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.
<table>
<thead>
<tr>
<th><strong>Instruments Relevant to Equality</strong></th>
<th><strong>Signed</strong></th>
<th><strong>Ratified/Acceded</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Civil and Political Rights (1966)</td>
<td>No</td>
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<tr>
<td>Optional Protocol I to the International Covenant on Civil and Political Rights (1966)</td>
<td>No</td>
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<td>International Covenant on Economic, Social and Cultural Rights (1966)</td>
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<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (1965)</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Convention on the Elimination of All Forms of Discrimination against Women (1979)</td>
<td></td>
<td>05/07/1995 acceded</td>
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<tr>
<td>Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)</td>
<td>No</td>
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<td>---------------------------------------------------------------</td>
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<tr>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Forced Labour Convention, 1930 (ILO Convention No. 29)</td>
<td>11/11/1957</td>
<td></td>
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<tr>
<td>Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)</td>
<td>18/11/1957 acceded</td>
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</tbody>
</table>
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. 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”. 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.

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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, the provision would be subject to the Syariah law on the division of inherited property; with respect to Article 7(b), 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, 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.

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.”
envisioned, 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.574

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-

574 United Nations Treaty Collection, Status as at: 28-07-2012 05:06:13 EDT.
The Legal and Policy Framework Related to Equality

...ing them, and especially reservations to Article 16, which are contrary to the object and purpose of the Convention”.

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.

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


576 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.”

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-
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.578

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.

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.\textsuperscript{579}

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.

\subsection*{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 \textit{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.\textsuperscript{580} 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.


\textsuperscript{580} \textit{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.\(^\text{581}\) 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.\(^\text{582}\)

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

\(^{581}\) 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”. 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”. In the same vein, the court has


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.\textsuperscript{585}

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.\textsuperscript{586} 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.\textsuperscript{587} 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.\textsuperscript{588}

\textsuperscript{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).


\textsuperscript{587} Abiad, N., above note 586.

\textsuperscript{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.”

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.

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. 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-

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.\textsuperscript{592}

The UN Committee on Economic, Social and Cultural Rights has also affirmed that:

\textit{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.}\textsuperscript{593}

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:

\textsuperscript{592} Human Rights Committee, \textit{General Comment No. 15: The position of aliens under the Covenant}, UN Doc. HRI/GEN/1/Rev.6, 1986, Para 1.

\textsuperscript{593} Committee on Economic, Social and Cultural Rights, \textit{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.\textsuperscript{594}

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.\textsuperscript{595}

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.\textsuperscript{596}

\textsuperscript{594} Convention on the Rights of Persons with Disabilities, above note 578, Article 5(2).


\textsuperscript{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.*

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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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.\(^{598}\)

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:

\[\text{[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and wom-}\]

\(^{598}\) Ibid.
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.\footnote{See above, note 575, Para 7-8.}

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:

\begin{quote}
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.\end{quote}

\begin{quote}
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.\end{quote}

\begin{quote}
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.\textsuperscript{601}

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 \textit{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.\textsuperscript{602} In refusing Ms Fernandez’s application for leave to appeal the Federal Court held, \textit{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

\textsuperscript{601} See above, note 597, Principle 5, p. 6-7.

\textsuperscript{602} \textit{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.\textsuperscript{603}

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.\textsuperscript{604}

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 \textit{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

\textsuperscript{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”.

\textsuperscript{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.*

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”.

605 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.606

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;607

(f) any provision restricting enlistment in the Malay Regiment to Malays.608

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”.\(^\text{609}\) 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.\(^\text{610}\) 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”.\(^\text{611}\)

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:

\(^\text{609}\) See above, note 597, Principle 5, p. 7.

\(^\text{610}\) See above, note 575, Para 10.

\(^\text{611}\) 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.\(^{612}\)

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-

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).*

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". 614 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. 615

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*

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.616

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.617

616 Jakob Renner v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur [2000] 3 CLJ 569.

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”. 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.

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.

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”. 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 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.

Priority in admission to the Malayan civil service, the grant of educational scholarships, business permits and licences and Malay reservation land were


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.623

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.624 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.625 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.626

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


624  Federal Constitution of Malaysia, above note 586, Article 89(6).

625  Ibid., Article 153(8A).

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”. 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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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 153.628

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.”629

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”.630 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).631

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:

\[\textit{All persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially.}\]

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. 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.

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.”


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.\textsuperscript{636} Article 2 of the ICERD states as follows:

\begin{quote}
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.\textsuperscript{637}
\end{quote}

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:

\begin{quote}
[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.\textsuperscript{638}
\end{quote}

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.\textsuperscript{639} They shall “in no way entail as a consequence the maintenance of unequal or separate standards.”\textsuperscript{640}

\begin{itemize}
\item \textsuperscript{636} See above, note 597, Principle 3, p. 5.
\item \textsuperscript{637} International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Art. 2(2).
\item \textsuperscript{639} Ibid., Paras 21 and 26.
\item \textsuperscript{640} See above, note 637, Article 4.
\end{itemize}
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, 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. 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

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-classfcontractors-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”.

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.*

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 orient-ed. 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.

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. 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.

(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 lifelong learning”.


(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.  

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. 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.

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;

648 Ibid., Articles 25(a), 25(c), 25(e) and 25(f).


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?” 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. Other issues discussed at the roundtables included the need to encourage the Malaysian Government


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”. 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.*

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.*

The exception does not apply for separated couples under certain circumstances. 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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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.\(^{657}\)

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”.\(^{658}\) 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

\(^{657}\) Ibid., section 375A.

\(^{658}\) 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.  

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.  

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. 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.  

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660 Evidence Act 1950, section 146A.


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.\textsuperscript{663} 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

\textsuperscript{663} All Women’s Action Society (AWAM), \textit{The Rape Report: An Overview of Rape in Malaysia}, 2002.
imprisonment for up to three years.\textsuperscript{664} 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.\textsuperscript{665}

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:

\begin{quote}
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.
\end{quote}

Section 119 demonstrates compliance with “reasonable accommodation” requirements as follows:

\begin{quote}
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.
\end{quote}

\textsuperscript{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.

\textsuperscript{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.  

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. 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”.

(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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666 See above, note 660, sections 118 and 119.

667 See above, note 575, Para 23.

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.\(^\text{669}\)

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.\(^\text{670}\) 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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\(^{670}\) See above, note 577, Para 36.
The Legal and Policy Framework Related to Equality

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.  

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, using a child for begging, and leaving a child without reasonable supervision. Part VIII establishes offences relating to the trafficking in and abduction of children. Chapter 2 of Part IX makes special provision for the detention of children in specified facilities. 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.

671 Ibid, Para 42.
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. 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. 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. 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

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.

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”.

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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pensation in respect of injury, damage or loss (section 10); and (iii) counsel-
ing 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:

\[
\text{[M]eans the commission of any of the following acts:}
\]

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 in-
jury 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.\textsuperscript{682}

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:

\textit{(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.}\textsuperscript{683}

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.\textsuperscript{684} 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 \textbf{Islamic Family Law (Federal Territories) Act 1984} states that:

\textsuperscript{682} Domestic Violence Act 1994 read together with Domestic Violence (Amendment) Act 2012, section 2.

\textsuperscript{683} Domestic Violence Act 1994, section 7(1).

\textsuperscript{684} See above, note 665, p. 35.
Any person who ill-treats his wife or cheats his wife of her property commits and offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.685

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.686

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.687


686 See above, note 665, p. 36.

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”. 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:

\[
\text{[A]ny unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.}\]

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.

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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.\(^{691}\)

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”.\(^{692}\)

(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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691 See above, note 597, Principle 5, p. 7.

692 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. 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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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. 694

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. 695

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.


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.\(^{696}\)

The Plan also foresees programmes targeting youths and ensuring the protection and wellbeing of children, through enhancing the quality of childcare 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.\(^{697}\)

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.”\(^{698}\) Finally, the

\(^{696}\) Ibid., Chapter 4, p. 180.

\(^{697}\) Ibid., Chapter 4, p. 184.

\(^{698}\) 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.\(^{699}\)

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),\(^{700}\) 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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• 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.701

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

701 Ibid.
working hours, the provision of crèches at workplaces as well as enabling them to work from home.\textsuperscript{702}

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,\textsuperscript{703} 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.\textsuperscript{704}

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”.\textsuperscript{705}

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\textsuperscript{703} Ibid., p. 10, n. 13.
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\textsuperscript{704} Ibid., p. 11.
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\textsuperscript{705} See above, note 575, Paras 18 and 20.
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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. 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.

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”. 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.\(^\text{709}\)

### 3.3.6 HIV/AIDS in the Workplace Code

The **Code of Practice on Prevention and Management of HIV/AIDS at the Workplace**\(^\text{710}\) 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.\(^\text{711}\)

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.\(^\text{712}\) Paragraph 3.3.4 (Non-judgemental, Non-

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\(^\text{709}\) Ibid.


\(^\text{711}\) Ibid., Glossary, p. 3.

\(^\text{712}\) 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 Policy⁷¹³ 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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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.\textsuperscript{714}

### 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.\textsuperscript{715}

**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.\textsuperscript{716} 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

\textsuperscript{714} Mokhtar, L., “Malaysia to have new social policy”, *New Straits Times*, 12 January 2012.

\textsuperscript{715} See above, note 597, Principle 18, p. 12.

\textsuperscript{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.\textsuperscript{717}

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 \textbf{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.\textsuperscript{718} An application for judicial review may seek as a remedy a declaration and/or any other relief.\textsuperscript{719} Damages may also be awarded.\textsuperscript{720} 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.\textsuperscript{721}

\begin{itemize}
  \item \textsuperscript{717} Byrnes, A., "Disability discrimination law and the Asian and Pacific region", UNESCAP, 2012.
  \item \textsuperscript{719} Rules of Court 2012, above note 718, Order 53, Rule 2(2).
  \item \textsuperscript{720} Ibid., Order 53, Rule 5.
  \item \textsuperscript{721} Ibid., Order 53, Rule 3.
\end{itemize}
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.\footnote{Ibid., Order 15, Rule 12.} 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.\footnote{See \textit{Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd \& Ors [1988] 2 MLJ 624}; see also \textit{Tang Kwor Ham \& Ors v Pengurusan Danaharta Nasional Bhd \& Ors [2006] 5 MLJ 60.}

\section*{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. \textit{National human rights institutions, endowed with appropriate powers, can contribute to this end.}\footnote{Human Rights Committee, \textit{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.}

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.\footnote{See, for example, Committee on the Elimination of Racial Discrimination, \textit{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, \textit{Principles relating to the Status of National Institutions (the Paris Principles)}, adopted by General Assembly resolution 48/134 of 20 December 1993.} 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.
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.*

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. 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.

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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.\textsuperscript{729}

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.

\textit{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:

\begin{quote}
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.\textsuperscript{730}
\end{quote}

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-

\begin{itemize}
  \item \textsuperscript{729} Rules of the Federal Courts 1995 on Legal Aid, Rule 9.
  \item \textsuperscript{730} See above, note 595, Para 32.
\end{itemize}
tions for breach of the right to equality must be effective, proportionate and dissuasive." 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. The High Court may also make declarations either as the sole remedy (via declaratory judgments), or alongside any other remedy.

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.


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.*

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.

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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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 ac-
tivities as are necessary in accordance with the written laws in force, if any, in
relation to such activities.  

Although SUHAKAM initially received a Grade A status by the Subcommit-
tee on Accreditation of the International Coordinating Committee of National
Human Rights Institutions (ICC) in 2002, it was criticised from several quar-
ters for its lack of independence and effectiveness. It was suggested that
SUHAKAM did not fully comply with the Paris Principles as it was under
the jurisdiction of the Prime Minister’s Department and was therefore not
autonomous from the Executive branch of the government. Further, the ap-
pointment process of Commissioners was conducted by the King, based on
the Prime Minister’s recommendations, and subsequently was non-transpar-
ent and was carried out without public consultation. The selection criteria
were unclear, with the Act stating only that Commissioners shall be appoint-
ed from amongst prominent personalities including those from “various reli-
gious and racial backgrounds”. 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.

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
739 Ibid., Para 5.3.
740 Ibid., Para 5.4. See also above note 569, section 5(3).
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.\footnote{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.} 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.\footnote{Human Rights Commission of Malaysia (Amendment) Act 2009, Act A1353.} 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.\footnote{Ibid.}
As a result of these amendments, the Sub-Committee of the ICC recommended in October 2010 that SUHAKAM retain its Grade A status.745

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 Prosecutor746 (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 1957.747

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.

\textit{As a legal concept [equality] is easy to state, but difficult to apply – because, first, equality can only apply among equals}

745 See above, note 742, Para 5.4.

746 Datuk Haji Harun Bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155.

747 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.\textsuperscript{748}

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.

\textsuperscript{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*, 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).

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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749  *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257.

750  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.  

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.\textsuperscript{752}

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.\textsuperscript{753}

The case of Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor\textsuperscript{754} (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.

\begin{footnotes}
\item[752] Public Prosecution v Datuk Haji Harun Bin Haji Idris & Ors [1976] 2 MLJ 116, section 3.
\item[753] See, for example, the recent case of Noorfadilla Ahmad Saikin v Chayed Basirun & Ors, above note 580.
\item[754] See above, notes 602 and 603.
\end{footnotes}
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.\textsuperscript{755} The Federal Court also referred to the interpretation of the right to equality in Malaysian case-law, stating:

\textit{[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}

could only come to the conclusion that there was obviously no contravention.\textsuperscript{756}

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\textsuperscript{757} 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”.\textsuperscript{758} 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:

\begin{quote}
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.\textsuperscript{759}
\end{quote}

\textsuperscript{756} Ibid., Para 18.

\textsuperscript{757} See above, note 575, Para 7.

\textsuperscript{758} See above, note 597, Principle 5, p. 7.

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”. 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”. 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.* 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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761  See above, note 602.

762  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.\textsuperscript{763}

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 introduce in 1999. It is non-binding, but companies are expected to accept and implement it. In \textit{Sitt Tatt Sdn Bhd v Flora Gnanapragasam},\textsuperscript{764} 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.\textsuperscript{765}

\textsuperscript{763}Syukri, A., “Govt’s Appeal against Gender Equality Cases an Insult to M’sian Women”, \textit{Malaysian Digest}, 31 January 2012.


\textsuperscript{765}Jothy, L. “Sexual Harassment as Discrimination”, [2010] 3 \textit{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,\textsuperscript{766} 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.\textsuperscript{767} The courts in Malaysia have recognised the concept of constructive dismissal in cases brought under section 20;\textsuperscript{768} and, in 1997, recognised for the first time that a victim of sexual harassment could bring a claim under section 20. In \textit{Jennico Associates v Lillian Therere De Costa},\textsuperscript{769} 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:

\textit{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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\textsuperscript{766} Industrial Relations Act 1967, section 20.

\textsuperscript{767} Ibid., section 30.

\textsuperscript{768} See, for example, \textit{Wong Chee Hong v Cathay Organisations (M) Sdn Bhd} [1988] 1 CLJ 298 (Rep); [1988] 1 CLJ 45.

\textsuperscript{769} \textit{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 Persekutuan770, 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-

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*,\(^{771}\) 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

\(^{771}\) *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*\(^7\) and *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors*.\(^8\)

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*\(^9\) 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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772  *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (High Court, Johor Bahru).

773  *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 2 CLJ 769 (High Court of Sabah and Sarawak, Kuching).

774  See above, note 580.
achieved in 2011. 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.

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. 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. 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.

In recent years, the government has undertaken initiatives to promote public


776 Ibid.


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.

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.\textsuperscript{780} 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.\textsuperscript{781} 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.\textsuperscript{782}

\textbf{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.

\textsuperscript{780} See above, note 665, p. 41.

\textsuperscript{781} Ministry of Finance, Budget of Malaysia, 2011 (delivered on 15 October 2010).

\textsuperscript{782} See above, note 702.