these two systems apply in a way that does not discriminate on any prohibited ground. Malaysia is urged to review in particular the relationship between the two systems so as to address legal disputes between non-Muslim mothers and fathers who have converted to Islam.

#### **(5) Education on Equality**

Malaysia is urged to take action to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right. Such action is particularly necessary in order to modify social and cultural patterns of conduct and to eliminate prejudices and customary practices which are based on the idea of the inferiority or superiority of one group within society over another.

#### **(6) Enforcement**

(6)(a) Malaysia is urged to ensure that persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy.

They must have effective access to judicial and administrative procedures, and appropriate legal aid for this purpose.

(6)(b) Malaysia is urged to introduce legislation or other measures to protect individuals from victimisation, defined as any adverse treatment or consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.

(6)(c) Malaysia is urged to ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

(6)(d) Malaysia is urged to adapt legal rules related to evidence and proof in order to ensure that victims of discrimination are not unduly inhibited from obtaining redress. In particular, rules on evidence and proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the right to equality.

(6)(e) Malaysia must ensure that sanctions for breach of the right to equality are effective, proportionate and dissuasive. Appropriate remedies should include reparations for material and non-material damages. Sanctions should also include the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy changes that are necessary for the realisation of the right to equality.

(6)(f) Malaysia is urged to establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. Such bodies must have independent status and competences, in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

(6)(g) Malaysia is urged to establish a focal point within government to coordinate policy and action relating to the right to equality.

### **(7) Duty to Gather Information**

During the research for this report, it has been established that there is a significant lack of information, including statistics available in relation to key indicators of equality in Malaysia. Malaysia is therefore urged to collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. Wherever statistics are collected in relation to key indicators of equality, they should be disaggregated in order to demonstrate the different experiences of disadvantaged groups within Malaysian society. Malaysia should further ensure that such information is not used in a manner that violates human rights.

### **(8) Dissemination of Information**

Laws and policies adopted to give effect to the right to equality must be accessible to all persons. Malaysia must take steps to ensure that all such laws and policies are brought to the attention of all persons who may be concerned by all appropriate means.

### **(9) Prohibition of Regressive Interpretation**

In adopting and implementing laws and policies to promote equality, Malaysia should not allow any regression from the level of protection against discrimination that has already been achieved.

### **(10) Derogations and Reservations**

No derogation from the right to equality should be permitted. Any reservation to a treaty or other international instrument, which would derogate from the right to equality, should be considered null and void.

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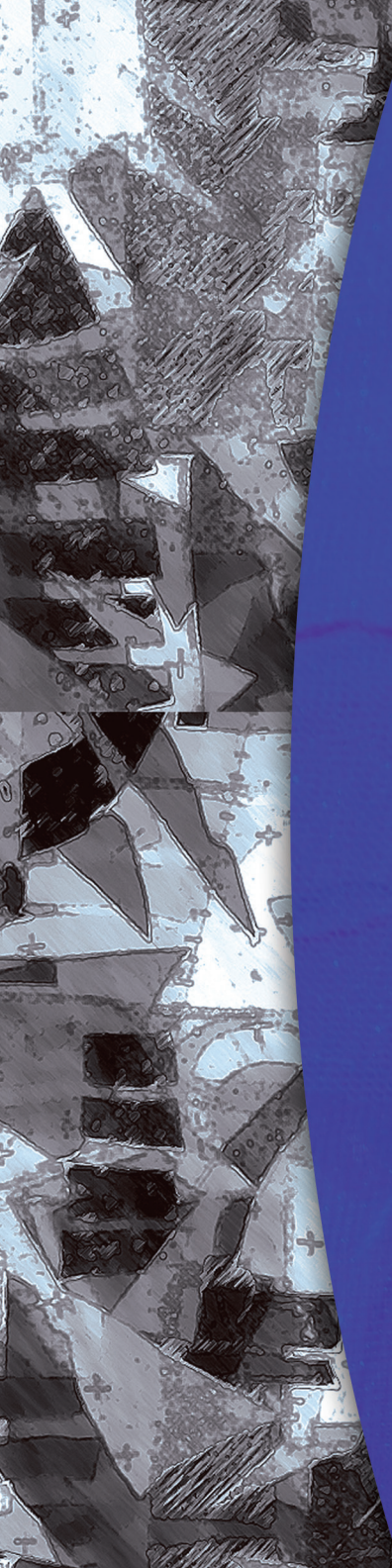
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The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Tenaganita is a Malaysian non-governmental organisation protecting and promoting the rights of women, migrants and refugees. It was born out of the struggles of women workers in the plantations and industrial sectors for decent wages, decent living conditions and the end of discrimination and gender based-violence.

On 28 April 2012, thousands of people took to the streets of Kuala Lumpur in Bersih 3.0, the biggest mass opposition rally in Malaysia's history. The protesters demanded "cleansing" of Malaysia's electoral system, which favours the coalition that has been in power since Malaysia's independence in 1957. Although this rally was violently suppressed, as were previous ones in recent years, the country lives in anticipation of change.

This report finds that the problems which the Bersih movement identifies with the political system are symptomatic of deep-rooted inequalities which limit people's rights and aspirations in this Asian Tiger nation. The Bumiputera continue to benefit from decades-old affirmative action policies that have outlived their legitimacy. Discrimination based on religion is widespread and religious dissent is punished. LGBTI persons suffer criminalisation and persecution. Refugees and domestic workers are struggling for survival on the margins. This report is a comprehensive portrayal of discrimination and inequality in Malaysia and contains a set of recommendations aimed at ensuring equal rights for all.



This report has been prepared with the financial assistance of the European Union. The contents of this report are the sole responsibility of The Equal Rights Trust and Tenaganita and can in no way be taken to reflect the views of the European Union.