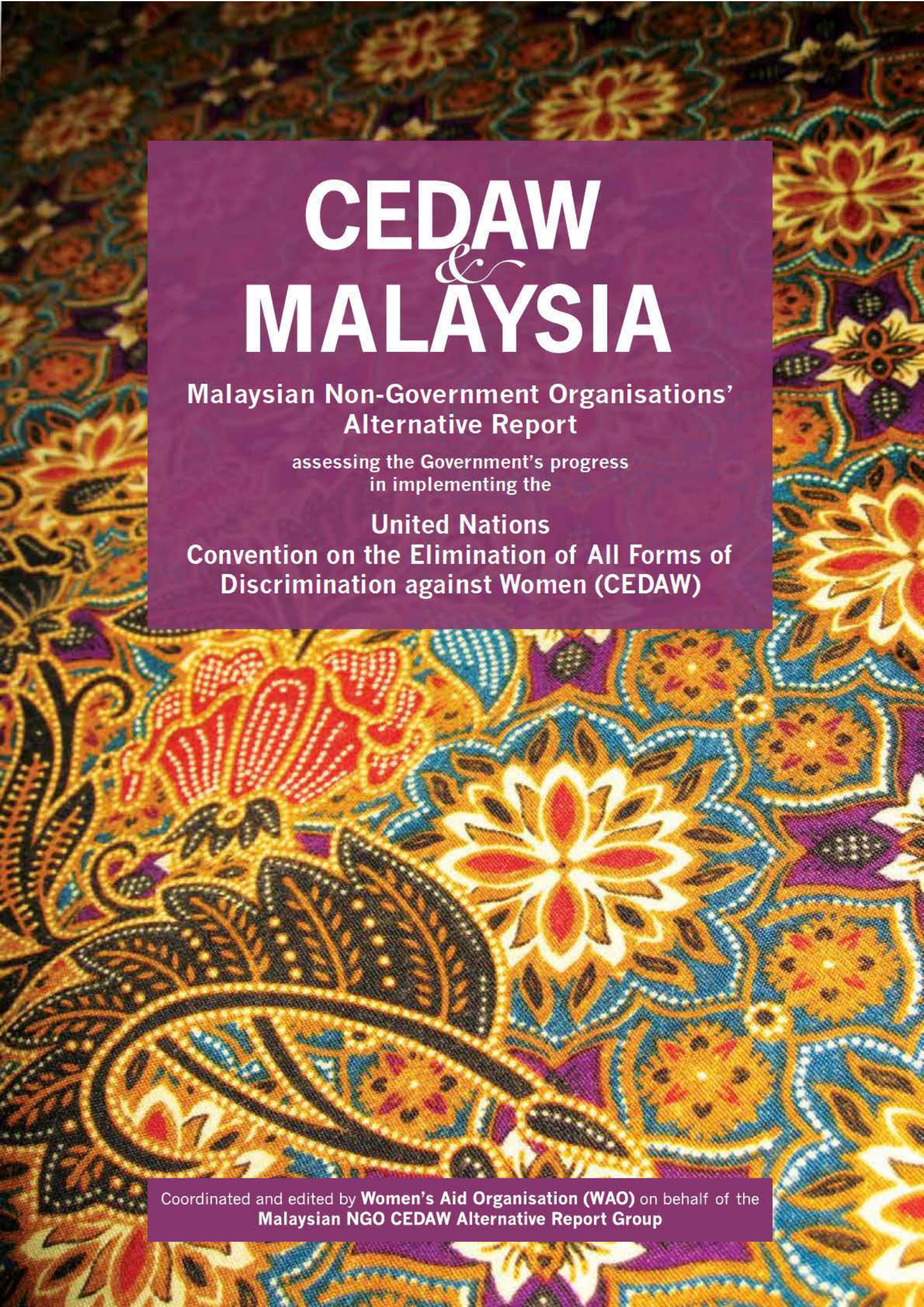

CEDAW & MALAYSIA

Malaysian Non-Government Organisations' Alternative Report

assessing the Government's progress in implementing the

United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Coordinated and edited by **Women's Aid Organisation (WAO)** on behalf of the **Malaysian NGO CEDAW Alternative Report Group**

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April 2012

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INTRODUCTION

INTRODUCTION

The Malaysian government's combined initial and second report to the Committee on the Elimination of Discrimination against Women was reviewed by the Committee at its 35th session in 2006.[1] Malaysian non-government organisations (NGOs) prepared a Shadow Report for the 2006 review session.[2]

The report you are now reading is the second Malaysian NGO report on the Convention on the Elimination of All Forms of Discrimination against Women. It has been produced by Malaysian NGOs as an Alternative Report, in the absence of the Malaysian government's combined third and fourth periodic report.

Malaysia's third report to the CEDAW Committee was due in August 2004 and the fourth periodic report was due in August 2008. Upon the delay of the third report, the CEDAW Committee requested that a combined third and fourth report be submitted by the Malaysian government in August 2008. At the time of writing, in April 2012, the Malaysian government has not yet submitted its combined third and fourth report to the CEDAW Committee.

Unfortunately, many of the concerns raised in the first Malaysian NGO CEDAW Shadow Report of 2005, submitted for review by the CEDAW Committee in 2006, are still relevant. This second NGO report does not attempt to replicate the first Shadow Report – nor does it attempt to provide an exhaustive picture of gender-based discrimination in Malaysia – it is intended to provide updated information and highlight some of the concerns that have developed since the first Shadow Report.[3] It should be read together with the first Shadow Report. The recommendations for the Malaysian government at the end of each chapter include the still relevant recommendations from the 2005 NGO CEDAW Shadow Report, as well as new recommendations.

Many organisations participated in the collection of information, data and case studies for the report. The list of these contributing organisations can be found on page 5. The report was compiled and edited by Sarah Thwaites, a Programme Officer at Women's Aid Organisation (WAO), a Malaysian NGO.[4]

Thanks must go to the writers of and contributors to the first Malaysian NGO CEDAW Shadow Report of 2005. This first report provided a baseline from which to prepare this current report. Also, thanks to all of the organisations in the Joint Action Group for Gender Equality, whose press statements and reports have been valuable sources of information. Thanks must go to all the contributors who participated in the process of data collection for this NGO report. Thank you to all of the contributing organisations who attended meetings and provided input, including staff from International Women's Rights Action Watch (IWRAW) Asia Pacific, who provided very useful advice. Thank you also to the National Council of Women's Organisations (NCWO) for their assistance.

In particular, I would like to thank Rashidah Abdullah (RRAAM) for her valuable input in the chapter on health in this report. Thanks to WAO interns, Colette Johnson and Franziska Gutzeit, for their research assistance and to Jillian Sadler for her research and writing. Thanks to Bina Ramanand (FSSG) for her contribution to the chapter on non-citizen spouses. Many thanks also to

1 The Malaysian government's combined initial and second report to the CEDAW Committee is available on the website of the Office of the UN High Commissioner for Human Rights: www2.ohchr.org/english/bodies/cedaw/cedaws35.htm

2 The 2005 Malaysian NGO Shadow Report is available on IWRAW Asia Pacific's website: www.iwraw-ap.org/resources/35_ngocedaw_resources.htm

3 Owing to a lack of resources, issues pertaining to women with disabilities, older women and stateless women have not been addressed in this report. These groups of women are particularly vulnerable to discrimination and we encourage the government to undertake extensive research on the status of these women and provide targeted support.

4 More information about Women's Aid Organisation (WAO) is available at: www.wao.org.my

Thilaga Sulathireh for assisting with research and writing up case studies and to Angela Kuga Thas (KRYSS) for her excellent feedback on drafts. Thank you to Zainah Anwar and Suri Kempe (SIS) for their contribution to the chapter on Article 16. A huge thank you must go to Ivy Josiah, Executive Director of WAO, for her support, guidance and assistance during the preparation of this report. Finally, thanks to the High Commission of Canada, Kuala Lumpur, for providing financial support to print this report.[5]

Sarah Thwaites
Programme Officer at Women's Aid Organisation and
Coordinator and Writer of the *Malaysian NGO Alternative Report assessing the Government's progress in implementing CEDAW*
Petaling Jaya
April 2012

[5] The High Commission of Canada, Kuala Lumpur, supported the printing of this report, however was not involved in the development of its contents.

CONTRIBUTING ORGANISATIONS

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All Women's Action Society, Malaysia (AWAM)

Association of Women Lawyers (AWL)

Asian-Pacific Resource and Research Centre for Women (ARROW)

Federation of Reproductive Health Associations Malaysia (FRHAM)

Foreign Spouses Support Group (FSSG)

Health Equity Initiatives (HEI)

Knowledge and Rights with Young People through Safer Spaces (KRYSS)

Malaysian Child Resource Institute (MCRI)

National Council of Women's Organisations (NCWO)

National Human Rights Society (HAKAM)

Perak Women for Women Society (PWW)

Persatuan Kesedaran Komuniti Selangor (Empower)

Persatuan Sahabat Wanita Selangor (PSWS)

Pusat Kebajikan Good Shepherd (PKGS)

P.S. The Children

Reproductive Rights Advocacy Alliance Malaysia (RRAAM)

Sabah Women's Action-Resource Group (SAWO)

Sisters in Islam (SIS)

Suara Rakyat Malaysia (SUARAM)

Tenaganita

Women's Aid Organisation (WAO)

Women's Centre for Change, Penang (WCC)

EXECUTIVE SUMMARY

"The balance between tradition and culture, on the one hand, and universal human rights, on the other, must be struck in favour of rights... No personal opinion, no religious belief, no matter how deeply held or widely shared, can ever justify depriving another human being of his or her basic rights."

— UN High Commissioner for Human Rights, Navi Pillay[6]

Since the first (and at the time of printing, the only) review of the Malaysian government by the CEDAW Committee in 2006 there have been changes in government policy, however there has not been a substantive change in the status of women's human rights in the country.

Malaysia is a member of the UN Human Rights Council. At the regional level, the Malaysian government is represented in two Association of Southeast Asian Nations (ASEAN) human rights mechanisms, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Intergovernmental Commission on Human Rights (AICHR). Civil society has consistently urged the Malaysian government to ground within the country international norms, standards and practices of human rights – to little avail.

In March 2012, for the first time in the herstory of the UN Commission on the Status of Women, there was a failure to adopt agreed conclusions at the 56th session. Alarmingly, governments failed to reach a consensus on the basis of safeguarding 'traditional values', at the expense of the human rights and fundamental freedoms of women.

This scenario is also being played out at the national level in Malaysia, whereby convenient cultural and religious excuses are offered to explain the lack of acceptance of the principle of the universality of women's human rights. Although women's human rights groups in Malaysia have since the CEDAW review in 2006 submitted more than ten memoranda to the government, attended numerous meetings with the Ministry of Women, Family and Community Development and issued many press statements calling for the full and effective implementation of the CEDAW Convention, there have been only a few government policy changes on paper. Notably, in July 2010 the government removed its reservations to CEDAW Articles 5(a), 7(b) and 16(2). However reservations still remain on five CEDAW Articles: 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g).

The central issue is that the Malaysian government has not incorporated the CEDAW Convention into national law. There is no gender equality legislation in place providing for the comprehensive realisation of substantive equality of women with men in both public and private spheres of life.

The overarching concerns expressed by the CEDAW Committee at the Malaysian government's 2006 review session continue to be issues of concern. These include the lack of clarity on the meaning of equality and non-discrimination; the lack of a legal framework for equality and non-discrimination; the lack of data disaggregated by gender; and the neutrality of the Malaysian government's five-year overarching policy document – currently the Tenth Malaysia Plan 2011 – 2015.

The progress of law reform on some issues, such as Islamic family law, is slow – there is a seemingly deliberate hesitation on the part of lawmakers to reform legislation. Yet law reform in other areas is undertaken at lightning speed. The Peaceful Assembly Bill, for example, which severely restricts the right to peaceful assembly and bans street protests, was drafted without meaningful public consultation and hastily tabled in parliament in 2011, where it was passed within a few weeks.

Although we have in place a designated government ministry for women, there has been a tendency for the Ministry of Women, Family and Community Development to take on the role of a facilitator, deferring to other government departments in the development of policies and law. We encourage the Ministry to take a stand to become an advocate for women and an active promoter of women's human rights in Malaysia.

[6] UN High Commissioner for Human Rights, Navi Pillay, cited in "Top UN officials urge countries to tackle violence based on sexual orientation", UN News Centre, 7 March 2012, accessed at: www.un.org/apps/news/story.asp?NewsID=41477&Cr=gay&Cr1=lesbia

Gender stereotypes abound in all areas of society. Rhetoric from the government often reinforces gender stereotypes and it is expected that women's primary responsibilities are in the home. Discrimination against women of diverse sexual orientations and gender identities is rife. The Penal Code continues to criminalise sex 'against the order of nature' and same-sex sexual relations between women is criminalised by state *Syariah* laws, as is 'cross-dressing', which leaves transgender people at constant risk of arrest.

In July 2011, there was one progressive court judgement, in which Justice Zaleha Yusof of the Shah Alam High Court stated explicitly that CEDAW has the force of law and is binding on Malaysia. In this case the court found that a decision by the Ministry of Education to revoke a teaching offer to a woman because she was pregnant was a case of gender discrimination. This one positive court outcome was however dampened by the Attorney General's Chambers decision to appeal this judgement. Also casting a shadow over this one positive judgement was a Court of Appeal decision in March 2012 that the discriminatory retirement age policy of a plastics industry company, in which women must retire at 50 and men at 55 years of age, does not constitute gender discrimination.

It is in essence the lack of a framework of equality and non-discrimination in Malaysia that continues to impact negatively on women's lives. This NGO Alternative Report attempts to highlight the material effects of this, which include:

- the continued under-representation of women in politics and decision-making positions and the lack of success of plans attempting to address this;
- the consistently low women's labour force participation rate;
- the lack of labour rights afforded to migrant domestic workers and their continued vulnerability to abuse;
- the non-recognition of refugees' identity;
- the legal permissibility of child marriage;
- the policing of morality;
- the lack of comprehensive, rights-based sex education;
- the difficulty women face in accessing their reproductive right to decide to have a child and to access high quality health services; and
- the continued non-recognition of marital rape.

It is the view of women's human rights groups in Malaysia that the above concerns are best addressed in an open and democratic environment. For that reason, many women's NGOs were part of a coalition for the advancement of civil and political rights – BERSIH 2.0 (*bersih* means clean in Bahasa Malaysia). BERSIH 2.0 called for clean and fair elections in Malaysia.[7] On 9 July 2011, the streets of Kuala Lumpur filled with a huge, peaceful gathering of BERSIH 2.0 supporters. The police responded with water cannon and tear gas and 1,697 people were arrested. BERSIH 2.0 had inspiring women leaders at the helm, Ambiga Sreenevasan and Maria Chin Abdullah. Ambiga received vitriolic personal attacks in the media and threats to her safety, which went without rebuke from government representatives and were therefore implicitly condoned.

Civil society again came under attack in 2011 during the Seksualiti Merdeka (sexuality independence) festival. Seksualiti Merdeka has been an annual festival since 2008 and its aim is to provide a safe space for all people of diverse sexual orientations and gender identities to come together to share knowledge about human rights. The police banned Seksualiti Merdeka, and Malaysia's home minister was reported to have said that the festival, which included art exhibitions, theatre and music performances and workshops and a book launch, would be a threat to national stability. The persecutory treatment Seksualiti Merdeka received from individuals, including government representatives, media outlets and the police incited hatred against already marginalised groups, and led to an atmosphere of intimidation. The organisers of Seksualiti Merdeka sought a judicial review of the legality of police action in banning the event, however the court denied the application, thereby condoning the arbitrary and oppressive police ban.

Another example of repressive State intervention came in February 2012, when a children's book titled "Where Did I Come From?", by Peter Mayle, was banned by the Malaysian government. First published about 30 years ago, the book describes the human reproductive process and contains cartoon images of naked people. The Deputy Secretary General (Security) of the Home Ministry said that the book

[7] BERSIH 2.0's eight demands included: clean up the electoral roll, reform postal voting, use indelible ink, establish a minimum campaign period of 21 days, ensure free and fair access to the media, strengthen public institutions, get rid of corruption and put a stop to dirty politics (www.bersih.org).

contained "elements detrimental to the community's moral values"[8] and that it was in the public interest to ban the book.[9]

There are two issues that the NGO Alternative Report Group would like the Malaysian government to address immediately:

- In appealing a High Court judgement of July 2011, which affirmed the binding nature of CEDAW on Malaysia, the government demonstrated that it wishes to continue to discriminate against women on the basis of pregnancy. The appeal also implies that the government disregards the provisions of CEDAW. We seek the government's plan of action to fully implement the CEDAW Convention in Malaysia.

- The perpetuation of gender stereotypes creates a negative and disempowering environment of conformity for women and openly encourages discrimination against women. These stereotypes range from housework always perceived to be 'women's work', whether undertaken by Malaysian women or migrant domestic workers, to the government-condoned vilification of women of diverse sexual orientations and gender identities. Among the material consequences of these stereotypes is, for example, the continued low level of women in leadership positions. We seek the government's plan of action to end the perpetuation of gender stereotypes.

8 "Book ban 'to guard moral values'", *New Straits Times*, 23 February 2012.

9 The ban came about after a complaint by the UMNO Youth Community Complaints Bureau. UMNO (the United Malays National Organisation) is the dominant political party of the Barisan Nasional (National Front) coalition, which has been in power for over 50 years.

LIST OF CRITICAL ISSUES

LIST OF CRITICAL ISSUES

The following is a list of critical or prioritised issues based on concerns raised in the Malaysian NGO CEDAW Alternative Report 2012.

This list has been adapted from the list provided to the CEDAW Committee by NGOs at the Malaysian government's first appearance before the Committee in 2006. Many of the issues highlighted in 2006 unfortunately continue to remain relevant. This list contains issues of concern, rather than recommendations. Recommendations to the Malaysian government appear throughout the report at the end of each chapter.

Reservations

1. The government is to be commended on **lifting its reservations to three CEDAW Articles: 5(a), 7(b) and 16(2)**. However, little has been done to achieve the practical realisation of the intent of these Articles, as there has been no change in law or policy and the status quo remains.

2. The government **has not removed its reservations to five CEDAW Articles: 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g).** The government has not given any indication of an intention to remove its reservations to these Articles.

Articles 1 – 4: Constitution, legislation and national machinery for the advancement of women

3. The government has not incorporated the CEDAW Convention into national law. There is **no gender equality legislation** in place providing for the comprehensive realisation of substantive equality of women with men in both public and private spheres of life.

4. The term **''discrimination'' in the Federal Constitution has been left up to the courts and the government to interpret**. On one occasion, the interpretation has been narrow, as was seen in the case of Beatrice Fernandez highlighted in the 2005 Malaysian NGO CEDAW Shadow Report. However, there was one progressive decision in 2011. On 12 July 2011, Judge Dato' Zaleha binti Yusof of the Shah Alam High Court declared that the Ministry of Education's actions in revoking a teaching job offer owing to pregnancy constituted gender discrimination, as per the definition of discrimination in CEDAW, and unconstitutional, as the revocation violated Article 8(2) of the Federal Constitution. In the grounds of judgement, Judge Dato' Zaleha binti Yusof states that CEDAW "has the force of law and binding on members states, including Malaysia. [sic]"[10] Shortly after the judgement was announced, the Ministry of Education indicated its intention to appeal the decision.

5. The **Attorney General's Chambers does not fulfil its role to promote and protect public wellbeing**. In the court case of gender discrimination owing to pregnancy noted above, the Attorney General's Chambers sought to obstruct justice by arguing that preventing a pregnant woman from working does not constitute discrimination. The Attorney General's Chambers has also attempted to obstruct justice in other cases by defending state laws on 'cross-dressing', arguing that transgender people have no rights in the country and must continue to be subjected to moral policing.

6. Although Article 8(2) of the Federal Constitution was amended to include gender as a prohibited ground for discrimination, **this was not accompanied by a comprehensive review of all laws,** including provisions within the Federal Constitution itself, which continue to be discriminatory.

7. The **Penal Code contains several discriminatory provisions**, including: Section 498, which perpetuates the anachronistic idea that women are the property of their husbands; Section 375A,

[10] Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p12.

which does not recognise marital rape; and 377CA which considers rape with an object to be an "unnatural offence" rather than rape.

8. Transgender people are at constant risk of arrest, merely because they are still seen as the biological sex they were born as, biologically male or biologically female. States of Malaysia have their own *Syariah* Criminal Offences enactments, many of which **criminalise acts such as a man dressing as a woman and being in a public place for immoral purposes**. Transgender people can be charged for wearing clothes and/or accessories deemed inappropriate for them. There are two states that **criminalise women dressing as men** – Perlis and Sabah.

9. *Syariah* laws **criminalise same-sex sexual practices between women** in Malaysia.

10. The **National Policy on Women and the National Action Plan for Women are not comprehensive**. Although actions were intended to start in 2009, the plan was not released until 2010.

11. A pilot project launched in 2003 to incorporate **gender-sensitive budgets into the national budgeting system has yet to be implemented** as a policy by the government.

12. The Malaysian government has **not ratified the optional protocol** to CEDAW.

13. The **grouping of women, children, family and community together under the Ministry of Women, Family and Community Development maintains patriarchal norms**. As the CEDAW Committee noted in its concluding observations after its session with South Korea, the merging of "family affairs and gender equality in a single mandate may directly or indirectly reinforce traditional patriarchal norms and be detrimental to the achievement of gender equality".[11]

14. Although there have been allusions in government rhetoric to the use of **temporary special measures**, limited action has been undertaken to carry out that which is necessary to achieve de facto equality.

Article 5: Gender stereotypes and discriminatory customs and practices

15. **Government rhetoric often reinforces gender stereotypes** and women's role in the home as the primary care-givers. Although the government has recently made announcements encouraging employers to offer part time work and flexible work arrangements, the rhetoric surrounding these announcements places the obligation on women to undertake the 'double burden' of working in the home taking care of children and seeking paid employment. **Government rhetoric never encourages fathers or 'parents' to seek flexible work arrangements** so that care for children and housework can be shared.

16. Elected Members of Parliament routinely make **sexist comments** in and outside of parliament and are not rebuked by their peers. Although it may be understood that the sexist comments are merely made by wayward individuals, the lack of reprimand from peers after such comments indicates the broad acceptance of a systemic sexist mindset.

17. There is a trend to **segregate sexes in public transport**. Although this may make women feel temporarily safer, it does not tackle the root causes of sexual harassment. In addition, such segregation is likely to increase the level of fear in women as notions that all men are potential doers of harm are reinforced.

18. The National Fatwa Council has declared a series of *fatwas* **focussing on limiting the rights of women to bodily integrity**. There is a *fatwa* making it obligatory for girl children to undergo circumcision, a *fatwa* against *pengkids* (a term referring to Malay women who appear masculine) and a *fatwa* against women who shave their heads. Although the *fatwas* have not been gazetted in Malaysian states, and therefore do not yet carry the weight of the law, the sentiment and attempts to control Muslim women's bodily integrity is of significant concern.

[11] *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Republic of Korea*, 49th Session, CEDAW/W/C/KOR/CO/7, released 29 July 2011, paragraph 16.

19. The **policing of morality** on the basis of religious values has serious implications for all members of society. The laws that attempt to regulate the private lives of citizens leave much scope for abuse, selective prosecution and victimisation, especially those from a marginalised class or gender. The policing of morality is undertaken with government support by both religious enforcement officers as well as the Royal Malaysian Police.

20. **Individuals of non-heteronormative sexual orientations or diverse gender identities face persecution** in Malaysia by government authorities. *Syariah* laws in each state specifically and explicitly criminalise acts such as a man dressing as a woman and/or posing as a woman and vice-versa, as well as sexual relations between women. The laws are different in each state and in some states the law includes a clause on cross-dressing for 'immoral purposes in a public space'. These laws have been abused and used against women and transgender people in private spaces. There have been many instances of religious enforcement officers and the police **harassing, assaulting and sexually abusing transgender people**.

21. **Gender stereotypes are perpetuated in the media.** In advertising, women are often portrayed in submissive roles. Film censorship guidelines require homosexual and transgender characters to either repent, die or be punished at the end of any film. Newspaper portrayals of sexual diversity often use disparaging words.

22. In November 2011 the **Malaysian police banned a festival called Seksualiti Merdeka (sexuality independence)**. Seksualiti Merdeka has been held annually since 2008 and it provides a safe space for all people of diverse sexual orientations and gender identities to come together to share knowledge about human rights. Government Ministers made comments inciting hatred, including claiming that the festival is attempting to promote "animal" culture[12] and the deputy Prime Minister alleged that it is "deviationist".[13]

Article 6: Trafficking of women

23. There is a **need to study the extent of trafficking** in the country as there are considerable inconsistencies in the statistics regarding the numbers of trafficking victims.

24. **Victims of trafficking continue to be incarcerated in ''shelters'' and deported** after investigations are carried out. Laws relating to the trafficking of persons do not adequately cover the protection and care of victims. There are no reparations for victims of trafficking. The wardens in the shelters are former prison guards. Furthermore, nothing is done to empower the victims to ensure that they do not fall victim to traffickers in the future – if poverty brought her here then there is nothing stopping her from coming back.

Articles 7 and 8: Participation in public life and decision-making

25. The government has not developed concrete plans for increasing the low numbers of women as candidates in the electoral processes, as elected representatives and in public office or decision-making positions. A policy decision to aim towards women making up 30 percent of public sector decision-making positions was announced in 2004, however **this 30 per cent target is far from being reached.**

26. The **number of women in parliament remains low**. Since 1957, there have never been more than three women Ministers in Cabinet at one time. Currently there are only two women Cabinet Ministers. In 2010, women comprised 25.7 per cent of the Senate (it must be noted that Members of the Senate are appointed, not popularly elected). Also in 2010, **women comprised only 10.4 per cent of the elected Members of Parliament in the House of Representatives** (in 2004 this figure was 9.6 per cent). Women only made up eight per cent of the Members of the 13 State Legislative Assemblies. There have never been transgender people as Ministers or Assemblypersons.

12 "Seksualiti Merdeka 2011 cuba promosi budaya 'binatang' – Ibrahim Ali", *Utusan Malaysia*, 3 November 2011.

13 "'Seksualiti Merdeka' programme a deviationist activity – Muhyiddin", *New Straits Times*, 3 November 2011.

27. **No political party in the coalition government has a quota** in place to ensure women's political participation.

28. **The political environment is hostile to women**. Elected Members of Parliament routinely make sexist comments in and outside of parliament which go unrebuked and which create a hostile environment for women.

29. In 2011, **a woman political leader was incarcerated for a month without trial** under the draconian *Emergency (Public Order and Prevention of Crime) Ordinance* (EO) for her purported role in an electoral reform campaign. Sarasvathy Muthu, who is the Vice-President of Parti Sosialis Malaysia (PSM, Socialist Party of Malaysia), was not involved in the electoral reform campaign yet was detained with others for a month.

30. Ambiga Sreenevasan, the woman leader of a civil society coalition for free and fair elections, BERSIH 2.0, was vilified in the media and received death threats. **Such treatment is a huge disincentive for women to participate in the public sphere**.

31. Representation of women at the **international level**, for example as Malaysian ambassadors and high commissioners, remains low.

Article 9: Citizenship

32. **Non-citizen wives married to Malaysian husbands who are on long term social visit passes are totally dependent on their husbands to maintain their legal status in the country**. Male spouses must be present at every visa renewal. This is also the case when a non-citizen spouse wishes to apply for permanent residency, as the male Malaysian spouse must be present at the Immigration Department office to endorse the application. Malaysian husbands must also give written permission for their non-citizen wives to work.

33. Should a husband refuse to be present at the Immigration Department office, the non-citizen wife's immigration status in the country may be at risk, leaving women **vulnerable in cases of domestic violence or estrangement**.

34. Federal Constitution provisions relating to the transmission of citizenship to children from Malaysian mothers to children born overseas remain discriminatory against women. **Only Malaysian fathers are able to automatically confer their citizenship to their children, mothers must apply for citizenship for their children.**

Article 10: Education

35. There is a **gender gap in technical courses** at universities and at the postgraduate degree level, in which there are more men enrolled than women.

36. **'Effeminate' boys and 'masculine' girls and transgender students have suffered discrimination in both public schools and higher learning educational institutions**. They are stigmatised and because of the lack of an enabling environment, often drop out of school or are forced to leave the institution. They are sometimes forced to attend camps to 'convert' them to conform to gender stereotypes. Some university authorities are also initiating 'research' which involves asking students to identify other students of diverse sexual orientations and gender identities. Schools regard homosexuality as an offence and students can be punished.

37. There is a continued lack of **comprehensive sex education** in all schools that is rights-based.

Article 11: Employment

38. The latest available statistics show that in 2010, **the labour force participation rate for women was very low at 46.1 per cent** (the rate for men was at 78.7 per cent). The labour force participation rate for women has remained consistently low for many years.

39. In 2009, **67.2 per cent of women outside the labour force gave 'housework' as the reason for not seeking work**, while 2.3 per cent of men out of the workforce provided the same reason.[14] However this statistic is not necessarily reflective of the 'real' situation as these women may be working in the informal sector or working for a family business. Alternatively these women may feel that they are not able to go out to work owing to family pressures.

40. In 1999, a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was launched. However this code is only voluntary for employers to follow and it has not been implemented widely. **In 2011, employment legislation was amended to include provisions relating to sexual harassment, however these provisions are significantly flawed**.

41. In some industries, **women must retire at a younger age than men**. In March 2012, the Court of Appeal decided that the retirement age policy of a plastics industry company, in which women must retire at 50 and men at 55 years of age, did not constitute gender discrimination.

42. **Non-citizen wives must be granted written permission from their Malaysian husbands to work**. Although in 2008 the government announced that it had reversed its policy which had previously prohibited non-citizen spouses from working, a non-citizen wife will only be given a work visa if her husband gives her permission to work.

43. Migrant domestic workers in Malaysia are discriminated against in many ways. **Domestic workers are not recognised as workers under Malaysian laws, they are not afforded the same labour protections as other workers and they are at risk of a range of rights violations and abuses owing to this lack of protection**.[15]

Article 12: Health

44. There is a critical need for **data on health to be disaggregated by gender** in order to understand how and why diseases affect women and men differently.

45. The continued **privatisation of healthcare** in Malaysia is threatening to make affordability one of the factors that will reduce women's accessibility to health care services.

46. Many women have **difficulty in accessing their reproductive right to decide to have a child and to access high quality services**, which can be seen by the following:

    a. The use of contraception hasn't increased in 25 years.
    b. The law allows for abortion to protect the physical and mental health of the mother, but abortion is stigmatised and costly and government hospitals often do not provide the service.
    c. Information and counselling from government hospitals are often provided within a religious framework, rather than a reproductive health rights framework.
    d. Women do not have access to full information so are not equipped with the knowledge to make informed decisions.
    e. There are violations of privacy in government hospitals – there has been anecdotal evidence of unmarried Muslim women over 18 years of age giving birth in hospitals and not being allowed to leave until the woman's parents have been contacted.
    f. For sterilisation procedures, women need the consent of their husbands.

[14] Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p14.

[15] The chapter on the CEDAW Committee's General Recommendation No. 26 in this report will examine the discrimination faced by migrant domestic workers in Malaysia.

47. Women are the **fastest growing part of the population being infected with HIV**. A 2008 report from the Malaysian Ministry of Health and UNICEF states that in 1990, the rate of new HIV infections amongst women was 1.2% of total new cases. In 2002, this figure was 9.0 per cent, in 2004 it was 10.8 per cent, in 2006 it was 15 per cent and in 2007 it was 16 per cent.[16]

48. **Mandatory HIV testing is in place for all Muslim couples intending to marry**. If either partner is found to be HIV positive, the couple will not be prevented from going ahead with the marriage.

49. **Sex education is inadequate** and based on religious morals rather than a rights-based approach to bodily integrity. The sex education curriculum for schools was approved by Cabinet in 2006, but has yet to be fully implemented. Demonstrative of the government's attitude to sex education is the banning of a children's educational book on human reproduction in February 2012 on the grounds that it would corrupt moral values.

50. Raids on entertainment venues are common. **The presence of condoms can be used as evidence against an individual and works against ensuring and protecting public health**. People are trying to practise safer sex, but are being effectively stopped through extortion, harassment and scare tactics.

51. **Access to health care is limited for some groups of women**, including refugee women, indigenous women, migrant women and transgender people.

Article 13: Social and economic rights

52. The government spends very little on benefits and disadvantaged women often cannot access welfare assistance from the State.

53. Non-citizen wives of Malaysian husbands face difficulty in opening individual bank accounts, leaving them economically dependent on their husbands.

Article 14: Rural women

54. The representation of women in village committees is very low.

55. Penan communities in Sarawak experience a denial of their rights to land and access to services. Many are dependent on the logging companies to provide basic services, such as transport. Women and girls are particularly vulnerable and have experienced abuse. The state government has failed to afford the right to redress for these abuses.

Article 15: Equality in the law

56. Women and men are in several areas not deemed equal before the law, for example:

    a. Anachronistic laws remain in the Penal Code and state *Syariah* laws which criminalise "enticing a married woman", perpetuating a view that women are the property of their husbands.
    b. Migrant domestic workers, who are all women, are not considered workers and not afforded the labour rights and protections of other workers.
    c. Laws discriminate against women on the basis of their gender identity, gender expression and sexual orientation.

Article 16: Marriage and family relations

57. In 2005, parliament passed the Islamic Family Law (Federal Territories) (Amendment) Act 2005, which contained several provisions discriminatory to women. At the time of its passing in parliament, the

[16] Ministry of Health and UNICEF Malaysia, "Women and Girls: Confronting HIV and AIDS in Malaysia", 2008, p11.

then Prime Minster noted the concerns of women's groups and stated that further amendments may be made to the law to remove the discriminatory elements. A committee was established to amend the legislation, and consensus was reached on the removal of the discriminatory elements. These amendments were then sent to the Malaysian Council of Rulers for review by religious authorities. These amended laws are now with the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia* (JAKIM)). To date, these amendments have not been tabled in parliament.

58. A **dual legal system** governs Muslim and non-Muslim personal laws separately and Article 121(1A) of the Federal Constitution excludes the civil courts from hearing matters relevant to the *Syariah* Courts or involving Muslim parties (and vice versa). This has created much difficulty for parties especially in cases of the conversion of a husband to Islam. The conflicting jurisdictions have far reaching effects on guardianship and custody of children, maintenance, the religious conversion of the children, inheritance and funerary rights of the deceased spouse.

59. **Women and men in Malaysia do not share the same rights in marriage.** Polygamy is still permitted for Muslim men. Women are discriminated against with regard to guardianship of children and may lose maintenance when deemed disobedient to their husbands.

60. **Child marriage is still legally permitted in Malaysia,** even though the Malaysian government has removed its reservation to Article 16(2) of CEDAW. Family law for non-Muslims permits the marriage of girls at 16 years of age with the consent of a Chief Minister and for Muslim girls, marriage below this age is permitted with the consent of a court.

61. **Muslim children born within six months of the date of marriage are considered 'illegitimate'** and are not allowed to carry the name of the father. In such cases, custody and maintenance of the child appertains exclusively to the mother and her relations, while the father has no rights to the child and vice versa.[17]

General Recommendation No. 19: Violence against women

62. Although the Domestic Violence Act 1994 has been in operation since 1996, **the implementation of this law has been poor**. For example, obtaining an Interim Protection Order against a perpetrator of domestic violence may take anywhere between 24 hours and 3 months. In addition, the implementation of the legislation is inconsistent across states and there are problems with the way in which cases are dealt with by the police, the welfare department and the courts.

63. In 2011, amendments to the Domestic Violence Act were passed by parliament. The **definition of domestic violence was expanded to include ''psychological abuse, including emotional injury''**. While this is a positive amendment, many other problems remain with the legislation.

64. **Marital rape is still not considered a criminal offence**. In 2006, the Penal Code was amended and the concept of rape within marriage was introduced into the legislation. However, this amendment is problematic as the definition of marital rape is based on potential or actual physical harm, rather than the act of rape itself, and the term rape is not even used. An earlier exception was left to remain in the Penal Code, which states "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."

65. In the Penal Code, **rape with an object is not considered rape** – it is considered an "unnatural offence".

66. **The State carries out violence against women as punishment for crimes under *Syariah* law**. For example, women found guilty of *musahaqah* (lesbianism) can be punished by whipping. In 2009, Kartika Sari Dewi Shukarno was sentenced by the Pahang *Syariah* Court to six strokes of the *rotan* for drinking beer in a hotel nightclub two years previously (the caning sentence was later commuted to a community service order). In 2010, three women were caned for engaging in illicit sex.

[17] Sections 80 and 85 of the Islamic Family Law (Federal Territories) (Amendment) Act 2005.

67. **Transwomen report high levels of violence and harassment** by religious enforcement officers and police.

68. Women **refugees and asylum seekers are vulnerable to violence and harassment owing to their precarious legal status**. The Malaysian government has not ratified the 1951 UN Refugee Convention or established mechanisms for the protection of the rights of refugees and asylum seekers.

General Recommendation No. 26: Migrant women workers

69. Malaysia's Employment Act 1955 **explicitly denies domestic workers the same rights as other workers**. Domestic workers are not entitled to maternity protection, rest days or holidays. Hours of work and conditions of service are also not protected. There is no minimum wage.

70. Many domestic workers in Malaysia are from Indonesia. In May 2011, an amended memorandum of understanding (MoU) was signed between Malaysia and Indonesia. The MoU is intended to clarify rights and conditions of work for domestic workers. In this MoU, it was reported that domestic workers should have one day off per week, or be paid one and a half days' wages in lieu of a day off. Domestic workers will be permitted to keep possession of their own passports however employers may take them for "safekeeping".[18] Employers must also pay wages into the domestic worker's bank account however cash payments are still permitted. **In every so-called ''protection measure'' for domestic workers in the MoU, there seems to be a way out of each measure, leaving the domestic worker vulnerable to abuse and exploitation.**

71. There is **no standard contract for migrant domestic workers** and no monitoring mechanisms to reign in errant agents and employers.

72. The isolating nature of domestic work and the lack of legal protection leaves domestic workers **vulnerable to abuse.**

General Recommendation No. 28: State obligation to eliminate all forms of discrimination against all women

73. In Malaysia, the CEDAW framework of equality and non-discrimination has not been implemented into domestic legislation, which in turn has implicitly condoned the continued discrimination in many areas of women's lives. In the absence of a legal framework of equality and non-discrimination, the impact is greater on some areas of women's human rights. Women's sexuality rights, including the right to sexual behaviour and practices and the right to sexual identity and relationships, are stifled in Malaysia. Women who are transgender, or who identify as lesbian or bisexual, face discrimination in many areas of their lives, based on their non-adherence to gender stereotypes. For example:

    a. Educational institutions **punish students for failing to adhere to heteronormative gender stereotypes**.
    b. The judiciary, the legal profession, the police, Islamic religious affairs department officers and State authorities **do not have an adequate level of knowledge on the right to equality and non-discrimination** so that the human rights of transpeople and women in same-sex partnerships are respected, protected and promoted.
    c. There is **no avenue for redress for victims of discrimination and violence on the basis of sexual orientation and gender identity**.
    d. Section 21 of the Minor Offences Act 1955 allows for women and transpeople to be charged for **indecent behaviour**.
    e. The Penal Code **criminalises sex ''against the order of nature''.**
    f. State *Syariah* laws **criminalise same-sex consensual sexual relations between women**.
    g. State *Syariah* laws **criminalise 'cross-dressing'**, and these laws are used by authorities to arrest and harass transgender women merely for expressing themselves.

[18] "New MoU on maids inked", *The Star*, 31 May 2011.

STATUS REPORT

Status report on the implementation of the CEDAW Committee's recommendations from 2006

The Malaysian government submitted its combined initial and second report to the Committee on the Elimination of Discrimination against Women in 2006. In May 2006, the Committee released recommendations for the Malaysian government based on the government's report and the appearance of its representatives before the Committee. These recommendations are in the CEDAW Committee's Concluding Comments.[19]

Malaysia's third report to the CEDAW Committee was due in August 2004 and the fourth periodic report was due in August 2008. Upon the delay of the third report, the CEDAW Committee requested that a combined third and fourth report be submitted in 2008. At the time of writing in 2012, the Malaysian government has not submitted its combined third and fourth report to the CEDAW Committee.

Laid out below are the 2006 recommendations of the CEDAW Committee and an assessment by NGOs as to what extent the government has or has not implemented these recommendations. Most of the concerns raised by the CEDAW Committee have not been addressed by the government and if action has been taken, often it has been ineffectual.

As noted in the first NGO CEDAW Shadow Report submitted to the CEDAW Committee in 2006, the Malaysian government often takes a piecemeal approach and does not follow through with an assessment of outcomes when implementing measures to eliminate discrimination against women. The result is unfortunately continued gaps and inconsistencies with the principles of CEDAW and Malaysia's obligations under the Convention.

Paragraph 8 of the 2006 Concluding Comments

The Committee calls on the State party to take immediate measures to ensure that the Convention and its provisions are incorporated into national law and become fully applicable in the domestic legal system.

The government has not incorporated the CEDAW Convention into national law.

Paragraph 8 of the 2006 Concluding Comments *cont'd*

The Committee urges the State party to incorporate in its Constitution and/or other appropriate national legislation, the definition of discrimination, encompassing both direct and indirect discrimination, in line with article 1 of the Convention.

Discrimination has not been defined in either the Federal Constitution or in legislation and it has been left up to the courts to interpret what constitutes discrimination. This has resulted in conflicting interpretations of what constitutes discrimination.[20]

[19] CEDAW Committee Concluding Comments: Malaysia, 2006, CEDAW/C/MYS/CO/2, released 31 May 2006.

[20] See the chapters in this report on Articles 1-4 and 15 of CEDAW for a discussion on the different judicial interpretations of discrimination.

Paragraph 8 of the 2006 Concluding Comments *cont'd*

The Committee further recommends that the State party enact and implement a comprehensive law reflecting substantive equality of women with men in both public and private spheres of life.

There is no gender-equality legislation in place providing for the comprehensive realisation of substantive equality of women with men in both public and private spheres of life.

According to government news agency Bernama, "The Women, Family and Community Development Ministry is currently studying the necessity to enact a Gender Equality Act... Datuk Seri Shahrizat Abdul Jalil said the rationale for the proposed act was the lack of punitive measures against discrimination towards women."[21] The first draft of this bill was reportedly due to be tabled in Parliament in July 2010, however this did not occur.

A meeting was held in September 2010 to discuss the necessity of a Gender Equality Act with representatives from government agencies and NGOs. At the conclusion of the meeting a representative from the Ministry of Women, Family and Community Development noted that "something concrete" will be produced by November 2010 related to a Gender Equality Act. This did not occur.

Laws in Malaysia continue to discriminate against women, even though the Federal Constitution was amended in 2001 to include gender as a prohibited ground for discrimination. Article 8(2) of the Federal Constitution states that,

> "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

As outlined in the first Malaysian NGO CEDAW Shadow Report,[22] this provision of the Federal Constitution is problematic for several reasons:

- The Federal Constitution contains many provisions that are discriminatory to women which continue to be valid owing of the phrase "except as expressly authorized by this Constitution" in Article 8(2).[23]
- The term "discrimination" in Article 8(2) of the Federal Constitution has been left up to the courts to interpret. Judicial interpretations of this provision have narrowly focused on discrimination relating to "employment under a public authority", finding that discrimination in the private sector is not covered by this constitutional provision.

The Penal Code and state-level *Syariah* laws also continue to contain gender discriminatory provisions.[24]

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21 "Shahrizat: Ministry Is Studying To Enact A Gender Equality Act", *Bernama,* 26 May 2010.

22 *Malaysian NGO CEDAW Shadow Report*, 2005, p11.

23 Such discriminatory constitutional provisions include, but are not limited to, the following:

- Article 8(5)(a) states that the equality clauses of the Constitution do not invalidate or prohibit "any provision regulating personal law", effectively leaving Muslim personal law unaffected by the amendment.
- Article 8(5)(b) states that the equality clauses of the Constitution do not invalidate or prohibit "any provision 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."
- Article 12(1) states that "there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth" with respect to access to education.
- There are numerous provisions in the Federal Constitution which discriminate against women's rights to citizenship and to confer citizenship on their children, including Articles 14, 15, 24(4) and 26(2) and the Second Schedule of the Federal Constitution. More information about discrimination against women with regard to citizenship is in the chapter on Article 9 of CEDAW in this report.

24 See the chapters on CEDAW Articles 1-4 and 15 for information on the discriminatory provisions in these laws.

Paragraph 8 of the 2006 Concluding Comments *cont'd*

[The Committee] also recommends that the State party include adequate sanctions for acts of discrimination against women and ensure that effective remedies are available to women whose rights have been violated.

There are no sanctions for acts of discrimination against women or bodies to which women can turn to seek remedies for violations of their rights.

For example, in cases of sexual harassment, there is often no possibility for seeking redress unless the perpetrator is charged under the Penal Code for insulting or outraging modesty. The Code of Practice on the Prevention and Handling of Sexual Harassment in the Workplace, which was established in 1999, is only voluntary for employers.[25] At 2011 only 1,671 employers nationwide had implemented the code.[26] Furthermore, since 1999, the labour department has "received and investigated" only 300 cases of sexual harassment.[27] In 2011, the Employment Act was amended to include provisions on sexual harassment in the workplace. These amendments are significantly flawed as they do not provide adequate remedies for women who have been sexually harassed.[28]

Paragraph 10 of the 2006 Concluding Comments

The Committee urges the State party to review all its remaining reservations with a view to withdrawing them, and especially reservations to article 16, which are contrary to the object and purpose of the Convention.

On 6 July 2010, the Malaysian government announced that it was planning to remove its reservations to three CEDAW Articles. On 19 July 2010, the United Nations Secretary-General officially announced the Malaysian government's removal of reservations to:

- **Article 5 (a):** *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;*
- **Article 7 (b):** *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; and*
- **Article 16 (2):** *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.*

Article 5(a)

Although the government's reservation to Article 5(a) has been lifted, polygamous marriages continue to be permitted. The CEDAW Committee has noted in its General Recommendation No. 21 that the continuation of the practice of polygamy breaches the provisions of Article 5(a).

Also in breach of Article 5(a) is a national *fatwa* decided upon on in April 2009. This *fatwa* on female circumcision states that it is obligatory for Muslim women to undergo circumcision unless it will result in some form of harm to the woman.[29]

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25 Ministry of Human Resources, "Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace", 1999.

26 "Sexual harassment cases on the rise", *New Straits Times*, 8 July 2011.

27 "Sexual harassment cases on the rise", *New Straits Times*, 8 July 2011.

28 See the chapter in this report on Article 11 of CEDAW for details on the amendments to the Employment Act.

29 The fatwa states, "Sehubungan itu, selaras dengan pandangan Jumhur Ulama', Muzakarah bersetuju memutuskan bahawa hukum berkhatan bagi wanita adalah wajib. Walau bagaimanapun, sekiranya ia boleh membawa kemudharatan pada diri, maka ia perlu dielakkan", www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-pemotongan-genitalia-wanita-female-genital-mutilation

Also in breach of Article 5(a) are the state-level *Syariah* laws criminalising women in same-sex relationships, transpeople and cross-dressing, which serve to reinforce stereotypes of men and women. The laws perpetuate the idea of the superiority of masculinity in their attempt to preserve stereotyped masculinity.

Article 16 (2)

Although the reservation has been lifted on Article 16(2), **child marriage is still legally permitted in Malaysia**. The Minister for Women, Family and Community Development stated that there would be no change in laws relating to the minimum age of marriage to reflect the removal of the reservation.[30]

Currently, non-Muslim females between the ages of 16 and 18 can marry with the authorisation of the Chief Minister. For Muslims, the minimum age of marriage is 16 years for females and 18 for males, with an exception that permits Muslim girls and boys below these ages to marry with the *Syariah* Court's consent.

Article 7(b)

In July 2010, the government announced the appointment of the first two female *Syariah* Court judges for the Federal Territories of Putrajaya and Kuala Lumpur.[31] However, since the announcement of the appointment, it was reported that there may be limitations placed on the purview of the female judges. Government-owned news agency Bernama reported that,

> "Syariah Appeals Court judge Datuk Md Yusup Che Teh said this was because there were certain cases that they could not preside over, such as divorce and 'wali hakim' cases... Md Yusup said the demarcation of duties for the women judges was not gender discrimination but was based on Islamic rulings that could not be disputed."[32]

In a u-turn decision, it was reported on 5 August 2010 that the female judges would in fact be able to hear all cases.[33] But on 8 December 2010, newspapers reported that the government was still "mulling" over permitting women judges to hear marriage and divorce cases as different states had different regulations and constraints.[34]

So, although reservations have been lifted on three CEDAW Articles, little change has taken place to enable the fulfilment of the intent of the Articles in a meaningful way.

Remaining reservations

The Malaysian government still has reservations to the following CEDAW Articles:

- **Article 9 (2):** *States Parties shall grant women equal rights with men with respect to the nationality of their children.*

- **Article 16 (1):** *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
  (a) The same right to enter into marriage;
  (c) The same rights and responsibilities during marriage and at its dissolution;
  (f) 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; in all cases the interests of the children shall be paramount; and
  (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

30 "Not enough is being done to discourage child marriages", *New Straits Times*, 4 July 2010.

31 This announcement follows the declaration of a national *fatwa* in 2006 on the right of women to be appointed judges.

32 "Area Of Jurisdiction Of Two Women Syariah Judges To Be Decided", *Bernama*, 14 July 2010.

33 "Female Syariah judges get full powers", *The Malaysian Insider*, 5 August 2010.

34 "Govt mulls over female syariah judge for marriage, divorce cases", *Sun2Surf*, 8 December 2010.

In its combined initial and second report to the CEDAW Committee, the Malaysian government stated that the reservations were in place as the Articles are in conflict with *Syariah* law and the Federal Constitution. However, according to Article 27 of the UN Vienna Convention on the Law of Treaties (1969), a State cannot use the excuse of the existence of a national law to not fulfil the objective of a treaty. Article 27 states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Of interest is an exchange during the Malaysian government's appearance before the CEDAW Committee in 2006:

> "60. Ms. Belmihoub-Zerdani said that the reservation to article 9 (2) regarding equality between men and women in conferring nationality upon their children was a case of glaring discrimination. There was no religious obstacle in Islam to acceptance of that measure. Many Islamic countries had lifted reservations to that provision and changed domestic law in order to comply with it.
> 61. Ms. Azailiza Mohd Ahad (Malaysia) agreed with Ms. Belmihoub-Zerdani that there **was no religious hindrance to acceptance of the clause. Reservations should be reviewed in order to ensure equal treatment**."[35]

Paragraph 12 of the 2006 Concluding Comments

The Committee calls on the State party to ensure that the Convention and related domestic legislation are made an integral part of legal education and the training of judicial officers, including judges, lawyers and prosecutors, so as to establish firmly in the country a legal culture supportive of women's equality and non-discrimination.

During the Malaysian government's Universal Periodic Review session in 2009, Thailand recommended that the Malaysian government "Continue to focus its efforts on ensuring full protection of human rights for all vulnerable groups, one such avenue is through the ongoing rigorous capacity-building programmes that Malaysia has initiated in this area, particularly for public officers."[36] Malaysia supported this recommendation.

Training on human rights principles has been offered to members of the judiciary. The Human Rights Commission of Malaysia, SUHAKAM, held a colloquium for the judiciary in October 2009. Among the objectives of this meeting was to provide examples to the members present about applying international human rights principles and standards within the Malaysian legal system.[37] However this colloquium is not part of legal curriculum and the extent to which the meeting focussed on gender discrimination is unknown.

The Judicial and Legal Training Institute (ILKAP) which is part of the Prime Minister's Department in 2010 held a course entitled "Course on Compliance with the Obligations under the Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Persons with Disabilities Convention (PWDC)".[38]

There have also been other seminars and workshops developed by the government but to whom these workshops and seminars are directed, how these actually discuss the issue of gender equality and non-discrimination, and the extent to which they are institutionalised is unknown.

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35 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraphs 60 and 61.

36 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 8.

37 *SUHAKAM Annual Report 2009*, p24.

38 Judicial and Legal Training Institute, Course Program 2010, accessed at: www.ilkap.gov.my/prime_bi.php

Paragraph 14 of the 2006 Concluding Comments

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

It also encourages the State party to take all necessary steps to increase support for law reform, including through partnerships and collaboration with Islamic jurisprudence research organizations, civil society organizations, women's nongovernmental organizations and community leaders.

The Committee further recommends that a strong federal mechanism be put in place to harmonize and ensure consistency of application of Syariah laws across all States.

The federal government has made attempts to have a uniform Islamic family law across all states, however these efforts have afforded fewer rights to women. Several states have adopted these laws since 2003, with the Federal Territories the last to adopt in 2005.

In December 2005, the Islamic Family Law (Federal Territories) (Amendment) Act 2005 was passed in parliament. At the time of its passing the then Prime Minister acknowledged the concerns of women's rights groups that women's rights may be curtailed under the amendments and stated that further amendments may be made to the law to remove the discriminatory elements.

In the 2009 Universal Periodic Review process, the Malaysian government stated that,

> "Malaysia is ... undertaking a comprehensive review of national legal framework to ensure compatibility with the principles and provisions of the CRC and CEDAW. In that regard, a Committee has been established to study the issues relating to dissolution of marriage, maintenance, custody, inheritance and determination of the religion of the child of a civil marriage during conflict situation resulting from one of the spouse converting to Islam. Simultaneously, a Committee was also established to review laws relating to women's rights under the Islamic family law."[39]

This committee was set up by former Prime Minister Tun Abdullah Ahmad Badawi after there was a public outcry over the 2005 amendments to the Islamic family law. This committee was chaired by the Attorney General's Chambers and the NGO Sisters in Islam and other members of the Joint Action Group for Gender Equality were represented. Agreement was reached to amend the discriminatory 2005 Islamic family law.

The government submitted the amendments to Malaysian Council of Rulers, together with amendments to the Law Reform (Marriage and Divorce) Act 1976 (on the rights of non-converting spouses (Section 51)). The Malaysian Council of Rulers said that they needed more time to consult with their state religious authorities and the amendments were not submitted to parliament. Despite consistently advocating for the amendments to be tabled in parliament, the NGOs involved in the process have not received an explanation regarding the delay. The government has demonstrated a lack of political will to push these changes through.

The Malaysian government has in the past stated that it is difficult to standardise *Syariah* laws as they fall under state, not federal, jurisdiction. However as the CEDAW Committee has noted in General Recommendation No. 28,

[39] *Malaysian Government Report to the Working Group on the Universal Periodic Review*, A/HRC/WG.6/4/MYS/1/Rev.1, 19 November 2008, paragraph 21.

> "The decentralization of power, through devolution and delegation of government powers in both unitary and federal States, does not in any way negate or reduce the direct responsibility of the State party's national or federal Government to fulfil its obligations to all women within its jurisdiction. In all circumstances, the State party that ratified or acceded to the Convention remains responsible for ensuring full implementation throughout the territories under its jurisdiction."[40]

A case that demonstrated clearly the problems raised by the inconsistencies between civil law and *Syariah* law was that of Shamala Sathiyaseelan, which was discussed in the 2005 Malaysian NGO CEDAW Shadow Report. In 2010, Shamala's case was again brought before the Federal Court. In 2002, Shamala's husband had converted to Islam and had also converted their two children without Shamala's knowledge, let alone her consent. Since then there have been numerous court cases in both the civil and *Syariah* courts. In November 2010, the Federal Court shirked its responsibility to execute justice by declining to answer constitutional questions relating to the validity of the unilateral conversion of children to Islam by a father. The Federal Court cited Shamala's absence as the rationale for neglecting to answer the constitutional questions.[41]

In past court decisions, Shamala's equal rights as a parent were denied and she was told to raise her children in a religion that was not her own. She fled the country with her children. The recent decision by the Federal Court, which was in effect a decision to not make any decision, leaves Shamala and others, mainly women, in similar situations without clarity as to their legal rights.

Paragraph 16 of the 2006 Concluding Comments

The Committee calls upon the State party to implement comprehensive measures to bring about change in the widely accepted stereotypical roles of men and women. Such measures should include awareness-raising and educational campaigns addressing women and men, girls and boys, and religious leaders with a view to eliminating stereotypes associated with traditional gender roles in the family and in society, in accordance with articles 2 (f) and 5 (a) of the Convention.

There have been no awareness-raising or educational campaigns to bring about change in the widely accepted and expected stereotypical gender roles. These gender stereotypes have a significant impact on the lives of women in Malaysia, including transgender people and women of diverse sexual orientations.

Government rhetoric about women reinforces stereotypes, and often focuses on women's 'family duties'. In 2010, Prime Minister Najib Tun Razak was reported in a national newspaper to have said while speaking about employment for women, "We need to use a more flexible and creative approach. Flexi-hours will encourage women to find jobs, and at the same time enable them to fulfil their responsibilities as mothers."[42] In speaking about maternity leave during his Budget 2011 speech, the Prime Minister stated, "The Government is concerned with the career prospects and welfare of female civil servants as they need to take care of their families."[43] The government never

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40 CEDAW Committee General Recommendation No. 28, paragraph 39.

41 The constitutional questions which were referred to the Federal Court but were not answered are:

Question 1: Whether Section 95 (b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) is ultra vires Article 12 (4) and Article 8 of the Federal Constitution, read in their proper context?

Question 2: Whether Section 95 (b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), as State law, is by reason of Article 75 of the Federal Constitution, inconsistent with a Federal law, namely, Section 5(1) of the Guardianship of Infants Act 1961 (as amended) and is therefore invalid?

Question 3: In the context of Article 121 (1A) of the Federal Constitution, where a custody order is made by the Syariah Court or the High Court, on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order?

Question 4: Where there has been a conversion of the children of a civil marriage into Islam by one parent without the consent of the other parent, whether the right of remedy under Part II of the Federal Constitution of the non-Muslim parent is vested in the High Court?

Question 5: Whether in the context of Articles 8, 11, 12 (4) and 121 (1A) of the Federal Constitution, the Syariah Court has exclusive jurisdiction to determine the validity of conversion of a minor into Islam once the minor has been registered by the Registrar of Muallafs (Majlis Agama Islam)?

42 "Flexi-hours will encourage more women to contribute, says Najib", *The Star*, 26 August 2010.

43 "Female civil servants can take up to 90 days maternity leave", *The Star,* 16 October 2010.

makes statements encouraging fathers to seek flexible working arrangements so that care of families can be shared by both parents.

Unfortunately there have been many instances in which Malaysian politicians have made highly derogatory comments about women both inside and outside of parliament. Although it may be seen that these sexist comments are made by wayward individuals, the lack of reprimand after such comments indicates a broader systemic sexist mindset, and creates a hostile political environment for women.[44]

In the case of Malaysia, women who are transgender, or who identify as lesbian or bisexual, face discrimination in many areas of their lives based on their non-adherence to gender stereotypes. As an example of such discrimination, in November 2011 the Malaysian police banned a festival called Seksualiti Merdeka (sexuality independence). Seksualiti Merdeka has been held annually since 2008 and it provides a safe space for all people of diverse sexual orientations and gender identities to come together to share knowledge about human rights. Government Ministers made comments inciting hatred, including claiming that the festival is attempting to promote "animal" culture[45] and the deputy Prime Minister alleged that it is "deviationist".[46] Subsequently a Member of Parliament has called for the creation of homosexual rehabilitation centres.[47]

State-level *Syariah* laws continue to reinforce gender stereotypes. *Syariah* laws criminalise women in same-sex relationships and also criminalise cross-dressing, and these provisions are used to arrest and harass transgender people.

Paragraph 18 of the 2006 Concluding Comments

The Committee encourages the State party to take sustained measures, including temporary special measures in accordance with article 4, paragraph 1, of the Convention and the Committee's general recommendation 25, and to establish concrete goals and timetables so as to accelerate the increase in the representation of women, in elected and appointed bodies in all areas of public life, including at the international level.

The representation of women in politics remains low: at 2010, 7.1 per cent of Cabinet Ministers were women; 25.7 per cent of appointed Senators were women; 10.4 per cent of elected federal Members of Parliament were women and 8 per cent of State Legislative Assembly members were women.[48]

In 2004, the then Prime Minister announced that there was to be a quota of at least 30 per cent women in decision making positions in the public service. In 2006, in response to a question by a CEDAW Committee member about why it was taking so long for Malaysia to reach the goal of at least 30 per cent representation of women in the public and private sectors, the government representative, Ms. Faizah Mohd Tahir said that "in fact it is not taking a long time, as the proposal had been submitted to the Cabinet in late 2005."[49]

The Tenth Malaysia Plan, released in 2010 and intended as the government's policy blueprint for the next five years, is very vague about the government's efforts to increase the participation of women in decision making positions. The Tenth Malaysia Plan states that the government will "increase its efforts to achieve a quota of at least 30% of decision-making positions to be held by women during the Plan period."[50] There is no plan of action, no concrete timeline and so far, no results.

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44 See the chapter in this report on Article 5 of CEDAW for more details.

45 "Seksualiti Merdeka 2011 cuba promosi budaya 'binatang' – Ibrahim Ali", *Utusan Malaysia*, 3 November 2011.

46 "'Seksualiti Merdeka' programme a deviationist activity – Muhyiddin", *New Straits Times*, 3 November 2011.

47 "Call to establish homosexual rehab centre", *The Sun*, 22 March 2012.

48 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, pp65-69.

49 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 59.

50 *Tenth Malaysia Plan 2011-2015*, p181, available at: www.epu.gov.my/html/themes/epu/html/RMKE10/rmke10_english.html

In June 2011, Prime Minister Najib announced inaccurately that 32.3 per cent of decision making positions in the civil service were made up of women in 2010. This figure was taken from a compilation of statistics released annually by the Ministry of Women, Family and Community Development. This 32.3 per cent figure comes from a chart entitled "Percentage of Top Management in Public Sector". The actual job positions covered under the term "Top Management" are not listed.

According to 2010 government statistics released by the Ministry of Women, Family and Community Development (in a chart titled "Women at Decision-Making Level in the Public Sector"):

- of the 24 Ministry Secretaries General, 4 are women;
- of the 57 Deputy Secretaries General, 17 are women;
- of the 43 Directors General, Directors and General Managers of Statutory Bodies, 8 are women; and
- of the 110 Directors General in the Federal Departments, 18 are women.

Added up, this equates to women filling a mere **20 per cent of decision making positions in the public sector**. For the Prime Minister to selectively quote favourable and non-verifiable statistics rather than the not-so-favourable and verifiable statistics is disingenuous.

Paragraph 18 of the 2006 Concluding Comments *cont'd*

The Committee invites the State party to also encourage political parties to use quotas.

The Malaysian government has not encouraged political parties to use quotas. Only one political party has inserted into its constitution a commitment to having 30 per cent of decision making positions to be filled by women. This commitment was made in June 2009 by opposition party, Parti Keadilan Rakyat (PKR).[51]

The Selangor State Government has also committed to having a minimum of 30 per cent of decision making positions to be held by women. At 2012, women comprise 40 per cent of the Selangor State Government executive committee.[52]

Paragraph 18 of the 2006 Concluding Comments *cont'd*

[The Committee] recommends that the State party conduct training programmes on leadership and negotiation skills for current and future women leaders.

It also encourages the State party to take measures that will lead to an increase in the number of women at the decision-making level in private sector organizations.

It further urges the State party to undertake awareness-raising about the importance of women's participation in decision-making processes at all levels of society.

The Tenth Malaysia Plan recognises women's low level of representation in the private sphere and states that, "in the private sector, women accounted for only 6.1% of Malaysia's corporate directors and 7.0% of CEOs in Bursa Malaysia largest 100 companies in 2008. From 2005 to 2009, female board representation in GLCs has maintained between 11.0% -14.0%."[53]

51 "PKR: Clearer policy needed on gender representation", *The Nut Graph*, 16 June 2009.

52 "Challenging and exciting times", *Selangor Times*, 16 March 2012.

53 *Tenth Malaysia Plan 2011-2015*, p179.

On 27 June 2011, the Prime Minister announced that within five years, at least 30 per cent of decision making positions in the private sector (on the boards of companies) should comprise women.[54] However this was followed by a clarification by the Prime Minister, who said in response to critics of the plan, "This is not a quota but a target."[55] In a positive move, however, the Malaysian Securities Commission subsequently announced that public-listed companies as well as businesses seeking public listing will have to declare how they will achieve the 30 per cent quota of women in boardrooms. In 2012, annual reports will need to contain information about policies and targets relating to increasing the representation of women. The chairperson of the Securities Commission is reported to have said "This is something we will do in phases. The first step is to allow companies to set their own year-on-year target and by the end of five years, they have to reach 30%."[56]

Paragraph 20 of the 2006 Concluding Comments

The Committee urges the State party to intensify its efforts towards accelerating the achievement of de facto equal opportunities for women with men in the area of employment through, inter alia, the use of temporary special measures in accordance with article 4, paragraph 1, of the Convention, and general recommendation 25.

The Committee recommends that monitoring measures be introduced to ensure effective implementation of efforts to promote change concerning the stereotypical expectations of women's roles and the equal sharing of domestic and family responsibilities between women and men, including by making the flexible work arrangements envisaged in the Ninth Malaysia Plan equally available to women and men.

As noted above, the government has made announcements about establishing quotas of 30 per cent for women in decision making positions in public and private sectors. With regard to the field of employment, and again as noted above, government rhetoric surrounding women in the workforce reinforces the stereotypical expectations of women as homemakers and care-givers for children. In August 2010, the Prime Minister commented that employers should have more flexible options for women wishing to work, including allowing working from home.[57] In December 2010, the Deputy Prime Minister Tan Sri Muhyiddin Yassin said, "There are plans to introduce part-time work regulations under the Employment Act 1955 while we are also looking into arrangements to enable women to work from home and engage in part-time or flexi-time options." He also said women worldwide are "still occupying low-productivity, low-paid and vulnerable jobs" and he didn't want Malaysian women to fall into this category.[58]

Although promoting part-time work may increase women's participation in the workforce, it would be preferable to promote flexible working options for 'parents', rather than just mothers, so that men and women could share the responsibilities of child-raising. Promoting part-time and home-based work for women only maintains the stereotype of women being primarily a care-giver and homemaker and also poses the risk of women being 'stuck' in low-paid and vulnerable jobs.

In 2007, subsidies for childcare were provided to public servants whose household income was less than RM2,000 per month. The subsidies came to RM180 per child. In 2009, this policy was extended and public servants whose household income was under RM3,000 were also included in the subsidy program.[59] It was reported that in 2009 tax relief was offered by the government as an incentive for companies to set up centres.[60] Some corporations have established childcare centres at the workplace, however recent reports have indicated that they are few in number.[61]

54 "PM: 30% of corporate decision-makers must be women", *The Star*, 27 June 2011.

55 "Women smart partners", *The Star*, 26 August 2011.

56 "Securities Commission: Firms must fulfill women quota for top positions to be listed", *The Star*, 15 September 2011.

57 "Flexi-hours will encourage more women to contribute, says Najib", *The Star*, 26 August 2010.

58 "Govt targeting bigger women workforce by 2015, says DPM", *The Star*, 9 December 2010.

59 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p24.

60 "Set up childcare support system fast", *New Straits Times*, 10 March 2012.

61 "Childcare centres at workplaces find few takers", *The Star*, 6 February 2012.

Much of the government rhetoric about childcare centres focuses on the function of the centres as supporting 'mothers' rather than working 'parents'.

Paragraph 22 of the 2006 Concluding Comments

The Committee requests the State party to enact legislation criminalizing marital rape, defining such rape on the basis of lack of consent of the wife.

The Penal Code does not recognise rape within marriage as a crime. In 2006 the Penal Code was amended and the concept of causing potential or actual harm in order to have sexual intercourse within marriage was introduced into the legislation. However, this amendment is problematic as the definition of this crime makes no mention of the term rape and is based on potential or actual physical harm, rather than the act of rape. The new subsection 375A of the Penal Code states,

> "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."

The penalty for causing "hurt or fear of death or hurt" within marriage (maximum of five years' jail) is much less than the penalty for rape (between five and twenty years' jail and whipping). Section 376 of the Penal Code gives the penalty for rape:

> "Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping."

Furthermore, an exception to subsection 375A of the Penal Code remains in the law, which states,

> "*Exception*—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."

In its 2006 appearance before the CEDAW Committee, a Malaysian government representative stated that,

> "the Parliamentary Select Committee had concluded that marital rape could not be made an offence, as that would be inconsistent with sharia law. As a compromise, the Select Committee had proposed that hurting or threatening to hurt a wife in order to compel her to have relations would constitute an offence."[62]

Paragraph 24 of the 2006 Concluding Comments

The Committee urges the State party to consider ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementary to the United Nations Convention against Transnational Organized Crime and to intensify its efforts to combat all forms of trafficking in women and girls, including by enacting specific and comprehensive legislation on the phenomenon.

The Committee further calls upon the State party to increase its efforts at international, regional and bilateral cooperation with countries of origin and transit so as to address more effectively the causes of trafficking, and improve prevention of trafficking through information exchange.

In February 2009, Malaysia acceded to the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" with a reservation.

[62] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 54.

In July 2007, the Anti-Trafficking in Persons Act (ATIP Act) was gazetted and it came into force in February 2008. This law stipulates penalties for trafficking, outlines the functions of the Council for Anti-Trafficking in Persons and the way in which victims of trafficking are to be protected.

In July 2010, the government tabled amendments to this Act in Parliament. The 2007 legislation deals with "trafficking in persons" while the 2010 amendments added "smuggling of migrants" and "matters connected therewith" as offences. As Human Rights Watch noted, the conflation of two distinct issues, the "serious rights abuse of human trafficking with the immigration violation of people smuggling", has been widely condemned by civil society groups.[63]

In 2010 and 2011, the US Department of State issued its annual Trafficking in Persons Reports in which Malaysia has been recognised as having made an improvement in its tackling of trafficking. Malaysia has been placed on the Tier 2 Watch List, which includes: "Countries whose governments do not fully comply with the TVPA's [Trafficking Victims Protection Act 2000] minimum standards, but are making significant efforts to bring themselves into compliance with those standards."[64]

In 2009, the US Department of State report placed Malaysia in the Tier 3 category, which includes "Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so."

Paragraph 24 of the 2006 Concluding Comments *cont'd*

The Committee urges the State party to collect and analyse data from the police and international sources, prosecute and punish traffickers, and ensure the protection of the human rights of trafficked women and girls.

The Committee urges the State party to ensure that trafficked women and girls are not punished for violations of immigration laws and have adequate support to be in a position to provide testimony against their traffickers.

Statistics on trafficking in persons are occasionally reported in the press. The recent publicly available statistics on trafficking are:

- From February 2008 to July 2010, 1,656 suspected human trafficking victims were rescued, however only 484 of them were considered 'actual victims'.[65]
- Of these 484, 291 were sex trafficking victims and 25 were below the age of 18.[66]
- During the period between March 2009 and February 2010, three sex trafficking offenders were convicted.[67]
- From March 2010 to February 2011, 11 people were convicted of sex trafficking and imprisoned for between three and eight years.[68]

When comparing the statistics from the media with statistics from the US Department of State Trafficking in Persons Report from 2009, it is clear that many victims of sex trafficking are not processed as victims of such under the Anti-Trafficking in Persons Act.

The US Department of State Report 2009 stated that,

> "Police reported rescuing about 2,000 foreign women and minors forced into prostitution during raids on brothels in 2008. The government deported or voluntarily repatriated most

63 Human Rights Watch, "Malaysia: Letter to the Prime Minister regarding amendments to the Anti-Trafficking in Persons Act", 8 September 2010.

64 US Department of State, *Trafficking in Persons Report 2010*.

65 "'Bulk of those trafficked are sex workers'", *New Straits Times*, 8 August 2010.

66 "'Bulk of those trafficked are sex workers'", *New Straits Times*, 8 August 2010.

67 US Department of State, *Trafficking in Persons Report 2010*, p224.

68 US Department of State, *Trafficking in Persons Report 2011*, p244.

> of the victims to their home countries, referring some to their respective embassy shelters and processing a limited number as victims under the anti-trafficking law."[69]

This discrepancy in the number of actual cases and the number of cases processed under the Anti-Trafficking in Persons Act is of significant concern.

The reporting of trafficking in the government-controlled media displays a concerning level of ignorance about the issue. A news report from August 2010 stated that "Many of the foreigners rescued in Malaysia on suspicion of being victims of human trafficking turned out to be people who came to work as prostitutes."[70] Often it is the case that women are brought to Malaysia under false pretences and after they arrive are forced into prostitution. The 2010 US Department of State Report on trafficking in persons notes that,

> "A significant number of young women are recruited for work in Malaysian restaurants and hotels, some of whom migrate through the use of "Guest Relations Officer" visas, but subsequently are coerced into Malaysia's commercial sex trade."[71]

During the course of investigations, identified victims of trafficking are forcibly placed in shelters run by the Ministry of Women, Family and Community Development for up to three months until they are deported to their country of origin. Currently there are nine shelter homes for trafficking victims gazetted by the government and four in operation.

Deputy Home Minister Datuk Wira Abu Seman Yusop was reported to have said, "Victims are fully protected in the shelter homes, where they receive counselling services and basic vocational training, such as sewing and craft- making... Foreign nationals will then be repatriated to their home country."[72]

Observers have noted that in these shelters, basic rights and freedoms are denied and some victims are "isolated, unable to work or earn income, and have little or no access to legal or psychological assistance provided by the government or NGOs...and these facilities did not employ medical officers or trained psychologists... Victims were typically uninformed about the legal processes to which they were subjected."[73]

The US Department of State Trafficking in Persons Report 2011 noted its concern that,

> "Poor investigation procedures did not take into account the best interests of victims, as under the current system, victims could be asked to recount their trafficking experience on up to seven different occasions to different officials. During trial proceedings, authorities did not make adequate efforts to separate victims from their traffickers or recruitment agents, which may have resulted in threats or pressure exerted on victims and their families if they cooperated with police and prosecutors."[74]

Paragraph 26 of the 2006 Concluding Comments

The Committee urges the State party to enact comprehensive laws and establish procedures to safeguard the rights of migrant workers, including migrant domestic workers.

The Malaysian government does not recognise domestic work as work. Prior to the 2011 International Labour Conference, governments were invited to send comments about the proposed international standards for decent work for domestic workers. These comments were compiled into a report. In this publication, the Malaysian government is reported to have stated that, "Domestic workers cannot

69 US Department of State, *Trafficking in Persons Report 2009*, p199.

70 "'Bulk of those trafficked are sex workers'", *New Straits Times*, 8 August 2010.

71 US Department of State, *Trafficking in Persons Report 2010*, p223.

72 "Turning the corner", *The Star*, 11 July 2010.

73 US Department of State, *Trafficking in Persons Report 2011*, p245.

74 US Department of State, *Trafficking in Persons Report 2011*, p245.

be equated to other workers in general,"[75] and, "Domestic work is not seen as ordinary employment. The rights of householders should also be considered."[76] The Malaysian government's statements throughout the report for the International Labour Conference consistently reflect its perception that domestic workers should not be afforded the same rights as other workers.[77]

In June 2011, a Convention Concerning Decent Work for Domestic Workers and a Recommendation Concerning Decent Work for Domestic Workers was adopted at the International Labour Conference. Malaysia not surprisingly abstained during the vote for both the convention and the recommendation.

Migrant domestic workers do not receive the legal protection afforded to other workers. Malaysia's Employment Act 1955 explicitly denies domestic workers the same rights as other workers. The Employment Act contains specific labour protections concerning leave and entitlements however, the First Schedule of the Employment Act specifically excludes domestic workers from being covered by the following provisions:

- Maternity protections, including leave and allowance entitlements[78] (furthermore, employment contracts prohibit pregnancy),
- One rest day per week,[79]
- Provisions limiting hours of work, including specifying that employees should not work more than five consecutive hours without a period of leisure of not less than thirty minutes and employees should not work for more than 48 hours in one week,[80]
- Paid public holidays,[81]
- Annual leave entitlements,[82]
- Sick leave,[83] and
- Termination, lay-off and retirement benefits.[84]

Notice of contract termination for employees under the Employment Act takes into account the length of time in service and can extend from four to eight weeks.[85] Domestic workers are excluded from these notice periods and for them, there is a blanket 14 day period of notice of termination, regardless of length of employment.[86]

Malaysia's Workmen's Compensation Act 1952 also excludes "domestic servants" from the list of occupations which fall under the category "workman", therefore leaving domestic workers without recourse to compensation for injury suffered in the course of their employment.

Memoranda of Understanding (MoU) have been signed with many countries sending domestic workers to Malaysia. In May 2011, an amended MoU was signed between Malaysia and Indonesia. The newspapers reported that under this MoU, domestic workers should have one day off per week or be paid one and a half days' wages in lieu of a day off. Domestic workers will be permitted to hold on to their own

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75 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p40.

76 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p6.

77 See the chapter in this report on the CEDAW Committee's General Recommendation No. 26 for more information about the Malaysian government's statements regarding domestic workers.

78 Maternity protections are covered under Part IX of the Employment Act 1955. Domestic workers are explicitly excluded.

79 Rest days are covered in Section 59, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

80 Hours of work are covered in Section 60A, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

81 Holidays are covered in Section 60D, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

82 Annual leave is covered in Section 60E, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

83 Sick leave is covered in Section 60F, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

84 Termination, lay-off and retirement benefits are covered under Part XIIA of the Employment Act 1955. Domestic workers are explicitly excluded.

85 Length of notice required for terminations of contracts is covered under Section 12 of the Employment Act 1955.

86 Section 57 of the Employment Act has a separate section outlining the length of notice to terminate a contract specifically for "domestic servants": "*Subject to any express provision to the contrary contained therein, a contract to employ and to serve as a domestic servant may be terminated either by the person employing the domestic servant or by the domestic servant giving the other party fourteen days' notice of his intention to terminate the contract, or by the paying of an indemnity equivalent to the wages which the domestic servant would have earned in fourteen days: Provided that any such contract may be terminated by either party without notice and without the paying of an indemnity on the ground of conduct by the other party inconsistent with the terms and conditions of the contract.*"

passports, however employers may have them in their possession for "safekeeping".[87] Employers must also pay wages into the domestic worker's bank account however cash payments are still permitted. So in every so-called "protection measure" for domestic workers in the MoU there seems to be a way out for the employers with regard to each measure. Furthermore, even though these measures are in place, the government neglects to acknowledge that domestic workers do not have the bargaining power to negotiate for their labour rights. Furthermore, there is no minimum monthly wage for Indonesian domestic workers.

In the Malaysian government's Universal Periodic Review session in 2009, the government supported both Nepal's recommendation to "Continue its efforts for the protection of the rights of foreign workers, and enhance their safety and welfare through institutional arrangements," [88] and Bangladesh's recommendation to "Continue its effort to protect the rights and interests of foreign workers."[89] The Malaysian government did not support South Africa's recommendation "That comprehensive protection is accorded to all migrant workers, including access to essential services like education, health and housing."[90]

Paragraph 26 of the 2006 Concluding Comments *cont'd*

The Committee calls upon the State party to provide migrant workers viable avenues of redress against abuse by employers and permit them to stay in the country while seeking redress. The Committee further urges the State party to make migrant workers aware of such rights.

Domestic workers are placed in an extremely difficult position if they become involved in a dispute with their former employer. Migrant domestic workers are only eligible for monthly visas which require a payment of RM100 per monthly renewal during the dispute, which may drag on for an extended period. They are also not permitted to work while they seek redress.

Migrant domestic workers are often contractually obliged to leave their jobs when they become pregnant. They also cannot marry during the course of their employment. Employment visas are usually connected to the employer, which means that an Indonesian worker would need to return to Indonesia before changing employers in Malaysia.

Paragraph 28 of the 2006 Concluding Comments

The Committee recommends that the State party adopt laws and regulations relating to the status of asylum-seekers and refugees in Malaysia, in line with international standards, in order to ensure protection for asylum-seekers and refugee women and their children.

The Committee further recommends that the State party fully integrate a gender-sensitive approach throughout the process of granting asylum/refugee status, in close cooperation with appropriate international agencies in the field of refugee protection, in particular the Office of the High Commissioner for Refugees.

The Malaysian government has not signed the UN Refugee Convention and there are no laws protecting the rights of refugees and asylum seekers in the country. Refugees and asylum seekers are considered to be the same as any other migrant. Refugees are able to enter Malaysia on a tourist visa, which can range in its validity length, but which often lasts for up to three months. Refugees without documentation or those who overstay these tourist visas are treated as undocumented migrants and are at risk of being placed in immigration detention centres.

87 "New MoU on maids inked", *The Star*, 31 May 2011.

88 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 50.

89 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 50.

90 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 84(b).

News reports have stated that the Deputy Foreign Minister explicitly "said as there were no special laws for refugees in this country, issues involving them came under the Immigration Act 1959/63 and that refugees were considered as illegal immigrants."[91]

Government rhetoric about refugees is often disturbing and points to a deep lack of understanding of basic human rights principles. The Deputy Foreign Minister Datuk A. Kohilan Pillay is reported to have said that Malaysia works with other agencies to "repatriate refugees to their countries of origin" or relocate them to a third country.[92] By the nature of their situation, refugees cannot return to their countries of origin as the risk of persecution is extremely high.

According to international customary law and the principle of non-*refoulement*, Malaysia has an obligation to not send refugees back to a country in which they are likely to be persecuted even though it has not signed the Refugee Convention. Malaysia flouts this international customary law.

There is a UNHCR office in Malaysia undertaking refugee status assessments and third country resettlements. At May 2011, 94,400 refugees and asylum seekers were registered with the UNHCR in Malaysia. About 30 percent were women. There are also asylum seekers in Malaysia who are as yet unregistered as refugees, whose number has been estimated to be about 10,000.[93]

As noted by the UNHCR, refugee women face "specific forms of abuse and violence which impact on them more severely than on men. They face harassment, offers of assistance in exchange for sex."[94]

Fear of arrest and maltreatment by the police and RELA leads to difficulties for refugees and asylum seekers as their freedom of movement is curbed, making obtaining healthcare and education difficult.

To give an idea of the treatment refugees and asylum seekers receive in Malaysia, between 2005 and 2010, 29,759 individuals were caned for immigration offences.[95] It is not known how many of these people were refugees or asylum seekers, however it is known that holders of UNHCR refugee cards were amongst those caned.[96]

The US State Department's Trafficking in Persons Report for 2010 highlighted that in Malaysia, the "People's Volunteer Corps (RELA) continued to conduct raids targeting illegal migrant communities and detained refugees, asylum seekers, and trafficking victims along with allegedly illegal migrants."[97]

In February 2010, the Malaysian government announced that it is considering allowing refugees and asylum seekers to work legally. This move is reportedly an attempt to deal with worker shortages and boost Malaysia's reputation as a "humane" nation. However the work which refugees may be permitted to do would only include "odd jobs".[98] No action has been taken since the announcement to confirm whether permitting refugees to work has become government policy.

Paragraph 30 of the 2006 Concluding Comments

The Committee urges the State party to include in its next report, data disaggregated by sex and ethnicity in all areas covered by the Convention and current sex-disaggregated data and information on the de facto position of rural women in all sectors.

There is a continued lack of data disaggregated by gender in Malaysia. For example, the data collected by the Ministry of Health in its annual reports about the incidence of communicable and non-

91 "Over 90,000 refugees in Malaysia", *Malay Mail*, 11 November 2010

92 "More than 90,000 refugees in Malaysia", *New Straits Times*, 11 November 2010.

93 UNCHR Malaysia website, www.unhcr.org.my/About_Us-@-Figures_At_A_Glance.aspx

94 UNCHR Malaysia website, www.unhcr.org.my/refugeeMsia.htm#

95 "Call for Malaysia to stop caning refugees", *Malaysia Today*, 11 March 2010.

96 "Burmese refugee tells of caning in Malaysia", *The Age* [Australian newspaper], 25 June 2011.

97 US Department of State, *Trafficking in Persons Report 2010*, p223.

98 "Government May Allow Refugees to Work", *The Star*, 22 February 2010.

communicable diseases has not been subjected to a gender disaggregated analysis.[99] Data on poverty is also not disaggregated by gender.[100]

Of note here is the way in which the most recent census was conducted in 2010. Anecdotal evidence suggested that the process involved serious inconsistencies and methodological flaws.[101] Reports have highlighted that census officers did not ask all of the questions on the form and left blank sections that required codes, as the officers had no knowledge of what these codes were. For accurate and useful data to be collected, so that it can be subjected to gender analysis and give a true picture of the position of women in the country, these methodological problems need to be addressed.

Paragraph 31 of the 2006 Concluding Comments

The Committee encourages the State party to ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and to accept, as soon as possible, the amendment to article 20, paragraph 1, of the Convention concerning the meeting time of the Committee.

Malaysia has not ratified the Optional Protocol to CEDAW.

During the Universal Periodic Review of Malaysia in 2009, both Turkey[102] and Lithuania[103] recommended to the Malaysian government that it ratify the Optional Protocol. The Malaysian government did not support this recommendation.

Malaysia's national human rights institution, SUHAKAM, stated in its 2009 annual report that it is in the process of formulating a proposal to submit to the government about ratifying the Optional Protocol.[104] In 2010, SUHAKAM noted that it is "still in discussion with the Ministry to promote and stress the importance of ratifying the Optional Protocol (OP) to CEDAW."[105]

Paragraph 32 of the 2006 Concluding Comments

The Committee requests the State party to ensure the wide participation of all ministries and public bodies in, and to continue to consult with nongovernmental organizations during, the preparation of its next report. It encourages the State party to involve Parliament in a discussion of the report before its submission to the Committee.

Women's human rights groups attended a meeting in 2009 chaired by the former Secretary General of the Ministry of Women, Family and Community Development about the CEDAW government report. To date, at 2012, there has been no further substantive contact with women's groups about the CEDAW government report.

Paragraph 33 of the 2006 Concluding Comments

The Committee urges the State party to utilize fully in its implementation of the obligations under the Convention, the Beijing Declaration and Platform for Action which reinforce the provisions of the Convention, and requests the State party to include information thereon in its next periodic report.

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99 Ministry of Health reports are available at: www.moh.gov.my

100 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2011*, p45.

101 "Census: Why wasn't I asked all 51 questions?", *New Straits Times*, 23 July 2010.

102 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 64(b).

103 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 94(c).

104 *SUHAKAM Annual Report 2009*, p50.

105 *SUHAKAM Annual Report 2010*, p49.

The extent to which this recommendation has been taken on board will need to be assessed when the government report is finalised.

Paragraph 34 of the 2006 Concluding Comments

The Committee also emphasizes that a full and effective implementation of the Convention is indispensable for achieving the Millennium Development Goals. It calls for the integration of a gender perspective and the explicit reflection of the provisions of the Convention in all efforts aimed at the achievement of the Millennium Development Goals and requests the State party to include information thereon in its next periodic report.

The extent to which this recommendation has been taken on board will need to be assessed when the government report is finalised.

Paragraph 35 of the 2006 Concluding Comments

The Committee notes that States' adherence to the seven major international human rights instruments enhances the enjoyment by women of their human rights and fundamental freedom in all aspects of life. Therefore, the Committee encourages the Government of Malaysia to consider ratifying the treaties to which it is not yet a party, namely, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Malaysia has not ratified these international conventions. The government has not given any indication that ratification is on its agenda. The Malaysian government has only ratified the following international conventions in addition to CEDAW: the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

Paragraph 36 of the 2006 Concluding Comments

The Committee requests the wide dissemination in Malaysia of the present concluding comments in order to make the people of Malaysia, including government officials, politicians, parliamentarians and women's and human rights organizations, aware of the steps that have been taken to ensure de jure and de facto equality of women, as well as the further steps that are required in that regard.

The Committee requests the State party to continue to disseminate widely, in particular to women's and human-rights organizations, the Convention, the Optional Protocol thereto, the Committee's general recommendations, the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly, entitled 'Women 2000: gender equality, development and peace for the twenty-first century'.

There has been no significant effort made by the government to disseminate the Convention or the CEDAW Committee's Concluding Comments. However, selected recommendations from the CEDAW Committee are quoted in some government documents, for example the *Measuring and Monitoring Gender Equality: Malaysia's Gender Gap Index* report developed by the UNDP and the Ministry of Women, Family and Community Development. This report is however highly technical in nature and not aimed at public consumption.

CEDAW is mentioned only once in passing in the Tenth Malaysia Plan, which was released in 2010. Without providing further detail, the Tenth Malaysia Plan states that, "The Government will incorporate principles and initiatives on combating gender discrimination as outlined by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Beijing Platform for Action, Millennium Development Goals (MDGs) and National Women Policy 2009."[106]

[106] *Tenth Malaysia Plan 2011-2015*, p181.

Paragraph 37 of the 2006 Concluding Comments

The Committee requests the State party to respond to the concerns expressed in the present concluding comments in its next periodic report under article 18 of the Convention. The Committee invites the State party to submit its third periodic report, which was due in August 2004 and its fourth periodic report, which is due in August 2008, in a combined report in 2008.

At the time of writing in 2012, the government report is yet to be completed. Women's groups wrote to the Minister for Women, Family and Community Development in August 2010 to request information about when the report is expected to be completed but as yet have not received a response. Women's groups wrote again in March 2011 and again there was no response. Ministry of Women, Family and Community Development staff have informally notified women's groups that a draft government report is being developed.

Statements of intent made during the Malaysian government's appearance before the CEDAW Committee in 2006

Statements of intent made by the Malaysian government in 2006	Has the government fulfilled its promises?
Reservations	
With reference to the reservation on Article 9(2), Malaysian government representative Ms. Azailiza Mohd Ahad stated, "Reservations should be reviewed in order to ensure equal treatment." [107]	The government has lifted its reservations to three CEDAW Articles: 5(a), 7(b) and 16(2). However, little has been done to achieve the realisation of the intent of these articles and the status quo remains. The government has not removed its reservations to five CEDAW Articles, including 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) and has not given any indication of an intention to do so.
Articles 1 and 2: Discriminatory laws	
Malaysian government representative, Ms. Azailiza Mohd Ahad, is reported to have said that, "The Government had ... embarked upon a process of reviewing existing laws so as to ensure potentially discriminatory provisions would be amended."[108]	To date there has been no information provided by the government about the progress of this review of existing legislation. Instead, there has been an increase in legislative and punitive actions controlling women's bodily integrity. For example, a *fatwa* was declared against *pengkids* (loosely translated as 'tomboys') and there have been continued arrests and harassment of transgender people.
Ms. Azailiza Mohd Ahad (Malaysia) said that, "As for sensitizing the judiciary, she agreed that domestic laws should be very clear in order for courts to be able to interpret the laws in compliance with Malaysia's obligations under the Convention. A formal process of sensitizing the judiciary on the pertinent issues had not begun, but the Government had every intention of pursuing that course."[109]	As at 2010, training courses were made available to judicial officers but these have not become a core part of legal training. One High Court judge in July 2011 recognised the importance of CEDAW in declaring that a woman whose job offer was withdrawn owing to pregnancy had suffered gender discrimination. However in another case in March 2012 a panel of judges in the Court of Appeal ruled that forced retirement ages of 50 years for women and 55 years for men in the plastics industry did not constitute gender discrimination.[110]
Ms. Faizah Mohd Tahir (Malaysia) said, "[L]egislation on sexual harassment was being drafted by the Ministry of Human Resources to be incorporated under amendments to existing laws, such as the Employment Act 1955..."[111]	In 2011, amendments to the Employment Act were tabled in parliament. The amendments included action employers must take when claims of sexual harassment are made. This law contains significant limitations.[112]

[107] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 61.

[108] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 10.

[109] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 12.

[110] See the chapter in this report on Article 15 of CEDAW for further details of these cases.

[111] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 20.

[112] See the chapter in this report on Article 11 of CEDAW for details on the sexual harassment provisions in the Employment Act.

Article 4: Temporary special measures	
The Malaysian government noted that it had not implemented any temporary special measures however "that issue would be revisited in light of the Committee's comments."[113]	In 2004, the government announced a 30 per cent quota for women in public sector decision making positions, however there was no concrete plan of action and this quota has not been reached. In 2011, the government announced that there would be a 'target' of 30 per cent of private sector company boards to be made up of women within the next five years.[114]
Article 6: Trafficking	
Ms. Azailiza Mohd Ahad said that the government was "examining the issue with a view to acceding to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime."[115]	In 2009, the government acceded to this Protocol.
Ms. Faizah Mohd Tahir stated that the "Ministry of Internal Security had pledged to establish female friendly accommodation within existing detention centres. In addition, law enforcement and immigration officials would receive training in the area of victim identification, with a view to ensuring that they were able to distinguish between genuine victims and persons who were being trafficked voluntarily."[116]	Training in victim identification is given to officials. However, there are numerous reports of victims of trafficking being detained in shelters for very long periods while they await deportation.[117] According to the US Department of State Trafficking in Persons Report 2011, observers have noted that in these shelters, basic rights and freedoms are denied and some victims are "isolated, unable to work or earn income, and have little or no access to legal or psychological assistance provided by the government or NGOs...and these facilities did not employ medical officers or trained psychologists... Victims were typically uninformed about the legal processes to which they were subjected."[118]
Article 11: Employment	
Mr. Aminuddin bin Ab. Rahman (Malaysia) said that "immigrant workers were, like all others, covered by the country's labour legislation, namely, the Employment Act 1955... Statistics on the number of complaints lodged by immigrant workers would be provided in the next periodic report."[119]	Migrant domestic workers are explicitly denied the labour rights afforded to other workers under legislation such as the Employment Act and the Workmen's Compensation Act.[120]

113 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 37.

114 See the chapter in this report on Articles 1-4 of CEDAW for further details of these temporary special measures.

115 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 48.

116 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 49.

117 See the chapter in this report on Article 6 of CEDAW for more details on trafficking.

118 US Department of State, *Trafficking in Persons Report 2011*, p245.

119 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 5.

120 See the chapter in this report on the CEDAW Committee's General Recommendation No. 26 for further information on migrant domestic workers in Malaysia.

Article 12: Health	
Ms. Hajjah Rosnah by. Hj. Ismail (Malaysia) stated that, "More data was needed on the accessibility of health services [and the] generation of gender-disaggregated data was planned."[121]	The health data collected by the Ministry of Health in its most recent annual reports about the incidence of communicable and non-communicable diseases has not been subjected to a gender disaggregated analysis.[122]
Ms. Faizah Mohd Tahir (Malaysia) stated that, "National guidelines on sex education in schools were to be introduced in the near future."[123]	After considerable delays, in November 2010 the Director General of the National Population and Family Development Board announced that a sex education module, which had been trialled in schools in five regions, was ready to be implemented across Malaysia.[124] The classes would not be compulsory and parents would be able to refuse the participation of their children. The sex education module does not actually include the use of the word 'sex', and is instead called "Social and Reproductive Health Education". After even further delays, in late 2011, it was reported that the module would be introduced in some schools in 2012.[125] The module is based on morals rooted in religious beliefs rather than a rights-based approach to bodily integrity.[126] Demonstrative of the government's attitude to sex education, in February 2012, a children's book titled "Where Did I Come From?" by Peter Mayle was banned by the Malaysian government. First published about 30 years ago, the book describes the human reproductive process and contains cartoon images of naked people. The Deputy Secretary General (Security) of the Home Ministry Datuk Abdul Rahim Mohd Radzi said that the book contained "elements detrimental to the community's moral values" and that it was in the public interest to ban the book.[127]
Ms. Faizah Mohd Tahir (Malaysia) stated that, "[E]fforts were being made to take account of the situation of rural women in the collection of gender-disaggregated data, but that comprehensive data were not yet available."[128]	Comprehensive gender disaggregated data on the situation of rural women is still not available.
General Recommendation No. 19: Violence against Women	
Ms. Faizah Mohd Tahir (Malaysia) stated that, "The 1994 Domestic Violence Act was currently under review; proposals included an expanded definition of domestic violence, as well as the provision of maximum protection and compensation for victims."[129]	In 2011, amendments to the Domestic Violence Act 1994 were passed in parliament. The definition of domestic violence was expanded to include psychological abuse and there is a provision for compensation for victims. However, significant concerns remain with the law, which are detailed in the chapter in this report on the CEDAW Committee's General Recommendation No. 19.

121 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 15.

122 Ministry of Health reports are available at: www.moh.gov.my

123 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 19.

124 "Trial run of sex education module yields positive results", *New Straits Times*, 12 November 2010.

125 "Sex education, finally", *Malaysia Today*, 6 October 2011.

126 See the chapter in this report on Article 12 of CEDAW for further details.

127 "Book ban 'to guard moral values'", *New Straits Times*, 23 February 2012.

128 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 28.

129 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 4.

Statements of intent made during the Malaysian government's examination at the Universal Periodic Review in 2009 relating to women

Malaysia was examined in a Universal Periodic Review (UPR) session in 2009. During this peer-review process, Malaysia received 103 recommendations and accepted 62 of these. Malaysia "noted" 19 recommendations and rejected outright a further 22. Malaysia will be reporting on the accepted recommendations in 2013.

Of note is that the recommendations accepted by the Malaysian government are unspecific and vaguely worded. The recommendations rejected by the Malaysian government are either from countries with which diplomatic links are limited or which are specific and able to be more easily monitored. Below are selected relevant recommendations pertaining to women's human rights, CEDAW, migrant workers and refugees given to the Malaysian government during the UPR session.

Recommendations which enjoy the support of the Malaysian government:

Although the Malaysian government notes that it supports the following recommendations, it has not made any changes to implement these recommendations.

CEDAW

- Algeria: *Continue to spearhead progress towards gender equality and development for women, in particular by giving due consideration to the recommendations of the Inter-agency Committee coordinated by the Ministry of Women, Family and Development regarding the compliance of Malaysia with the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women and the withdrawal of its reservations to both conventions.*[130]

- Ukraine: *Continue to implement the comments and recommendations of the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.*[131]

Women's rights

- Thailand: *Continue to focus its efforts on ensuring full protection of human rights for all vulnerable groups, one such avenue is through the ongoing rigorous capacity-building programmes that Malaysia has initiated in this area, particularly for public officers.*[132]

- Belarus: *Continue to take measures to protect the rights of women, children and people with disabilities.*[133]

- Oman: *Take all necessary measures and implement all necessary programmes to overcome the obstacles that prevent women's status from progressing further.*[134]

- Kazakhstan: *Continue to enhance efforts to further improve the status of women to enable them to reach their full potential and contribute towards the social and economic development of the country.*[135]

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130 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 3.

131 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 4.

132 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 8.

133 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 14.

134 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 17.

135 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 18.

Women in decision making positions

- Bangladesh: *Step up its efforts to enhance women's participation at the decision making level in both public and private sectors in line with the progress made in women's education.*[136]

Trafficked women and migrant workers

- Viet Nam: *Continue its positive engagement with neighbouring countries in combating trafficking in persons and explore further ways and means aimed at improving and enhancing protection of victims of domestic violence.*[137]

- Palestine: *Continue raising awareness of trafficking in persons and migrant workers, particularly women and children, who are a vulnerable group in the society and deserve all possible help.*[138]

- Nepal: *Continue its efforts for the protection of the rights of foreign workers, and enhance their safety and welfare through institutional arrangements.* [139]

- Bangladesh: *Continue its effort to protect the rights and interests of foreign workers.*[140]

Recommendations which do not enjoy the support of the Malaysian government:

In summary, the Malaysian government did not support recommendations to ratify the Optional Protocol to CEDAW, accord migrant workers their human rights and de-criminalise non-heterosexual behaviour.

Trafficked women

- Israel: *Develop and adopt national legislation and practices granting formerly trafficked and exploited women and children remaining in Malaysia immunity from penalties under national immigration laws.*[141]

OP-CEDAW

- Turkey: *Ratify the Optional Protocol to CEDAW.*[142]

- Lithuania: *Ratify the OP-CEDAW.*[143]

Discrimination on sexual orientation

- Chile: *The elimination from the Penal Code of standards which allow for discrimination against people on the grounds of their sexual orientation.*[144]

- France: *To respect the human rights of all individuals, including homosexuals, by de-penalizing homosexuality.*[145]

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136 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 19.

137 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 29.

138 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 30.

139 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 50.

140 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 104, recommendation 50.

141 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 21(f).

142 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 64(b).

143 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 94(c).

Migrant workers and refugees

- Canada: *Take steps to ensure that all migrant workers, refugees, and asylum seekers are treated in accordance with international human rights standards and that it sign and ratify the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and adopt and implement refugee protection legislation.*[146]

- South Africa: *That comprehensive protection is accorded to all migrant workers, including access to essential services like education, health and housing.*[147]

Recommendations "noted" by the Malaysian government

The following recommendations were "noted" by the Malaysian government and the government later provided a written response to these recommendations. The responses are below.

UPR recommendation	Malaysian government's response
• Finland: *Withdraw all of its reservations to CEDAW and CRC as soon as possible;* • Mexico: *Promote gender equality and protection of childhood and give favourable consideration to withdrawing the reservation on CRC and CEDAW; and* • France: *Withdraw the reservations made to CEDAW, as an extension of measures already taken in 1998.*	*Malaysian government's response:* "Malaysia is progressively reviewing the reservations to CEDAW with a view to lifting them, taking into consideration the constitutional provisions, laws and national interests. Malaysia has undertaken the necessary policy and legislative amendments and conducted awareness programmes targeted at all sections of society on gender equality and children's rights. These activities were carried out with substantive involvement of NGOs and civil society."[148] *Malaysian NGO Alternative Report Group comment:* *The government is to be commended on lifting its reservations to three CEDAW Articles: 5(a), 7(b) and 16(2). However, little has been done to achieve the practical realisation of the intent of these articles, as there has been no change in law or policy and the status quo remains. The government has not removed its reservations to five CEDAW Articles: 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g). The government has not given any indication of an intention to remove its reservations to these articles.*
• Chile: *Bring domestic legislation into conformity with CEDAW.*	*Malaysian government's response:* "Malaysia is undertaking appropriate measures including strengthening existing legislation and is currently engaging relevant stakeholders especially civil society to translate the provisions of CEDAW into domestic laws."[149] *Malaysian NGO Alternative Report Group comment:* *The government has not incorporated the Convention into national law. There is no gender-equality legislation in place providing for the comprehensive realisation of substantive equality of women with men in both public and private spheres of life.*

144 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 76(f).

145 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 88(a).

146 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 81(f).

147 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30*, 5 October 2009, paragraph 84(b).

148 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, "Response of the Government of Malaysia to the Recommendations listed under Paragraph 106 of the Outcome Report of the Universal Periodic Review", A/HRC/11/30/Add.1, 3 June 2009, paragraph 1.

• Germany: *Outlaw corporal punishment at home; and provide victims of domestic violence with access to legal remedies and protection from potential perpetrators; Set in place effective campaigns to inform and sensitize the population on this matter.*	*Malaysian government's response:* "Protection against domestic violence is enshrined in existing legislation including the Domestic Violence Act 1994, the Penal Code and the Child Act 2001... Victims of domestic violence are afforded protection and avenues for remedies under existing legislative and administrative frameworks. Awareness and sensitisation campaigns are being consistently carried out by the Government."[150] *Malaysian NGO Alternative Report Group comment:* *There is not a standardised implementation of the Domestic Violence Act across the country and in some cases knowledge of the law by frontline service providers is poor.*
• Canada: *Strengthen efforts to combat violence against women, including by ensuring that rape within marriage, defined as being when one of the spouses does not consent, is a criminal offence.*	*Malaysian government's response:* "The Government has undertaken necessary measures to address this issue, including by amending the Domestic Violence Act, the Criminal Procedure Code, the Penal Code and the enactment of the Anti-Trafficking in Persons Act of 2007, all of which are aimed at strengthening protection for victims of domestic violence. The Domestic Violence Act was amended[151] to expand the definition of "domestic violence" to include emotional, mental and psychological forms of domestic violence; to extend the duration of interim protection and to introduce a new provision on the right to compensation to the victim. The Penal Code was amended to provide that "any man who during the subsistence of a valid marriage causes hurt or fear of death 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 5 years."[152],[153] *Malaysian NGO Alternative Report Group comment:* *Rape within marriage is still not considered a crime, as the definition of marital rape is based on potential or actual physical harm, rather than the rape itself. Also, an exception to subsection 375A of the Penal Code remains which states: "Exception—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."*

149 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review,* "Response of the Government of Malaysia to the Recommendations listed under Paragraph 106 of the Outcome Report of the Universal Periodic Review", A/HRC/11/30/Add.1, 3 June 2009, paragraph 3.

150 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review,* "Response of the Government of Malaysia to the Recommendations listed under Paragraph 106 of the Outcome Report of the Universal Periodic Review", A/HRC/11/30/Add.1, 3 June 2009, paragraph 11.

151 At the time of the UPR session in 2009, the amendments to the Domestic Violence Act had not been tabled in parliament. It was only in 2011 that the amendments to the law were tabled.

152 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review,* "Response of the Government of Malaysia to the Recommendations listed under Paragraph 106 of the Outcome Report of the Universal Periodic Review", A/HRC/11/30/Add.1, 3 June 2009, paragraph 12.

153 It must be noted here that the punishment for rape is between 5 to 20 years' jail and whipping.

• Chile: *Adopt the necessary measures to prevent abuses against migrant workers and respect for their rights*; Germany: *Allow migrant domestic workers full access to legal remedies in case of abuse and duly investigate all cases of abuse and bring perpetrators to justice; take effective steps to protect migrant workers from attacks from militia groups; ensure that the pre-departure training centres are operated to meet the basic needs of the workers and do not encourage any form of abuse*; Belarus: *Continue to take measures to ensure that the rights of migrants are observed and not to allow any negative phenomena related to migration, including trafficking in persons.*	*Malaysian government's response:* "Foreign workers are protected by local labour laws including the Employment Act 1955; the Industrial Relations Act 1967; the Trade Union Act 1959; the Workmen's Compensation Act 1952; and the Occupational Safety and Health Act 1994. Foreign workers also have access to legal remedies. The Government regularly reviews labour policies, laws and regulations to meet current needs. New provisions are being introduced to deal with cases of sexual harassment involving foreign workers and to protect the wages and condition of work for foreign domestic workers and to control exploitative employment of foreign workers. The Government has also introduced guidelines on the requirements for employers for the recruitment of foreign domestic workers on the treatment and protection of the rights of foreign domestic workers."[154] *Malaysian NGO Alternative Report Group comment:* *This statement from the government is misleading. Migrant domestic workers are* ***explicitly excluded*** *from enjoying the same rights and labour protections as other workers under the Employment Act 1955 and the Workmen's Compensation Act 1952.*

[154] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, "Response of the Government of Malaysia to the Recommendations listed under Paragraph 106 of the Outcome Report of the Universal Periodic Review", A/HRC/11/30/Add.1, 3 June 2009, paragraph 19.

ARTICLES 1 – 4

ARTICLES 1 – 4:

DEFINITION OF DISCRIMINATION, LAW, POLICY AND MEASURES TO IMPLEMENT THE CONVENTION

Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any 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 women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure 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.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Much of the chapter on Articles 1 – 4 of the first Malaysian NGO CEDAW Shadow Report of 2005 is, unfortunately, still relevant in 2012.

This chapter will revisit some of the key issues highlighted which have not been addressed by the government and highlight some further important issues. The chapter will also reiterate the recommendations from the first NGO CEDAW Shadow Report as well as outline some additional recommendations.

Key issues in this chapter:

- The government has not incorporated the CEDAW Convention into national law. There is **no gender equality legislation** in place providing for the comprehensive realisation of substantive equality of women with men in both public and private spheres of life.
- The term **''discrimination'' in the Federal Constitution has been left up to the courts and the government to interpret**. On one occasion, the interpretation has been narrow, as was seen in the case of Beatrice Fernandez highlighted in the 2005 Malaysian NGO CEDAW Shadow Report. However, there was one progressive decision in 2011. On 12 July 2011, Judge Dato' Zaleha binti Yusof of the Shah Alam High Court declared that the Ministry of Education's actions in revoking a teaching job offer owing to pregnancy constituted gender discrimination, as per the definition of discrimination in CEDAW, and unconstitutional, as the revocation violated Article 8(2) of the Federal Constitution. In the grounds of judgement, Judge Dato' Zaleha binti Yusof states that CEDAW "has the force of law and binding on members states, including Malaysia. [sic]"[155] Shortly after the judgement was announced, the Ministry of Education indicated its intention to appeal the decision.
- The **Attorney General's Chambers does not fulfil its role to promote and protect public wellbeing**. In the court case of gender discrimination owing to pregnancy noted above, the Attorney General's Chambers sought to obstruct justice by arguing that preventing a pregnant woman from working does not constitute discrimination. The Attorney General's Chambers has also attempted to obstruct justice in other cases by defending state laws on 'cross-dressing', arguing that transgender people have no rights in the country and must continue to be subjected to moral policing.
- Although Article 8(2) of the Federal Constitution was amended to include gender as a prohibited ground for discrimination, **this was not accompanied by a comprehensive review of all laws,** including provisions within the Federal Constitution itself, which continue to be discriminatory.
- The **Penal Code contains several discriminatory provisions**, including: Section 498, which perpetuates the anachronistic idea that women are the property of their husbands; Section 375A, which does not recognise marital rape; and 377CA which considers rape with an object to be an "unnatural offence" rather than rape.
- Transgender people are at constant risk of arrest, merely because they are still seen as the biological sex they were born as, biologically male or biologically female. States of Malaysia have their own *Syariah* Criminal Offences enactments, many of which **criminalise acts such as a man dressing as a woman and being in a public place for immoral purposes**. Transgender people can be charged for wearing clothes and/or accessories deemed inappropriate for them. There are two states that **criminalise women dressing as men** – Perlis and Sabah.

[155] Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p12.

- *Syariah* laws **criminalise same-sex sexual practices between women** in Malaysia.
- The **National Policy on Women and the National Action Plan for Women are not comprehensive**. Although actions were intended to start in 2009, the plan was not released until 2010.
- A pilot project launched in 2003 to incorporate **gender-sensitive budgets into the national budgeting system has yet to be implemented** as a policy by the government.
- The Malaysian government has **not ratified the optional protocol** to CEDAW.
- The **grouping of women, children, family and community together under the Ministry of Women, Family and Community Development maintains patriarchal norms**. As the CEDAW Committee noted in its concluding observations after its session with South Korea, the merging of "family affairs and gender equality in a single mandate may directly or indirectly reinforce traditional patriarchal norms and be detrimental to the achievement of gender equality".[156]
- Although there have been allusions in government rhetoric to the use of **temporary special measures**, limited action has been undertaken to carry out that which is necessary to achieve de facto equality.

[156] *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Republic of* Korea, 49th Session, CEDAW/W/C/KOR/CO/7, released 29 July 2011, paragraph 16.

Article 1: Definition of discrimination lacking in legislation

The Malaysian NGO CEDAW Shadow Report prepared in 2005, submitted to the CEDAW Committee in 2006, highlighted that there is no definition of discrimination against women in place in with the Federal Constitution or other legislation. At the time of writing in 2012, there is still no definition of discrimination.

Article 2: Limited progress in eliminating discrimination in law

The wording of the anti-discrimination provision in the Federal Constitution is limited

The Federal Constitution was amended in 2001 to include a provision that there shall be no discrimination based on gender. Section 8(2) of the Federal Constitution states that,

> "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

As outlined in the first Malaysian NGO CEDAW Shadow Report,[157] this provision of the Federal Constitution is problematic for several reasons:

- The Federal Constitution contains many provisions that are discriminatory to women which continue to be valid owing of the phrase "except as expressly authorized by this Constitution" in Article 8(2).[158]
- The term "discrimination" in Article 8(2) of the Federal Constitution has been left up to the courts to interpret. Judicial interpretations of this provision have narrowly focused on discrimination relating to "employment under a public authority", finding that discrimination in the private sector is not covered by this constitutional provision.

This was most disappointingly the case in the court case of *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor [2004]*, which was outlined in the first Malaysian NGO CEDAW Shadow Report.[159] In brief, Beatrice Fernandez's employment was terminated from Malaysia Airlines System in 1991 when she fell pregnant and refused to resign, which was the requirement for female flight attendants under the collective agreement. After various court hearings, the 2004 judgement found that discrimination based on gender was permitted on the following grounds:

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157 *Malaysian NGO CEDAW Shadow Report*, 2005, p11.

158 Such discriminatory constitutional provisions include, but are not limited to, the following:

- Section 8(5)(a) states that the equality clauses of the Constitution do not invalidate or prohibit "any provision regulating personal law", effectively leaving Muslim personal law unaffected by the amendment.
- Section 8(5)(b) states that the equality clauses of the Constitution do not invalidate or prohibit "any provision 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."
- Section 12(1) states that "there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth" with respect to access to education.
- There are numerous provisions in the Federal Constitution which discriminate against women's rights to citizenship and to confer citizenship on their children, including Articles 14, 15, 24(4) and 26(2) and the Second Schedule of the Federal Constitution. More information about discrimination against women with regard to citizenship is in the chapter on Article 9 of CEDAW in this report.

159 *Malaysian NGO CEDAW Shadow Report*, 2005, p11.

i. Individuals are only protected from violations of their rights by the state and public authorities, not private enterprises.
ii. Collective agreements are not considered law, therefore the constitutional provisions do not apply.
iii. The term "gender" was included in Section 8(2) after 1991 so cannot be applied retrospectively.
iv. The equal protection in Section 8(2) of the Federal Constitution extends only to people in the same class. So if all women flight attendants are treated the same, no discrimination is taking place.

Of interest are the comments made by a Malaysian government representative at its appearance before the CEDAW Committee in 2006. Ms Azailiza Mohd Ahad (Malaysia) noted that "with reference to the Beatrice At Fernandez case...the Government was concerned over the implications of that case for its treaty obligations."[160] This concern expressed by the government representative has a strong basis, as the CEDAW Convention applies the principle of equality and non-discrimination across both public and private spheres.

The CEDAW Committee's General Recommendation No. 28 states, in paragraph 13, that States parties are "obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention." General Recommendation No. 28 also notes in paragraph 34 that, "States parties must ensure that women can invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention, committed by public officials or by private actors."

A further concern with regard to the interpretation of Article 8(2) of the Federal Constitution is that the understanding of gender in this provision has been limited to "men" and "women" in a biological sense. The term gender should be understood as a socially constructed concept and be inclusive of transgender people.

One High Court judgement recognised the importance of CEDAW

In July 2011, a High Court judgement decided that CEDAW's definition of discrimination has the force of law in Malaysia. The judgement declared that in revoking a teaching job offer owing to pregnancy, the Ministry of Education's action constituted gender discrimination as per Article 1 of CEDAW, and violated Article 8(2) of the Federal Constitution.

As a brief summary of the case, in 2008, Noorfadilla applied for a temporary teaching position in a government school. In January 2009, Noorfadilla was offered and accepted the teaching job and was given a memo informing her of her placement. Then she was asked whether she was pregnant. Noorfadilla was at the time three months' pregnant. After learning of her pregnancy, the Ministry of Education Officer withdrew Noorfadilla's placement memo.

The reasons given by the Ministry of Education as to why a pregnant woman cannot be employed included that she would be absent for two months after the birth of her child thereby requiring the hiring of a replacement teacher and during the course of her pregnancy she may encounter health problems and therefore need to be absent during working hours.

Noorfadilla filed an application in court to declare that the revocation of her appointment as a temporary teacher by the government owing to her pregnancy was unlawful, discriminatory and unconstitutional (by contravening Article 8(2) of the Federal Constitution).

Judge Dato' Zaleha binti Yusof's judgement of 12 July 2011 states that CEDAW "has the force of law and binding on members states, including Malaysia. [sic]"[161]

The High Court judgement included for the first time in Malaysian legal history a decision on what constitutes gender discrimination in declaring that, "in interpreting Article 8(2) of the Federal

[160] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am,* CEDAW/C/SR.731, released on 20 June 2006, paragraph 10.

[161] Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p12.

Constitution, it is the Court's duty to take into account the Government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The Court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under Article 8(2) of the Federal Constitution."[162]

The judgement declared that the "plaintiff should have been entitled to be employed as a [teacher] even if she was pregnant. Further, the plaintiff was pregnant because of her gender. Discrimination on the basis of pregnancy is a form of gender discrimination because [of the] basic biological fact that only women [have] the capacity to become pregnant."[163]

The judgement concluded that the "defendant's act of revoking and withdrawing the Placement Memo because the plaintiff was pregnant constitute a violation of Article 8(2) of the Federal Constitution. [sic]"[164]

Shortly after the judgement was announced, the Ministry of Education indicated its intention to appeal the decision. In appealing a High Court judgement which affirmed the binding nature of CEDAW on Malaysia, the government effectively demonstrated that it wishes to continue to discriminate against women on the basis of pregnancy. The appeal also implies that the government disregards the provisions of CEDAW.

In 2012, a Court of Appeal decision ruled that different retirement ages for men and women was not a case of gender discrimination. See the chapter in this report on Article 15 for details.

Government mooted a Gender Equality Act in 2010 but no follow up

In the Malaysian government's previous appearance before the CEDAW Committee in 2006, the Committee Chairperson "urged Malaysia to take legislative steps to define discrimination clearly and to enact a law on gender equality."[165]

In July 2010, a news report stated that the government was in the process of looking at the possibility of a Gender Equality Act.[166] The first draft of this bill was reportedly due to be tabled in Parliament in July 2010, however this did not occur.

A meeting was held in September 2010 with officials from the Ministry of Women, Family and Community Development and NGOs to discuss the necessity of a Gender Equality Act. At the conclusion of the meeting the representative from the Ministry of Women, Family and Community Development noted that "something concrete" would be produced by November 2010 related to a Gender Equality Act, however this did not occur.

The national human rights commission, SUHAKAM, has expressed its hope that the proposed Gender Equality Act will protect the rights of women.[167]

The UNDP is reportedly involved in discussions with the government about the possibility of a gender equality law.[168]

At the time of writing, in 2012, there is still no gender equality law in Malaysia.

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162 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p16.

163 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p20.

164 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p23.

165 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 30.

166 "Shahrizat: Ministry Is Studying To Enact A Gender Equality Act", *Bernama*, 26 May 2010.

167 *SUHAKAM Annual Report 2010*, p15.

168 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p3.

Laws that discriminate on the basis of gender identity

Muslim transwomen (male to female transgender) and transmen (female to male transgender) are at constant risk of arrest in Malaysia, merely because they are still seen as the biological sex they were born as, biologically male or biologically female, regardless of the gender they express. As Malaysian activist and researcher Angela M Kuga Thas has noted,

> "Both transgenders embody the female body and feminine mannerisms in one form or another, and as a result, are equally susceptible to the types of gender-based discrimination, abuse and violence – physically, emotionally and mentally – suffered and experienced by women and girls. Many have experienced violations of their human rights with no legal recourse, whether under civil or syariah laws. They are deemed inferior to men in the same way as women are deemed inferior to men."[169]

All states of Malaysia have their own *Syariah* Criminal Offences enactments, which criminalise acts such as a man dressing as a woman. There are two states that criminalise women dressing as men – Perlis and Sabah.

To cite an example of these laws, Section 28 of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states that,

> "Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both."

In the state of Sabah, Section 92 of the Criminal Offences Enactment 1995 criminalises a "male posing as woman or vice versa."[170]

Laws that discriminate on the basis of women's sexual orientation

Women of diverse sexual orientations (who may identify themselves as lesbian or bisexual) are discriminated against, as they do not conform to traditional gender stereotypes. Both civil and *Syariah* laws criminalise non-heteronormative sexual practices between consenting adults in Malaysia.

In the following states of Malaysia, *Syariah* Criminal Offences enactments criminalise same-sex sexual relationships between women (*musahaqah*):[171] Perlis, Kedah, Pulau Pinang, Perak, Wilayah-Wilayah Persekutuan (Federal Territories, including Kuala Lumpur), Selangor, Negeri Sembilan, Melaka, Johor, Terengganu, Kelantan, Sabah and Sarawak.

An example of a state's law against *musahaqah* is Section 26 of the *Syariah* Criminal Offences (Federal Territories) Act 1997:

> "Any female person who commits *musahaqah* 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 whipping not exceeding six strokes or to any combination thereof."

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169 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p259.

170 Section 92 of the *Sabah Syariah Criminal Offences Enactment 1995*.

171 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, pp337-342.

The Penal Code, covering all states in Malaysia, continues to criminalise acts "against the order of nature" even if these are sex acts between two consenting adults, and the punishment can extend to 20 years' imprisonment and whipping.[172]

Discriminatory Penal Code provision: Section 498 of Malaysia's Penal Code

Under CEDAW the differential treatment of men and women in Section 498, and its effect of maintaining the status of women as an inferior partner, constitutes discrimination against women as defined in Article 1 of CEDAW.

Section 498 of the Penal Code reads:

> *Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.*

Section 498 of the Penal Code is discriminatory **not** in failing to give women the same rights to sue other women who entice their husbands, but in failing to recognise that in contemporary Malaysia neither husbands nor wives have ownership over their spouses as was the case when the provision was introduced as law.

Some state-level *Syariah* criminal offences laws also contain provisions on "enticing a married woman" however the difference in these state laws is that the court can "order the said wife to return to her husband."[173]

Court case involving Section 498 of the Penal Code

In 2009, a high profile court case brought Section 498 into the public spotlight. Darren Choy Khin Ming was taken to court by Ryan Chong, who accused Choy of enticing away his wife, Daphne Iking, knowing that she was Chong's wife. After a private summons was issued against Choy, he filed an appeal.

In August 2010, the High Court referred the appeal to the Federal Court to decide whether Section 498 was discriminatory against men as women do not have the same access to its provisions. The Federal Court would also decide whether Section 498 violates Article 5(1) of the Federal Constitution by depriving citizens' liberty.[174]

Section 498 of the Penal Code does not discriminate against men but in fact it privileges men (husbands). The husband is privileged as he has the right, pursuant to Section 498, to sue another man, the third party, for the enticement.

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[172] Under a section titled "Unnatural Offences" in the Penal Code, the following are listed as offences:

377A. Carnal intercourse against the order of nature. *Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Explanation—Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.*

377B. Punishment for committing carnal intercourse against the order of nature*. Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.*

377C. Committing carnal intercourse against the order of nature without consent, etc*. Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.*

377CA. Sexual connection by object*. Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping. Exception—This section does not extend to where the introduction of any object into the vagina or anus of any person is carried out for medical or law enforcement purposes.*

377D. Outrages on decency*. Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.*

[173] See the chapter in this report on Article 15 of CEDAW for more information.

[174] Article 5(1) of the Federal Constitution states that "No person shall be deprived of his life or personal liberty save in accordance with law."

Section 498 is inherently discriminatory against women – it treats women as property

Section 498 was adopted from the Indian Penal Code, which was drafted at a time when women were perceived as the property of their husbands – passive agents with merely reproductive functions, with no self agency. Married women were subordinated to their husbands on the assumption that they were under their husbands' protection. This perception of women is outmoded, discriminatory and irrelevant in contemporary Malaysia. Article 5(a) of CEDAW is contravened by Section 498 as it perpetuates an idea of the inferiority of women as compared to men.

Section 498 denies women their right to bodily autonomy

Every woman has the right to make decisions over her own body. Section 498 clearly denies this right. Consensual intimate relationships between adults should not be the government's concern.

Other jurisdiction in which similar legal provisions have been repealed

The Singapore Government updated its Penal Code provisions "to reflect societal norms and values" by repealing Section 498:

> "....section 498 which criminalizes the enticing, taking away, detaining or concealing with criminal intent a married woman will be repealed as it is an archaic offence. The section was enacted at a time when a wife was considered a chattel belonging to the husband..."[175]

The existence of Section 498 of the Penal Code violates:

- Article 2(g) of CEDAW, which urges States to repeal all national penal provisions which constitute discrimination against women,
- Article 5(a) of CEDAW, as it perpetuates an idea of the inferiority of women as compared to men, and
- Article 16(c) of CEDAW, as women and men do not have the same rights and responsibilities during marriage and at its dissolution. (Malaysia still has a reservation to this article.)

Discriminatory Penal Code Provision: Marital Rape

The Penal Code **does not recognise rape within marriage as a crime**.

In 2006, the Penal Code was amended and the concept of causing potential or actual harm in order to have sexual intercourse within marriage was introduced into the legislation.

However, this amendment is problematic as **the definition of this crime makes no mention of the term rape and is based on potential or actual physical harm, rather than the rape itself**.

The new subsection 375A of the Penal Code states,

> *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.*

The penalty for causing "hurt or fear of death or hurt" within marriage is much less than the penalty for rape. Section 376 of the Penal Code gives the penalty for rape:

> *Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.*

Furthermore, an exception to subsection 375A of the Penal Code states,

> Exception – *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.*

[175] Singapore Parliamentary Debates, Official Report, Eleventh Parliament, Monday 22 October 2007.

The issue of marital rape will be discussed further in the chapter in this report on the CEDAW Committee's General Recommendation No. 19: Violence against Women.

Discriminatory Penal Code Provision: Rape with an object not considered rape

In the Penal Code, rape with an object is not considered rape – it is considered an "unnatural offence". Rape with an object should be moved to the section of the Penal Code which deals with rape. Section 377CA of the Penal Code states,

> *Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping.*

Discriminatory Penal Code Provision: Prostitution

Section 372B of the Penal Code relates to "soliciting for purpose of prostitution". It states,

> *Whoever solicits or importunes for the purpose of prostitution or any immoral purpose in any place shall be punished with imprisonment for a term not exceeding one year, or with fine, or with both.*

This section should be amended to criminalise the exploitation of one person by another, rather than its current focus on 'immoral purposes'. Both women and transwomen sex workers who engage in sex work as individuals (not exploited by others) and/or because they cannot get any other reasonably waged work, are currently harassed under this law. The law does not take into consideration the circumstances of the sex worker and the factors, such as a lack of formal education and consequently, lack of employment opportunities in the formal sector, which may have led to the sex work. For many transgender people, sex work is the only work they see available to them.[176]

Optional Protocol to CEDAW

The national human rights institution in Malaysia, SUHAKAM, noted in its 2010 Annual Report that it was in discussions with the Ministry of Women, Family and Community Development to promote the importance of ratifying the CEDAW Optional Protocol.[177] However, the government has not as yet ratified the Optional Protocol.

Article 3: Measures to promote equality

National Policy on Women

Although there is a National Policy on Women, this has a vague action plan and many of the goals have not been achieved. In 2008, feedback was provided to the Ministry of Women, Family and Community Development about the National Policy on Women by a coalition of women's groups called the Joint Action Group for Gender Equality. This feedback included that there is a general failure in the policy and action plan to link targets with specific and comprehensive strategies, methods, timeframes and responsible agencies. There is also a lack of indicators for the monitoring of specific actions and there is a general confusion and inconsistency between categories, for instance, certain "objectives" were listed as "target groups" or as "strategies".[178]

In 2010, the National Action Plan based on the National Policy was published however many of its actions were due to begin the year before, in 2009.

There is no national CEDAW implementation plan.

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176 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p268.

177 *SUHAKAM Annual Report 2010*, p49.

178 Letter to Minister of Women, Family and Community Development, YB Dato' Seri Shahrizat Abdul Jalil from the Joint Action Group for Gender Equality, "Feedback on the Draft National Plan of Action for Women's Development", 2008, p2.

Government Structures

Gender Focal Points in Government Ministries

Gender Focal Points have been established in all government ministries to ensure that gender is incorporated into policies and programs. Academic Cecilia Ng has noted that the terms of reference for the Gender Focal Points were not made clear from the outset. Interviews undertaken with government officials indicate that there is a lack of understanding about gender and many responded that government policies are "gender neutral."[179]

The national human rights institution in Malaysia, SUHAKAM, noted in its 2010 Annual Report that, "Due to certain problems within the GFPs [Gender Focal Points]...the Commission was unable to conduct training programmes during the year."[180]

In 2011, in a highly positive move, Gender Focal Points began to receive training from two highly qualified experts, Shanthi Dairiam and Shanthi Thambiah.

Cabinet Committee on Gender Equality

In 2005, a Cabinet Committee on Gender Equality was established. However in 2009 this Committee was downgraded.[181] To date there has been little publicly available information about this Cabinet Committee.

The women's caucus does not have any kind of prominence in the machinery of parliament.

Ministry of Women, Family and Community Development

The Ministry of Women, Family and Community Development is under-resourced. It has the lowest number of staff (at 2007) out of all the Ministries. Ministry staff members are not adequately qualified to undertake the necessary work.

The Ministry of Women, Family and Community Development has a very wide purview and maintains patriarchal norms by keeping women, families and children under the one banner. As the CEDAW Committee noted in its concluding observations after its session with Korea, the merging of "family affairs and gender equality in a single mandate may directly or indirectly reinforce traditional patriarchal norms and be detrimental to the achievement of gender equality".[182]

SENADA

After the 2008 General Elections, the government set up the *Sekretariat Pembelaan dan Permekasakan Wanita Islam* (SENADA) for issues related to Muslim women only, while the Ministry of Women, Family and Community Development (MWFCD) deals with non-Muslim women's rights. SENADA, which is now under the MWFCD, only serves to perpetuate a false divide between Muslim and non-Muslim women. It also defeats the purpose of the MWFCD to be inclusive and representative of all women's rights issues.

Poverty

According to the Tenth Malaysia Plan, 3.8 per cent of Malaysians were living below the poverty line in 2009. The Tenth Malaysia Plan also states,

> "In 2009, the bottom 40% households had a total household income level of less than RM2,300 per month. There were a total of 2.4 million households in this category, with 1.8% of households within the hardcore poor group, 7.6% within the poor group, and the remaining 90.6% within the low income households group."[183]

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179 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p10.

180 *SUHAKAM Annual Report 2010*, p28.

181 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p10.

182 *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Republic of Korea*, 49th Session, CEDAW/W/C/KOR/CO/7, released 29 July 2011, paragraph 16.

183 *Tenth Malaysia Plan, 2011-2015*, p149.

The Tenth Malaysia Plan does not disaggregate the data on poverty by gender.

It has been reported that out of 6.2 million households in 2009, 228,400 were classified as poor – meaning that the average household income is RM800 and below.[184] The poverty line in Malaysia is different throughout the country. In peninsular Malaysia, the poverty line is a monthly income of RM763, in Sabah it is RM1048, in Sarawak it is RM912 and on average in Malaysia it is RM800.[185]

Many women's human rights NGOs find that their clients share their experiences of violence and/or discrimination, but also their struggle with poverty.[186] The feminisation of poverty is an increasingly recognised concept around the world and households headed by women are at an elevated risk of poverty. The 2010 Millennium Development Goals Report for Malaysia states that,

> "Urban female-headed households in 2009 had a higher probability of being poor than urban male-headed households and than rural female-headed households... Among the poor, female-headed households are at the very bottom of the income distribution. The crude poverty incidence for female-headed households was 4.1 per cent, compared with 3.7 per cent for male-headed households."[187]

Since 2008, the government has been developing a data bank on the poor, called e-Kasih, which has gender as a key variable. However, there is still a lack of available gender disaggregated data on poverty, which means that little is known about the various categories of poor women nationwide, whether they are single women, single mothers and/or heads of households and/or living in poor families, as well as the extent of their poverty and their specific situations and locations (rural/urban).[188]

Article 4: Temporary special measures in Malaysia

Although announcements have been made about establishing quotas or targets for women in public and private sector decision-making positions, these quotas have had no accompanying plan of action and as yet no results. There seems to be a lack of understanding of the purpose of temporary special measures.

30 per cent quota in public sector decision-making positions

In 2004, the then Prime Minister announced that there was to be a quota of at least 30 per cent women in decision-making positions in the public service. There was no action plan, no follow through and no timeframe.

In 2006, in response to a question by a CEDAW Committee member about why it was taking so long for Malaysia to reach the goal of at least 30 per cent representation of women in the public and private sectors the government representative, Ms. Faizah Mohd Tahir said that "in fact it is not taking a long time, as the proposal had been submitted to the Cabinet in late 2005."[189]

The Tenth Malaysia Plan is very vague about the government's efforts to increase the participation of women in decision making positions. The Tenth Malaysia Plan states that the government will "increase its efforts to achieve a quota of at least 30% of decision-making positions to be held by women during the Plan period."[190]

There is no plan of action, no concrete timeline and so far, at 2012 (eight years after the initial announcement), no results.

In 2007, a research project was commissioned with the MWFCD and the UNDP about achieving a 30 per cent quota of women in decision-making positions.[191] The UNDP provided funds of RM20,000 and

184 "How poor are we, really?", *The Malaysian Insider*, 21 July 2010.

185 "How poor are we, really?", *The Malaysian Insider*, 21 July 2010.

186 Unpublished paper by Prema Devaraj, Women's Centre for Change (WCC), Penang, 2010.

187 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, pp15-16.

188 Unpublished paper by Prema Devaraj, Women's Centre for Change (WCC), Penang, 2010.

189 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 59

190 *Tenth Malaysia Plan 2011-2015*, p181.

assisted with the development of a cabinet paper, however the outcome of this project has not been made public.

In June 2011, Prime Minister Najib announced inaccurately that 32.3 per cent of decision-making positions in the civil service were made up of women in 2010.

This figure was taken from a compilation of statistics released annually by the Ministry of Women, Family and Community Development. This 32.3 per cent figure comes from a chart entitled "Percentage of Top Management in Public Sector". The actual job positions covered under the term Top Management are not listed so it is not known whether these positions are genuinely decision-making positions.

The verifiable percentage of women in decision-making positions in the public sector in 2010 is 20 per cent. According to 2010 government statistics released by the Ministry of Women, Family and Community Development (in a chart titled "Women at Decision-Making Level in the Public Sector"):

- of the 24 Ministry Secretaries General, only 4 are women;
- of the 57 Deputy Secretaries General, 17 are women;
- of the 43 Directors General, Directors and General Managers of Statutory Bodies, 8 are women.
- of the 110 Directors General in the Federal Departments, only 18 are women.

All up, this equates to women filling a mere **20 per cent of decision making positions in the public sector**. There is a long way to go.

For Prime Minister Najib to selectively quote favourable and non-verifiable statistics rather than the not-so-favourable and verifiable statistics is disingenuous and has the potential to mislead.

30 per cent quota in private sector decision-making positions

On 27 June 2011, the Prime Minister announced that within five years, at least 30 per cent of decision making positions in the private sector (on the boards of companies) should comprise women.[192]

However this was followed by a clarification by the Prime Minister, who said in response to critics of the plan, "This is not a quota but a target."[193]

This statement and the downgrading of the language is indicative of the government's lack of understanding of temporary special measures and their role, as articulated in General Recommendation No. 25, in giving women "an equal start" so that they can "be empowered by an enabling environment to achieve equality of results."[194]

In a positive move, however, the Malaysian Securities Commission subsequently announced that public-listed companies as well as businesses seeking public listing will have to declare how they will achieve the 30 per cent quota of women in boardrooms. In 2012, annual reports will need to contain information about policies and targets relating to increasing the representation of women. The chairperson of the Securities Commission is reported to have said, "This is something we will do in phases. The first step is to allow companies to set their own year-on-year target and by the end of five years, they have to reach 30%."[195]

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191 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p14.

192 "PM: 30% of corporate decision-makers must be women", *The Star*, 27 June 2011.

193 "Women smart partners", *The Star*, 26 August 2011.

194 Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, paragraph 8.

195 "Securities Commission: Firms must fulfill women quota for top positions to be listed", *The Star*, 15 September 2011.

Recommendations to the Malaysian Government regarding Articles 1 – 4 of CEDAW

Article 1

- Discrimination as provided under Article 1 of the CEDAW Convention must be defined both in the body of the Federal Constitution and in legislation. This definition should encompass discrimination in both public and private spheres and discrimination based on sexual orientation and gender identity and citizenship status. It is essential that the Malaysian government recognise and promote the acceptance and understanding of equality of all persons under the law.

Article 2

- Incorporate the CEDAW Convention into domestic legislation through the enactment of a gender equality law, which should include provisions for the establishment of an anti-discrimination commission vested with powers to advise the government, hear complaints and deliver decisions and guidelines on gender equality.
- Develop a national CEDAW implementation plan, which should be embedded into the National Policy on Women.
- Amend the discriminatory provisions within the Federal Constitution.[196]
- Amend Penal Code provisions that continue to discriminate against women:
    - Repeal Section 498 of the Penal Code, as it perpetuates the anachronistic idea that women are the property of their husbands.
    - Amend the Penal Code to criminalise marital rape:
        - Amend Subsection 375A of the Penal Code to ensure that it is the act of rape within marriage which is criminalised, not merely the potential or actual physical harm caused, and
        - Remove the exception to Subsection 375A of the Penal Code, which explicitly states that sexual intercourse within marriage can never be considered rape.
    - Review laws that criminalise sex work and sex workers, and strengthen the legal framework to protect the human rights of sex workers. In this regard, amend Section 372B of the Penal Code relating to prostitution to criminalise the *exploitation* of one person by another, rather than its current focus on 'immoral purposes'.
    - Amend Section 377CA of the Penal Code, which regards rape with an object an "unnatural offence", rather than rape. Rape with an object should be moved to the section of the Penal Code which deals with rape.
- Amend laws that perpetuate discrimination against women who have same-sex relationships and transgender people, including but not limited to:
    - Amend the state *Syariah* Criminal Offences enactments to decriminalise same-sex consensual sexual relations.
    - Amend the state *Syariah* Criminal Offences enactments to decriminalise 'cross-dressing' for 'immoral purposes', which is used to arrest and harass transgender people.
- Remove the remaining reservations to CEDAW Articles 9(2) and 16(1) (a), (c), (f) and (g).

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[196] Such discriminatory constitutional provisions include, but are not limited to, the following:

- Section 8(5)(a) states that the equality clauses of the Constitution do not invalidate or prohibit "any provision regulating personal law", effectively leaving Muslim personal law unaffected by the amendment.
- Section 8(5)(b) states that the equality clauses of the Constitution do not invalidate or prohibit "any provision 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."
- Section 12(1) states that "there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth" with respect to access to education.
- There are numerous provisions in the Federal Constitution which discriminate against women's rights to citizenship and to confer citizenship on their children, including Articles 14, 15, 24(4) and 26(2) and the Second Schedule of the Federal Constitution. More information about discrimination against women with regard to citizenship is in the chapter on Article 9 of CEDAW in this report.

Article 3

- Gender should be mainstreamed into all sectors and policies in the five year development plan of the government and on the basis of equality between women and men as required by CEDAW. Data disaggregated by sex and other socio-economic factors must be gathered to facilitate planning and implementation of initiatives aimed at integrating women's interests into national development plans.
- Reassess the grouping of women, children, family and community together under the Ministry of Women, Family and Community Development, as grouping these areas under one banner maintains patriarchal norms and therefore will not aid the achievement of gender equality in Malaysia.
- The Ministry of Women, Family and Community Development has to adopt a more proactive role as an advocator (and not only as a facilitator) to detect, monitor and eliminate discrimination against women within the public and private sector.
- The Gender Focal Points of each of the ministries should have their roles and functions clearly defined with proper guidelines on strategies and actions to be taken to ensure that gender mainstreaming is effectively implemented within each government ministry.
- Gender budgeting should be implemented to ensure appropriate allocation of the budget and resources within each sector for programmes that promote women's rights and gender equality.
- Undertake comprehensive mapping and assessment of poverty in the country and subject this data to gender disaggregation.
- Ratify the Optional Protocol to CEDAW.

Article 4

- Identify areas for application of temporary special measures and develop specific guidelines and concrete plans for their implementation, monitoring and evaluation to ensure effectiveness.

ARTICLE 5

ARTICLE 5:

SEX ROLES AND STEREOTYPING

Article 5

States Parties shall take all appropriate measures:

(a) 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;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

In the Malaysian government's appearance before the CEDAW Committee in 2006, Committee member Ms Arocha Domínguez noted the importance of an "ideological shift [which is] necessary to bring about lasting attitudinal change."[197]

Unfortunately, much of the government's attitude, indicated by its rhetoric, remains steeped in stereotyped views of the 'roles' of women and men.

The first Malaysian NGO CEDAW Shadow Report of 2005 highlighted many issues of concern that remain relevant. This chapter will not replicate the first Shadow Report – it will focus on new developments since 2005. Although the government has lifted its reservation to Article 5(a), little has been done to ensure that the intent of the Article is realised.

Key issues in this chapter:

- **Government rhetoric often reinforces gender stereotypes** and women's role in the home as the primary care-givers. Although the government has recently made announcements encouraging employers to offer part time work and flexible work arrangements, the rhetoric surrounding these announcements places the obligation on women to undertake the 'double burden' of working in the home taking care of children and seeking paid employment. **Government rhetoric never encourages fathers or 'parents' to seek flexible work arrangements** so that care for children and housework can be shared.

- Elected Members of Parliament routinely make **sexist comments** in and outside of parliament and are not rebuked by their peers. Although it may be understood that the sexist comments are merely made by wayward individuals, the lack of reprimand from peers after such comments indicates the broad acceptance of a systemic sexist mindset.

- There is a trend to **segregate sexes in public transport**. Although this may make women feel temporarily safer, it does not tackle the root causes of sexual harassment. In addition, such segregation is likely to increase the level of fear in women as notions that all men are potential doers of harm are reinforced.

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[197] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 43.

- The National Fatwa Council has declared a series of ***fatwas* focussing on limiting the rights of women to bodily integrity**. There is a *fatwa* making it obligatory for girl children to undergo circumcision, a *fatwa* against *pengkids* (a term referring to Malay women who appear masculine) and a *fatwa* against women who shave their heads. Although the *fatwas* have not been gazetted in Malaysian states, and therefore do not yet carry the weight of the law, the sentiment and attempts to control Muslim women's bodily integrity is of significant concern.

- The **policing of morality** on the basis of religious values has serious implications for all members of society. The laws that attempt to regulate the private lives of citizens leave much scope for abuse, selective prosecution and victimisation, especially those from a marginalised class or gender. The policing of morality is undertaken with government support by both religious enforcement officers as well as the Royal Malaysian Police.

- **Individuals of non-heteronormative sexual orientations or diverse gender identities face persecution** in Malaysia by government authorities. *Syariah* laws in each state specifically and explicitly criminalise acts such as a man dressing as a woman and/or posing as a woman and vice-versa, as well as sexual relations between women. The laws are different in each state and in some states the law includes a clause on cross-dressing for 'immoral purposes in a public space'. These laws have been abused and used against women and transgender people in private spaces. There have been many instances of religious enforcement officers and the police **harassing, assaulting and sexually abusing transgender people**.

- **Gender stereotypes are perpetuated in the media.** In advertising, women are often portrayed in submissive roles. Film censorship guidelines require homosexual and transgender characters to either repent, die or be punished at the end of any film. Newspaper portrayals of sexual diversity often use disparaging words.

- In November 2011 the **Malaysian police banned a festival called Seksualiti Merdeka (sexuality independence)**. Seksualiti Merdeka has been held annually since 2008 and it provides a safe space for all people of diverse sexual orientations and gender identities to come together to share knowledge about human rights. Government Ministers made comments inciting hatred, including claiming that the festival is attempting to promote "animal" culture[198] and the deputy Prime Minister alleged that it is "deviationist".[199]

Removal of reservation to Article 5(a)

On 6 July 2010, the Malaysian Government announced that it was planning to remove its reservations to three CEDAW Articles, including Article 5(a). On 19 July 2010, the United Nations Secretary-General officially announced the removal of these reservations.

Although the government's reservation to Article 5(a) has been lifted, and the government should be commended for such a move, little has been done to practically realise the intent of the Article.

First, polygamous marriages continue to be permitted for Muslim men in Malaysia. The CEDAW Committee noted in its General Recommendation No. 21 that the continuation of the practice of polygamy breaches the provisions of Article 5(a).

198 "Seksualiti Merdeka 2011 cuba promosi budaya 'binatang' – Ibrahim Ali", *Utusan Malaysia*, 3 November 2011.

199 "'Seksualiti Merdeka' programme a deviationist activity – Muhyiddin", *New Straits Times*, 3 November 2011.

Also in breach of Article 5(a) is a national *fatwa* decided upon in April 2009. This *fatwa* on female circumcision states that it is obligatory for Muslim women to undergo circumcision unless it will result in some form of "harm" to the woman.[200] CEDAW Committee General Recommendation No. 14 urges countries to "take appropriate and effective measures with a view to eradicating the practice of female circumcision" and directs that "States parties include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision."

Also in breach of Article 5(a) are the state-level *Syariah* laws criminalising women in same-sex relationships, transgender people and cross-dressing, which serve to reinforce stereotypes of men and women. The laws perpetuate the idea of the superiority of masculinity in their attempt to preserve stereotyped masculinity.

Of interest is that the division of property under *Hukum Faraid* in the state *Syariah* laws was cited as a reason for the reservation being placed on Article 5(a).[201] The laws remain unchanged.

Government rhetoric reinforces women's stereotypical roles

Women regarded as primary care-givers in families

Government rhetoric has in the past and continues to reinforce women's stereotypical role in the home as primary care-givers. Although the government has in the past made announcements encouraging employers to offer part time work and flexible work arrangements, the rhetoric surrounding these announcements places the obligation on mothers to undertake the 'double burden' of working in the home and seeking paid employment. It is never fathers who are encouraged to seek flexible work arrangements so that they can share the child care responsibilities.

One example of this rhetoric is from 2010, when Prime Minister Najib Tun Razak was reported in a national newspaper to have said while speaking about employment for women,

> "We need to use a more flexible and creative approach. **Flexi-hours will encourage women to find jobs, and at the same time enable them to fulfil their responsibilities as mothers**."[202]

This sort of statement, which is typical of government statements, is based on stereotyped 'traditional' roles for men and women (in contravention of Article 5(a) of CEDAW) and also fails to comprehend maternity as a social function and places the responsibility for raising children on women alone (in contravention of Article 5(b) of CEDAW).

In the 2006 appearance of the Malaysian government before the CEDAW Committee, a government representative noted that the government "was helping women perform their multiple roles by instituting flexible work arrangements such as home offices, part-time work or flexible schedules."[203] This again demonstrates the lack of awareness of the need for society to bear the costs of maternity, which should involve men also being encouraged to take up flexible work arrangements. The double burden is continually being placed on the shoulders of women.

In December 2010, the Deputy Prime Minister Tan Sri Muhyiddin Yassin said,

> "There are plans to introduce part-time work regulations under the Employment Act 1955 while we are also looking into arrangements to enable women to work from home and engage in part-time or flexi-time options."[204]

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200 Decision at the 86th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 21 – 23 April 2009, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-pemotongan-genitalia-wanita-female-genital-mutilation

201 *Malaysian NGO CEDAW Shadow Report*, 2005, p26.

202 "Flexi-hours will encourage more women to contribute, says Najib", *The Star*, 26 August 2010.

203 Committee on the Elimination of Discrimination against Women, *Summary Record of the 732nd Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 2.

204 "Govt targeting bigger women workforce by 2015, says DPM", *The Star*, 9 December 2010.

He also said women worldwide are "still occupying low-productivity, low-paid and vulnerable jobs" and he did not want Malaysian women to fall into this category.[205]

However, although promoting part-time work may increase women's participation in the workforce, a better idea would be to promote flexible working options for all, so that men and women could share the responsibilities of child-raising. Promoting part-time and home-based work for women maintains the stereotype of women being primarily a carer and homemaker and also poses the risk of women being 'stuck' in low-paid and vulnerable jobs.

Patronising rhetoric about women

Comments by the Prime Minister about women are often laced with patronising overtones. For example, during a highly publicised event at which the government gave money to NGOs, reports stated, "Najib said a woman's patient nature was best in instilling love, mutual respect and appreciation for cultural and religious differences among the younger generation in the country."[206]

In his speech outlining the Tenth Malaysia Plan, the Prime Minister stated in what could be interpreted as reinforcing women's role in the home, "Women are the cornerstone of happy families and the essence of a successful nation."[207]

Perception that it is women's 'choice' to leave employment

Statements from the government also neglect to demonstrate an awareness of pervasive discriminatory attitudes which leave women little option but to leave their employment when they have babies. For example, in 2011 a newspaper reported that Prime Minster "Najib said there are many women of calibre, though many chose to resign after working for a few years due to family commitments."[208]

The newspaper also reported that, "The Prime Minister said women in Malaysia were fortunate as there is no gender discrimination in the workplace that would hinder them from holding high-ranked positions."[209]

In speaking about maternity leave during his Budget 2011 speech, Prime Minister Najib stated that,

> "The Government is concerned with the career prospects and welfare of female civil servants as they need to take care of their families."[210]

Anecdotal evidence has suggested that often it is family pressure that leads women to resign from their jobs – women do not 'choose' to resign. Anecdotal evidence also suggests that women often seek permission from husbands before they accept a promotion offered to them.

Women cite housework as main reason for not being in labour market

According to government statistics, in 2009, 67.2 per cent of women outside the labour force gave 'housework' as the reason for not seeking work, while 2.3 per cent of men out of the workforce provided the same reason.[211] These statistics of course do not tell the whole story and it may be the case that these women are in fact also working in the informal sector.

Government-backed courses for women focus on stereotyped areas

Government ministries continue to perpetrate views of stereotyped roles for men and women. Academic Cecilia Ng noted that the Ministry of Women, Family and Community Development had planned to introduce "beautification, cooking and hair salon courses" for only women participants of government training programs.[212] Ng notes that it may be a good idea "to impose quotas on the enrolment of

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205 "Govt targeting bigger women workforce by 2015, says DPM", *The Star*, 9 December 2010.

206 "Women smart partners", *The Star*, 26 August 2011.

207 Speech by Prime Minister Dato' Sri Mohd. Najib Bin Abdul Razak introducing the motion to table the Tenth Malaysia Plan, 10 June 2010, www.1malaysia.com.my/speeches/introducing-the-motion-to-table-the-tenth-malaysia-plan

208 "Government wants more women in leading roles", *The Star*, 31 January 2011.

209 "Government wants more women in leading roles", *The Star*, 31 January 2011.

210 "Female civil servants can take up to 90 days maternity leave", *The Star*, 16 October 2010.

211 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p14.

212 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p27.

students so that access is also given to both boys and girls alike in these courses to overcome gender stereotypes as well as to achieve gender equitable balance."[213]

State-level government pays men to marry single mothers

In 2012, it was reported that six men had taken up the Melaka government's offer to pay them RM1000 to marry single mothers. The Chief Minister of Melaka, Datuk Seri Mohd Ali Rustam, reportedly said that the scheme would continue.[214]

Concerning rhetoric about domestic workers

Rhetoric from the government and media about domestic workers is of concern. There is constant use of the term 'maid', which is defined as a female domestic servant. The use of the term 'domestic worker' acknowledges that domestic work is work. One who is employed in this role must be afforded the rights of all other workers, and must not be treated as a house slave or servant. The term 'maid' is a condescending term that ignores the employment rights of domestic workers.[215]

Stereotyping of masculinity

Government rhetoric also reinforces stereotyped notions of gender. In 2007, the Secretary of the Ministry of Higher Education declared that male teachers 'confused' about their gender would be prevented from teaching. Men seen as 'effeminate' fell into this category of 'gender confused'.[216] The government representative also stated that if these men applied for graduate courses at local universities, their applications would most likely be rejected.

Gender stereotypes reinforced in the education sector

Camps for school boys with 'effeminate tendencies'

In April 2011, it was reported that 66 school boys with 'effeminate tendencies' were sent to a four-day camp in Besut to 'curb' their behaviour. One of the mainstream daily newspapers, the *New Straits Times*, maintained a consistent use of the word 'sissies' in reports about this camp.[217]

Government school handbook lists homosexuality and 'gender confusion' as offences

In public schools, a handbook is provided to the students that outlines different sorts of offences, including: serious/heavy offences (*kesalahan berat*); moderate offences (*kesalahan sederhana*); and light offences (*kesalahan ringan*).

Below is a page of the public school handbook, which states that homosexuality and 'gender confusion' is deemed a 'serious/heavy offence' and possible punishments include:

- stern warning;
- whipping (1 - 3 times on padded derrière using a light rotan/cane);
- compensation;
- suspension (no longer than 14 days);
- expulsion; or
- court.[218]

University requesting information on students who are 'gender confused'

In 2011, students of Universiti Teknologi Mara (UiTM) Sabah received an email which requested information from them about other students deemed 'gender confused'. Such a practice is akin to a witch-hunt. The text of the email can be found in the chapter of this report on the CEDAW Committee's General Recommendation No. 28.

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213 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p27.

214 "State offers RM1,000 for men to accept single mothers", *The Star*, 15 March 2012.

215 In a letter to the editor by Women's Aid Organisation published in the *New Straits Times* about the death of an Indonesian domestic worker after alleged abuse by her employers, ("Treat them with more respect", *New Straits Times*, 13 June 2011) each use of the term "domestic worker" in the letter was changed by the editorial team to the term "maid". A complaint letter was subsequently sent to the *New Straits Times* seeking correction, however no correction was made.

216 Lee, Julian C. H., *Policing Sexuality: Sex, Society and the State*, Zed Books, London 2011, p108.

217 "Besut boot camp for 66 sissies", *New Straits Times*, 18 April 2011.

218 Translated excerpt from "Buku Peraturan Disiplin: Sekolah Menengah, Wilayah Persekutuan Kuala Lumpur" (Disciplinary Rule Book: Secondary School, Federal Territory of Kuala Lumpur), Jabatan Pelajaran Wilayah Persekutuan Kuala Lumpur (Department of Education), 2008, p74.

Women in government policy plans

Every five years, the government releases a 'Malaysia Plan', which outlines the overarching policy directions of the government for the following five years. As academic Cecilia Ng has noted, women were mentioned for the first time in these plans in the Sixth Malaysia Plan (1991 – 1995).

Cecilia Ng has observed that,

> "The recently unveiled Tenth Malaysia Plan (2011 – 2015) speaks about empowering women to enhance their economic contribution so as to enable them to realise their full potential and participate more effectively in the economic and social development of the country. At the fundamental level, however, the framework is still based on the 1970s Women in Development (WID) model of Boserup which aims to 'fit' women into the existing economic development framework by giving them skills and know-how, rather than alter the development paradigm to suit women's needs... It basically instrumentalises rather than empowers women."[219]

Sexist remarks by politicians

Regrettably, there have been many instances in which Malaysian politicians have made highly derogatory comments relating to women. Although it may be seen that these sexist comments are made by wayward individuals, the lack of reprimand after such comments indicates a broader systemic sexist mindset. As a consequence, parliament appears to be a hostile environment for women. Fellow politicians from the same political party rarely speak out against sexist remarks and it is left to opposition politicians to condemn the comments, which in turn politicises the issue.

Sexist remarks by Member of Parliament Nazri Abdul Aziz

In March 2011, a Minister in the Prime Minister's Department Datuk Seri Nazri Abdul Aziz, was reported to have likened the situation of a political party, the MCA, to that of "a wife who complains all day long that she was being abused, raped and not given enough food, but yet does not want to divorce her husband."[220]

Sexist remarks by Member of Parliament Bung Mokhtar Radin

In May 2007, Member of Parliament Bung Mokhtar Radin, while referring to a leak in the Parliament building ceiling, said,

> "Where's the leak... Batu Gajah also leaks every month."[221]

Batu Gajah refers to the female Member of Parliament for Batu Gajah, Fong Poh Kuan. Even the reporting of the offensive comments by government news agency Bernama was condescending. The news article picked up on comments by the Deputy Prime Minister who said that the comments had not meant to insult women, but that they had "hurt women's feelings."[222]

In 2011, the same MP Bung Mokhtar Radin also made derisive comments about women drivers. He was reported to have said during a debate in parliament,

> "Some women drivers drive slowly and seem oblivious to traffic. When you honk at them, they get agitated with some even showing hand gestures to other drivers."[223]

The next day he was reported to have said that his words in parliament were misinterpreted. Bung said,

> "After my statement was twisted, I have become the focus of women in the country, including women's groups. I ask for the speaker's help, because this is sexual harassment against me."[224]

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219 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p8.

220 "MCA raps Nazri over remarks", *The Star*, 24 March 2011.

221 "Explain, Najib Tells BN MPs Implicated In 'Leak' Issue", *Bernama,* 16 May 2007.

222 "Explain, Najib Tells BN MPs Implicated In 'Leak' Issue", *Bernama,* 16 May 2007.

223 "Bung collides with MPs", *The Star*, 29 March 2011.

224 "Women's groups sexually harrassing me", *Malaysiakini*, 30 March 2011.

He also said in parliament, "I had no intention of belittling (women). Women are gifts from Allah who should be taken care of as best possible... Please don't think I am sexist or your enemy, I take care of them (women) too."[225]

After his comments were defended by fellow male parliamentarians, Bung said, "I thank my friends for their explanations, *sebab kita sama sama pencinta wanita* (we are all lovers of women)."[226]

It should be noted that in 2010, Bung Mokhtar Radin was fined for marrying a second wife without the consent of the *Syariah* court (see the chapter on Article 16 in this report for more details).

Sexist remarks by Member of Parliament Ibrahim Ali

Just a week after Bung's comments in parliament about women drivers, in early April 2011 another politician made comments of significant concern in parliament. Ibrahim Ali, who is the head of the right-wing Malay group, Perkasa, said in parliament that extramarital affairs occur owing to "wives who neglect their responsibilities" to their husbands.[227]

Excerpt from *Malaysiakini* news article:

''Irresponsible wives the cause of extramarital affairs'', 7 April 2011

The high occurrence of extramarital affairs is due to "wives who neglect their responsibilities" to their husbands, the MP for Pasir Mas (Ind) Ibrahim Ali claims.

Therefore, he asked in a supplementary question during Question Time in Parliament, what was the Department of Islamic Development Malaysia (Jakim) doing about educating wives on their responsibilities?

"There are times when husbands have urges (*ada keinginan*)... but when they come home to their wives, they will say, 'wait, I'm cooking', or 'wait, I'm getting ready to visit relatives'. In Islam, wives are supposed to stop everything to fulfil their husbands' demands," Ibrahim...said.

"Husbands driving home after work see things that are sexually arousing (*menaikan semangat*) and go to their wives to ease their urges (*semangat*). So much so there are husbands who go to private places (*tempat-tempat yang sulit*) to satisfy their urges... this is why I want a proper explanation as to whether wives understand their roles."

Government attempts to control women's movement

In 2008, the Malaysian Foreign Minister Rais Yatim proposed that single women travelling alone must have a letter of permission from families or employers stating the reason for their travel. The ostensible argument for the restrictions on travel included that women are sometimes recruited by 'gangs' to smuggle drugs, and a letter of permission would therefore clarify the woman's reason for travelling.

The proposal was intended for those under 21 years of age, even though, as stated in a news report, "[Rais Yatim] told Bernama that of the 119 cases of Malaysians detained in various countries for drug-related offences, 90 per cent were women and within the 21-27 age group."[228]

Rais Yatim is also reported to have said "Many of these women (who travel alone) leave the country on the pretext of work or attending courses and seminars... With this declaration, we will know for sure where and for what she is travelling overseas."[229]

225 "Women's groups sexually harrassing me", *Malaysiakini*, 30 March 2011.

226 "Women's groups sexually harrassing me", *Malaysiakini*, 30 March 2011.

227 "Irresponsible wives the cause of extramarital affairs", *Malaysiakini*, 7 April 2011.

228 "Anger at Malaysia women travel curb", *Al Jazeera*, 5 May 2008.

229 "Malaysia Plans Women Travel Curbs", *BBC News*, 4 May 2008.

The proposal was viewed by women's groups as an attempt to curb women's freedom of movement under the pretext of protection. Women's groups cited the lack of information about the percentage of men involved in criminal activity as evidence of this. This proposal was unsuccessful in becoming government policy.

Gender segregation in public transport

The year 2010 saw an increase in segregation as an ostensible solution to sexual harassment in public transport in the Klang Valley. Currently, the middle carriage of every three-carriage commuter train is for "ladies only" and pink signs proclaiming such in Bahasa Malaysia and English adorn the windows and doors (see Picture 1).

In December 2010, women-only buses, named the "Rapid Lady Bus" (the transport company is called RapidKL), were launched on a few bus lines and the number of routes was expanded in January 2011.

Although measures such as the women-only train carriages and bus services may temporarily make women feel safer, such measures do not tackle the root problem of sexual harassment.

In a meeting with government representatives in April 2011, an official from the Ministry of Women, Family and Community Development noted that the Ministry had undertaken a poll and of 2,282 respondents, 78 per cent said that they were in favour of a "special taxi service" operated by women for women. Although the details of this poll are sketchy, the Ministry official stated that it is the role of the Ministry to garner sentiments and pass these ideas on to the private sector and now it is "up to them" to implement such a taxi service.

Also at the meeting, the Ministry official stated that one shopping mall has introduced special car parking spaces for women near to the entrance of the mall, and other malls have introduced panic buttons for women in car parks.

Although all the measures outlined above may temporarily make women feel safer, they are of concern for several reasons: they do not tackle the root of the problem of sexual harassment and lack of respect for women, and they are likely to actually increase the level of fear in women who are surrounded by reminders that they must be segregated from men and that all men are potential doers of harm.

Media portrayals of women

Malaysia does have a Communications and Multimedia Content Code, which states, "despite societal discrimination, content should reflect an awareness of the need to avoid and overcome biased portrayals on the basis of gender. Women and men should be portrayed as equals both economically and emotionally, and in both public and private spheres."[230] The Content Code is currently under a five-year periodic review phase. Complaints about breaches of the code can be made to the Communications and Multimedia Content Forum, however this has not received publicity.

Gender stereotypes abound in the media, especially in advertising. Women are often portrayed in advertisements in submissive roles and stereotypes are maintained (e.g. in commercial radio 'battle of the sexes' competitions.)

Of note is the banning of a concert by US singer Erykah Badu after a photo of her with mock tattoos was published in The Star newspaper, an English-language daily. The concert was cancelled the day before it was due to be held because the mock tattoos in the promotional picture contain the Arabic word for 'Allah', in addition to other symbols in Hebrew. Information, Communications, Culture and Arts Minister Datuk Seri Dr Rais Yatim reportedly said that the concert was cancelled because it "touches on religious sensitivity and Malaysian cultural values."[231] The Minister also said, "With the graphic exhibition of Allah on the body of the singer, it is sufficient to warrant irrefutable religious controversies from among Muslims who disdain such practice."[232]

230 *The Malaysian Communications and Multimedia Content Code*, September 2004, p18.

231 "Badu concert cancelled as it contravenes guidelines", *The Star*, 29 February 2012.

232 "Badu concert cancelled as it contravenes guidelines", *The Star*, 29 February 2012.

Film censorship guidelines

In 2010, the film censorship board adapted its guidelines on the portrayal of LGBT characters – homosexual and transgender characters are required to either repent, die or be punished at the end of any film.[233]

'Obedient Wives Club' blames women for domestic violence

In June 2011, the mainstream media covered the launch of a new 'Obedient Wives Club' run by Global Ikhwan, comprising former members of the Al-Arqam Islamic group. Government representatives attended the launch.

News reports of the club launch quoted its vice-president Dr Rohaya Mohamad as saying that women will be given classes to "serve their husbands better than a first-class prostitute." Dr Rohaya said that when women fulfil the sexual needs of their husbands, "the family institution is protected and we can curb social ills like prostitution, domestic violence, human trafficking and abandoned babies."[234]

It was also reported in The Star newspaper that Global Ikhwan spokesperson Siti Maznah Mohd Taufik said, "Domestic abuse happens because wives don't obey their husband's orders. A man must be responsible for his wife's wellbeing but she must listen to her husband."[235]

This club received widespread coverage. Of note however is that there was a degree of critical coverage and letters were published damning the club's position.[236]

Section 498 of the Penal Code

As mentioned in the chapter on Articles 1 – 4 of CEDAW in this report, the continued existence of Section 498 of the Penal Code promotes the submission of women to men. Section 498 states:

> *Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.*

Section 498 of the Penal Code fails to recognise that in contemporary Malaysia neither husbands nor wives have ownership over their spouses as was the case when the provision was introduced as law.

Section 498 was adopted from the Indian Penal Code, which was drafted at a time when women were perceived as the property of their husbands – passive agents with merely reproductive functions. Married women were subordinated to their husbands on the assumption that they were under their husbands' protection. This perception of women is outmoded, discriminatory and irrelevant in contemporary Malaysia. Article 5(a) of CEDAW is contravened by Section 498 as it perpetuates an idea of the inferiority of women as compared to men.

Polygamy

Although the government's reservation to Article 5(a) has been lifted, polygamous marriages continue to be permitted. The CEDAW Committee has noted in General Recommendation No. 21 that the continuation of the practice of polygamy breaches the provisions of Article 5(a). Polygamy in Malaysia will be discussed in more detail in the chapter on Article 16 of CEDAW in this report.

National fatwas *discriminatory to women*

The National Fatwa Council's role is to proclaim *fatwas*, however such *fatwas* are not legally binding until they are adopted by the states of Malaysia. Once states have adopted a *fatwa*, they have the force of law and a breach of a *fatwa* is considered an offence.

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233 Lee, Julian C. H., *Policing Sexuality: Sex, Society and the State*, Zed Books, London 2011, p108.

234 "Obedient Wives Club to offer sex lessons on how to pleasure husbands", *The Star*, 4 June 2011.

235 " 'Wives can curb social ills like prostitution by being obedient and alluring' ", *The Star*, 3 June 2011.

236 Letter to the Editor by Sarah Thwaites, Women's Aid Organisation, "Dispelling myth of the cause of domestic violence", *The Star*, 19 June 2011.

Although the *fatwas* below have not yet been gazetted in Malaysian states, the sentiment and attempts to control Muslim women's bodily integrity is of significant concern.

Fatwa on female circumcision

In breach of Article 5(a) is a national *fatwa* decided upon on 21 – 23 April 2009. This *fatwa* on female circumcision states that it is obligatory for Muslim women to undergo circumcision unless it will result in some form of "harm" to the woman.[237]

In relation to Islam and female circumcision, a report by UNICEF and Al-Azhar University states that, "From an Islamic perspective, the Quran says nothing relating explicitly or implicitly to female circumcision. The use of the general term 'Sunnah Circumcision' is nothing but a form of deceit to misguide people and give the impression that the practice is Islamic. As for the traditions attributed to the Prophet, peace be upon him, in this regard, past and present scholars have agreed that none of these traditions are authentic and should not be attributed to the Prophet."[238]

Fatwa ruling on ''women imitating men''

The Malay term used for tomboy in the *fatwa* is *pengkid*, which targets Muslim Malay women and girls with a masculine appearance and/or mannerisms.

In October 2008, the National Fatwa Council ruled that "*pengkids*, women whose appearance, behaviour and sexual inclination are like men is forbidden in Islam."[239] Among the reasons given for this *fatwa* is that *pengkids* are likely to become lesbians.

The National Fatwa Council "urged the public to educate young girls properly especially in matters pertaining to dressing, behaviour and appearance so that this phenomenon can be prevented ... as this act contradictory to nature and sunnatullah (God's laws). [sic]"[240]

Similar to the *fatwa* on female circumcision, the *fatwa* on *pengkids* has not yet been gazetted by states in Malaysia so is not considered law. However, the sentiment is nevertheless concerning, and especially so because it comes from the authority of the National Fatwa Council, which advises Malaysian states.

In some states, namely Perlis and Sabah, *Syariah* laws criminalise women impersonating or dressing like men.

Fatwa against transpeople seeking sex reassignment surgery

Transgender women and transgender men face discrimination if they seek to undergo sexual reassignment surgery. In 1982, the National Fatwa Council decided that,

1. *Sexual change from male to female or vice versa through operation is prohibited by Islamic law.*
2. *A person who is born male remains a male even though he has successfully changed to female through operation.*
3. *A person who is born female remains a female even though she has successfully changed to male through operation.*[241]

The Council of Malay rulers in the Council's 126th Meeting held on 24 February 1983 also agreed to the prohibition of sex change.

Fatwa on women who shave their heads

The National Fatwa Council also made a pronouncement in 2008 about the prohibition of women shaving their heads and having "strange make-ups. [sic]"

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237 Decision at the 86th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 21 – 23 April 2009, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-pemotongan-genitalia-wanita-female-genital-mutilation

238 UNICEF and Al-Azhar University, International Islamic Center for Population Studies and Research, "Children in Islam: Their Care, Development and Protection", 2005, p9, available at: www.unicef.org/egypt/Egy-homepage-Childreninislamengsum%281%29.pdf

239 Decision at the 83rd Muzakarah (Conference) National Committee of the Fatwa Council of Malaysia Islamic Religious Affairs held on 22 – 24 October 2008, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-wanita-menyerupai-lelaki-pengkid

240 Decision at the 83rd Muzakarah (Conference) National Committee of the Fatwa Council of Malaysia Islamic Religious Affairs held on 22 – 24 October 2008, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-wanita-menyerupai-lelaki-pengkid

241 Decided at the 4th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 13 – 14 April 1982, www.e-fatwa.gov.my/fatwa-kebangsaan/pertukaran-jantina-daripada-lelaki-kepada-perempuan

The Council decided that, "1. Men and women are both Prohibited to present themselves with the appearance contradictory to THEIR natural characteristics. [sic] 2. Women are Prohibited from... [shaving] THEIR heads unless for the purpose of medical treatment or to treat problems of Certain disease. [sic] 3. Strange...body piercing (Except of piercing ear lobes) are Prohibited in Islam. [sic]"[242]

Moral policing

Since the 1990s there has been an increase in the state sanctioned policing of morality in Malaysia. This moral policing has mostly been undertaken against Muslims for indecency, *liwat* (sodomy), *musahaqah* (acts of lesbianism), drinking alcohol, *khalwat* (close proximity of unmarried couples), *zina* (sexual intercourse out of wedlock) and not fasting during the fasting month. It also impacts on non-Muslims when for example one partner is Muslim or when non-Muslims look like Malays (in the Federal Constitution the definition of being Malay includes being Muslim).

Civil laws are also used in moral policing efforts. In March 2012, three women were charged for indecent behaviour for pole dancing in a nightclub in Seremban and fined RM25 each.[243] The women, who were allegedly "dressed scantily" were charged under Section 21 of the Minor Offences Act 1955, which states,

> *Any person who is found drunk and incapable of taking care of himself, or is guilty of any riotous, disorderly or indecent behaviour, or of persistently soliciting or importuning for immoral purposes in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, shall be liable to a fine not exceeding twenty-five ringgit or to imprisonment for a term not exceeding fourteen days, and on a second or subsequent conviction to a fine not exceeding one hundred ringgit or to imprisonment for a term not exceeding three months or to both.*

Raids by religious officers

Raids are relatively commonplace in Malaysia. Officers from state religious departments sometimes act on tip-offs. In 2007 a singer, Siti Noor Idayu Abd Moin, was detained by the Perak religious department officers for "allegedly dressing sexily and encouraging vice by performing at a nightclub."[244] The case was dropped owing to lack of evidence.

In March 2011, a hair salon owner was issued a summons on the basis of an allegedly inappropriate outfit of a staff member. The staff member, who at the time of the raid was washing a client's hair, was wearing a shirt which covered three-quarters of her arm, leaving her wrists exposed.[245] The offending shirt can be seen in Picture 2 at the end of this report.

Raids on unmarried couples

Khalwat raids and resulting press reports are common in Malaysia. Such raids attempt to catch unmarried couples in 'close proximity'. In the Malaysian state of Selangor, it was reported that "the state religious department rounded up 80 people for committing *khalwat* in an operation called *Ops Valentine*" on 14 February 2011. In the same nine-hour *Ops Valentine*, a further 61 people were arrested for indecent behaviour. It was reported that "the operation, which began at 8pm, involved two phases – visits at recreational lakes and public parks in Selangor, and raids on budget hotels." [246]

What constitutes 'indecent behaviour' is not defined, and it is arbitrarily interpreted by the authorities concerned.

Valentine's Day is seen by some in Malaysia, including the Selangor Islamic Department (JAIS) as "not part of Islamic teaching, it violates the syariah and contradicts the universal code of ethics." Furthermore, it was reported that the Selangor Islamic Department "pointed out that there were

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242 Decision made at the 80th Muzakarah (Conference) National Committee of the Fatwa Council of Malaysia Islamic Religious Affairs Held on 1 – 3 February 2008, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-wanita-membotakkan-kepala-dan-berhias-secara-aneh

243 "Three women fined RM25 each for pole dancing", *The Star*, 28 March 2011.

244 "Perak Religious Dept drops case against nightclub singer", *The Star*, 6 August 2007.

245 "Salon owner fined for letting employee wear 'inappropriate' blouse", *The Star*, 13 March 2011.

246 "88 Muslims nabbed for khalwat", *The Star*, 15 February 2011.

257,411 births out of wedlock between 2000 and 2008, and blamed Valentine's Day celebrations as one of the causes."[247]

The Valentine's Day raid is just one example of a *khalwat* raid by religious department enforcement officers. In several cases, people have fallen to their deaths from apartment blocks or hotel windows attempting to escape the enforcement officers.

In 2003, a non-Muslim couple was issued a summons under the Public Parks By-Laws (Federal Territory) 1981 by the Kuala Lumpur City Hall for allegedly kissing and hugging at a park on 2 August 2003.[248] Section 8(1) of the law states "Any person found behaving in a disorderly manner in any park commits an offence" and the possible punishments include a one year jail term or a maximum fine of RM2,000 or both.

Sex out of wedlock

Sex out of wedlock is considered an offence for Muslims under *Syariah* law. Section 23(3) of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states,

> *The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be* prima facie *evidence of the commission of an offence under subsection (2) by that woman.*

Section 23(4) of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states,

> *For the purpose of subsection (3), any woman who gives birth to a fully developed child within a period of six* qamariah *months from the date of her marriage shall be deemed to have been pregnant out of wedlock.*

Children born to Muslim parents within six months of their parents' marriage are deemed to have been conceived out of wedlock and therefore illegitimate. The National Registration Department, which is responsible for issuing birth certificates, records the child's illegitimacy on the birth certificate, which, instead of stating the father's name, states "binti/bin Abdullah". In one Malaysian state, Perlis, the father of the child is able to insert his name on the birth certificate, rather than "binti/bin Abdullah".

The National Registration Department Director General Datin Jariah Mohd Said said that this practice is "based on a National Fatwa Council decision which was gazetted on Jan 28, 1981."[249] The *fatwa* states that, "the man cannot be recognized as the father of the unborn baby, the baby cannot inherit from him, cannot be his mahram (unmarriageable kin) and the man cannot be the baby's guardian."

The repercussions of the insertion of "binti/bin Abdullah" in the birth certificate go beyond the stigma associated with being illegitimate and have an impact on guardianship and inheritance.

Corporal punishment

In February 2010, three women were caned and received a jail sentence for engaging in "illicit sex" after the Federal Territory *Syariah* High Court found them guilty under Section 23(2) of the *Syariah* Criminal Offences (Federal Territories) Act 1997, which states,

> *Any woman who performs sexual intercourse with a man who is not her lawful husband 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 whipping not exceeding six strokes or to any combination thereof.*

Home Minister Datuk Seri Hishammuddin Tun Hussein reportedly said, "The punishment is aimed at getting the offenders to repent and seek Allah's forgiveness. It is also meant to educate Muslims to follow the teachings of Islam."[250]

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247 "No love in KL or Selangor", *The Malaysian Insider*, 11 February 2011.

248 "Holding hands case: court rejects impeachment bid", *Malaysiakini*, 20 November 2006.

249 "NRD explains the Fatwa Council ruling", *The Star*, 6 November 2011.

250 "Three women caned under syariah law", *The Star*, 17 February 2010.

Discrimination based on sexual orientation and gender identity

In October 2010, the CEDAW Committee released General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW. General Recommendation No. 28 recognises that discrimination on the basis of sex and gender is linked to sexual orientation and gender identity and expression.

General Recommendation 28 states that "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." General Recommendation No. 28 also notes that "Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women."

Although Malaysia has a history of sexual diversity[251] in recent years, tolerance and respect for such diversity has waned considerably. Since the adoption of laws on *Syariah* criminal offences in each state from the 1980s onwards, 'moral offences' have been criminalised.

The National Fatwa Council has declared several *fatwas* targeting sexual orientation and gender identity, which have included condemning *pengkids* (loosely translated as tomboys) and prohibiting sex change operations. More information on these *fatwas* can be found earlier in this chapter on Article 5 of CEDAW.

Contrary court decisions on gender and name change for transpeople

There is no law in Malaysia that prohibits a change of gender on an identity card, the main identification document used in Malaysia. However, two transwomen were unable to change their name and gender on their identity card at the National Registration Department and took their cases to court. One was successful and the other unsuccessful.

Court prohibits gender change in 2011

In 2011, Mohd Ashraf Hafiz Abdul Aziz, 25, who underwent a sex change procedure in Thailand in 2009, was prohibited by the Kuala Terengganu High Court from changing her name to Aleesha Farhana and being legally recognised as a woman.[252] Tragically, Aleesha passed away a short time after the judge handed down the decision on her case.

Court permits gender change in 2005

The decision in 2011 departed from a previous judgement in 2005, in which a transgender woman from Kuala Lumpur successfully applied to the court for an official gender change (*JG v Pengarah Jabatan Pendaftaran Negara 2005*).[252] In this case, the judge permitted that:

- The plaintiff, who was born male but identifies as a female and underwent gender reassignment surgery, be declared as a female, and
- That the registration department be directed to change the last digit of her identity card to a digit that reflects a female gender.

Government's position on gender change

The Attorney General's Chambers have a clear position that gender cannot be changed on an individual's identity card. In a court case in which a group of transwomen sought leave for the court to review the constitutionality of a section of *Syariah* law in the state of Negeri Sembilan that prohibited 'cross-dressing', the Attorney General's Chambers submission asserted,

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251 Michael G. Peletz, *Gender Pluralism: Southeast Asia since Early Modern Times*, Routledge, New York and Oxford, 2009.

252 "Shahrizat sad ministry was not able to help Ashraf", *The Sun*, 30 July 2011.

253 "'Courts have precedence on transgender name change'", *Malaysiakini*, 1 August 2011.

> "Through registration at birth, all the Applicants were registered as males regardless of their contention that medically or psychologically they are not. There is no provision which allows such recognition. Further, the Applicants have had identity card [sic] issued to them. **It is our submission that the particulars on the identity card are conclusive evidence to establish the identity of a person including his gender**. Most unfortunately for the Applicants, in the eyes of the law, they are viewed and recognized only as males. **The presence of any evidence to contradict this does not make the Applicants females in law**."[254]

Laws that discriminate on the basis of gender identity[255]

As mentioned in the chapter on Articles 1 – 4 of CEDAW in this report, Muslim transwomen (male to female transgender, often called *Mak Nyah*) and transmen (female to male transgender) are at constant risk of arrest in Malaysia, merely because they are still seen as the biological sex they were born as, biologically male or biologically female.

All states of Malaysia have their own *Syariah* Criminal Offences enactments which criminalise acts such as a man dressing as a woman. There are two states that criminalise women dressing as men – Perlis and Sabah. In the state of Sabah, Section 92 of the Criminal Offences Enactment 1995 criminalises a "male posing as woman or vice versa."[256]

To cite an example of these laws, Section 28 of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states that,

> *Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.*

The *Mak Nyah* community of Negeri Sembilan (a state in Malaysia) released a press statement in November 2010 in which the concerns about the *Syariah* Criminal Offences laws are outlined:

> "We [the Mak Nyah community] have suffered mental distress, physical violence and even sexual molestation at the hands of the religious officers who enforce these laws. We are stripped of a life of dignity and deprived of our personal liberty, and we fear for our lives. We are unable to step out of our homes without the fear of getting harassed, abused or arrested. We are no longer able to go out or to eat and drink in public without the fear of harassment and abuse from the religious officers who enforce these laws. We demand that the religious authorities of the State of Negeri Sembilan and all of its officers stop harassing, victimising and persecuting us for who we are."[257]

To read more of this press statement, see the chapter of this report on the CEDAW Committee's General Recommendation No. 28.

High court grants leave to review constitutionality of one state's 'cross-dressing' law

Section 66 of the *Syariah* Criminal (Negeri Sembilan) Enactment 1992 criminalises any male who wears women's attire or poses as a woman.

On Friday 4 November 2011, the Seremban High Court handed down its decision to grant leave for the constitutionality of Section 66 of the *Syariah* Criminal (Negeri Sembilan) Enactment 1992 to be reviewed by the court.[258]

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254 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 5.9.

255 Gender identity refers to a person's deeply felt experience of gender, which may or may not correspond to the sex assigned at birth.

256 Section 92 of the *Sabah Syariah Criminal Offences Enactment 1995*.

257 Press Statement by the Mak Nyah Community of Malaysia, "Stop the Violence and Persecution towards us", 30 November 2010.

258 "Four get leave to challenge law barring cross-dressing", *Malaysiakini*, 4 November 2011.

The four transwomen applicants argued that Section 66 is discriminatory as it criminalises them – originally biologically male persons who identify as women who may or may not have had gender reassignment surgery – for expressing their true gender identity. Section 66 contravenes Malaysia's Federal Constitution which enshrines fundamental liberties including freedom of expression and prohibits discrimination on the basis of gender.

The Seremban High Court judge noted that the objections from the Attorney General's Chambers[259] did not have a basis and thus permitted leave for the judicial review of Section 66. For more detail on the Attorney General Chamber's objections, see the chapter of this report on the CEDAW Committee's General Recommendation No. 28.

Laws that discriminate on the basis of women's sexual orientation

As mentioned in the chapter on Articles 1 – 4 of CEDAW in this report, in the following states of Malaysia, *Syariah* Criminal Offences enactments criminalise same-sex sexual relationships between women (*musahaqah*):[260] Perlis, Kedah, Pulau Pinang, Perak, Wilayah-Wilayah Persekutuan (Federal Territories, including Kuala Lumpur), Selangor, Negeri Sembilan, Melaka, Johor, Terengganu, Kelantan, Sabah and Sarawak.

An example of a state's law against *musahaqah* is Section 26 of the *Syariah* Criminal Offences (Federal Territories) Act 1997:

> *Any female person who commits musahaqah 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 whipping not exceeding six strokes or to any combination thereof.*

The Penal Code, covering all states in Malaysia, continues to criminalise acts "against the order of nature" even if these are sex acts between two consenting adults, and the punishment can extend to 20 years' imprisonment and whipping.

Response of SUHAKAM to discrimination based on sexuality and gender identity

The Malaysian national human rights institution, SUHAKAM, has noted its concern over the violation of rights of people of diverse sexual orientations and gender identities. However the language used by SUHAKAM seems to keep such communities at arms-length: "There can be no justification in harming [LGBT people], no matter how different they are or how unacceptable their LGBT-related actions are to the majority."[261]

In 2010, meetings were held between SUHAKAM officials and religious groups and people of diverse sexual orientations and gender identities. The SUHAKAM Annual Report noted that "The meetings provided a good platform for the Commission to conduct further research on LGBT rights, taking into consideration religious and cultural sensitivities as well as the majority view."[262]

The Chairperson of SUHAKAM reportedly stated that sexuality rights "is a sensitive issue. We need to look at it with understanding. In fact, at the Asia Pacific Forum in Bali, I was the first to take the floor to discuss this issue. I [told the delegates] I had a personal dilemma dealing with these issues. We need to protect human rights, but at the same time, we live in a society that is not ready to embrace these communities. Suhakam is not dismissing it, but we will need to look into the issues within our cultural and religious context."[263]

Assaults by religious officers

In 2007, a case came to light of the beating of a *Mak Nyah* by religious department officers in Melaka, which resulted in serious injury and her hospitalisation.[264]

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259 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011.

260 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, pp337-342.

261 *SUHAKAM Annual Report 2010*, p16.

262 *SUHAKAM Annual Report 2010*, p57.

263 "Suhakam chief: 'We're an independent entity'", *The Nut Graph*, 30 August 2010.

264 Amnesty International, *Amnesty International Report 2008 - Malaysia*, 28 May 2008.

In October 2010, a transgender woman who worked as a hair stylist in Melaka was allegedly forced to remove all clothing, including underwear, in front of religious officers. Rahimin Bani, director of the Melaka religious department (JAIM) reportedly said of the transgender woman, "He may feel his rights as a person had been violated, but as Muslims we have the responsibility to ensure he does not go astray."[265]

Further information about violence against transwomen can be found in the chapter in this report on the CEDAW Committee's General Recommendations No. 19 and 28.

Banning of sexuality rights arts festival in 2011

On 3 November 2011, the Malaysian police banned a festival called Seksualiti Merdeka (sexuality independence). Seksualiti Merdeka has been held annually since 2008 and it provides a safe space for all people of diverse sexual orientations and gender identities to come together to share knowledge about human rights. More information on the ban can be found in the chapter of this report on the CEDAW Committee's General Recommendation No. 28.

Negative comments by individuals about Seksualiti Merdeka reported in the press have ranged from baseless and illogical to inciting hatred against marginalised groups.

Malaysia's home minister is reported to have said that the festival, which includes art exhibitions, theatre and music performances and workshops and a book launch, is a threat to national stability.

An elected member of parliament, Ibrahim Ali MP, was reported to have claimed that the festival is attempting to promote "animal" culture,[266] while the deputy PM alleged that it is "deviationist".[267] There were also allegations that the festival was a "pesta seks bebas" (free sex party).[268]

When speaking about Seksualiti Merdeka, former Prime Minister Mahathir Mohamad said that freedom must be limited. He was reported to have said, "We don't need this sexuality thing. We don't need men marrying men, women marrying women and blatant exhibitionists (here)... What will happen to us when people decide to walk naked on the streets? We can't stop them. If they (people) decide as seen in some countries to have sex in public, what will happen to us?"[269]

Such misinformed opinions and blatant fear-mongering is irresponsible at best and dangerous at worst. People of diverse sexual orientations and gender identities are among the most stigmatised and vulnerable in our society. Condemnatory statements by various elements of government perpetuate discriminatory attitudes and hinder the reporting of human rights abuses from those whose rights have been violated, leading to an environment in which continued violence and oppression is condoned.

After the ban, in November 2011, the states of Pahang and Melaka indicated that they will be increasing the penalties for homosexuality so that Muslims could be charged under both state and federal laws, thereby increasing their jail sentences. The Chief Minister of Melaka, Mohd Ali Rustam, stated that the act of supporting homosexuality should also be criminalised. He is quoted as saying, "We want to put it in the enactment so that we can enforce it and bring them to our sharia (Islamic law) court. Then we can charge them for promoting or supporting these illegal activities."[270]

In 2012, a government backbencher called for the establishment of a homosexual rehabilitation centre to "find a solution to combat these activities from getting rampant just like the efforts we take to combat drugs."[271]

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265 "Religious department firm against cross-dressing", *Malay Mail*, 21 April 2011.

266 "Seksualiti Merdeka 2011 cuba promosi budaya 'binatang' – Ibrahim Ali", *Utusan Malaysia*, 3 November 2011.

267 "'Seksualiti Merdeka' programme a deviationist activity – Muhyiddin", *New Straits Times*, 3 November 2011.

268 "Seksualiti Merdeka not a 'free sex party', says Marina", The Star, 7 November 2011.

269 "Hisham: Activities will affect nation's stability", *New Straits Times*, 5 November 2011.
This quote seems in concert with Mahathir's previous comments, including stating that "the British people accept homosexual ministers. But if they ever come here bringing their boyfriend along, we will throw them out. We will not accept them." Quote from Human Rights Watch World Report 2002, available at www.hrw.org/legacy/wr2k2/lgbt.html

270 "States eye harsher laws for Muslim gays", *The Malaysian Insider*, 11 November 2011.

271 Datuk Baharum Mohamad (Barisan Nasional – Sekijang) quoted in "Call to establish homosexual rehab centre", *The Sun*, 22 March 2012.

Deputy Minister in the Prime Minister's Department, Mashitah Ibrahim, also said in parliament that the government was working with NGOs to curb the "spread" of LGBT "problem".[272] This involves training volunteers to approach the LGBT community and encouraging NGOs to establish anti-homosexuality campaigns.[273]

Media portrayals of sexual diversity

In a memorandum to SUHAKAM in June 2010,[274] concerns were raised about the portrayal of lesbians in the media. The memorandum stated,

> "We refer to the articles published in Kosmo! ("Parti Lesbian Berleluasa") and the Harian Metro ("Aksi Panas Pengkid, Lesbian") dated 2nd and 16th May respectively.
>
> We, the undersigned, are enraged by the usage of disparaging words such as "songsang" (deviant), "lucah" (lewd) and "jijik" (disgusting) in the newspaper reports to describe the queer community. The words used by Kosmo! and the Harian Metro and echoed by other newspapers (such as The Star, 3 May 2010) are heavily loaded with moral connotations and paint the queer community unjustifiably and unfairly as deviants and morally tainted."[275]

Neither SUHAKAM nor any government representatives have sought to censure the media in its discriminatory reporting.

Government control of images of women on International Women's Day

During March 2011 an arts event took place in Malaysia to celebrate 100 years of International Women's Day. On 18 February 2011, there was a meeting with the theatre group organising the event, and its funding partners, the Ministry of Women, Family and Community Development (MWFCD).

Although posters had already been printed and distributed, the MWFCD stated that it did not approve of the logo depicting a woman located in the top left hand corner and directed that the logo must be changed and a woman in a *tudung* (head scarf worn by Muslim women) must be depicted. The logo was altered and the image of a woman was removed completely (see Pictures 3 and 4 for examples of an original and altered poster).

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272 "Campaign to curb homosexuality", *Free Malaysia Today*, 22 March 2012.

273 "Campaign to curb homosexuality", *Free Malaysia Today*, 22 March 2012.

274 *Memorandum on Ill Representation and Discrimination of the Queer Community in the Media*, 10 June 2010. Endorsed by All Women's Action Society (AWAM), Annexe Gallery, Asian-Pacific Resource & Research Centre for Women (ARROW), Centre for Independent Journalism (CIJ), Malaysian Bar Council, Positive Malaysian Treatment Access & Advocacy Group (MTAAG+), Straten Malaysia, Suara Rakyat Malaysia (SUARAM), Titled World, Women's Candidacy Initiative (WCI), Women's Aid Organisation (WAO) and individuals.

275 Other examples of news articles using derogatory language targeted at LGBT groups can be found in Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p265.

Recommendations to the Malaysian Government regarding Article 5 of CEDAW

- Amend government rhetoric and policy to focus on encouraging employers to adopt flexible work arrangements for parents, not only mothers.
- Sexist comments by elected representatives both inside and outside of parliament must not be tolerated. Amend the code of conduct (standing orders) of parliamentarians to include sexual harassment provisions.
- The government must rebuke the discriminatory comments of its representatives as well as non-State actors inciting hatred against people of diverse sexual orientations and gender identities.
- Conduct gender sensitisation trainings with media agents (editors, journalists, photographers etc) on equal and fair representation of women, lesbians, bisexuals and transpeople.
- Transgender people must be entitled to change their name and gender on their identity cards without onerous legal and administrative procedures.
- Undertake public education campaigns to combat the stereotype of housework as being only women's responsibility.
- Recognise domestic work as work in labour laws.
- Review national policies to address aspects of culture and religion, as well as gender stereotyping that perpetuate discriminatory practices against women and transgender people. Ensure representation of women in bodies and departments which have the authority over the interpretation and construction of religion and religious laws.
- Review marriage counselling modules and programmes to ensure an understanding of equality and rights of women within marriage are incorporated.
- Continue to review school textbooks and remove elements that perpetuate stereotyping of gender roles.
- Ensure that schools do not punish students for their sexual orientation or gender identity. Homes and schools must be nurturing and supportive places for children. Parents and teachers have a vital role to play in encouraging students to become critical thinkers and eventually to become independent adults who can live full lives.

ARTICLE 6

ARTICLE 6:

TRAFFICKING AND EXPLOITATION OF PROSTITUTION OF WOMEN

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Key issues in this chapter:

- There is a **need to study the extent of trafficking** in the country as there are considerable inconsistencies in the statistics regarding the numbers of trafficking victims.
- **Victims of trafficking continue to be incarcerated in ''shelters'' and deported** after investigations are carried out. Laws relating to the trafficking of persons do not adequately cover the protection and care of victims. There are no reparations for victims of trafficking. The wardens in the shelters are former prison guards. Furthermore, nothing is done to empower the victims to ensure that they do not fall victim to traffickers in the future – if poverty brought her here then there is nothing stopping her from coming back.

Malaysia acceded to UN trafficking in persons protocol

In February 2009, Malaysia acceded to the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" with a reservation.[276]

Anti-Trafficking in Persons Act 2007

In 2006, the CEDAW Committee noted its concern about trafficking in Malaysia. The CEDAW Committee urged the Malaysian government to enact "specific and comprehensive legislation on the phenomenon".[277] In 2007, legislation was passed in parliament entitled the Anti-Trafficking in Persons Act (known as the ATIP Act). In 2008 it came into force.

In 2007, the US Trafficking in Persons Report ranked Malaysia at Tier 3 – the lowest ranking. In response, the government developed the ATIP Act. In 2009, again Malaysia was ranked Tier 3. In response, the five-year National Plan of Action was released. Again it was demonstrated that the Malaysian government places a high degree of importance to its ranking in the US Trafficking in Persons Report.

The ATIP Act covers: the offence of trafficking in persons and the smuggling of migrants; the protection of trafficked persons; enforcement and investigation procedures; and the establishment of the Council for Anti-Trafficking in Persons.

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[276] Malaysia's reservation: "1. (a) Pursuant to Article 15, paragraph 3 of the Protocol, the Government of Malaysia declares that it does not consider itself bound by Article 15, paragraph 2 of the Protocol ; and (b) the Government of Malaysia reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in Article 15, paragraph 2 of the Protocol or any other procedure for arbitration."

[277] CEDAW Committee Concluding Comments: Malaysia, 2006, paragraph 24.

In 2010, amendments were made to the ATIP Act. The main change in the law was the inclusion of 'smuggled migrants'. This move received much criticism, including by the national human rights institution, SUHAKAM, which noted its concern over the conflation of smuggled migrants and trafficked persons.[278]

Refugees can fall into the category of 'smuggled migrants' so under the ATIP Act can be deported. Human Rights Watch noted its concern about these amendments and state that they "reduce protections for both groups [trafficking victims and migrants]."[279]

Human Rights Watch wrote to the Prime Minister in September 2010 to express concern over the amendments to the ATIP Act: "We...regret that there are no provisions that guarantee humane treatment of smuggled migrants during interception, detention, and deportation proceedings, or that require police and immigration enforcement officers to treat migrants humanely in accordance with international law... Many individuals smuggled into Malaysia are refugees and asylum seekers fleeing persecution. Malaysia is the destination for the fourth largest number of asylum-seekers globally... The anti-smuggling amendments to the ATIP Act do not recognize the unique needs of refugees and asylum seekers. This omission risks increasing the possibility that refugees will be detained and deported to places where they face further persecution or where their lives or freedom may be threatened in violation of Malaysia's non-refoulement obligations under international law."[280]

Civil society groups have further significant concerns with the ATIP Act, including but not limited to the following:

- The 2010 amendments narrowed the definition of trafficking in the ATIP Act.[281] The new definition of trafficking in persons, which focuses on coercion, is inconsistent with the definition provided in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[282] The definition in the protocol is extensive and includes the irrelevance of the consent of the victim.

- Section 51 of the ATIP Act provides that a foreign victim of trafficking will be placed in a place of refuge for up to three months before being handed over to the immigration department for "necessary action", i.e. deportation. In practice, the shelters in which trafficking victims are housed resemble detention centres.[283]

- There is no provision in the law for compensation for victims of trafficking.

- The inclusion of smuggled migrants into the law originally enacted to deal with trafficking conflates two distinct problems, the human rights abuse of human trafficking and the immigration law breach of 'illegal' migrants.

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278 *SUHAKAM Annual Report 2010*, p14.

279 Human Rights Watch, *World Report 2011: Events of 2010*, p332.

280 Letter to the Prime Minister regarding amendments to the Anti-Trafficking in Persons Act, from Phil Robertson, Deputy Director, Asia Division, Human Rights Watch, 8 September 2010.

281 Original definition in 2007: "'trafficked person' means any person who is the victim or object of an act of trafficking in persons"

Amended definition in 2010: "'trafficking in persons' means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act"

282 Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime states:

(a) *"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, 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, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;*

(b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*

(c) *The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;*

(d) *"Child" shall mean any person under eighteen years of age.*

283 Human Rights Watch, *World Report 2011: Events of 2010*, p332.

The Act set up the council on trafficking – MAPO. Criticism of MAPO includes that it does not contain people of sufficient expertise, it lacks understanding of the issues, it lacks effective coordination between agencies and it lacks resources and funding, which is indicative of a lack of political will.

Statistics on trafficking

The publicly available statistics on trafficking are:

- From February 2008 to July 2010, 1,656 suspected human trafficking victims were rescued, however only 484 of them were considered 'actual victims'.[284]
- Of these 484, 291 were sex trafficking victims and 25 were below the age of 18.[285]
- During the period between March 2009 and February 2010, three sex trafficking offenders were convicted.[286]
- From March 2010 to February 2011, 11 people were convicted of sex trafficking and imprisoned for between three and eight years.[287]

When comparing the statistics from the media with statistics from the US Department of State Trafficking in Persons Report from 2009, it is clear that many victims of sex trafficking are not processed as victims of such under the ATIP Act.

The US Department of State Report 2009 stated that,

> "Police reported rescuing about 2,000 foreign women and minors forced into prostitution during raids on brothels in 2008. The government deported or voluntarily repatriated most of the victims to their home countries, referring some to their respective embassy shelters and processing a limited number as victims under the anti-trafficking law."[288]

This discrepancy in the number of actual cases and the number of cases processed under the ATIP Act demonstrates that there is an urgent need to study the extent of trafficking in the country to ensure that victims receive the support they require.

The reporting of trafficking in the government-controlled media displays a concerning level of ignorance about the issue. A news report from August 2010 stated that "Many of the foreigners rescued in Malaysia on suspicion of being victims of human trafficking turned out to be people who came to work as prostitutes."[289] Often it is the case that women are brought to Malaysia under false pretences and only discover when they arrive that they have been brought to the country to work as prostitutes. The US Department of State Report 2010 report on trafficking in persons notes that,

> "A significant number of young women are recruited for work in Malaysian restaurants and hotels, some of whom migrate through the use of "Guest Relations Officer" visas, but subsequently are coerced into Malaysia's commercial sex trade."[290]

Intra-country trafficking (between east Malaysia and the peninsular) is an area requiring further investigation, as this does not appear in trafficking statistics.

Malaysia's low ranking in the US Department of State Trafficking in Persons Reports

In 2010, the US Department of State released its annual Trafficking in Persons Report. Malaysia's ranking had risen from "Tier 3" in 2009 to "Tier 2 Watch List". In the 2011 report, Malaysia remained on the Tier 2 Watch List.

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284 '"Bulk of those trafficked are sex workers'", *New Straits Times*, 8 August 2010.

285 '"Bulk of those trafficked are sex workers'", *New Straits Times*, 8 August 2010.

286 US Department of State, *Trafficking in Persons Report 2010*, p224.

287 US Department of State, *Trafficking in Persons Report 2011*, p244.

288 US Department of State, *Trafficking in Persons Report 2009*, p199.

289 '"Bulk of those trafficked are sex workers'", *New Straits Times*, 8 August 2010.

290 US Department of State, *Trafficking in Persons Report 2010*, p223.

As a country on the Tier 2 Watch List, Malaysia "does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so."[291]

The 2011 US Department of State report states:

> "While the government increased the number of convictions obtained under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act during the year and continued public awareness efforts on trafficking, it ... failed to address problems of government complicity in trafficking and lack of effective victim care and counselling by authorities. There remain many serious concerns regarding trafficking in Malaysia, including the detention of trafficking victims in government facilities."[292]

Poor treatment of trafficking victims

During the course of investigations, identified victims of trafficking are forcibly placed in 'shelters' run by the Ministry of Women, Family and Community Development until they are deported to their country of origin.

Observers have noted that in these shelters, basic rights and freedoms are denied and some victims are "isolated, unable to work or earn income, and have little or no access to legal or psychological assistance provided by the government or NGOs...and these facilities did not employ medical officers or trained psychologists."[293]

The US Department of State Trafficking in Persons Report 2011 noted its concern that,

> "The government treated victims of trafficking as illegal aliens and turned them over to immigration authorities for deportation after they provided evidence to prosecutors, usually after a 90-day stay at a trafficking in persons "shelter." Victims were are at times locked in their rooms, handcuffed to and from court appearances, and reported being subjected to body patdowns and searches prior to entering the facilities. Victims were typically uninformed about the legal processes to which they were subjected."[294]

The 2011 report also stated that,

> "Poor investigation procedures did not take into account the best interests of victims, as under the current system, victims could be asked to recount their trafficking experience on up to seven different occasions to different officials. During trial proceedings, authorities did not make adequate efforts to separate victims from their traffickers or recruitment agents, which may have resulted in threats or pressure exerted on victims and their families if they cooperated with police and prosecutors."[295]

The NGO Tenaganita has stated that in Sarawak, victims of trafficking are handcuffed and housed in prisons and treated as the other prisoners.

Treatment of victims is a disincentive to report trafficking

The detention and deportation of victims of trafficking provides a significant disincentive to report the crime. As noted by the US Department of State Trafficking in Persons Report 2011,

> "While the government reports that it encourages victims to assist in the prosecution of their traffickers, it did not make available any alternatives to repatriation for victims who may face harm or retribution upon return to their home country, nor did it provide any incentives for victim cooperation in the prosecution of their traffickers, such as work permits or extended stay visas. Victims were deported once prosecutors were satisfied with their testimonies."[296]

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291 US Department of State, *Trafficking in Persons Report 2010*, p223.

292 US Department of State, *Trafficking in Persons Report 2011*, p244.

293 US Department of State, *Trafficking in Persons Report 2011*, p245.

294 US Department of State, *Trafficking in Persons Report 2011*, p245.

295 US Department of State, *Trafficking in Persons Report 2011*, p245.

296 US Department of State, *Trafficking in Persons Report 2011*, p245.

When deported, victims of trafficking have their passports stamped "Deported". This of course has repercussions for future travel.

In one case reported by an NGO, a domestic worker who had not been paid wanted to claim unpaid wages and leave the country, however she was not permitted to do so as she was assessed as a trafficking victim and had to wait in Malaysia until her long-delayed court case had been held.

Degrading and humiliating treatment of women prostitutes

In June 2011, a raid was conducted in a Penang nightclub by police officers to detain 38 women, 30 of which were not Malaysian citizens, for alleged prostitution. During the raid, the detained women were either marked in pen with an X or a tick on their foreheads or chests and were chained together. It had been reported that for one week prior to the raid officers had attended the club undercover.[297] Although it is unknown whether these women were trafficking victims, the treatment of the women was humiliating and degrading. China Press published photos of the women during the raid (see Picture 5).

[297] "X-marks and chains for suspects rile rights groups", *Malaysiakini*, 3 June 2011.

Recommendations to the Malaysian Government regarding Article 6 of CEDAW

- The Malaysian government is to be commended for adopting the Anti-Trafficking in Persons Act however this law must be amended to remove the inclusion of smuggled migrants. The smuggling of migrants and the trafficking of persons are two distinct problems and cannot be conflated.
- Expand the definition of human trafficking in the Anti-Trafficking in Persons Act so that it becomes compliant with the definition provided in the UN Trafficking Protocol.
- Conduct comprehensive and in-depth research on the extent and trends of trafficking in women in Malaysia, both in terms of trafficking victims and trafficking syndicates, so as to be better able to formulate responses to the situation.
- Sensitise law enforcement agents to understand trafficking as a human rights violation and to appreciate their obligation to protect and help victims of trafficking.
- Continue to train officials on the effective handling of sex and labour trafficking cases, with a particular emphasis on victim protection and the identification of labour trafficking victims.
- Recognise that trafficking in women is not just confined to sex trafficking – women are also trafficked for labour.
- Victims of trafficking should not have their rights further violated by their incarceration during investigations. They should be permitted to work and live in the community.
- Improve victim protection by providing legal assistance, and providing effective counselling and care to the victims of trafficking.
- Ensure that civil society organisations are able to gain access to the victims of trafficking to provide support.
- Foster relationships with anti-trafficking agencies from both government and civil society sectors in other countries in the region. Use this cooperative network to assist in the return and repatriation of trafficking victims.
- Provide legal alternatives to the removal of trafficking victims to countries in which they would face retribution or hardship. After the conclusion of court proceedings, victims of trafficking should have the option of remaining in Malaysia as residents.
- Ensure that victims of trafficking are not threatened or punished for crimes committed as a result of being trafficked.
- Increase efforts to prosecute and convict public officials who profit from or are involved in trafficking, or who exploit victims.
- Compensation must be made available to victims of trafficking.
- Provide guidelines for the non-discriminatory portrayal of trafficked women by the media and introduce sensitisation programmes for the media to appreciate the social implications of their reports. Encourage the media to treat traffickers as criminals instead of trafficking victims.
- The government/courts/police should make public yearly trafficking statistics, rather than the current ad hoc approach to releasing statistics.
- Make greater efforts to educate migrant workers on their rights, legal recourses available, and how to seek remedies against traffickers or employers who fail to meet their legal obligations.
- Make efforts to reduce the demand for both sex and labour trafficking.

ARTICLES 7 & 8

ARTICLES 7 AND 8:

PARTICIPATION IN POLITICAL AND PUBLIC LIFE

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
(b) 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;
(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Malaysia ranked very low on the World Economic Forum's 2010 Global Gender Gap Index. Out of 134 countries, Malaysia ranked 98. Although educational attainment was reasonable, in terms of economic participation and opportunity, Malaysia ranked 99 and with regard to **political empowerment, Malaysia ranked 110 out of the 134 countries**.[298]

Key issues in this chapter:

- The government has not developed concrete plans for increasing the low numbers of women as candidates in the electoral processes, as elected representatives and in public office or decision-making positions. A policy decision to aim towards women making up 30 percent of public sector decision-making positions was announced in 2004, however **this 30 per cent target is far from being reached**.
- The **number of women in parliament remains low**. Since 1957, there have never been more than three women Ministers in Cabinet at one time. Currently there are only two women Cabinet Ministers. In 2010, women comprised 25.7 per cent of the Senate (it must be noted that Members of the Senate are appointed, not popularly elected). Also in 2010, **women comprised only 10.4 per cent of the elected Members of Parliament in the House of Representatives** (in 2004 this figure was 9.6 per cent). Women only made up eight per cent of the Members of the 13 State Legislative Assemblies. There have never been transgender people as Ministers or Assemblypersons.
- **No political party in the coalition government has a quota** in place to ensure women's political participation.
- **The political environment is hostile to women**. Elected Members of Parliament routinely make sexist comments in and outside of parliament which go unrebuked and which create a hostile environment for women.

[298] World Economic Forum, *The Global Gender Gap Report 2010*.

- In 2011, **a woman political leader was incarcerated for a month without trial** under the draconian *Emergency (Public Order and Prevention of Crime) Ordinance* (EO) for her purported role in an electoral reform campaign. Sarasvathy Muthu, who is the Vice-President of Parti Sosialis Malaysia (PSM, Socialist Party of Malaysia), was not involved in the electoral reform campaign yet was detained with others for a month.
- Ambiga Sreenevasan, the woman leader of a civil society coalition for free and fair elections, BERSIH 2.0, was vilified in the media and received death threats. **Such treatment is a huge disincentive for women to participate in the public sphere**.
- Representation of women at the **international level**, for example as Malaysian ambassadors and high commissioners, remains low.

Removal of reservation to Article 7(b) of CEDAW

In July 2010, the Malaysian government announced that it was lifting its reservation to Article 7(b) of CEDAW.

Appointment of female Syariah Court judges

A few days before the announcement of the removal of its reservation to Article 7(b) in July 2010, the government announced the appointment of the first two female *Syariah* Court judges for the Federal Territories of Putrajaya and Kuala Lumpur.[299]

However, since the announcement of the appointment, it was reported that there may be limitations placed on the purview of the female judges. Government-owned news agency Bernama reported that,

> "Syariah Appeals Court judge Datuk Md Yusup Che Teh said this was because there were certain cases that they could not preside over, such as divorce and "wali hakim" [solemnizing a marriage] cases... Md Yusup said the demarcation of duties for the women judges was not gender discrimination but was based on Islamic rulings that could not be disputed."[300]

However, on 5 August 2010, it was reported that the female judges would in fact be able to hear all cases.[301]

But on 8 December 2010, newspapers reported that the government was still "mulling" over permitting women judges to hear marriage and divorce cases as different states had different regulations and constraints.[302]

So, although reservations have been lifted on Article 7(b), little change has taken place to enable the fulfilment of the intent of the article in a meaningful way.

Women's low representation in politics

Women's participation in politics is hampered by the existence of social perceptions which indirectly limit women's negotiating power, making it much harder for women become involved in the public sphere.

In the 2008 General Elections, there were only 118 women candidates out of 1,588 (7.4 per cent).[303]

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299 In 2006 a national *fatwa* was declared on the right of women to be appointed as judges.

300 "Area Of Jurisdiction Of Two Women Syariah Judges To Be Decided", *Bernama,* 14 July 2010.

301 "Female Syariah judges get full powers", *The Malaysian Insider*, 5 August 2010.

302 "Govt mulls over female syariah judge for marriage, divorce cases", *Sun2Surf*, 8 December 2010.

303 Abdul Rashid Moten, "2008 General Elections in Malaysia: Democracy at Work", *Japanese Journal of Political Science* 10 (1), p25.

Quotas

The parties of the ruling coalition do not have quotas to increase the level of women's participation in parliament. Only one political party, an opposition party, has included in its constitution a commitment to having 30 per cent of decision-making positions to be filled by women. This commitment was made in June 2009 by Parti Keadilan Rakyat.[304]

The Selangor State Government, which is currently governed by the opposition coalition, has also committed to having a minimum of 30 per cent of decision-making positions to be held by women. Currently women comprise 40 per cent of the Selangor State Government executive committee.[305]

The high cost of election deposits

As noted in the first Malaysian NGO CEDAW Shadow Report, election deposits in Malaysia are high. Candidates must pay RM15,000 to become a candidate for the federal-level Dewan Rakyat (House of Representatives) and RM8,000 for the state Legislative Assemblies.[306]

Hostile political environment for women

As discussed in the chapter on Article 5 of CEDAW, government rhetoric continually reinforces women's role as carers in the home. The chapter on Article 5 also includes examples of the sexist comments which not infrequently come from Members of Parliament, and the lack of reprimand from peers, which indicates a tacit acceptance of such behaviour.

There have also been attacks against the character of women opposition politicians, such as Elizabeth Wong. In early 2009 photos of the opposition state assemblyperson taken in her bedroom were circulated. The subsequent attack on her personal life as a successful single woman was a prime example of the political environment that is hostile to women.[307]

Statistics of women's participation in politics

The Ministry of Women, Family and Community Development produces an annual statistics booklet. Below are the statistics relating to women's political representation in Malaysia. The statistics have remained quite stagnant.

Cabinet Ministers in 2010: 7.1 per cent women

In 2010, there were only two women cabinet ministers out of a total of 28 and seven women deputy ministers out of a total of 42 (16.7 per cent).[308] Zainah Anwar has noted that, "Since independence, the number of women Cabinet ministers has never exceeded three, even though the number of ministers has increased."[309]

Senators in 2010: 25.7 per cent women

In 2010, 18 out of a total of 70 appointed Senators in the Dewan Negara were women.[310] In 2008, this percentage was 26.7 per cent.

Members of Parliament in the Dewan Rakyat in 2010: 10.4 per cent women

In 2010, 23 out of a total of 222 seats in the House of Representatives (Dewan Rakyat) were filled by women (this constitutes 10.4 per cent). In 2004 this percentage was 9.6 and in 2008 it was also 10.4 per cent.

304 "PKR: Clearer policy needed on gender representation", *The Nut Graph*, 16 June 2009.

305 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p13.

306 The website of the Malaysian Election Commission (www.spr.gov.my/) states that federal-level candidates must pay a deposit of RM 10,000 plus an additional RM 5,000 for the cost of clearing up campaign materials. Candidates for the state-level assemblies must pay a RM 5,000 deposit plus an additional RM 3,000 for clearing up campaign materials.

307 "Elizabeth Wong offers to quit her posts 'to protect party'", *The Star*, 18 February 2009.

308 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p65.

309 Zainah Anwar, "Closing the gender gap", *The Star*, 13 March 2011.

310 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p66.

Members of State Legislative Assemblies in 2010: 8 per cent women

In all 13 State Legislative Assemblies, only 46 out of the 576 members are women.[311] The state with the highest representation of women is Selangor, with 14.3 per cent of the State Legislative Assembly made up of women. However in the majority of states, the representation of women is below 10 per cent. In Terengganu and Perlis there are no women representatives.[312] In Selangor, 40 per cent of the Executive Committee is made up of women.[313]

Local Council Presidents in 2011: 4.8 per cent women

Of the 146 Local Council Presidents in Malaysia, seven are women. The women Local Council Presidents are from the following constituencies:[314]

Kedah:	Majlis Perbandaran Sungai Petani (Municipal Council of Sungai Petani)
Melaka:	Majlis Perbandaran Hang Tuah Jaya (Municipal Council of Hang Tuah Jaya)
Pulau Pinang:	Majlis Perbandaran Pulau Pinang (Municipal Council of Pulau Pinang)
	Majlis Perbandaran Seberang Perai (Municipal Council of Seberang Perai)
Selangor:	Majlis Daerah Kuala Selangor (District Council of Kuala Selangor)
Sabah:	Majlis Daerah Kota Marudu (District Council of Kota Marudu)
Sarawak:	Majlis Daerah Marudi (District Council of Marudi)

Chair of Village Committees in 2009: 1.0 per cent women

Women's participation in the *Jawatankuasa Kemajuan dan Keselamatan Kampung* (JKKK, Village Development and Security Committees) is low throughout the country. These committees are not local governments. In 2009, out of the 15,460 committees throughout the country, only 161 committees had a woman chairperson, which equates to 1 per cent.[315]

Ambassadors and High Commissioners

Representation of women at the international level remains low. In 2010, only nine of the 67 Malaysian Ambassadors were women (13.4 per cent), while two of the 14 High Commissioners were women (14.3 per cent), leaving the total percentage of women in Ambassador and High Commissioner positions at 13.6 per cent.[316]

Women at the decision-making level in the public sector

In 2010, there were,

- 4 women Ministry Secretary Generals out of a total of 24 (**16.7 per cent**),
- 17 women Ministry Deputy Secretary Generals out of 57 (**29.8 per cent**),
- 8 women Directors General, Directors and General Managers of Statutory Bodies, out of 43 (**18.6 per cent**).
- 18 women Director Generals in Federal Departments, out of 110 (**16.4 per cent)**.[317]

All up, this equates to women at 2010 filling a mere 20 per cent of decision-making positions in the public sector.

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311 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p68.

312 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p68.

313 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p13.

314 The names of the Local Council Presidents are available on the website of the Department of Local Government (*Jabatan Kerajaan Tempatan*): jkt.kpkt.gov.my/bm/main.php?Content=vertsections&SubVertSectionID=60&VertSectionID=31&CurLocation=31&lID=&Page=1 (accessed 21 March 2012)

315 Data from the Malaysian National Council of Women's Organisations (NCWO).

316 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p71.

317 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p70.

30 per cent quota of women in decision-making positions in the public sector not reached

As mentioned in the chapter on Articles 1 – 4 of CEDAW, the Tenth Malaysia Plan is very vague about the government's efforts to increase the participation of women in decision-making positions. The Tenth Malaysia Plan vaguely states that the government will "increase its efforts to achieve a quota of at least 30% of decision-making positions to be held by women during the Plan period."[318]

There is no plan of action, no concrete timeline and so far, as can be seen by the 20 percent figure on the previous page, no results.

The Prime Minister has publicly stated that 32.3 per cent of decision-making positions in the civil service were made up of women in 2010.[319] This statistic of 32.3 per cent is also taken from the same compilation of statistics released annually by the Ministry of Women, Family and Community Development. However, this 32.3 per cent figure comes from a chart entitled "Percentage of Top Management in Public Sector". The actual job positions covered by the term "Top Management" are not listed so it is not known whether these positions are genuinely decision-making positions. The Prime Minister selectively quoted favourable and non-verifiable statistics rather than the not-so-favourable and verifiable statistics.

Women's participation in the public sphere

Threats against woman leader of civil society movement

Women's human rights groups in Malaysia believe that substantive equality for women will be potentially attainable if there is an open and democratic system of government. For that reason, many women's NGOs were part of a coalition for the advancement of civil and political rights – BERSIH 2.0 (*bersih* means clean in Bahasa Malaysia). BERSIH 2.0 called for clean and fair elections in Malaysia.[320]

On 9 July 2011, the streets of Kuala Lumpur filled with a huge, peaceful gathering of BERSIH 2.0 supporters. The police responded with water cannon and tear gas and 1,697 people were arrested (see Picture 6). BERSIH 2.0 had inspiring women leaders at the helm, Ambiga Sreenevasan and Maria Chin Abdullah. Ambiga, a lawyer who had been President of the Bar Council, received relentless vitriolic personal attacks in the media and threats to her safety, which went without rebuke from government representatives and were therefore implicitly condoned.

Arrest and detention without trial of woman political leader

In July 2011, one woman was among six socialist party members who were detained for a month without trial under the *Emergency (Public Order and Prevention of Crime) Ordinance* (EO). The six were arrested during a Parti Sosialis Malaysia (PSM) voter awareness campaign.

The police did not provide an adequate reason for the arrests, and the detainees were subjected to vague accusations of waging war against the king, spreading communist ideology and having foreign links before finally being accused of being the key players in BERSIH 2.0. BERSIH 2.0 is a coalition made up of 63 civil society organisations and is non-partisan. Political parties are not part of the leadership or endorsing organisations of BERSIH 2.0.

The one woman detainee, Sarasvathy Muthu, is the Vice-President of PSM. She has been a grassroots activist for most of her life. During her detention she was forced to take a polygraph (lie detector) test after which time she experienced chest pain. She remain handcuffed while she underwent a stress test in hospital to assess her cardiac health and also reported being compelled against her will to sign a 62 page document, a compilation of statements taken from 20 days of interrogation. When she informed the police officers that she could neither read nor understand the text, as she was experiencing stomach and chest pain, she was nevertheless forced to sign the document. It is extremely concerning that a woman political leader, of whom there are few in Malaysia, was detained for political reasons and treated so appallingly.

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318 *Tenth Malaysia Plan 2011-2015*, p181.

319 "PM: 30% of corporate decision-makers must be women", *The Star*, 27 June 2011.

320 BERSIH 2.0's eight demands included: clean up the electoral roll, reform postal voting, use indelible ink, establish a minimum campaign period of 21 days, ensure free and fair access to the media, strengthen public institutions, get rid of corruption and put a stop to dirty politics (www.bersih.org).

Recommendations to the Malaysian Government regarding Articles 7 and 8 of CEDAW

- Encourage all political parties and the Election Commission to implement a temporary special measure to reserve at least 30 per cent of nominations to party positions, municipal council seats and state and federal parliamentary elections for women.
- Develop a concrete timeline for the achievement of at least a 30 per cent quota of women in decision-making positions in the public sector and at the international level and specify exactly which 'decision-making' positions are included.
- Develop a concrete timeline for the achievement of at least a 30 per cent quota of women in all state-level religious institutions.
- Lower the election deposits needed to run as a candidate.
- Ensure that the political environment is no longer a hostile environment for women by rebuking sexist and discriminatory comments by elected representatives both inside and outside of parliament.
- Reintroduce municipal council elections to enable Malaysians to participate actively in local government.
- Repeal laws that prevent freedom of information, including those that hamper the freedom of the press.

ARTICLE 9

ARTICLE 9: CITIZENSHIP

Article 9

1. *States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.*

2. *States Parties shall grant women equal rights with men with respect to the nationality of their children.*

Key issues in this chapter:

- **Non-citizen wives married to Malaysian husbands who are on long term social visit passes are totally dependent on their husbands to maintain their legal status in the country**. Spouses must be present at every visa renewal. This is also the case when a non-citizen spouse wishes to apply for permanent residency, as the Malaysian spouse must be present at the Immigration Department office to endorse the application. Malaysian husbands must also give written permission for their non-citizen wives to work.
- Should a husband refuse to be present at the Immigration Department office, the non-citizen wife's immigration status in the country may be at risk, leaving women **vulnerable in cases of domestic violence or estrangement**.
- Federal Constitution provisions relating to the transmission of citizenship to children from Malaysian mothers to children born overseas remain discriminatory against women. **Only Malaysian fathers are able to automatically confer their citizenship to their children, mothers must apply for citizenship for their children.**

Non-citizen spouses

Since the first Malaysian NGO CEDAW Shadow Report, some gains have been made in improving the circumstances of non-citizen wives of Malaysians and Malaysian wives of foreigners. However these two groups of women still face discrimination in different ways. In Malaysia women and men are not granted equal rights to acquire, change or retain their nationality and women are not granted equal rights with men with respect to the nationality of their children.

Employment for non-citizen spouses permitted with restrictions

In 2008, the government amended its policy on employment for non-citizen spouses. Prior to 2008, severe restrictions were placed on employment opportunities for non-citizen spouses, however the policy change now enables non-citizen spouses to work under a 'long term social visit pass'.

Non-citizen wives must get written permission from their Malaysian husbands to work

There are still restrictions on employment for non-citizen spouses and one of the most concerning restrictions is that non-citizen wives must have written permission from their Malaysian husbands to work. This is not a written policy, but is a regular practice at Immigration Department offices. Malaysian wives do not need to give permission to non-citizen husbands to work.

Different constitutional provisions for citizenship for men and women

The Federal Constitution has different provisions for non-citizen wives and non-citizen husbands of Malaysian citizens wishing to apply for citizenship. Section 15(1) of the Federal Constitution entitles non-citizen wives of Malaysian citizens the right to apply for Malaysian citizenship.[321]

In practice, however, anecdotal evidence has suggested that non-citizens are only able to apply for citizenship after they have received permanent residency, which requires that the non-citizen live in the country for five years before application. However administrative delays often mean that non-citizen wives must wait many years before they are even able to apply to become Malaysian citizens.

Non-citizen husbands of Malaysian women are required to seek citizenship by naturalisation.[322]

Discrimination against non-citizen wives who become Malaysian citizens

Section 24(4) of the Federal Constitution contravenes Article 9(1) of CEDAW as it does not grant women equal rights with men to retain their nationality. Section 24(4) of the Federal Constitution states:

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

Section 26(2) of the Federal Constitution also contravenes Article 9(1) of CEDAW as it too does not grant women equal rights with men to retain their nationality:

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

Discriminatory constitutional provisions regarding the citizenship of children born overseas

Malaysia maintains its reservation to Article 9(2) of CEDAW. Current provisions in the Second Schedule of the Federal Constitution for conferral of citizenship by operation of law to babies born outside of Malaysia stipulate that only fathers can automatically confer their Malaysian citizenship to their children.[323] This constitutional provision contravenes Article 9(2) of CEDAW, as mothers do not have the same rights to automatic conferral.

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321 Section 15(1) of the Federal Constitution: "…any married woman whose husband is a citizen is entitled, upon making application to the Federal Government, to be registered as a citizen if the marriage was subsisting and the husband a citizen at the beginning of October 1962, or if she satisfies the Federal Government – (a) that she has resided in the Federation throughout the two years preceding the date of the application and intends to do so permanently; and (b) that she is of good character."

322 Section 19(1) of the Federal Constitution lays out the criteria for citizenship by naturalisation: "…the Federal Government may, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalisation to that person if satisfied – (a) that – (i) he has resided in the Federation for the required periods and intends, if the certificate is granted, to do so permanently; (ii) (Repealed); (b) that he is of good character; and (c) that he has an adequate knowledge of the Malay language.'

323 Section 1(b), Second Schedule, Part II, Federal Constitution: "1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say: (b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State"

Section 1(d), Second Schedule, Part I, Federal Constitution: "1. Subject to the provisions of Part III of this Constitution and anything done thereunder before Malaysia Day, the following persons born before Malaysia Day are citizens by operation of law, that is to say: (d) every person born outside the Federation on or after Merdeka Day whose father was a citizen at the time of his birth and either was born in the Federation or was at the time of the birth in service under the Government of the Federation or of a State."

In April 2010, Malaysian Home Minister Datuk Seri Hishammuddin Tun Hussein announced that Malaysian women married to foreigners can apply for citizenship for their children born abroad. Citizenship applications for children can be submitted to Malaysian embassies or high commissions.[324] However, although this may not have previously been possible in practice, this was always possible in law, as Section 15(2) of the Federal Constitution is worded such that applications for citizenship are allowed when one parent is Malaysian, therefore implying that women are able to apply for their children to become citizens:

> *...the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian.*

Children born in Malaysia

NGOs in Malaysia have become aware of birth certificates being issued by the National Registration Department that state explicitly that the child is not a Malaysian citizen (*bukan warganegara*), even though one parent is Malaysian. In one example, the child of a non-citizen mother and Malaysian father was declared a non-citizen. This is problematic as the child's right to citizenship has been denied in a seemingly arbitrary way.

Entry visas and permanent residency for non-citizen spouses

Although the Federal Constitution permits application for citizenship after a period of two years of living in the country, in practice non-citizen spouses must first obtain a permanent residency visa. To be eligible for a permanent residency visa, continuous residence in Malaysia on a long term social visit pass for five years is required.

Long term social visit pass

It is now possible for non-citizen spouses to obtain a long term social visit pass which will cover a period of five years.[325] Previously the maximum length of validity was one year, which required both husband and wife to visit the Immigration Department office annually for renewals. However, although receiving a pass for five years is possible in theory, anecdotal evidence has shown that it is often the case that applicants only receive a six-month or one-year pass, which still requires regular renewal.[326]

The process of visa renewal is cumbersome. The physical presence of the Malaysian spouse is needed for every long term social visit pass renewal. For non-citizen wives, permission to work is also needed from the Malaysian husband. Such dependence on the Malaysian husband to both be present at each renewal and grant permission to work leaves women in a very vulnerable position.

Case Study

A non-citizen spouse, Bina Ramanand, spoke to *The Nut Graph*, an independent online news site about her experiences:

"We keep making repeated trips to the Immigration Department. We cannot hold well-paying jobs, do business, or study at the same fees that Malaysians pay. We find it difficult to open bank accounts in our own name. And we pay tourist rates at leisure and entertainment spots. Without PR [permanent residency], we are treated like foreigners and not as part of our Malaysian families.

There has to be clear cut policies and guidelines with clearly spelt out time frames so that foreign spouses and their children are not at the mercy of the immigration officers and their individual interpretation of the law. Each visit to Immigration is traumatic, one never knows what to expect and the rules keep changing."[327]

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324 "Malaysian women can register children born abroad", *The Star*, 12 April 2010.

325 According to the Malaysian Immigration Department's website, "Foreign husbands/wives to Malaysians can be given a Social Visit Pass for a period of 5 years on condition that they comply with all the requirements", www.imi.gov.my, accessed 15 March 2012.

326 "The long wait to be Malaysian: The foreign spouse experience", *The Nut Graph*, 4 August 2010.

327 Quoted in "The long wait to be Malaysian: The foreign spouse experience", *The Nut Graph*, 4 August 2010.

Lengthy waiting time for permanent residency visas for non-citizen spouses

Many spouses are kept indefinitely on a long term social visit pass, as the processing for permanent residency can take decades. This has resulted in many families with non-citizen spouses relocating to the home country of the non-citizen spouse, deterred by the long wait for permanent residency, without even considering citizenship in Malaysia.[328] Other families who decide to stay and wait for permanent residency are left with uncertain futures as they are left to wait for long periods after application and there is no guarantee of the application's success.

A minimum requirement for an application for permanent residency is a continued stay in Malaysia of five years.

In November 2009, the Home Ministry declared that it had cleared a backlog of 16,812 permanent residency applications and 32,927 citizenship applications, which had been filed between 1997 and December 2006.[329] Although it is not known how many of these applicants were non-citizen spouses, this backlog saw the granting of permanent residency and citizenship to spouses who had been waiting for almost two decades since their first application. Although announced proudly by the government as part of the achievement of some of its key performance indicators, it is disheartening that so many applicants were left waiting for so long before learning of the success or otherwise of their application.

There is a lack of transparency in the process of issuing permanent residency visas to non-citizen spouses of Malaysian citizens. There is also a lack of explicit guidelines stipulating the time limits for the review of applications, reasons for rejection of the applications and appeal procedures.

There is also no provision in the law or policy to accommodate couples with one non-citizen partner who are in a long term partnership, but who do not wish to enter into a marriage.

There have also been reports of a variation in the procedure for application based on nationality. Chinese non-citizen wives have reportedly had difficulty even obtaining the application forms for permanent residency.[330] This is ostensibly owing to a bias against so-called 'sham' marriages of convenience.[331]

There have also been reports of Chinese spouses being forced to pay more for long term social visit passes – RM600 as compared to RM90 for applicants from other countries.[332]

Case Study

In an interview with *The Star*, a mainstream English language daily newspaper, in March 2010, a Malaysian woman with a non-citizen husband spoke about the problems associated with the delay in finding out the result of her husband's and children's permanent residency applications:

"It became a big strain on our marriage. They were on a social pass and had to cross borders every six months at first. With a PR status, things would have been more stable and he could get a job more easily here...

...We had to pay double for medical service and schooling for the children was a problem. I had to do everything, like registering for the telephone line, for example, because my husband was either not eligible or had to pay higher charges...

...We considered all the possibilities and understood that our best option was to stay in Ireland because the immigration laws in Malaysia were not friendly to women with foreign husbands."[333]

328 "Foreign spouses and the brain drain", *The Nut Graph*, 23 July 2010.

329 "Home Ministry clears backlog of applications", *The Star*, 14 November 2009.

330 "Immigration woes of Chinese wives", *The Sun*, 10 May 2009.

331 "Chong: Be wary of runaway foreign wives", *The Star*, 9 August 2010.

332 "Immigration woes of Chinese wives", *The Sun*, 10 May 2009.

333 Quoted in "Unsettled by gender-biased laws", *The Star*, 14 March 2010.

Vulnerability of non-citizen wives who are widowed or estranged from their husbands

There is a mandatory requirement for non-citizen spouses to have their Malaysian spouses physically present when renewing their long term social visit pass and applying for permanent residency. This creates great inconvenience in the event that the Malaysian spouses are unable to be present owing to work commitments, illness or disability.

The situation becomes more difficult in the event that the marriage is estranged or there is a situation of domestic violence or the non-citizen spouse is left widowed.

Although there is an Immigration Department policy that an estranged or widowed spouse can stay in the country upon obtaining a sponsor who has the monthly earning capacity of RM2,000 and above,[334] these spouses remain in a vulnerable position. Some may be forced to leave Malaysia with their Malaysian children, which is potentially problematic as the children may face immigration difficulties in other countries as Malaysian citizens.

The CEDAW Committee's General Recommendation No. 26 notes the importance of independent residency status and the need to enact provisions for migrant women who have been abused to stay in the country:

> "When residency permits of women migrant workers are premised on the sponsorship of an employer or spouse, States parties should enact provisions relating to independent residency status. Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or spouse or is fired for complaining about abuse (article 2 (f))."[335]

Case Study

Mary (a pseudonym) has been living in Malaysia with her Malaysian husband for the past 20 years. Although she still lives with her husband and daughter, her husband often stays with another woman and Mary sees him very infrequently. Mary's husband has not given permission for Mary to work so she does not have an employment visa and has no choice but to work in the informal sector as a cleaner.

Mary wishes to apply for permanent residency (PR) so that she can become independent and seek employment. However in order to apply for PR she requires her husband's presence at the Immigration Department office.

Mary lives in fear of her husband and he is unwilling to assist her in applying for PR. Owing to the strict Immigration Department regulations, Mary is in a difficult situation and remains dependent on her husband.[336]

[334] www.imi.gov.my

[335] CEDAW Committee General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/W.P.1/R, paragraph 26(f).

[336] Case study from the Foreign Spouse Support Group.

Recommendations to the Malaysian Government regarding Article 9 of CEDAW

- Amend the discriminatory provisions within the Federal Constitution:
    - Article 15 of the Federal Constitution should be amended to allow women to have the same rights as men with regarded to citizenship status of their non-citizen spouses.
    - The language of Schedule II of the Federal Constitution should be amended to allow both men and women to automatically confer citizenship status on their children even when the child is born outside of Malaysia.
- Malaysian spouses should not be required to continually accompany non-citizen spouses to the Immigration Office to renew their long term social visit pass.
- Automatic permanent residency status should be granted to non-citizen spouses irrespective of gender and nationality upon two years' stay in Malaysia, enabling independent residency status.
- The mandatory requirement for written consent to work for non-citizen wives from Malaysian husbands should be removed. This will also enable non-citizen spouses who are estranged, abused, divorced or widowed to enjoy their right to livelihood.
- Non-citizen children with one Malaysian parent should be accorded with permanent residency to enable them similar rights and access to education and healthcare as Malaysian children.
- Correspondence regarding application for permanent residency and citizenship should be directed to those who are making applications rather than only the Malaysian spouse or sponsor.
- Policy announcements regarding immigration issues must be followed up to ensure they have been translated to administrative directives.
- Provide immigration department officials with regular training to cultivate sensitivity on challenges faced by non-citizen spouses of Malaysians and their children.

ARTICLE 10

ARTICLE 10: EDUCATION

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Key issue in this chapter:

- There is a **gender gap in technical courses** at universities and at the postgraduate degree level, in which there are more men enrolled than women.
- **'Effeminate' boys and 'masculine' girls and transgender students have suffered discrimination in both public schools and higher learning educational institutions.** They are stigmatised and because of the lack of an enabling environment, often drop out of school or are forced to leave the institution. They are sometimes forced to attend camps to 'convert' them to conform to gender stereotypes. Some university authorities are also initiating 'research' which involves asking students to identify other students of diverse sexual orientations and gender identities. Schools regard homosexuality as an offence and students can be punished.
- There is a continued lack of **comprehensive sex education** in all schools that is rights-based.

Many of the same issues and concerns expressed in the NGO CEDAW Shadow Report from 2005 remain relevant. These include accessibility of schools in rural areas and the quality of facilities. Dropout rates were reported to be high in the last NGO CEDAW Shadow Report.

More up to date information is needed from the government on the accessibility of schools for indigenous students and disabled students. More information is also required from the government about its efforts in schools to challenge traditional gender stereotypes.

Continued gender gaps in technical courses and higher degrees

The 2010 Millennium Development Goal Report for Malaysia states that,

> "Malaysia has achieved gender parity at primary, secondary and post-secondary levels of education and greater than parity at university level. At tertiary level, however, a gender gap remains in technical courses, probably a consequence of gender stereotypes and the labour market for technical personnel."[337]

In these technical and engineering courses at the tertiary level, women make up 31 per cent of students.[338]

During the meeting between the CEDAW Committee and the Malaysian delegation in 2006, the Malaysian government noted that although women's participation in the tertiary sector had improved, women were still lagging behind men at the PhD level.[339]

In 2009 enrolment statistics, in public institutions, 39.4 per cent of PhD students were women and in private institutions, this figure was 35.8 per cent.[340]

Gender stereotypes reinforced in the education sector

As mentioned in the chapter on Article 5 of CEDAW in this report, schools in Malaysia reinforce gender stereotypes by punishing students who do not 'fit' traditional gender roles.

A report of the United Nations High Commissioner for Human Rights has highlighted that schools should confront prejudice against students of diverse sexual orientations and gender identities:

> "Some education authorities and schools discriminate against young people because of their sexual orientation or gender expression... LGBT youth frequently experience violence and harassment, including bullying, in school from classmates and teachers. Confronting this kind of prejudice and intimidation requires concerted efforts from school and education authorities and integration of principles of non-discrimination and diversity in school curricula and discourse."[341]

Government school handbook lists homosexuality and 'gender confusion' as offences

In public schools, a handbook is provided to students outlining different sorts of offences and punishments. The punishments for homosexuality and 'gender confusion', which are deemed 'serious offences', include: stern warning; whipping (1 - 3 times on padded derrière using a light rotan/cane); compensation; suspension (no longer than 14 days); expulsion; or court.[342]

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337 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p48.

338 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p48.

339 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st meeting, 24 May 2006 at 10am*, CEDAW/C/SR.731, p2.

340 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p49.

341 Report of the United Nations High Commissioner for Human Rights, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity", A/HRC/19/41, 17 November 2011, paragraph 58.

342 Translated excerpt from "Buku Peraturan Disiplin: Sekolah Menengah, Wilayah Persekutuan Kuala Lumpur" (Disciplinary Rule Book: Secondary School, Federal Territory of Kuala Lumpur), Jabatan Pelajaran Wilayah Persekutuan Kuala Lumpur (Department of Education), 2008, p74.

Camps for school boys with 'effeminate tendencies'

In April 2011, it was reported that 66 school boys with 'effeminate tendencies' were sent to a four-day camp in Besut to 'curb' their behaviour. One of the mainstream daily newspapers, the *New Straits Times*, maintained a consistent use of the word 'sissies' in reports about this camp.[343]

University requesting information on students who are 'gender confused'

In 2011, students of Universiti Teknologi Mara (UiTM) Sabah received an email which requested information from students about other students deemed 'gender confused'. Such a practice is akin to a witch hunt. The text of the email can be found in the chapter of this report on the CEDAW Committee's General Recommendation No. 28.

Sex education in schools

In December 2006, Cabinet approved sex education to be taught in schools. After a delay of five years, in 2011 the subject "Social and Reproductive Health Education" was introduced into the National Service Training Programme.

In late 2011, it was reported that "Social and Reproductive Health Education" would be introduced in schools in 2012.[344]

The Ministry of Education and the Ministry of Women, Family and Community Development trialled a pilot project called "I'm in control" in five secondary schools over the last few years. The module is reported to include "pointers like assertive techniques to avoid premarital sex and how to identify and avoid high-risk situations."[345]

There has been significant debate on sex education in schools, as it is seen by many as a "culturally and religiously sensitive subject."[346] In 2010 the Kelantan Menteri Besar, Datuk Nik Abdul Aziz Nik Mat, reportedly said that introducing sex education in schools would be like "teaching thieves how to steal properly".[347]

Pregnant girls drop out of school

It is often the case that pregnant teenagers drop out of school and cease their studies. In 2010, a school for pregnant teenagers was opened in Melaka, called *Sekolah Harapan* (School of Hope). The Chief Minister of the state, Datuk Seri Mohd Ali Rustam, said that the intention of the school is to provide "a second chance for wayward teens."[348] It was reported that the school would provide religious counselling.[349]

The school's establishment is linked with the Melaka Islamic Religious Council's announcement earlier in the year which encouraged Muslim teenagers to get married, so that they would not have sex out of wedlock.[350] Melaka's Chief Minister said that teens marrying would be "a good way to solve the problem" of babies being dumped after unintended pregnancies.[351] It was reported that Melaka was planning to give RM500 in financial assistance to teenage couples intending to marry.[352] While the intention of encouraging pregnant teens to continue their studies is positive, the moralistic motivations are deeply concerning.

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343 "Besut boot camp for 66 sissies", *New Straits Times*, 18 April 2011.

344 "Sex education, finally", *Malaysia Today*, 6 October 2011.

345 "Sex education, finally", *Malaysia Today*, 6 October 2011.

346 "No new sex education classes yet, says Education Ministry", *The Malaysian Insider*, 16 November 2010.

347 "Nik Aziz: Sex education is like teaching thieves how to steal", *The Malaysian Insider*, 2 July 2010.

348 "Hope for pregnant teens", *The Star*, 2 September 2010.

349 "Hope for pregnant teens", *The Star*, 2 September 2010.

350 "School for pregnant teens", *The Star*, 16 August 2010.

351 "Malaysia state chief encourages teen marriages", *Malaysia Today*, 5 August 2010.

352 "Malaysia state chief encourages teen marriages", *Malaysia Today*, 5 August 2010.

Recommendations to the Malaysian Government regarding Article 10 of CEDAW

- Ensure that all school-age children have access to high quality schools and infrastructure, particularly in rural areas, on plantation estates and indigenous communities.
- Compile sex disaggregated data on the access of disabled students to education and review the suitability of schools to cater to the needs of different disabilities.
- Develop initiatives to reduce dropout rates.
- Develop an encouraging environment to enable pregnant girls to continue and complete their education.
- Ensure that sex education is taught in all schools. The syllabus must adopt a rights-based approach and include content on unintended pregnancies, contraception, abortion, healthy relationships, sexualities, gender identities, puberty, body image and STIs.
- Provide sex disaggregated data on the recipients of government scholarships and loans.
- Introduce temporary special measures to enable women to hold key decision-making positions within the education system.
- Provide sex disaggregated data on involvement in sporting activities and programmes run by the state to identify any disparities that might exist.
- Eradicate gender stereotyping in schools. No student should be punished, discriminated against or stigmatised on the basis their gender identity or sexual orientation.

ARTICLE 11

ARTICLE 11: EMPLOYMENT

Article 11

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:*

   (a) The right to work as an inalienable right of all human beings;

   (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

   (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

   (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

   (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

   (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. *In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:*

   (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

   (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

   (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

   (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. *Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.*

Although many women are achieving higher levels of education than previously, this has not been reflected in women's participation in the workforce. As Zainah Anwar has commented,

> "There is a disconnect between the level of education Malaysian women have received and their achievements in the economic and political fields. Malaysian women's political and economic participation remain abysmally low. We can't continue to use the fact that there are more women in universities than men to prove that women are making it in Malaysia. **This access to education has not translated into proportionate economic and political opportunities and outcomes for Malaysian women because of continuing discrimination**."[353]

Key issues in this chapter:

- The latest available statistics show that in 2010, **the labour force participation rate for women was very low at 46.1 per cent** (the rate for men was at 78.7 per cent). The labour force participation rate for women has remained consistently low for many years.
- In 2009, **67.2 per cent of women outside the labour force gave 'housework' as the reason for not seeking work**, while 2.3 per cent of men out of the workforce provided the same reason.[354] However this statistic is not necessarily reflective of the 'real' situation as these women may be working in the informal sector or working for a family business. Alternatively these women may feel that they are not able to go out to work owing to family pressures.
- In 1999, a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was launched. However this code is only voluntary for employers to follow and it has not been implemented widely. **In 2011, employment legislation was amended to include provisions relating to sexual harassment, however these provisions are significantly flawed**.
- In some industries, **women must retire at a younger age than men**. In March 2012, the Court of Appeal decided that the retirement age policy of a plastics industry company, in which women must retire at 50 and men at 55 years of age, did not constitute gender discrimination.
- **Non-citizen wives must be granted written permission from their Malaysian husbands to work**. Although in 2008 the government announced that it had reversed its policy which had previously prohibited non-citizen spouses from working, a non-citizen wife will only be given a work visa if her husband gives her permission to work.
- Migrant domestic workers in Malaysia are discriminated against in many ways. **Domestic workers are not recognised as workers under Malaysian laws, they are not afforded the same labour protections as other workers and they are at risk of a range of rights violations and abuses owing to this lack of protection**.[355]

Participation of women in the workforce

In 2010, the Minister for Women was reported to have said that the government was targeting to increase women's participation in the workforce to 55 per cent by 2015.[356] However no detail was released as to the way in which this will be achieved.

In 1997, the labour force participation of women was at 46 per cent, and the male labour force participation rate was 84.3 per cent.[357]

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353 Zainah Anwar, "Closing the gender gap", *The Star*, 13 March 2011.

354 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p14.

355 The chapter on the CEDAW Committee's General Recommendation No. 26 in this report will examine the discrimination faced by migrant domestic workers in Malaysia.

356 "Shahrizat: Set up childcare centres before we compel you", *The Star*, 19 February 2011.

357 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2009*, p19.

Since 1997, the lowest labour force participation rate for women has been 44.4 per cent in 1998 (the male rate was 83.1 per cent). Also since 1997, the highest labour force participation rate for women has been 47.7 per cent in 2003 (the male rate at the time was 82.1 per cent).

In 2009, the labour force participation rate for women was 46.4 per cent (the rate for men was at 78.9 per cent). In 2009, in the rural areas, the rate for women was 42 per cent and in urban areas, the rate for women was 48.4 per cent.

In 2010, the labour force participation rate for women was 46.1 per cent (the rate for men was at 78.7 per cent). In 2010, in the rural areas, the rate for women was 41.2 per cent and in urban areas, the rate for women was 48.5 per cent.

These statistics show that the labour force participation rate has stagnated at between 44.4 and 47.7 per cent for over a decade. During the same time the labour force participation rate for men has hovered at between 79.5 and 84.3 per cent.

Parental leave

Section 37 of the Employment Act 1955 states that female employees are entitled to a maternity leave allowance of 60 days. The ILO has a standard requirement of 90 days' maternity leave.

In October 2010, the Prime Minister announced that public servants will have access to 90 days of paid maternity leave, granted upon consultation between the employer and the employee. The 90 days of leave will be optional. The maximum number of maternity leave days per employee is 300 days.

The Prime Minister said,

> "The Government is concerned with the career prospects and welfare of female civil servants as they need to take care of their families, particularly newborn babies. To improve the maternity leave facility for female civil servants, the Government will allow flexibility to self-determine fully-paid maternity leave, not exceeding 90 days from the current 60 days. This facility is subject to a total of 300 days of maternity leave throughout the tenure of service."[358]

Two concerning elements of this statement are that the rhetoric used continues to reinforce women's stereotypical role as the primary carer in the household and ignores the role of other parents in child-raising. Furthermore, the limit of 300 days' leave limits the number of children a woman may have.

Although the 90 days is in theory available, reports have come to light that indicate that public sector employees have not been given access to these 90 days and have instead only been granted 60 days of leave. In May 2011, a newspaper reported that the secretary-general of the Malaysian National Union of Teaching Profession said that some teachers "were given 60 days and made to apply for the additional 30 days, and often, the application would be rejected by the school or (state education) department head. I checked with the school heads and was told that the problem was due to a lack of allocation to pay for replacement teachers. This is akin to denying the teachers their right."[359]

In August 2010, the National Union of Bank Employees signed a new collective agreement with the Malaysian Commercial Banks Association, bringing into force a 90 day maternity leave entitlement.[360]

In January 2009, the state of Selangor increased maternity leave for public sector employees to 90 days and paternity leave from seven to 14 days.[361]

In June 2011, an Employment Amendment Bill 2011 was passed by parliament which included extending maternity leave protection to "every female employee who is employed under a contract of service irrespective of her wages." However, domestic workers are still excluded from this provision.

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358 "Full text of PM Najib's Budget 2011 speech", *The Star*, 15 October 2010.

359 "NUTP: 90-day maternity leave denied to teachers", *The Star*, 23 May 2011.

360 "Bank staff to retire at 57", *The Star*, 23 August 2010.

361 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p25.

"Housework" main reason women don't enter workforce

In 2009, 67.2 per cent of women outside the labour force gave "housework" as the reason for not seeking work, while 2.3 per cent of men out of the workforce provided the same reason.[362] In 2008, this figure was 67.7 per cent for women and three per cent for men.[363] This statistic is not necessarily reflective of the 'real' situation as these women may be working in the informal sector or working for a family business. Alternatively these women may feel that they are not able to go out to work owing to family pressures.

Childcare centres

In 2007, subsidies for child care were provided to public servants whose household income was less than RM2,000 per month. The subsidies came to RM180 per child. In 2009, this policy was extended and public servants whose household income was under RM3,000 were also included in the subsidy program.[364]

It was reported that in 2009 tax relief was offered by the government as an incentive for companies to set up centres.[365]

In December 2010, Citibank established a childcare centre at one of its premises.[366] Other corporations have also established childcare centres at the workplace, however recent reports have indicated that they are few in number.[367]

Sexual harassment

The 2005 NGO CEDAW Shadow Report noted that in 1999, a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was launched. However this code is only voluntary for employers to follow and its implementation has been ad hoc.

The aim of the Sexual Harassment Code of Practice is to "encourage the development and implementation of policies and practices which will ensure a safe and healthy working environment".[368]

Human Resources Deputy Minister Datuk Maznah Mazlan is reported to have said in parliament, "Since the Sexual Harassment Code of Practise in 1999 at workplaces was implemented, the labour department has received and investigated 300 cases".[369] This is an extremely low number of cases for a 12 year period.

The overwhelming majority of Malaysian employers have not adopted the Sexual Harassment Code of Practice – only 1,671 employers nationwide had implemented the code between 1999 and 2011.[370]

In July 2010, an Employment Amendment Bill 2010 was brought before parliament with new provisions which compel employers to examine claims of sexual harassment at the risk of facing a fine if complaints are ignored. In October 2010, the amendments to the law were not passed and further changes were made. In June 2011, the Employment Amendment Bill 2011 was brought before parliament for a second reading. The bill was passed in October 2011.

There are several problematic elements in the sexual harassment provisions in the Employment (Amendment) Act 2011, which are outlined below:[371]

- Upon receiving a complaint of sexual harassment, the employer "shall inquire into the complaint". The only exception to this is when the complaint is made against an employer who is the sole

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362 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2010*, p14.

363 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community 2009*, p15.

364 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p24.

365 "Set up childcare support system fast", *New Straits Times*, 10 March 2012.

366 "Citibank launches childcare centre", *The Star*, 2 December 2010.

367 "Childcare centres at workplaces find few takers", *The Star*, 6 February 2012.

368 Ministry of Human Resources, "Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace", 1999.

369 "Sexual harassment cases on the rise", *New Straits Times*, 8 July 2011.

370 "Sexual harassment cases on the rise", *New Straits Times*, 8 July 2011.

371 The Joint Action Group for Gender Equality highlighted these problems in a Letter to the Editor, "Employment Act amendments piecemeal and unjust", *Malaysiakini*, 8 November 2011. Significant concerns with the legislation were also highlighted by Charles Hector, charleshector.blogspot.com/2011/10/why-sexual-harassment-proposed.html.

proprietor – in this case the inquiry shall be conducted by the Director General of the labour department. It should be the case that an independent body with the necessary skills and knowledge inquires into complaints.

- The law allows the employer to decide on whether or not an inquiry should be conducted. The employer can decide against holding an inquiry if "(a) the complaint of sexual harassment has previously been inquired into and no sexual harassment has been proven; or (b) the employer is of the opinion that the complaint of sexual harassment is frivolous, vexatious or is not made in good faith."[372] Should the employer decide against holding an inquiry, the complainant can refer the matter to the Director General who, upon reviewing the matter, may agree with the employer or instruct the employer to conduct the inquiry. Although the employer will then have to hold an inquiry, the objectivity of the inquiry is at risk given that the employer was not willing to carry out the inquiry in the first place.

- The law is silent about the right to appeal a decision of the employer or the Director General not to conduct an inquiry or the decision following an inquiry into a complaint.

- There is no possibility of compensation or an apology to victims of sexual harassment. In the case that an inquiry by the Director General finds that sexual harassment did take place by the sole proprietor, the options available to the victim are to resign and be entitled to "(a) wages as if the complainant has given the notice of the termination of contract of service; and (b) termination benefits and indemnity."[373]

- In the case of an inquiry by the employer finding that sexual harassment did take place, the perpetrator may be dismissed, downgraded or receive a "lesser punishment" as the employer "deems fit". If the perpetrator is a person other than an employee, the employer shall "recommend that the person be brought before an appropriate disciplinary authority to which the person is subject to."[374] If the perpetrator is a contract worker or a visitor to the workplace, there is no punishment.

The inclusion of sexual harassment provisions in employment legislation in such a superficial way disregards the rights of victims and demonstrates a lack of understanding of the complexities of sexual harassment.

The lack of appropriate legislation dealing with sexual harassment contravenes Article 11(f) of CEDAW, which states that women must have the "right to protection of health and to safety in working conditions" as well as Article 2(b) of CEDAW which encourages states to "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women."

The government should enact separate comprehensive sexual harassment legislation, which includes the creation of an independent tribunal to examine sexual harassment claims inside and outside the workplace.

Retirement age different for women in some industries

In July 2008, the mandatory retirement age for Malaysian civil servants was extended from 56 years of age to 58. In 2011, the retirement age for public sector employees was increased to 60. Civil servants now have a choice of opting to retire at 56 or work until they reach 60.

In the Malaysian private sector, the retirement age is 55 years. The mandatory retirement age for private sector employees has not changed since 1957. In 2011, reports emerged that the government was planning to increase the retirement age in the private sector.[375]

Gender discrimination in retirement age at Malaysian Airlines

There is a discrepancy in retirement age for women and men in Malaysia in some industries. For example, all male Malaysian Airlines employees are able to work until they are 55 years old. Women employees of Malaysian Airlines who undertake different roles have different retirement ages.

The 2002 *Malaysian Airline System Berhad and Malaysian Airline System Employees' Union Peninsular Malaysia Agreement* states that, "The retirement age of all office (non-front line) staff female employees,

372 Section 81B (3) of the *Employment (Amendment) Act 2011*.

373 Section 81E (2) of the *Employment (Amendment) Act 2011*.

374 Section 81B (1) of the *Employment (Amendment) Act 2011*.

375 "Time to raise retirement age", *The Star*, 25 December 2011.

except female Cabin Crew shall be 55 years", however, "The retirement age for Female Inflight Supervisor and Chief Stewardess shall be 45 years... The retirement age of Leading Stewardess shall be 45 years... The retirement age of Flight Stewardess shall be 40 years."[376]

Gender discrimination in retirement age in plastics industry

In 2001, eight women plastics industry workers from Guppy Plastic Industries were forced to retire after a new handbook of employment regulations was introduced by the company. Among the regulations was that women must retire at 50 years of age while men are to retire at 55 years of age.

The eight women, who were all 50 years of age or over, worked as production operators, cleaners and general workers. They received a letter from their employer dated 18 June 2001, informing them that as they had reached the retirement age, they would be forcibly retired 20 days later, on 7 July 2001.[377]

The women filed a complaint at the Industrial Court. In 2008, the Industrial Court decided in favour of the women workers, finding that the difference in retirement ages constituted gender discrimination. Guppy Plastic Industries sought a review of this decision and in 2010 the High Court overturned the Industrial Court's decision, finding in favour of the company.

The women appealed the 2010 High Court decision. On 21 March 2012, the Court of Appeal dismissed the women's appeal. One of the three judges on the Court of Appeal bench, Datuk K. N. Segara, is reported to have said, "It is our unanimous view that the appeal should be dismissed. We are entirely in agreement with the High Court judge that the Industrial Court had erred by failing to take into consideration the relevant factors and taking into consideration the irrelevant factors."[378]

These relevant factors, according to Judge Datuk K. N. Segara, were that the company was merely following its own employment regulations and that it was the industry norm to have different retirement ages.[379] The judge said, "Guppy Plastic Industries followed procedures based on its guide book when it terminated its female employees."[380]

The judge also reportedly said that "The employees should have objected at the time of introduction of the retirement age policy."[381]

According to the women's lawyer, it is often the industry norm that upon reaching the age of 50, women workers in the plastics industry are forced to retire, and many are then re-hired on a short term contract basis.[382] Besides elements of labour exploitation, their livelihood becomes insecure as they do not receive the benefits of permanent employment.

Forcing women to retire at a younger age than men is a clear case of gender discrimination as per the definition of discrimination in Article 1 of CEDAW. Article 11 of CEDAW is also contravened by this retirement policy, as women are not afforded the right to the same employment opportunities as men.

Among the material consequences of such discrimination is that women are effectively robbed of five years of salary and benefits.

Non-citizen women married to Malaysian men must have written permission from husbands to work

Non-citizen wives face discrimination in terms of employment. An immigration policy change in 2008 resulted in non-citizen spouses being granted authorisation to work under a long term social visit pass.[383] Although this change is positive, it comes with a catch in that non-citizen wives are required to produce

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376 *Malaysian Airline System Berhad and Malaysian Airline System Employees' Union Peninsular Malaysia Agreement* (COG 346/2003), 2002.

377 "Appeal on gender discrimination decision quashed", *The Sun*, 21 March 2012.

378 "Court rules no gender bias in workers' retirement age", *The Malaysian Insider*, 21 March 2012.

379 "Court rules no gender bias in workers' retirement age", *The Malaysian Insider*, 21 March 2012.

380 "Eight women lose gender discrimination suit", *Free Malaysia Today*, 21 March 2012.

381 "Appeal on gender discrimination decision quashed", *The Sun*, 21 March 2012.

382 "Court rules no gender bias in workers' retirement age", *The Malaysian Insider*, 21 March 2012.

383 This policy change was advertised on the Permudah website (www.pemudah.gov.my/web/guest/281, accessed 21 September 2010). Permudah is a government taskforce established to facilitate business in Malaysia.

a letter from their Malaysian husbands granting them permission to work.[384] Although this provision is not declared in any government policy document, and upon learning that this is the practice, Members of Parliament have expressed surprise at this practice, its occurrence nevertheless contravenes Article 11(b) of CEDAW.

Restrictions on employment for non-citizen spouses before 2008

Before 2008, non-citizen spouses were subjected to severe restrictions on their right to work, which required them to secure jobs in companies with a specified capital. Unless a non-citizen spouse had permanent resident status, they could only work on an employment pass within the spouse programme.[385]

Although it is now less onerous for non-citizen spouses to become eligible to work in Malaysia, many non-citizen spouses who have been in the country for many years unable to work do not benefit from the change. Many have not had the chance to work throughout their 'prime' years, and now may be close to retirement but face difficulty finding gainful employment owing to a lack of previous experience.

Restrictions on superannuation and social security

Employees who are Malaysian, permanent residents of Malaysia, or who are not citizens but have elected to contribute before 1 August 1998, benefit from the Employees Provident Fund (EPF) scheme. Under this scheme employers make a mandatory contribution of 12 per cent of the employees' monthly salary to the EPF and a further 11 per cent of the employees' monthly salary is also contributed by the employee to the EPF.

The Third Schedule of the Employees Provident Fund Act 1991 stipulates that employers of foreigners, including non-citizen spouses, are only required to contribute a minimum of RM5 per month to the EPF, regardless of the employees' salary.[386] This severely disadvantages non-citizen spouses, who are deprived of this essential benefit contributing towards their retirement, health care and ownership of property.

As foreigners, spouses are also not entitled to the benefits of social security, which provides protection to employees who suffer from an employment-related injury.

Job security

Non-citizen spouses' jobs are less secure than those of Malaysian citizens. The Employment Act 1955 states that when an employer is forced to make people redundant, non-citizen workers are the first to be made redundant:

> *Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee*.[387]

Many of the problems outlined above would be alleviated with a more transparent and efficient system by which non-citizen spouses can apply for and be granted permanent residency. For more information see the chapter on Article 9 of CEDAW in this report.

Discrimination based on diverse sexual orientations and gender identities in employment

Research published in 2002 about *Mak Nyahs* (transwomen) in Malaysia indicated that over 60 per cent of the 507 respondents earned less than RM500 a month.[388] Many found obtaining well-paid employment difficult owing to the stigma and blatant discrimination against them.

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384 On 29 September 2010 an immigration officer at the Pusat Bandar Damansara Immigration Department office confirmed that only non-Malaysian wives need to seek permission from their husbands to work and non-Malaysian husbands need no such permission from their wives.

385 "Foreign spouses at the losing end", *The Star*, 13 July 2010.

386 Part B, Third Schedule, Employees Provident Fund Act 1991.

387 Section 60N, Part XIIB, Employment Act 1955.

388 Research undertaken by Teh Yik Koon, *The Mak Nyahs: Malaysian Male to Female Transsexuals*, 2002, cited in Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p268.

Transmen and *pengkids* also face difficulty in obtaining well-paid employment owing to stigma and discrimination as they do not adhere to traditional stereotyped gender roles.[389]

More information and case studies of discrimination in employment based on sexual orientation and gender identity can be found in the final chapter of this report on the CEDAW Committee's General Recommendation No. 28.

Refugee women

Refugee women's access to employment is limited and as academic Cecilia Ng has noted, "[i]ssues associated with their illegal status are low wages, informal and irregular work, unpaid/delayed wages, termination without notice and sexual abuse."[390]

Recommendations to the Malaysian Government regarding Article 11 of CEDAW

- Collect genuine gender disaggregated data on employment (in the formal and informal sectors), unemployment and under-employment so that plans can be developed to increase greater participation of women in the workforce.
- Formulate monitoring mechanisms and laws to enforce equality of wages between men and women in the private sector.
- Establish a decent living wage.
- Enact separate comprehensive sexual harassment legislation, which includes the creation of an independent tribunal to examine sexual harassment claims inside and outside the workplace.
- Encourage more women to hold leadership positions in the public and private sector unions.
- Increase maternity leave from 60 days to 90 days throughout the private and public sector without a cap on the total number of days women are permitted to take.
- Extend paternity leave to partners in both the public and private sectors to 14 days.
- Provide community based childcare facilities.
- Pass a family leave statute to cover both men and women, in opposite-sex or same-sex partnerships, for adoption of a child and for caring for children and family members who are seriously ill.
- Ensure that people who experience discrimination in the workplace based on gender identity or sexual orientation are afforded the right to redress.
- Afford refugees the right to work.
- Recognise domestic workers as workers, not 'servants', under employment legislation and afford them protection of their labour rights.
- Ensure that migrant workers who fall pregnant are permitted to continue working and be eligible for full maternity benefits.

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389 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p270.

390 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p41.

ARTICLE 12

ARTICLE 12: HEALTH

Article 12

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

2. *Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

Key issues in this chapter:

There is a critical need for **data on health to be disaggregated by gender** in order to understand how and why diseases affect women and men differently.

The continued **privatisation of healthcare** in Malaysia is threatening to make affordability one of the factors that will reduce women's accessibility to health care services.

Many women have **difficulty in accessing their reproductive right to decide to have a child and to access high quality services**, which can be seen by the following:

- The use of contraception hasn't increased in 25 years.
- The law allows for abortion to protect the physical and mental health of the mother, but abortion is stigmatised and costly and government hospitals often do not provide the service.
- Information and counselling from government hospitals are often provided within a religious framework, rather than a reproductive health rights framework.
- Women do not have access to full information so are not equipped with the knowledge to make informed decisions.
- There are violations of privacy in government hospitals – there has been anecdotal evidence of unmarried Muslim women over 18 years of age giving birth in hospitals and not being allowed to leave until the woman's parents have been contacted.
- For sterilisation procedures, women need the consent of their husbands.

Women are the **fastest growing part of the population being infected with HIV**. A 2008 report from the Malaysian Ministry of Health and UNICEF states that in 1990, the rate of new HIV infections amongst women was 1.2% of total new cases. In 2002, this figure was 9.0 per cent, in 2004 it was 10.8 per cent, in 2006 it was 15 per cent and in 2007 it was 16 per cent.[391]

Mandatory HIV testing is in place for all Muslim couples intending to marry. If either partner is found to be HIV positive, the couple will not be prevented from going ahead with the marriage.

Sex education is inadequate and based on religious morals rather than a rights-based approach to bodily integrity. The sex education curriculum for schools was approved by Cabinet in 2006, but has yet to be fully implemented. Demonstrative of the government's attitude to sex education is the banning of a children's educational book on human reproduction in February 2012 on the grounds that it would corrupt moral values.

Raids on entertainment venues are common. **The presence of condoms can be used as evidence against an individual and works against ensuring and protecting public health**. People are trying to practise safer sex, but are being effectively stopped through extortion, harassment and scare tactics.

Access to health care is limited for some groups of women, including refugee women, indigenous women, migrant women and transgender people.

391 Ministry of Health and UNICEF Malaysia, "Women and Girls: Confronting HIV and AIDS in Malaysia", 2008, p11.

Lack of gender disaggregated data

As highlighted in the 2005 CEDAW NGO Shadow Report, there is a critical need for data to be disaggregated by gender in the health care system. The health data collected by the Ministry of Health in its annual reports about the incidence of communicable and non-communicable diseases has not been subjected to a gender disaggregated analysis.[392] Studies around the world have shown that the burden of disease is different for women and men. This highlights the importance of a need for gender analysis in Malaysia in order to understand differences and the extent of the problem – to study how and why diseases affect women and men differently.

Forty years ago, Malaysia's Cabinet approved the development of a women's hospital. Since then, this proposal has been shelved. A women's hospital should be developed using the framework of the CEDAW Committee's General Recommendation No. 24.

Access to healthcare services

The government is continuing to make efforts to improve the physical accessibility of healthcare services.[393] However, there are still obstacles to accessing healthcare. For example, in east Malaysia in the case of HIV treatment, as the 2010 UNGASS report on Malaysia states: "Patients could be required to travel significant distances to healthcare centres which provide ART [Anti-Retroviral Therapy]. For example, in Sabah and Sarawak, a patient may be forced to travel for 2 days to reach the designated hospital which has HIV treatment facilities. The cost of travel is a major deterrent and adds as a burden to those who do not posses full time employment."[394]

However, as discussed in the 2005 NGO CEDAW Shadow Report, the physical accessibility of services does not guarantee accessibility. Lack of awareness about the available services, as well as social and cultural factors, which may include an inability for women to leave the house without their husband's permission, lack of transportation and/or alternative child care arrangements, may make services inaccessible to some women.

Although government-provided healthcare services are free of charge, the privatisation of healthcare in Malaysia is threatening to make affordability one of the factors that will reduce accessibility.

Contraceptive prevalence

According to the Malaysian Millennium Development Goals (MDG) 2010 Report, "The contraceptive prevalence rate is the percentage of women married or in-union aged 15–49 who are currently using, or whose sexual partner is using, at least one method of contraception, regardless of the method – modern or traditional."[395]

The contraceptive prevalence rate has hovered around the fifty per cent mark for the last 25 years. In 1984 the contraceptive prevalence rate was 52 per cent. The most recent statistics about contraceptive prevalence come from 2004. The 2004 estimated prevalence was 51.9 per cent.[396]

The Reproductive Rights Advocacy Alliance of Malaysia (RRAAM) has highlighted that the low contraceptive prevalence rate in Malaysia demonstrates that there is a lack of political will in prioritising services and problems with service quality.

The Malaysian MDG 2010 Report stated that, "Among women not wanting any more children but not practising family planning, 24.5 per cent had an unmet need. The highest rate was among the 45–49

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392 Ministry of Health reports are available at: www.moh.gov.my

393 *Tenth Malaysia Plan, 2011-2015*, pp269-276.

394 *UNGASS Country Progress Report – Malaysia*, March 2010, p57 (UNGASS is the acronym for the United Nations General Assembly Special Session on HIV/AIDS).

395 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p74.

396 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p75.

age group (41.7 per cent) followed by the 40–44 age group (22.7 per cent) and the 20–24 age group (21.4 per cent). A slightly higher proportion of rural women (30.6 per cent) than urban women (22.0 per cent) had an unmet need."[397]

Women are not yet able to achieve the reproductive right to choose whether or not to have a child due to the inability of contraceptive service delivery to reassure them about the safety of contraceptives.

The National Population and Family Survey of 2004 found that 12.5 per cent of women who were not using contraception, even though they did not want to fall pregnant, said that they didn't use contraception because their husbands did not agree to it.[398]

Unmarried couples are denied the rights to contraceptive services from government clinics, however in some cases young people engaging in regular sex are discreetly provided contraceptives. This is a new and welcome development in the last few years, however it is not widespread.

Contraceptives from private sector clinics are relatively expensive. This indirectly becomes a barrier for unmarried sexually active women and men to access to contraceptives.

The MDG report noted that emergency contraception (Postinor) is available from government hospitals and private clinics, although knowledge of the existence of such a drug is limited.

Maternal mortality rate

The maternal mortality rate (MMR) has remained at a similar level for the past ten years.

- In 1991, the MMR was reported at 44 per 100,000 live births.
- In 2000, the MMR was reported at 28.1 per 100,000 live births.
- In 2008, the MMR was reported at 27.3 per 100,000 live births.[399]

The Malaysian MDG 2010 Report states that there is a significant correlation between the low contraceptive rate and maternal mortality:[400] "Maternal and reproductive health is also associated with access to contraception. Malaysia's unmet need for family planning remains high and is increasing, resulting in unplanned pregnancies and unwanted births, especially for women with less education."[401]

Abortion

Section 312 of Malaysia's Penal Code permits abortion in the case that the pregnant woman's mental or physical health is threatened:

> *Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years or with fine or with both; and if the woman is quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.*
>
> *Explanation—A woman who causes herself to miscarry is within the meaning of this section.*
>
> *Exception—**This section does not extend to a medical practitioner registered under the Medical Act 1971 [Act 50] who terminates the pregnancy of a woman if such medical practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy were terminated**. (emphasis added)*

397 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p75.

398 "Women still lose out in health", *The Star*, 3 December 2006.

399 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p72.

400 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p74.

401 United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia, *Malaysia: The Millennium Development Goals at 2010*, p.viii.

Although terminations are permitted, the law is not being implemented to its full extent, especially in government hospitals where access to the service is very limited. Under the Penal Code, it is one doctor alone who makes the decision as to whether a termination should be carried out. In cases of abortion, it is often the case that the woman themselves are best placed to ascertain their mental health needs and potential risks of continuing with a pregnancy.

The level of knowledge of medical personnel about the law in relation to abortion is worryingly limited. In 2007, a survey conducted by RRAAM found that only 57 per cent of 120 doctors and nurses surveyed in six states, in both public and private clinics, knew that abortion is legal in certain circumstances.[402]

An RRAAM rapid assessment "showed that women who had been raped or survived incest or those who had foetuses with gross brain deformity were reported to have been refused abortion services in most public hospitals."[403]

The 2007 RRAAM survey of medical personnel also found that "in response to the question 'What do you think women who are pregnant due to rape should consider doing?' 38% said that women should continue the pregnancy and either look after their baby themselves or give it up for adoption rather than consider having an abortion."[404]

RRAAM has noted that even in cases in which the law is known, sometimes the interpretation of what constitutes a threat to mental health is defined narrowly.

The reluctance of some doctors to provide the service has resulted in many women not being able to access safe, affordable abortions. Abortions are costly in Malaysia's capital, where they range in cost from RM600 to RM2,000.

Women are not provided with a chance to have informed choices and their knowledge is therefore limited. Pre- and post-procedure and non-judgemental counselling is not widely available.

This situation has serious impact on both women's physical and mental health as well as their freedom to decide whether or not they want to have the child when they have an unintended pregnancy.

Statistics from the National Registration Department statistics show that in 2010 there were 52,982 children born out of wedlock.[405]

Some women conceal their pregnancy and continue to work and study. There are frequent media reports of women giving birth in the toilets of factories, schools and colleges. Some of the babies die during the process and some of the women also die from the unassisted birth.

The mental suffering of these women due to the stigma of an unintended pregnancy and the impact on life choices and direction is enormous. Women are not given accurate and full information about their right to choices when faced with an unintended pregnancy especially the choice of an abortion. The legal right to have an abortion exists, but the law is not understood by many doctors, nurses and social workers and thus this choice is often denied.

Women with unintended pregnancies who hide their pregnancy out of severe mental stress due to stigma and then abandon their baby have been charged under the Penal Code with infanticide. A young woman was imprisoned for this action in 2011. Muslim women and couples who abandon their babies have also been charged under state *Syariah* law for the crime of illegal sexual relations (*zina*, i.e. unmarried). Punishments like this only add to the mental stress of women and further negatively affect mental health.

Unintended pregnancies of unmarried women needs to be viewed with compassion as a health and women's rights issue, not as immoral and requiring punishment. Moral frameworks are having adverse consequences for women through judgemental attitudes, which stigmatise and discriminate, restrict information and limit access to options and services.

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402 "Is abortion the answer?" *New Straits Times*, 13 February 2011.

403 "Is abortion the answer?" *New Straits Times*, 13 February 2011.

404 www.rraam.org/about.html

405 "Dealing with illegitimacy", *New Straits Times*, 17 November 2011.

Sex education

In December 2006, Cabinet approved sex education to be taught in schools. After a delay of five years, in 2011 the subject "Social and Reproductive Health Education" was introduced into the National Service Training Programme.

In late 2011, it was reported that "Social and Reproductive Health Education" would be introduced in schools in 2012.[406]

The Ministry of Education and the Ministry of Women, Family and Community Development trialled a pilot project called "I'm in control" in five secondary schools over the last few years. The module is reported to include "pointers like assertive techniques to avoid premarital sex and how to identify and avoid high-risk situations."[407]

There has been significant debate on sex education in schools, as it is seen by many as a "culturally and religiously sensitive subject."[408] In 2010 the Kelantan Menteri Besar, Datuk Nik Abdul Aziz Nik Mat, reportedly said that introducing sex education in schools would be like "teaching thieves how to steal properly".[409]

Government banned children's sex education book

In February 2012, a children's educational book titled "Where Did I Come From?", by Peter Mayle was banned by the Malaysian government. First published about 30 years ago, the book describes the human reproductive process and contains cartoon images of naked people (see Picture 7).

The Deputy Secretary General (Security) of the Home Ministry Datuk Abdul Rahim Mohd Radzi said that the book contained "elements detrimental to the community's moral values" and that it was in the public interest to ban the book.[410] Those in possession of the book could face up to three years in jail or a fine of up to RM20,000 or both.[411]

The ban came about after the UMNO Youth Community Complaints Bureau complained about it to the government.[412] The UMNO Youth Community Complaints Bureau chief, Datuk Muhd Khairun Aseh reportedly said that the book was "obscene". He also said, "The person to blame here is not so much the writer because his writing and products may be accepted in his country, but this country (Malaysia) has a different set of values."[413]

Violations of women's rights in government hospitals

RRAAM has received reports from sympathetic doctors and social workers on the violation of women's reproductive rights in government hospitals. Unmarried women above 18 years of age who give birth at government hospitals and who choose not to inform their parents of the pregnancy are having their rights to privacy and confidentiality violated. Muslim clerics employed in recent years are required to counsel unmarried Muslim women and involve their parents.

Doctors are required to make an official report on the marital status of such single Muslim mothers. This goes against the doctors' oath to respect patients' privacy and confidentiality. This situation appears to be widespread as it has also been reported in Penang. Such discrimination is experienced by Muslim women only.

406 "Sex education, finally", *Malaysia Today*, 6 October 2011.

407 "Sex education, finally", *Malaysia Today*, 6 October 2011.

408 "No new sex education classes yet, says Education Ministry", *The Malaysian Insider*, 16 November 2010.

409 "Nik Aziz: Sex education is like teaching thieves how to steal", *The Malaysian Insider*, 2 July 2010.

410 "Book ban 'to guard moral values'", *New Straits Times*, 23 February 2012.

411 "Book ban 'to guard moral values'", *New Straits Times*, 23 February 2012.

412 UMNO (the United Malays National Organisation) is the dominant political party of the Barisan Nasional (National Front) coalition, which has been in power for over 50 years.

413 "Confirmed no go for 'Where Did I Come From?' book", *The Star*, 23 February 2012.

There have been several reports in Kuala Lumpur of Muslim women in their twenties admitted to government hospitals for post-abortion treatment after abortions at private clinics encountering similar discrimination. In 2010, a 28 year-old woman was not permitted to discharge herself until the hospital contacted her parents, who had not known about her pregnancy. She asked the private sector gynaecologist who performed the abortion for help, but he was unable to intervene as he was told this was government hospital policy.

Young women have said to these sympathetic doctors that they will avoid government hospitals for childbirth or abortion related follow up due to these violations of rights. This has serious implications for their physical and mental health, as government health services cost much less than private sector services and are thus more accessible to women on low incomes. An abortion for example costs RM25 in a government hospital compared to between RM600 to RM2,000 in the private sector.[414]

One Stop Crisis Centres

One Stop Crisis Centres (OSCC) were established in the emergency departments of government hospitals in the 1990s to handle cases of gender-based violence. OSCCs are reported to be functioning well in some hospitals and inadequately in others.

The intention of the OSCCs is to provide a one-stop service for survivors of rape and abuse, including medical examination, treatment, specimen collection and counselling, and referrals for shelter and legal aid.[415]

There are OSCC services in 102 government hospitals nationwide. The numbers of clients at each differs greatly, from fewer than 10 a year to over 500 a year.[416]

The OSCCs are not funded directly, and are funded as part of the emergency department within hospitals. Clinical practice guidelines are currently being developed.

RRAAM reported in 2009 that,

> "For many rape and incest survivors, emergency contraception is not routinely available, referral for abortion for unwanted pregnancies depends on the views of the Head of the [Obstetrics and Gynecology] Department and there is little follow up to identify and treat HIV and other infections (discussion with RRAAM members after the OSCC Seminar of the Women's Centre For Change in Penang, 5th May 2009)."[417]

Since this time, the Penang Hospital OSCC has improved its services and works well with the Women's Centre for Change, Penang, in providing support to domestic violence and sexual assault survivors.

HIV/AIDS

At December 2010, there were 77,064 people living with HIV in Malaysia. During the year 2010, there were 3,652 new cases of HIV identified, and 668 of these (18.3 per cent) were women and girls. In the same year there were 1,035 new cases of AIDS identified, and 167 of these (16.1 per cent) were women and girls.[418]

A 2008 report from the Malaysian Ministry of Health (MOH) and UNICEF states that in 1990, the rate of new HIV infections amongst women was 1.2% of total new cases. In 2002, this figure was 9.0 per cent, in 2004 it was 10.8 per cent, in 2006 it was 15 per cent and in 2007 it was 16 per cent.[419]

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414 RRAAM Memorandum to the Director General of Health, November 2011 (forthcoming).

415 Associate Professor Dr Wong Yut Lin, "Hospital-Based One-Stop Crisis Centres (OSCC): Health Sector Response to Gender-Based Violence in Peninsular Malaysia", United Nations Population Fund (UNFPA), Malaysia, 2011, p9.

416 Associate Professor Dr Wong Yut Lin, "Hospital-Based One-Stop Crisis Centres (OSCC): Health Sector Response to Gender-Based Violence in Peninsular Malaysia", United Nations Population Fund (UNFPA), Malaysia, 2011, p13.

417 Abdullah, R., *Increasing Access to the Reproductive Right to Contraceptive Information and Services, SRHR Education for Youth and Legal Abortion,* Kuala Lumpur, Malaysia: Asian-Pacific Resource and Research Centre for Women (ARROW), 2009, p16.

418 *Malaysian AIDS Council and Malaysian AIDS Foundation Annual Report 2010*, p10.

419 Ministry of Health and UNICEF Malaysia, "Women and Girls: Confronting HIV and AIDS in Malaysia", 2008, p11.

The Malaysian MDG 2010 Report stated that the "proportion of women with HIV has...almost doubled from an already significant 9.4 per cent of reported cases in 2000 to 18 per cent in 2009."[420]

The MOH and UNICEF report also noted that it is monogamous housewives who are often contracting the virus. The report noted that "in many ways, female sex workers are able to better protect themselves compared to housewives as they are better positioned and have the opportunity to negotiate the use of condoms during sexual intercourse."[421]

These women, having acquired HIV, could become discriminated and marginalised from their communities. Fear of such marginalisation could result in women not seeking the right information or undergoing screening for HIV. It could also prevent them from disclosing their status and obtaining appropriate counselling and treatment. With increasing numbers of affected families whose parents become infected with HIV, the number of children infected or orphaned may also rise.

Mandatory HIV testing for Muslim couples

Mandatory HIV testing is in place for all Muslim couples intending to marry. In October 2008, the Director-General of the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia* (JAKIM)), Datuk Wan Mohamad Sheikh Abdul Aziz announced that effective from 2009, it is compulsory for Muslim couples to undergo premarital HIV testing.[422] If either partner is found to be HIV positive, the couple will not be prevented from going ahead with the marriage.

The position of the World Health Organisation and the Joint United Nations Program on HIV/AIDS, UNAIDS, on mandatory testing is as follows,

> "UNAIDS/WHO do not support mandatory testing of individuals on public health grounds. Voluntary testing is more likely to result in behaviour change to avoid transmitting HIV to other individuals."[423]

Health promotion for sex workers hindered by police

In a UNDP report stemming from the 2011 Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law, it was noted that the PT Foundation highlighted that "health promotion efforts are frustrated by police practices".

> "The Ministry of Health pays for us to have peer outreach workers to distribute condoms. But if police find people with more than three condoms then they arrest the sex workers on suspicion of solicitation... when (the sex workers) come out of detention they avoid contact with the outreach workers for fear of re-arrest. It is a waste of government resources."[424]

In the same UNDP report it was noted that the "raids by police and religious authorities hinder HIV prevention work targeting transgender sex workers in Malaysia."

A submission from Malaysia's PT Foundation was quoted:

> "(In 2010) we received 22 cases of transgenders who had been arrested by religious authorities and referred to the Legal Aid Centre. Feedback from outreach workers and the clients stated that raids by the authorities happened almost every day at sex work venues... There were also complaints of assault by enforcement officers. There were complaints from transgender sex workers that they were threatened by authorities for having condoms with them. Some of them are reluctant to (ask for) condoms from the outreach workers."[425]

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420 *United Nations Country Team, Malaysia and the Economic Planning Unit, Prime Minister's Department, Malaysia: The Millennium Development Goals at 2010*, p.viii.

421 Ministry of Health and UNICEF Malaysia, "Women and Girls: Confronting HIV and AIDS in Malaysia", 2008, p47.

422 "Mandatory testing flawed", *The Nut Graph*, 19 December 2008.

423 *UNAIDS/WHO Policy Statement on HIV Testing*, UNAIDS/WHO, 2004.

424 Raymond Tai, PT Foundation, quoted in *HIV, Health and Development Programme for Asia and the Pacific, UNDP Asia-Pacific Regional Centre*, "Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law", Bangkok, 17 February 2011, p10.

425 *HIV, Health and Development Programme for Asia and the Pacific, UNDP Asia-Pacific Regional Centre*, "Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law", Bangkok, 17 February 2011, p6.

Female circumcision compulsory for Muslim women

General Recommendation No. 14 of the CEDAW Committee, adopted in 1990, urges countries to "take appropriate and effective measures with a view to eradicating the practice of female circumcision" and requests "States parties include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision."

In Malaysia in April 2009, a national *fatwa* was declared on female circumcision, stating that it is obligatory for Muslim women to undergo circumcision unless it will result in some form of harm to the woman.[426] This *fatwa* has not been gazetted in any state of Malaysia so it is not considered as having the force of law.

This *fatwa* came into being after the Malaysian Ministry of Health (MOH) consulted with the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia* (JAKIM)) on the practice. The MOH had become concerned about the practice as the World Health Organisation was encouraging States to put an end to the practice. JAKIM referred this matter to the National Fatwa Council, which adopted the *fatwa* in 2009. Prior to this there had been no *fatwa* on the matter.

The extent of the practice of female circumcision in Malaysia is unknown, as is the extent of the procedure.[427]

As mentioned in the chapter in this report on Article 5 of CEDAW, a report by UNICEF and Al-Azhar University highlighted that, "From an Islamic perspective, the Quran says nothing relating explicitly or implicitly to female circumcision. The use of the general term 'Sunnah Circumcision' is nothing but a form of deceit to misguide people and give the impression that the practice is Islamic. As for the traditions attributed to the Prophet, peace be upon him, in this regard, past and present scholars have agreed that none of these traditions are authentic and should not be attributed to the Prophet."[428]

Differing levels of access to health care for vulnerable women

Rashidah Abdullah has noted that,

> "There are no problems in accessing affordable maternal health services for married Malaysian citizens and Malaysia is a model for other countries in Asia. For women who are migrants (particularly those unregistered), foreign workers (especially domestic workers whose contracts do not allow them to be pregnant even when married), refugees, and unmarried pregnant women, however, there are access problems connected to social stigma, cost and citizenship."[429]

Non-citizen spouses

Women who are married to Malaysian men, but who are neither Malaysian citizens nor permanent residents face challenges accessing health care, including having to pay non-citizen rates at public hospitals. Anecdotal evidence has suggested that some spouses have had difficulty admitting their children into hospital.[430] Bina Ramanand, a non-citizen spouse, said that "I once had the distressing experience of not being able to admit my child into emergency, because I am on a [foreign] passport. As foreigners, we pay double charges at government hospitals and to deliver our Malaysian babies."[431]

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426 www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-pemotongan-genitalia-wanita-female-genital-mutilation

427 Ab. Rahman Isa, Rashidah Shuib, M Shukri Othman, "The Practice of Female Circumcision among Muslims in Kelantan, Malaysia", *Reproductive Health Matters*, Vol. 7, No. 13, May 1999.

428 UNICEF and Al-Azhar University, International Islamic Center for Population Studies and Research, "Children in Islam: Their Care, Development and Protection", 2005, p9, available at: www.unicef.org/egypt/Egy-homepage-Childreninislamengsum%281%29.pdf

429 Abdullah, R., *Increasing Access to the Reproductive Right to Contraceptive Information and Services, SRHR Education for Youth and Legal Abortion*, Kuala Lumpur, Malaysia: Asian-Pacific Resource and Research Centre for Women (ARROW), 2009, p12.

430 "Married to locals but treated differently", *New Straits Times*, 6 June 2009.

431 Quoted in "The long wait to be Malaysian: The foreign spouse experience", *The Nut Graph*, 4 August 2010.

Refugee women

Refugees in Malaysia experience many barriers to accessing health care. Although health care is available to holders of UNHCR cards at a 50 per cent discount of the usual non-citizen rate, asylum seekers in the process of having their refugee status claims assessed by UNHCR are not entitled to this discount.[432]

A study undertaken by the NGO Health Equity Initiatives on the experiences of Afghan refugees and asylum seekers in Malaysia identified that cost is a significant barrier for many refugees in accessing health care. A further barrier was fear while travelling of encountering the police or RELA, who have the authority to arrest refugees, as they are considered "illegal immigrants" in Malaysia.[433]

Further to the cost of health care and fear of arrest, refugees cite "fear of physical violence and fear of being robbed while travelling to health care facilities, arrest during treatment, insufficient funds for treatments, transportation inaccessibility, language barriers and discrimination during treatment."[434]

In 2008 and 2009, the UNHCR discovered that there was a "significant degree of unmet family planning needs" among the refugee and asylum seeker population in Malaysia.[435]

Indigenous women

In peninsular Malaysia, there are 125 locations which are visited by a mobile clinic and 20 transit centres for people waiting to go to a hospital and 10 clinics for Orang Asli communities. The Ministry of Health is responsible for providing services to communities with road access and the Jabatan Kemajuan Orang Asli Malaysia (JHEOA, Department of Orang Asli Development) provides services to the interior villages.[436]

Past statistics have shown that indigenous women in peninsular Malaysia die at an earlier age than males. Colin Nicholas has noted that, "Orang Asli women have the highest recorded rates of postpartum haemorrhage and puerperal sepsis, far above the rates for other groups."[437]

Orang Asli women are also at risk of lacking adequate nutrition and contracting intestinal parasites.[438] Colin Nicholas stated that, "with the majority of [Orang Asli] living below the poverty line, their narrow margin of survival makes the Orang Asli's health situation precarious."[439]

A study from 2002 indicated that in some areas of Sarawak, in east Malaysia, women were more susceptible to infections such as roundworm and hookworm than men.[440]

Another study from 2002 demonstrated that indigenous women from both east and west Malaysia had the highest rates of maternal deaths than other women in the country, at 92.4 per 100,000 births.[441]

As a further indication of indigenous women's state of health, a study from 2007 showed that women in Sabah who were poor and not formally educated tended to seek healthcare only when their breast cancer had advanced.[442]

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432 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p43.

433 Health Equity Initiatives, *Between a Rock and a Hard Place: Afghan Refugees and Asylum Seekers in Malaysia*, 2010, p15.

434 These barriers to accessing healthcare were identified by Cecilia Ng's findings from interviews that were conducted with women refugees from four communities, Rohingyas, Somalis, Afghans and Sri Lankans. In Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p43.

435 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p43.

436 Colin Nicholas, *Orang Asli: Rights, Problems, Solutions,* A report commissioned by SUHAKAM, 2010, pp46-47.

437 Colin Nicholas, *Orang Asli: Rights, Problems, Solutions,* A report commissioned by SUHAKAM, 2010, p42.

438 Colin Nicholas, *Orang Asli: Rights, Problems, Solutions,* A report commissioned by SUHAKAM, 2010, p42.

439 Colin Nicholas, *Orang Asli: Rights, Problems, Solutions,* A report commissioned by SUHAKAM, 2010, pp42-43.

440 Sagin, D. D., et al. "Intestinal parasite infection among five interior communities at Upper Rejang River, Sarawak, Malaysia", *SEAJTMPH* 33 (1), 2002, pp18-22.

441 Jegasothy, R., "Sudden maternal deaths in Malaysia: a case report", *J. Obstetrical Gynaecological Research* 28 (4), 2002, pp186-193.

442 Leong, B. D., et al., "Breast cancer in Sabah, Malaysia: a two year prospective study", *Asian Pacific J. Cancer Prevention* 8 (4), 2007, pp525-529.

Statistics on health are sometimes disaggregated by ethnicity – Malay, Chinese, Indian, Other Bumiputera and Others. This can mask the realities for the health of indigenous women in the states of Sabah and Sarawak. Clearly defined and distinct data collection and analysis for indigenous populations is needed to better understand the state of health of indigenous women from both peninsular and east Malaysia.

Lesbians and transpeople

There is a lack of safe sex information available for lesbians in health clinics.

Transgender people face discrimination in accessing health care as their gender on their identity card differs from the gender they express. The discriminatory treatment transwomen (male to female transgender) and transmen (female to male transgender) receive in hospitals leads some to self-medicate with over the counter medication rather than face going to a hospital or clinic.[443]

In 2010, a Malaysian transwoman was granted refugee status in Australia owing to the discrimination she faced in Malaysia. In its published decision, the Australian Refugee Review Tribunal found that "the visa applicant ... was vulnerable in Malaysia due to her socio-economic circumstances, brought about principally by the lack of an identity card that would enable her to access every day services, circumventing prejudice and discrimination on a daily basis."[444]

"The Tribunal finds, therefore, that the visa applicant would face a real chance of serious harm in Malaysia because she is a transgender woman in Malaysia without familial or financial support or protection were she to return now or in the reasonably foreseeable future."[445]

The transwoman said of her life in Malaysia in relation to her access to health care,

> "If I am sick and go to the hospital, they will put me in the men's ward. Any prescription or receipt they give me will be issued in the name of [applicant's former name]. The pharmacy calls out that name and it is very embarrassing for me to answer to that name in front of everyone. People laugh at me and I worry that someone will try to beat me or assault me because I am transgender. It is not possible for me to change my identity card to say that I am a woman."[446]

The CEDAW Committee has previously recognised discrimination against lesbian, bisexual, transgender and intersex women in access to healthcare services.

In its Concluding Observations to Costa Rica in July 2011, the CEDAW Committee expressed concern "at information received indicating that some of these women are victims of abuses and mistreatment by health services providers and law enforcement officials." The CEDAW Committee urged Costa Rica "to intensify its efforts to combat discrimination against women based on their sexual orientation and gender identity, including by launching a sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and health services providers, in order to avoid abuses and mistreatment of these women."[447]

Health insurance

For people over the age of 60, health insurance is not readily available. In some cases insurers will provide health insurance, but if there is a family history of heart disease, for example, any cardiac related illness will not be covered under the insurance policy. For women, who tend to live longer than men, this lack of security is of significant concern.

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443 There is also a lack of appropriate facilities for transgender people. For example, conventional toilet facilities deter many from using public toilets for fear of being abused when they enter all-male or all-female toilets. The possible result of not using the toilet facilities is urinary tract infections.

444 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 49.

445 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 68.

446 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 38.

447 CEDAW Committee Concluding Observations to Costa Rica, CEDAW/C/CRI/CO/5-6, 11-29 July 2011.

Recommendations to the Malaysian Government regarding Article 12 of CEDAW

- Mainstream gender into health policy development, research, planning, service organisation and delivery. NGOs have made this recommendation to the government for the last 15 years however there has been no progress in implementing gender mainstreaming.

- Detailed socio-economic, ethnic and gender disaggregated data should be recorded in a standardised way in all national datasets and analyses of these data should be routinely published. Include clearly defined and distinct data collection and analysis for indigenous populations to better understand the state of health of indigenous women.

- Subject all health data (including mental health) to gender-disaggregated analysis. Such analysis will enable evidence-based conclusions as to how and why conditions affect women differently and whether there is equal access for men and women. If differences exist, to identify if the differences are due to discrimination, social conditions or other factors.

- Review the impact of the privatisation of government health facilities on women's access to healthcare.

- Review the current indicators used to monitor women's ability to exercise their right to choose the number, spacing and timing of their children. Apart from measuring contraceptive prevalence rate, total fertility rate and unmet need in family planning, the proportion of all births that are unplanned and the prevalence of abortions are also important reproductive health indicators. Other indicators include the annual number of abandoned babies.

- Ensure women migrant workers and refugees are able to access comprehensive healthcare. For migrant workers, treatment should be given first priority, instead of deportation. Pre- and post-test counselling on HIV/AIDS should be provided to all migrants subjected to medical screening.

- Incorporate a gender analysis in the evaluation of HIV/AIDS transmission and programmes of action. We recommend the use of the more appropriate term 'parent-to-child transmission' instead of 'mother-to-child transmission' to be used to describe the vertical transmission of HIV to babies.

- The government must respect the rights of adolescents to information, education and counselling on sexual and reproductive health. Services for adolescents should be extended and in youth-friendly clinics including contraceptive services.

- Women must be permitted to obtain services and surgery without the consent of their husbands in government and private hospitals. Practices that contravene the rights of women to health such as limiting family planning services to married women or requiring consent from husbands for tubal-ligation needs to be reviewed and changed accordingly by the Ministry of Health. At the same time male responsibility and participation in reproductive health needs to be promoted and inculcated in the society. There has been no progress on this despite 30 years of advocacy.

- The Ministry of Health must provide secular reproductive health services based on reproductive health rights, not religious-based morals, especially in the area of childbirth, abortion and contraception. This means:

  – Women must be provided with free access to information and contraceptive services without exception (for example, on the basis of marital status, citizenship, ethnicity or religion).
  – Policy guidelines must be developed on separating the religious views of doctors and nurses from their professional services and not carrying out religious counselling.
  – Abortion services using the latest and safest technology must be made more available in government hospitals according to the full extent of the law. This is especially important in cases of pregnant women suffering mental distress after rape or incest.
  – The training curricula for doctors and nurses on contraception and abortion law and methods must be revised and updated.

  - Information, counselling and health services from government hospitals and private sector clinics needs to include information on the full range of options including legal abortion and not only focus on adoption.
  - Stop discriminatory practices such as unmarried adult women requiring parental involvement for childbirth or abortion and unmarried adult Muslim women being given mandatory religious counselling.

- Ensure that sex education is taught in all schools. The syllabus must adopt a rights-based approach and include content on unintended pregnancies, contraception, abortion, healthy relationships, sexualities, gender identities, puberty, body image and STIs.

- The programme name of 'family planning services' must be changed to 'contraceptive services' to respect and promote the right of unmarried people to use contraceptives.

- Government funding for reproductive health services needs to be increased, including government support to FRHAM to upgrade its clinics and reach out to youth, migrants and poor women so as to be better able to contribute to increasing the contraceptive prevalence rate and reducing unintended pregnancies.

- Government funding to NGOs (women's NGOs and FRHAM) for their school education programmes on reproductive health and gender based violence needs to be increased and provided regularly so as to address the increasing incidence of rape, incest and unintended pregnancies among school children.

- Health service providers must be able to address the health needs of transgender people and be sensitive to their needs, for example not warding them in hospitals with people of the opposite sex.

- Health service providers should provide information on safe sex for all, taking into account sexual orientation and gender identity.

- Undertake research to provide up-to-date data on the contraceptive prevalence rate and unmet needs. This data must be analysed and used to strategically develop a plan to increase contraceptive use.

- Undertake research to understand and overcome the low rate of contraceptive prevalence. Two important areas are how to best educate men so as to reduce their objections and increase their use of male methods and what works best for empowering women to successfully negotiate their sexual rights.

ARTICLE 13

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Much of what is contained in the 2005 Malaysian NGO CEDAW Shadow Report section relating to Article 13 remains relevant. In the chapter on Article 13 in the first NGO CEDAW Shadow Report of 2005, the issues of childcare and parental leave were raised. These issues are addressed in the current report in the chapter on Article 11 of CEDAW.

Key issues in this chapter:

- The government spends very little on benefits and disadvantaged women often cannot access welfare assistance from the State.
- Non-citizen wives of Malaysian husbands face difficulty in opening individual bank accounts, leaving them economically dependent on their husbands.

Benefits

Malaysia is not a welfare state and family benefits are minimal. Payments to single mothers and older people are made in an ad hoc way.[448]

There are some government programmes available which provide monetary assistance, for example 1Tekun and 1Azam, however many women do not have access to these funds as they are unaware of such aid or they are deemed ineligible based on current unrealistic poverty line income levels (see the chapter in this report on Articles 1 – 4 for further information on poverty in Malaysia).[449]

Poor families may receive assistance from low cost housing schemes and from the hardcore poverty alleviation programs. However single women face difficulties in obtaining low-cost housing. Kuala Lumpur City Hall has noted that there is an "inadequate provision of housing for special needs groups," including "the physically disabled, the aged, single mothers and single men and women."[450]

Banking for non-citizen spouses

Non-citizen spouses who are not employed and not permanent residents are unable to open individual bank accounts and have to resort to opening the account jointly with their husbands. Non-citizen spouses also face difficulties securing credit cards in their own names, most often they have to be linked or dependent on their Malaysian spouses or a large deposit is needed to secure a credit card. Devoid of economic independence, this creates a situation of vulnerability for non-citizen spouses.

448 "RM1.4bil allocation for elderly, disabled and single mothers", *New Straits Times*, 24 March 2012.

449 Unpublished paper by Prema Devaraj, Women's Centre for Change (WCC), Penang, 2010.

450 Kuala Lumpur City Hall website, www.dbkl.gov.my/pskl2020/english/housing/index.htm

As the CEDAW Committee's General Recommendation No. 21 states,

> "When a woman cannot...have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy... Such restrictions seriously limit the woman's ability to provide for herself and her dependants."[451]

Non-citizen spouses who wish to own property are also subject to conditions stipulated in the law pertaining to ownership of property by foreigners.

Women's participation in sport

There are no overt obstacles to women's participation in recreational activities and sports. Girls are expected to fulfill their physical education requirements in school, as are the male fellow students. The only difference is that all Muslim female children are required to be attired according to Islamic custom, with long-sleeved shirts and head scarves.

Recommendations to the Malaysian Government regarding Article 13 of CEDAW

- Compile and publish gender disaggregated data on poverty.
- Review eligibility criteria for access to welfare aid and cash transfer programmes based on a realistic poverty line.
- Allocate more funds for targeted direct family benefits including for housing, child allowances for education, food and nutritional supplements for families living below the poverty line and for single parent families.
- Automatic permanent residency status should be granted to non-citizen spouses upon two years' stay in Malaysia, enabling non-citizen wives residency status independent of their husbands. This will give non-citizen wives access to bank accounts and financial credit.

[451] CEDAW Committee, General Recommendation No. 21, paragraph 7.

ARTICLE 14

ARTICLE 14: RURAL WOMEN

Article 14

1. *States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.*

2. *States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:*

   (a) To participate in the elaboration and implementation of development planning at all levels;

   (b) To have access to adequate health care facilities, including information, counselling and services in family planning;

   (c) To benefit directly from social security programmes;

   (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

   (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

   (f) To participate in all community activities;

   (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

   (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Unfortunately there is a lack of data available on rural women, and as such an up to date analysis of the situation of rural women in Malaysia is not possible. For the latest available information, please refer to the 2005 NGO CEDAW Shadow Report to the CEDAW Committee.

Recently, cases of abuse against women in indigenous communities in Sarawak came to light. This chapter will address the details of these cases and the wider political context that provided the enabling environment for the abuse to take place.

Key issues in this chapter:

- The representation of women in village committees is very low.
- Penan communities in Sarawak experience a denial of their rights to land and access to services. Many are dependent on the logging companies to provide basic services, such as transport. Women and girls are particularly vulnerable and have experienced abuse. The state government has failed to afford the right to redress for these abuses.

Low representation of women in village committees

Women's participation in the *Jawatankuasa Kemajuan dan Keselamatan Kampung* (JKKK, Village Development and Security Committees) is low throughout the country. These committees are not local governments. In 2009, out of the 15,460 committees throughout the country, only 161 committees had a woman Chairperson, which equates to 1 per cent.[452]

Abuse of Penan women and girls in Sarawak

For a number of years, reports have emerged indicating that sexual violence and exploitation against Penan women and girls has been occurring in Middle and Ulu Baram, Sarawak.

The impact of logging and 'land development' on the Penan communities, their land and their rights was detailed in the NGO report "Not Development, but Theft" in 2000. The SUHAKAM Report of 2007 on Penan in Ulu Belaga highlights the abject poverty in which many Penan communities live and states clearly that the Sarawak state government, as the primary duty bearer, is chiefly responsible to ensure the Penan people's right to life and standard of living.

In September 2009, findings from a government-backed National Taskforce[453] were released, confirming earlier reports. The National Taskforce Report of 2009, while confirming the allegations of sexual abuse, also makes reference to the poverty the community faces, as well as the lack of access to health care and education among other issues.

In 2010, a group of NGOs set out to investigate further the situation in Sarawak when informed that there were other Penan women and their families who wanted to share their stories of sexual violence and exploitation.[454]

Furthermore the NGOs were motivated to document new evidence in light of Sarawak state government leaders' repeated refusals to acknowledge that Penan girls were sexually abused by timber workers and their apparent rejection of the National Taskforce Report findings.

The fact-finding mission visited three Penan communities and one Kenyah community and listened to evidence from a further thirteen Penan communities. The mission found that the women were willing to share their stories, but they did not want to go to the authorities owing to past police responses and further obstacles including the lack of identity cards, language barriers and the prohibitive cost of travel.

The following is a selection of case studies from the NGO report.

A's case:

"In the middle of the night sometime in 2001, two loggers broke into *A*'s house... Despite their refusal and cries, *A* and her sister were forced into a car the next morning and taken to the logging camp... At the camp, the sisters were separated from each other... *A* was kept in the camp for a week, and she was badly beaten and scolded by the logger the whole time. She was repeatedly raped almost daily by the logger... A person-in-charge at the camp sympathised with *A*'s suffering and sent her back to the village. *A* then found herself pregnant... The headman and the villagers went to the camp to look for the logger, but failed to find him. They were also unable to locate *A*'s sister who is still missing...

"*A* is sick with tuberculosis and cannot work... She is in need of medical assistance and financial support for her child to go to school... She considered logging a police report but did not do so in the end because she simply did not know how to and did not even have the money to go to the police station."[455]

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452 Data from the Malaysian National Council of Women's Organisations (NCWO).

453 This National Taskforce was called *Laporan Jawatankuasa Bertindak Peringkat Kebangsaan Bagi Menyiasat Dakwaan Penderaan Seksual Terhadap Wanita Kaum Penan Di Sarawak*.

454 The report entitled "A Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia" is the result of a fact-finding mission by the Penan Support Group, FORUM-ASIA and Asian Indigenous Women's Network (AIWN).

455 "A Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia: An independent fact-finding mission report by the Penan Support Group, FORUM-ASIA and Asian Indigenous Women's Network (AIWN)", SUARAM 2010, pp27-28.

J's case:

"In 2002, when *J* was 14 years old, a logger in his thirties approached her to propose friendship and marriage. *J* refused. One night, the logger returned *J*'s house and raped her. *J* did not tell her family members about the rape. *J* was afraid this man would kill her and her family members.

"A few days after the rape, the logger returned to *J*'s house proposing to marry her. *J*'s father did not agree to this marriage. However, the logger was persistent... As *J* felt the logger would harm her family members unless she married (customary marriage only) him, she managed to convince her father to let her marry this man.

"After marrying the logger, *J* stayed at the logging camp... Whilst *J* was there, the logger would abuse her physically and psychologically. The logger would force *J* to have sex with him, and if she refused he would beat her (sometimes with a wooden stick)...

"When *J* became pregnant in 2003, the logger sent her back to her village so that her family could look after her... when her pregnancy reached seven months, he disappeared and never returned."[456]

O's case:

"*O* was at [a logging] camp to look after her pregnant sister, who was married to a logger. Another logger came to her and promised to marry her. *O* stayed with him after that, but they were never actually married, either by way of a customary wedding or legal registration.

"Upon realising that *O* was pregnant, the logger claimed he needed to go back to his own village to visit his parents, and promised to return soon. However, the logger never returned...

"Shortly after *O* returned to her village, a Penan man from another village approached to marry her. *O* did not like the man and refused his proposal few times. But since she was pregnant and needed financial support, her parents persuaded her to marry the Penan man."[457]

T's case:

"In 2001, *T* met a logger. Whenever *T*'s father was not home, the logger would come by the house... Despite *T*'s parents' objections, the logger insisted on marrying *T* and promised to take care of her. *T* kept crying when the logger tried to take her to the camp... Later, the parents found out that *T* had been raped by the logger prior to his proposal.

"The logger did not marry *T*, either through customary or through legal registration. After *T* became pregnant, the logger abandoned her at the camp, leaving *T* no choice but to find her own way back to her village. While pregnant, *T* fell seriously ill and even contracted malaria."[458]

The cases documented in the NGO report all point to systematic patterns of violence. Themes include harassment, abduction, rape, physical assault, emotional abuse, coercion into marriage and desertion upon pregnancy.

The report recorded instances of sexual violence and rape and it also contextualised these crimes in the political situation in Middle and Ulu Baram, Sarawak. This report further confirms that the treatment of the Penan people is intrinsically tied to the wider political situation and demands a political solution.

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456 "A Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia: An independent fact-finding mission report by the Penan Support Group, FORUM-ASIA and Asian Indigenous Women's Network (AIWN)", SUARAM 2010, pp23-24.

457 "A Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia: An independent fact-finding mission report by the Penan Support Group, FORUM-ASIA and Asian Indigenous Women's Network (AIWN)", SUARAM 2010, p26.

458 "A Wider Context of Sexual Exploitation of Penan Women and Girls in Middle and Ulu Baram, Sarawak, Malaysia: An independent fact-finding mission report by the Penan Support Group, FORUM-ASIA and Asian Indigenous Women's Network (AIWN)", SUARAM 2010, p27.

This wider context within which the sexual violence has taken place includes the systemic undermining of the autonomy and sustainability of the Penan people, which is caused by:

- the denial of their land rights;
- the denial of basic citizenship rights for many through a failure to register and issue ID cards;
- State neglect of their welfare including a failure to guarantee adequate access to basic services such as education and health care; and
- State failure to provide a supporting environment of the right to redress.

Recommendations to the Malaysian Government regarding Article 14 of CEDAW[459]

- Integrate a gender perspective in development policies and programmes for the rural sector, based on the rights and needs of the rural, estate and indigenous communities; placing them at the centre of all development policies through open discussions and consultations.
- The Ministry of Agriculture and Agro-based Industry and the Ministry of Rural and Regional Development should target women as active participants and beneficiaries of agricultural technology and agro-based commercialisation programmes and develop a quota of at least 30 per cent women in decision-making positions at all levels.
- Women engaged in agriculture and agro-based micro-enterprise as well as small scale entrepreneurs, must be empowered with technical and management skills and be able to access and utilise the credit facilities available.
- Monitor the standard of housing, health, education facilities provided by the private corporations for their plantation workers to ensure adequate provision and access to services and facilities.
- Monitor the compliance of plantations on the usage of pesticides in the estates. Women workers must be made aware of the dangers and supplied with the necessary protective gear. Estate clinics should be upgraded equal to district hospitals and there should be regular monitoring of women's health.
- Develop initiatives that attempt to reduce poverty, ill health and low levels of education in indigenous communities in close consultation with the women in the communities to ensure sustainable livelihoods.
- Facilitate the genuine and transparent participation of indigenous women in decision making and development planning at all levels and within all societal structures.
- Indigenous women must not only have access to land but must also be given ownership of titled land.

[459] These recommendations include those issued in the 2005 Malaysian NGO CEDAW Shadow Report which remain relevant.

ARTICLE 15

ARTICLE 15: EQUALITY IN THE LAW

Article 15

1. *States Parties shall accord to women equality with men before the law.*

2. *States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.*

3. *States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.*

4. *States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.*

As noted in the first Malaysian NGO CEDAW Shadow Report, Malaysia has yet to pass any legislation to adopt fully the provisions of the CEDAW Convention but instead takes a piecemeal approach that has resulted in continued gaps and contradictions in the implementation of CEDAW.

Since the first NGO CEDAW Shadow Report of 2005, there has been no change in the status of women's equality before the law. Most of the section relating to Article 15 of CEDAW in the first Malaysian NGO CEDAW Shadow Report submitted to the Committee is still relevant.

Key issues in this chapter:

- Women and men are in several areas not deemed equal before the law, for example:
    - Anachronistic laws remain in the Penal Code and state *Syariah* laws which criminalise "enticing a married woman", perpetuating a view that women are the property of their husbands.
    - Migrant domestic workers, who are all women, are not considered workers and not afforded the labour rights and protections of other workers.
    - Laws discriminate against women on the basis of their gender identity, gender expression and sexual orientation.

Judicial interpretation of the Federal Constitution

As mentioned in the chapter on Articles 1 – 4 of CEDAW in this report, Article 8(2) of the Federal Constitution prohibits discrimination on the basis of gender:

> *Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*

Although Article 8(2) could be interpreted widely, judicial interpretations of this provision have narrowly focused on discrimination relating to "employment under a public authority".

The opening words of Article 8(2) ("Except as expressly authorized by this Constitution...") also permit discrimination already in place in the Federal Constitution, namely in Articles 15, 24, 26 and the Second Schedule.[460]

A further concern with regard to the interpretation of Article 8(2) of the Federal Constitution is that the understanding of gender in this provision has been limited to "men" and "women" in a biological sense. The term gender should be understood as a socially constructed concept and be inclusive of transgender people.

One High Court judgement recognised the importance of CEDAW

In July 2011, a High Court judgement decided that CEDAW's definition of discrimination has the force of law in Malaysia. The judgement declared that in revoking a teaching job offer owing to pregnancy, the Ministry of Education's action constituted gender discrimination as per Article 1 of CEDAW, and violated Article 8(2) of the Federal Constitution.

As a brief summary of the case, in 2008, Noorfadilla applied for a temporary teaching position in a government school. In January 2009, Noorfadilla was offered and accepted the teaching job and was given a memo informing her of her placement. Then she was asked whether she was pregnant. Noorfadilla was at the time three months' pregnant. After learning of her pregnancy, the Ministry of Education Officer withdrew Noorfadilla's placement memo.

The reasons given by the Ministry of Education as to why a pregnant woman cannot be employed included that she would be absent for two months after the birth of her child thereby requiring the hiring of a replacement teacher and during the course of her pregnancy she may encounter health problems and therefore need to be absent during working hours.

Noorfadilla filed an application in court to declare that the revocation of her appointment as a temporary teacher by the government owing to her pregnancy was unlawful, discriminatory and unconstitutional (by contravening Article 8(2) of the Federal Constitution).

Judge Dato' Zaleha binti Yusof's judgement of 12 July 2011 states that CEDAW "has the force of law and binding on members states, including Malaysia. [sic]"[461]

The High Court judgement included for the first time in Malaysian legal history a decision on what constitutes gender discrimination in declaring that, "in interpreting Article 8(2) of the Federal Constitution, it is the Court's duty to take into account the Government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The Court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under Article 8(2) of the Federal Constitution."[462]

The judgement declared that the "plaintiff should have been entitled to be employed as a [teacher] even if she was pregnant. Further, the plaintiff was pregnant because of her gender. Discrimination on the basis of pregnancy is a form of gender discrimination because [of the] basic biological fact that only women [have] the capacity to become pregnant."[463]

The judgement concluded that the "defendant's act of revoking and withdrawing the Placement Memo because the plaintiff was pregnant constitute a violation of Article 8(2) of the Federal Constitution. [sic]"[464]

Shortly after the judgement was announced, the Ministry of Education indicated its intention to appeal the decision. In appealing a High Court judgement which affirmed the binding nature of CEDAW on Malaysia,

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460 See the chapter in this report on Article 9 of CEDAW for further details about these constitutional provisions.

461 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p12.

462 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p16.

463 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p20.

464 Judge Dato' Zaleha binti Yusof, *In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan, Originating Summons No.: 21-248-2010 between Norfadilla binti Ahmad Saikin and Defendents,* "Grounds of Judgement", 12 July 2011, p23.

the government effectively demonstrated that it wishes to continue to discriminate against women on the basis of pregnancy. The appeal also implies that the government disregards the provisions of CEDAW.

Court of Appeal upholds gender discriminatory retirement policy

In 2001, eight women plastics industry workers from Guppy Plastic Industries were forced to retire after new employment regulations were introduced which stipulated that women must retire at 50 years of age while men are to retire at 55 years of age.

As mentioned previously in the chapter on Article 11 of CEDAW in this report, the eight women, who were all 50 years of age or over, worked as production operators, cleaners and general workers. They received a letter from their employer dated 18 June 2001, informing them that as they had reached the retirement age, they would be forcibly retired 20 days later, on 7 July 2001.[465]

The women filed a complaint at the Industrial Court. In 2008, the Industrial Court decided in favour of the women workers, finding that the difference in retirement ages constituted gender discrimination. Guppy Plastic Industries sought a review of this decision and in 2010 the High Court overturned the Industrial Court's decision, finding in favour of the company.

The women appealed the 2010 High Court decision. On 21 March 2012, the Court of Appeal dismissed the women's appeal. One of the three judges on the Court of Appeal bench, Datuk K. N. Segara, is reported to have said, "It is our unanimous view that the appeal should be dismissed. We are entirely in agreement with the High Court judge that the Industrial Court had erred by failing to take into consideration the relevant factors and taking into consideration the irrelevant factors."[466]

These relevant factors, according to Judge Datuk K. N. Segara, were that the company was merely following its own employment regulations and that it was the industry norm to have different retirement ages.[467] The judge said, "Guppy Plastic Industries followed procedures based on its guide book when it terminated its female employees."[468]

According to the women's lawyer, it is often the industry norm that upon reaching the age of 50, women workers in the plastics industry are forced to retire, and many are then re-hired on a short term contract basis.[469] Besides elements of labour exploitation, their livelihood becomes insecure as they do not receive the benefits of permanent employment.

Forcing women to retire at a younger age than men is a clear case of gender discrimination as per the definition of discrimination in Article 1 of CEDAW. Article 15(3) of CEDAW makes it clear that the provisions of CEDAW apply to "contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women." The material consequences of such discrimination includes that women are effectively robbed of five years of salary and benefits.

Women viewed as the property of their husbands in laws against "enticing a married woman"

Under CEDAW, the differential treatment of men and women in Section 498 of the Penal Code, and its effect of maintaining the status of women as an inferior partner, constitutes discrimination against women as defined in Article 1 of CEDAW.

Section 498 of the Penal Code reads:

> *Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.*

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465 "Appeal on gender discrimination decision quashed", *The Sun*, 21 March 2012.

466 "Court rules no gender bias in workers' retirement age", *The Malaysian Insider*, 21 March 2012.

467 "Court rules no gender bias in workers' retirement age", *The Malaysian Insider*, 21 March 2012.

468 "Eight women lose gender discrimination suit", *Free Malaysia Today*, 21 March 2012.

469 "Court rules no gender bias in workers' retirement age", *The Malaysian Insider*, 21 March 2012.

Section 498 of the Penal Code is discriminatory **not** in failing to give women the same rights to sue other women who entice their husbands, but in failing to recognise that in contemporary Malaysia neither husbands nor wives have ownership over their spouses as was the case when the provision was introduced as law.

Section 498 was adopted from the Indian Penal Code, which was drafted at a time when women were perceived as the property of their husbands – passive agents with merely reproductive functions. Married women were subordinated to their husbands on the assumption that they were under their husbands' protection. This perception of women is outmoded, discriminatory and irrelevant in contemporary Malaysia.

Every woman has the right to make decisions over her own body. Section 498 clearly denies this right. Consensual intimate relationships between adults should not be the government's concern.[470]

For details on a 2009 court case involving Section 498 of the Penal Code, see the chapter on Articles 1 – 4 of CEDAW in this report.

Similar to Section 498 of the Penal Code is Section 86 of the Sabah Criminal Offences Enactment 1995 on "enticing other person's wife", which applies only to Muslims. This law states that,

> *Whoever entices or causes other person's wife to abscond her matrimonial home determined by the husband shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both and the Court shall order the said wife to return to her husband.*[471]

Section 36 of the *Syariah* Criminal Offences (Federal Territories) Act 1997 also contains provisions on "enticing a married woman", but with stiffer penalties:

> *Any person who entices a married woman or takes her away from or in any manner influences her to leave the matrimonial home determined by her husband 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, and the Court shall order the said woman to return to her husband.*

The difference between these state-level laws and Section 498 of the Penal Code is that under the state laws, the *Syariah* court can "order the said wife to return to her husband."

Other jurisdiction in which similar legal provisions have been repealed

The Singapore Government updated its Penal Code provisions "to reflect societal norms and values" by repealing Section 498:

> "....section 498 which criminalizes the enticing, taking away, detaining or concealing with criminal intent a married woman will be repealed as it is an archaic offence. The section was enacted at a time when a wife was considered a chattel belonging to the husband..."[472]

Employment laws do not protect migrant domestic workers' rights

Malaysia's Employment Act 1955 does not afford domestic workers the same rights as other workers. The Employment Act contains labour protections concerning leave and entitlements however, the First Schedule of the Employment Act specifically excludes domestic workers from being covered by the following provisions:

- Maternity protections, including leave and allowance entitlements,[473]
- One rest day per week,[474]

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470 Women's Aid Organisation and Sisters in Islam, "Drop Section 498 from Penal Code", *The Sun*, 9 Nov 2010.

471 Section 86 of the *Sabah Syariah Criminal Offences Enactment 1995*.

472 Singapore Parliamentary Debates, Official Report, Eleventh Parliament, Monday 22 October 2007.

473 Maternity protections are covered under Part IX of the Employment Act 1955. Domestic workers are explicitly excluded.

474 Rest days are covered in Section 59, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

- Provisions limiting hours of work, including specifying that employees should not work more than five consecutive hours without a period of leisure of not less than thirty minutes and employees should not work for more than 48 hours in one week,[475]
- Paid public holidays,[476]
- Annual leave entitlements,[477]
- Sick leave,[478]
- Termination, lay-off and retirement benefits.[479]

Notice of contract termination for employees under the Employment Act takes into account the length of time in service and can extend from four to eight weeks.[480] Domestic workers are excluded from these notice periods and for them, there is a blanket 14 day period of notice of termination, regardless of length of employment.[481]

Malaysia's Workmen's Compensation Act 1952 also excludes "domestic servants" from the list of occupations that fall under the category "workman", therefore leaving domestic workers without recourse to compensation for injury suffered in the course of their employment.

The current situation in Malaysia for migrant domestic workers is in direct conflict with the CEDAW Committee's General Recommendation No. 26, which states that,

> "States parties should ensure that constitutional and civil law and labour codes provide to women migrant workers the same rights and protection that are extended to all workers in the country, including the right to organize and freely associate. They should ensure that contracts for women migrant workers are legally valid. In particular, they should ensure that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations."[482]

The Malaysian government has stated in the international arena that domestic workers should not be afforded labour rights

Prior to the 2011 International Labour Conference, governments were invited to send comments about the proposed international standards for decent work for domestic workers. These comments were compiled into a report. In this publication, the Malaysian government is reported to have stated that,

> "Domestic workers cannot be equated to other workers in general,"[483]
> and,
> "Domestic work is not seen as ordinary employment. The rights of householders should also be considered."[484]

The Malaysian government's statements throughout the report for the International Labour Conference consistently reflect its perception that domestic workers should not be afforded the same rights as other workers.

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475 Hours of work are covered in Section 60A, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

476 Holidays are covered in Section 60D, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

477 Annual leave is covered in Section 60E, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

478 Sick leave is covered in Section 60F, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

479 Termination, lay-off and retirement benefits are covered under Part XIIA of the Employment Act 1955. Domestic workers are explicitly excluded.

480 Length of notice required for terminations of contracts is covered under Section 12 of the Employment Act 1955.

481 Section 57 of the Employment Act has a separate section outlining the length of notice to terminate a contract specifically for "domestic servants": "*Subject to any express provision to the contrary contained therein, a contract to employ and to serve as a domestic servant may be terminated either by the person employing the domestic servant or by the domestic servant giving the other party fourteen days' notice of his intention to terminate the contract, or by the paying of an indemnity equivalent to the wages which the domestic servant would have earned in fourteen days: Provided that any such contract may be terminated by either party without notice and without the paying of an indemnity on the ground of conduct by the other party inconsistent with the terms and conditions of the contract.*"

482 CEDAW Committee General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/W.P.1/R, paragraph 26(b).

483 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p40.

484 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p6.

The Malaysian government was reported to have:

- Requested that domestic workers be ineligible for maternity benefits afforded to other workers,[485]
- Recommended that the text of the international standards "should specify that domestic workers may ask their employers to hold their travel and identity documents for safe-keeping,"[486]
- Recommended that conditions of service remain as per individual contracts,[487] and
- Recommended that "Employment agencies should be allowed to deduct fees from the remuneration of domestic workers, provided that it is done in a fair and equitable manner that is agreeable to both parties."[488]

In June 2011, a Convention Concerning Decent Work for Domestic Workers and a Recommendation Concerning Decent Work for Domestic Workers was adopted at the International Labour Conference. Malaysia not surprisingly abstained during the vote for both the convention and the recommendation.

See the chapter in this report on the CEDAW Committee's General Recommendation No. 26 for more information on discrimination against migrant domestic workers in Malaysia.

Non-recognition of the rights of women of diverse sexual orientations and gender identities in law

Contrary court decisions on gender and name change for transpeople

There is no law in Malaysia that prohibits a change of gender on an identity card, the main identification document used in Malaysia. However, two transwomen were unable to change their name and gender on their identity card at the National Registration Department and took their cases to court. One was successful and the other unsuccessful.

In 2011, a Malaysian court prohibited a legal gender change. Mohd Ashraf Hafiz Abdul Aziz, 25, who underwent a sex change procedure in Thailand in 2009, was prohibited by the Kuala Terengganu High Court from changing her name to Aleesha Farhana and being legally recognised as a woman.[489] Tragically, Aleesha passed away a short time after the judge handed down the decision on her case.

In another court case in which a group of transwomen sought leave for the court to review the constitutionality of a section of *Syariah* law in the state of Negeri Sembilan which prohibited cross-dressing, the Attorney General's Chambers asserted that,

> "Through registration at birth, all the Applicants were registered as males regardless of their contention that medically or psychologically they are not. There is no provision which allows such recognition. Further, the Applicants have had identity card [sic] issued to them. It is our submission that the particulars on the identity card are conclusive evidence to establish the identity of a person including his gender. Most unfortunately for the Applicants, in the eyes of the law, they are viewed and recognized only as males. The presence of any evidence to contradict this does not make the Applicants females in law."[490]

Here the representatives of the government, the Attorney General's Chambers, categorically deny the right of transgender people to express their true identity and have that identity recognised in law.

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485 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p47.

486 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p35.

487 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p40.

488 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p51.

489 "Shahrizat sad ministry was not able to help Ashraf", *The Sun*, 30 July 2011.

490 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, Paragraph 5.9.

The view of the Attorney General's Chambers and the court decision in 2011 departed from a previous judgement in 2005, in which a transwoman from Kuala Lumpur successfully applied to the court for an official gender change (*JG v Pengarah Jabatan Pendaftaran Negara 2005*).[491] In this case, the judge permitted that:

- The plaintiff, who was born male but identifies as a female and underwent gender reassignment surgery, be declared as a female, and
- That the registration department be directed to change the last digit of her identity card to a digit that reflects a female gender.

Laws that discriminate on the basis of gender identity

As mentioned previously in this report, transgender women, in particular transwomen, often called *Mak Nyah* in Malaysia, face persecution in Malaysia. Transgender people are at constant risk of arrest, merely because they are still seen as the biological sex they were born as, biologically male or biologically female. All states of Malaysia have their own *Syariah* Criminal Offences enactments which criminalise acts such as a man dressing as a woman. There are two states that criminalise women dressing as men – Perlis and Sabah.

Section 28 of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states,

> *Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.*

See the chapter on the CEDAW Committee's General Recommendation No. 28 for details on a court case in which the judge granted leave to review the constitutionality of this 'cross-dressing' law.

Laws that discriminate on the basis of women's sexual orientation

As mentioned previously in this report, in the following states of Malaysia, *Syariah* Criminal Offences enactments criminalise same-sex sexual relationships between women (*musahaqah*):[492] Perlis, Kedah, Pulau Pinang, Perak, Wilayah-Wilayah Persekutuan (Federal Territories, including Kuala Lumpur), Selangor, Negeri Sembilan, Melaka, Johor, Terengganu, Kelantan, Sabah and Sarawak.

An example of a state's law against *musahaqah* is Section 26 of the *Syariah* Criminal Offences (Federal Territories) Act 1997:

> *Any female person who commits musahaqah 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 whipping not exceeding six strokes or to any combination thereof.*

The Penal Code continues to criminalise acts "against the order of nature" even if these are consensual sex acts between two consenting adults.

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491 "'Courts have precedence on transgender name change'", *Malaysiakini*, 1 August 2011.

492 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, pp337-342.

Recommendations to the Malaysian Government regarding Article 15 of CEDAW [493]

- Discrimination as provided under Article 1 of the CEDAW Convention must be defined both in the body of the Federal Constitution and in legislation. This definition should include reference to discrimination in both public and private spheres and discrimination based on sexual orientation and gender identity and citizenship status.

- Repeal laws based on the anachronistic idea that women are the property of their husbands, for example Section 498 of the Penal Code and state Syariah laws which criminalise "enticing a married woman".

- Recognise migrant domestic workers as workers in national legislation. Amend immigration and labour laws to provide comprehensive and equal labour protections for domestic workers.

- Transgender people must be entitled to change their name and gender on their identity cards without onerous legal and administrative procedures.

- Review and reform all laws that discriminate on the basis of gender identity, gender expression and sexual orientation. These include:
  - the state *Syariah* Criminal Offences enactments that criminalise same-sex consensual sexual relations, and
  - the state *Syariah* Criminal Offences enactments that criminalise "cross-dressing" for immoral purposes, which is used to arrest and harass transgender people.

[493] The recommendations issued in the 2005 Malaysian NGO CEDAW Shadow Report remain relevant.

ARTICLE 16

ARTICLE 16: EQUALITY IN MARRIAGE AND FAMILY

Article 16

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

   a) *The same right to enter into marriage;*

   b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*

   c) *The same rights and responsibilities during marriage and at its dissolution;*

   d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*

   e) *The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*

   f) *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; in all cases the interests of the children shall be paramount;*

   g) *The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;*

   h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

2. *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.*

Many of the issues highlighted in the first Malaysian NGO CEDAW Shadow Report of 2005 remain relevant. This chapter will begin by briefly outlining the situation of family law in Malaysia and revisit some of the issues of concern raised in the 2005 NGO CEDAW Shadow Report.

Key issues in this chapter:

- In 2005, parliament passed the Islamic Family Law (Federal Territories) (Amendment) Act 2005, which contained several provisions discriminatory to women. At the time of its passing in parliament, the then Prime Minster noted the concerns of women's groups and stated that further amendments may be made to the law to remove the discriminatory elements. A committee was established to amend the legislation, and consensus was reached on the removal of the discriminatory elements. These amendments were then sent to the Malaysian Council of Rulers for review by religious authorities. These amended laws are now with the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia* (JAKIM)). To date, these amendments have not been tabled in parliament.

- A **dual legal system** governs Muslim and non-Muslim personal laws separately and Article 121(1A) of the Federal Constitution excludes the civil courts from hearing matters relevant to the Syariah Courts or involving Muslim parties (and vice versa). This has created much difficulty for parties especially in cases of the conversion of a husband to Islam. The conflicting jurisdictions have far reaching effects on guardianship and custody of children, maintenance, the religious conversion of the children, inheritance and funerary rights of the deceased spouse.
- **Women and men in Malaysia do not share the same rights in marriage**. Polygamy is still permitted for Muslim men. Women are discriminated against with regard to guardianship of children and may lose maintenance when deemed disobedient to their husbands.
- **Child marriage is still legally permitted in Malaysia**, even though the Malaysian government has removed its reservation to Article 16(2) of CEDAW. Family law for non-Muslims permits the marriage of girls at 16 years of age with the consent of a Chief Minister and for Muslim girls, marriage below this age is permitted with the consent of a court.
- **Muslim children born within six months of the date of marriage are considered 'illegitimate'** and are not allowed to carry the name of the father. In such cases, custody and maintenance of the child appertains exclusively to the mother and her relations, while the father has no rights to the child and vice versa.[494]

Removal of reservation to Article 16(2)

The only significant development since 2006 in the area of family relations is that the Malaysian government has lifted its reservation to Article 16(2) of CEDAW. Despite this, family laws for both Muslims and non-Muslims continue to permit child marriage. The government has stated that there will be no change in these laws to reflect the intent and enable the practical realisation of Article 16(2).

The government has not removed its remaining reservations to Articles 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) and has not given any indication that it will.

A brief overview of family law in Malaysia

Malaysia operates a dual legal system, based on both English common law and Islamic law. Civil courts have jurisdiction over the majority of laws, including contracts, torts, property, crime and constitutional and administrative matters. State *Syariah* courts have jurisdiction over personal and family law. Both the civil family laws and Islamic family laws contain elements which are discriminatory against women.

Family Law for Non-Muslims

The federal Law Reform (Marriage and Divorce) Act 1976 regulates marriage relations for non-Muslims

Family Law for Muslims

Islamic family law is a matter under the jurisdiction of the states. Each of the 14 jurisdictions (this includes 13 states and the Federal Territories) is able to enact its own set of laws governing the personal laws of Muslims in that state. *Syariah* courts only have jurisdiction on matters when all parties are Muslim.

In 1984, the Federal Parliament enacted the Islamic Family Law (Federal Territories) Act 1984 for the Federal Territories (including Kuala Lumpur, Labuan and Putrajaya). Many of the states adopted slightly altered versions of this model law, but several states, including Kelantan, Melaka and Kedah, have adopted their own family law enactments that restrict women's rights in marriage and divorce much more than the Federal Territories Act. In 1994, a series of gender discriminatory amendments were made to the law.

The federal government has made attempts to have a uniform Islamic family law across all states, however these efforts have afforded fewer rights to women. Several states have adopted these laws since 2003, with the Federal Territories the last to adopt in 2005.

494 Sections 80 and 85 of the Islamic Family Law (Federal Territories) (Amendment) Act 2005.

In December 2005, the Islamic Family Law (Federal Territories) (Amendment) Act 2005 was passed in parliament. At the time of its passing the then Prime Minister acknowledged the concerns of women's rights groups that women's rights may be curtailed under the amendments and stated that further amendments may be made to the law to remove the discriminatory elements. These discriminatory elements included:

- The right of the husband to claim a share of his existing wife's assets upon his polygamous marriage (section 23(9));
- Making polygamy easier for men (section 23(3) and 23(4)(a)). In the original 1984 law, a proposed polygamous marriage had to be shown to be "just **and** necessary". The 2005 amendments changed this to "just **or** necessary", thereby reducing the husband's burden of proof to justify a polygamous marriage in court;
- Forcing a wife to choose maintenance or division of *harta sepencarian* (matrimonial assets) upon a husband's polygamous marriage (section 23(9)(a)). This provision could be abused by husbands, as a husband who is going to marry a new wife would be able to seek the sale of the matrimonial home and divide the proceeds;
- Extending the wife's right to *fasakh* divorce to the husband (section 52(1)); and
- A husband can now get a court order to stop his wife from disposing her assets (section 107A).

In the 2009 Universal Periodic Review process, the Malaysian government stated that,

> "Malaysia is ... undertaking a comprehensive review of national legal framework to ensure compatibility with the principles and provisions of the CRC and CEDAW. In that regard, a Committee has been established to study the issues relating to dissolution of marriage, maintenance, custody, inheritance and determination of the religion of the child of a civil marriage during conflict situation resulting from one of the spouse converting to Islam. Simultaneously, a Committee was also established to review laws relating to women's rights under the Islamic family law."[495]

This committee was set up by former Prime Minister Tun Abdullah Ahmad Badawi after there was a public outcry over the 2005 amendments to the Islamic family law. This committee was chaired by the Attorney General's Chambers and the NGO Sisters in Islam and other members of the Joint Action Group for Gender Equality were represented. Agreement was reached to amend discriminatory amendments.

The government submitted the amendments to Malaysian Council of Rulers, together with amendments to the Law Reform (Marriage and Divorce) Act 1976 (on the rights of non-converting spouses (Section 51)). The Malaysian Council of Rulers said that they needed more time to consult with their state religious authorities. These amended Islamic family laws are now with the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia* (JAKIM)). To date, these amendments have not been tabled in parliament. The government has demonstrated a lack of political will to push these changes through.

Discrimination faced by women under civil and Islamic family law

Child marriage permitted despite removal of reservation to Article 16(2)

In July 2010, the Malaysian government removed its reservation to Article 16(2) of CEDAW. Although Article 16(2) does state that the marriage of a child shall have no legal effect, it nevertheless states that the age of majority is to be specified by the State, which ostensibly implies that there is some degree of room for manoeuvre. This vagueness is, however, clarified in the General Recommendations provided by the CEDAW Committee. In General Recommendation No. 21, the CEDAW Committee states that it "considers that the minimum age for marriage should be 18 years for both man and woman."[496]

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[495] *Malaysian Government Report to the Working Group on the Universal Periodic Review*, A/HRC/WG.6/4/MYS/1/Rev.1, 19 November 2008, paragraph 21.

[496] CEDAW Committee, General Recommendation No. 21, paragraph 36.

The CEDAW Committee's General Recommendation No. 21 also states that legal provisions which allow for different ages at which men and women can marry should be abolished:

> "Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner."[497]

The Malaysian government has stated that despite the removal of its reservation to Article 16(2), it will not amend Malaysia's laws regarding the minimum age of marriage.[498] The government's position and current laws, which permit the marriage of children, and allow girls to marry at a younger age than boys, contravene the principles of CEDAW.

Civil (non-Muslim) Marriage Laws

Non-Muslims in Malaysia are able to marry when they reach 18 years of age, although non-Muslim females between the ages of 16 and 18 can marry with the authorisation of the Chief Minister. Section 10 of the Law Reform (Marriage and Divorce) Act 1976 states,

> *Any marriage purported to be solemnized in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years unless, for a female who has completed her sixteenth year, the solemnization of such marriage was authorized by a licence granted by the Chief Minister under subsection 21(2).*

Subsection 21(2) reads,

> *The Chief Minister may in his discretion grant a licence under this section authorizing the solemnization of a marriage although the female party to the marriage is under the age of eighteen years, but not in any case before her completion of sixteen years.*

In Sabah, many native customary marriages are not registered.[499]

Muslim Marriage Laws

For Muslims, the minimum age of marriage is 16 years for females and 18 for males, with an exception that permits Muslim girls and boys below these ages to marry with the *Syariah* Court's consent. Section 8 of the Islamic Family Law (Federal Territories) Act 1984 states,

> *No marriage may be solemnized under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah Judge has granted his permission in writing in certain circumstances.*[500]

Child Act 2001

Although girls younger than 18 years of age are entitled to marry, Malaysia's Child Act 2001 nevertheless defines a child as "a person under the age of eighteen years."

The Committee on the Rights of the Child expressed concern about the inconsistency between the Islamic and civil laws' definitions of the minimum age for marriage. In 2007, the Committee on the Rights of the Child recommended that the Malaysian government "take all necessary measures to harmonize the definition of the child, including the terminology used, in the national laws so as to eliminate inconsistencies and contradictions."[501]

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497 CEDAW Committee General Recommendation No. 21, paragraph 38.

498 "Not enough is being done to discourage child marriages" *New Straits Times*, 4 July 2010.

499 "Sabah native family law set for change", *Malaysiakini*, 25 May 2009.

500 The purview of the *Islamic Family Law (Federal Territories) Act 1984* does not cover all of Malaysia. Each state in Malaysia has its own set of Islamic family laws however the provisions for marriage are similar throughout Malaysia.

501 United Nations Committee on the Rights of the Child, *Concluding Observations: Malaysia*, 25 June 2007, paragraph 30.

In its 2006 Concluding Comments, the CEDAW Committee also urged Malaysia "to undertake a process of law reform to remove inconsistencies between civil law and Syariah law".

The continued permissibility of child marriages in Malaysian law contravenes Article 16(2) of CEDAW and is in conflict with the CEDAW Committee's General Recommendation No. 21 (paragraph 36).

Contrary statements from the government about child marriage

In July 2010, the Women, Family and Community Development Minister, Datuk Seri Shahrizat Abdul Jalil, made a public statement condemning child marriage. The Minister was quoted in the New Straits Times:

> "Children do not have the choice or capacity to give their full consent. As such, child marriages must be viewed within the context of force and coercion; it is an act that subjects the child to physical, social and psychological trauma and abuse."[502]

The newspaper article also reported that the ministry stated that it regards child marriage as a human rights violation.

However, the newspaper article also noted that, contrary to her above statement,

> "Shahrizat said in cases involving Muslim child marriages, the ministry believed that it would be prudent for the Syariah Court to obtain independent assessments on the general social background of the children and their readiness to marry from trained experts, such as those from the Welfare Department, and child psychologists."[503]

Shahrizat said that in order to stop the practice of child marriage, it is the mindset of society that requires change, rather than the laws regarding the age of majority.[504]

While it is heartening to read the statement made by Shahrizat condemning child marriage as a human rights violation, it is disappointing to also read that her views do not seem to extend to Muslim girls. It is also disappointing that she ignores the recommendations of international conventions to which Malaysia is a party, such as CEDAW, by being of the view that changing the laws relating to the minimum age of marriage is not necessary.

Malaysian law contravenes international standards beyond CEDAW: Convention on the Rights of the Child

Article 1 of the CRC states that, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." On 6 July 2010, the Malaysian government announced that it was removing its reservation to Article 1 of the CRC, thereby affirming its view that a child is anyone under the age of 18 years.

Child marriage contravenes many rights enshrined in the CRC, including:

- Article 9: States Parties shall ensure that a child shall not be separated from his or her parents against their will.
- Article 15: States Parties recognize the rights of the child to freedom of association. (Malaysia removed its reservation to this article in July 2010).
- Article 24: States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health.
- Article 28: States Parties recognize the right of the child to education.[505]
- Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.
- Article 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

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502 "Not enough is being done to discourage child marriages" *New Straits Times*, 4 July 2010.

503 "Not enough is being done to discourage child marriages" *New Straits Times*, 4 July 2010.

504 "Not enough is being done to discourage child marriages" *New Straits Times*, 4 July 2010.

505 Note that Malaysia still has a reservation to 28(1)(a): "Make primary education compulsory and available free to all".

Current prevalence of child marriage in Malaysia

Recent data published in the 2010 UNGASS[506] Country Progress Report for Malaysia indicates that there are high numbers of couples intending to marry in Malaysia where the girl is under 16 years of age. All Malaysian Muslims intending to marry are required to undertake a premarital HIV test. Although not providing firm evidence of the rate of Muslim underage marriage, the collection of age data at the point of testing provides an indication of the prevalence of Muslim engagements in which the girl is under 16 years.

Shockingly, **32 girls under 10 years of age undertook the premarital HIV test in 2009**. No boys in that age group were tested, and only **2 boys in the 10-14 year old age group were tested, compared to 445 girls**. The data indicates that girl children are getting married, and to men who are much older than them.[507]

Further statistics from the report show that **in the 15 – 19 year old group, 1911 boys and 6815 girls were tested**.[508]

In a newspaper article, Zainah Anwar notes that, "Data in the 2000 Population and Housing Census revealed that 6,800 girls under the age of 15 were married, with Selangor recording the highest number, followed by Sabah. Malays recorded the highest incidence of child marriage at 2,450, followed by other bumiputeras 1,550, Chinese 1,600, Indians 600 and others 600."[509] Furthermore, between the ages of 10 to 14, there were 235 children already widowed and 77 divorced or permanently separated.[510]

It is appalling that girls are able to marry at such a young age and that the law provides for this. The high numbers of married non-Muslim girls shows that, as Zainah Anwar says, "there is a gap between legal protection and implementation, and cracks exist within the system that allow for child marriage to take place among non-Muslims." The government must amend both civil and Islamic family laws to ensure that all boys and girls are protected from child marriage.

In 2010, the Melaka Islamic Religious Council announced that there would be an incentive payment made to Muslim teenagers to get married, so that they would not have sex out of wedlock.[511] Melaka's Chief Minister, Datuk Seri Mohd Ali Rustam, said that teens marrying would be "a good way to solve the problem" of babies being dumped after unintended pregnancies.[512] It was reported that Melaka was planning to give RM500 in financial assistance to teenage couples intending to marry.[513] According to the Melaka Chief Minister, as at March 2012, there had been "two takers" for the RM500 grant to get married.[514]

Examples of child marriage reported in the national press

In March 2010, newspapers covered reports about the discovery of an 11 year old girl in a semi-conscious state in a mosque near Batu Caves. She had married a 41 year old man on 20 February 2010 after the man reportedly "convinced her father that there was nothing wrong with the marriage."[515]

This report appeared the day before another report from Kelantan about the marriage of a 10 year old to a man in his 30s. The Kelantan *Syariah* Court Chief Judge Datuk Daud Mohamad was reported in the

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506 UNGASS is the acronym for the United Nations General Assembly Special Session on HIV/AIDS.

507 *UNGASS Country Progress Report – Malaysia*, March 2010. These statistics were taken from the UNGASS report accessed in March 2010. After these statistics were cited in newspaper reports, the statistics were amended in the report without any explanatory note to show that there had been an amendment. The new statistics included: no girls and no boys tested in the under 10 age group; and 2 boys and 61 girls tested in the 10 – 14 age group. As at August 2011, these statistics have been amended yet again and the original statistics appear once more. The statistics can be found on p42 of the report: data.unaids.org/pub/Report/2010/malaysia_2010_country_progress_report_en.pdf.

508 *UNGASS Country Progress Report – Malaysia*, March 2010.

509 Zainah Anwar "Nothing divine in child marriage" *The Star*, 6 June 2010.

510 Zainah Anwar "Nothing divine in child marriage" *The Star*, 6 June 2010.

511 "School for pregnant teens", *The Star*, 16 August 2010.

512 "Malaysia state chief encourages teen marriages", *Malaysia Today*, 5 August 2010.

513 "Malaysia state chief encourages teen marriages", *Malaysia Today*, 5 August 2010.

514 "State offers RM1,000 for men to accept single mothers", *The Star*, 15 March 2012.

515 "Girl, 11, married to husband, 41, found semi-consious" *The Star*, 13 March 2010.

newspaper to have said that for marrying without the permission of the court they are liable to a fine of up to RM1,000 or six months' imprisonment or both according to the Kelantan Islamic Family Law Enactment 2002. The newspaper report stated that the judge "said the regulation stipulated the age condition to prevent divorce of incompatible persons."[516]

Harmful consequences of child marriage

The harmful effects of child marriage have been well documented by United Nations agencies and the World Health Organisation. Malaysian NGOs also highlighted the consequences of child marriage in the first CEDAW Shadow Report. Girls who marry young often do not attend school, which disadvantages them as they then cannot access further education and therefore have lower employment opportunities. This results in economic dependency on their husbands. There are also considerable power imbalances within marriages in which the man is much older than the girl. Pregnant girls are also more vulnerable to premature deliveries and other complications that can result in maternal and infant mortality.

According to a report by UNICEF and Al-Azhar University, "Child marriages cause serious damages that oblige parents to spare their young from such repercussions... Contrary to a popular misconception, we find nowhere in the Shariah a specification of the age of marriage. What exists is a fixed standard of mental maturity or sound judgment."[517]

At the Malaysian government 2006 session with the CEDAW Committee, Ms. Schöpp-Schilling of the CEDAW Committee requested that, "The next periodic report should provide a percentage breakdown of married women by age at marriage. In view of the concern that early marriage could lead young women to abandon their studies, it would be helpful to correlate the age of marriage of young women with their educational achievements and indicate what proportion of those women continued their studies once married."[518] Ms. Shin of the CEDAW Committee further recommended that, "in the next periodic report, the data on marriageable age by level of schooling should include statistics for both rural and urban areas."[519]

Other jurisdictions in which child marriage is prohibited

In other countries with significant Muslim populations, child marriage is not permitted.

In Algeria, the minimum age of marriage is nineteen for both males and females. Judges can grant an exception on the grounds of benefit or necessity.[520]

In Bangladesh, the Child Marriage Restraint Act (1929, amended in 1984), sets the minimum age at 18 for females and 21 for males and exceptions are not permitted.[521]

In Sierra Leone, the parliament passed three 'Gender Acts' in June 2007. One of these, the Registration of Customary Marriage and Divorce Act will set the minimum age of marriage at 18.[522]

In 2008, the Singaporean Administration of Muslim Law Act was amended and the minimum age of marriage was raised from 16 to 18 years for Muslim women. There are still provisions allowing Muslims and non-Muslims below 18 years of age to get married after an application is made.

Non-heteronormative partnerships

There have been several cases of informal marriages that do not 'fit' the heteronormative concept of marriage. When reported in the press, these cases have received much criticism and vitriol.

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516 "10-year-old girl forced to marry father's friend" *The Star*, 12 March 2010.

517 UNICEF and Al-Azhar University, International Islamic Center for Population Studies and Research, "Children in Islam: Their Care, Development and Protection", 2005, p9, available at: www.unicef.org/egypt/Egy-homepage-Childreninislamengsum%281%29.pdf

518 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 40.

519 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 48.

520 Musawah, "CEDAW and Muslim Family Laws: In Search of Common Ground", 2011, p45.

521 Musawah, "CEDAW and Muslim Family Laws: In Search of Common Ground", 2011, p45.

522 Musawah, "CEDAW and Muslim Family Laws: In Search of Common Ground", 2011, p45.

In 2007, the Melaka Lower *Syariah* Court annulled the marriage between Mohd Soffian Mohamad and Zaiton Aziz because the former was born a woman, although lived as a man. The judge in the case stated that same-sex marriage was *haram* (forbidden) and cited Section 11 of the Islamic Family Law (Melaka) Enactment 2002 in ordering the annulment.[523] The pair had been married since 2002.

In 2011, a lesbian couple in the Johor town of Batu Pahat underwent a traditional wedding.[524] Although receiving some support on the internet,[525] some comments on blogs incited hatred against the couple.

Article 16 of CEDAW calls on States to enable women to exercise the right to choose a partner/spouse. Lesbians and transgender women in Malaysia must be able to realise this right and enjoy the same legal recognition as heterosexual married couples.

Discrimination faced by women under civil law

Divorce under civil law

Divorce, maintenance and custody proceedings are costly. As stated in the 2005 NGO CEDAW Shadow Report, women in marriage are already in a vulnerable position based on the fact that they are likely to be economically dependant on their husbands; this position becomes even more precarious upon divorce.

The 2005 NGO CEDAW Shadow Report also pointed out that the mutual consent divorce process can be coercive if the wife is financially dependent on her husband and wants custody of the children. Women may agree to less than favourable terms in order to avoid the cost and delay of a contested divorce. The husband may threaten that he will fight for custody of the children if his wife does not agree to terms that are more advantageous to him. The presumption that women and men in mutual divorce cases have equal bargaining positions is untrue.

Division of property in civil laws

There has been no change in the situation for women in relation to the division of property at divorce. As was noted in the first Malaysian NGO CEDAW Shadow Report, in the event the marriage is declared void or voidable, judges are given an absolute discretion in determining the division of property, which often leads to women being denied an equitable share of property. The unfair division of property is a result of an absence of laws closely regulating the division of property coupled with the social norms that lead to a man being awarded a greater amount of property. The woman's domestic contributions are rarely valued at the same level as a man's financial contributions.

In divorce proceedings relating to valid marriages, the law states that property acquired before marriage by one spouse is not divided between the spouses upon divorce, unless the other spouse or both spouses have substantially improved this property. Women as noted earlier are more likely to be homemakers and often forfeit or are made to forfeit any opportunities to earn enough money to substantially improve the property. Men, who are more likely to work outside the house and are free to pursue their careers, are more likely to be deemed to have "substantially improved" the property. This clearly fails to recognise the contributions of homemakers and undervalues the contributions made by women while married.

At the root of the inequitable distribution of property at divorce is the failure to recognise the contribution of homemakers and women, which in turn contravenes Article 16(h) of CEDAW regarding the same rights for both spouses with regard to property.

Maintenance

As outlined in the first NGO CEDAW Shadow Report, women face problems in obtaining maintenance from husbands. There is often difficulty in establishing husbands' incomes. Although the court can require a man to declare his earnings, the court has no investigatory powers and can only rely on the documents produced in court. A further problem is that men may not make their payments regularly and there is a lack of enforcement of such payment orders by the court.

523 "Marriage void, rules court", *The Star*, 4 September 2007.

524 "Lesbian couple ties the knot", *The Star*, 31 July 2011.

525 "6,100 likes for lesbians who tied the knot", *The Star*, 2 August 2011.

Discrimination faced by women under Islamic family law

Wali

In the Islamic family laws in Malaysia, a woman requires a *wali*, a legal guardian who has the authority to contract a marriage on her behalf. In the first NGO CEDAW Shadow Report, it was stated that the concept of *wali* is outdated and paternalistic carrying with it the implication that women have no capacity to protect themselves.

In the "Responses to the list of issues and questions for consideration of the combined initial and second periodic report"[526] document of 2006, the Malaysian government stated that,

> "The requirement of the consent of the *wali* under IFL is not based on discrimination against women but on the concept that as guardian of the bride, the *wali* has been consulted and as guardian of the bride, he has the right to give consent to the marriage. It is the responsibility of the *wali* to ensure that the bride truly consents to the marriage."[527]

However, as a report by Musawah has asserted,

> "In terms of social realities supporting freedom to choose if, when, and whom to marry, requiring the consent of a wali has a negative impact on a woman's autonomy, independence and self-esteem."[528]

The requirement of a *wali* contravenes Article 16(1)(a) and (b) relating to the same rights to enter into marriage and the right freely to choose a spouse.

Polygamy

Muslim men in Malaysia are still permitted to practice polygamy with the consent of a *Syariah* court. Polygamy contravenes Article 5(a) of CEDAW regarding prejudicial customary practices as well as Article 16(1)(a) concerning the same rights to enter into marriage. The Malaysian government maintains its reservation to the latter. Men and women in Malaysia do not have the same rights pertaining to entry into marriage.

The CEDAW Committee's General Recommendation No. 21 states,

> "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention."

In the case of Malaysia, of significant concern is that:

- The criteria which must be met before polygamy is permitted are limited and oftentimes not met.
- Although men are not legally able to enter into polygamous marriages without the court's permission, in practice permission from the court can be granted retrospectively and the man is fined an insignificant amount.
- The consequences of polygamy on women are of concern and a study undertaken by the NGO Sisters in Islam has documented some of these impacts.

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526 "Responses to the list of issues and questions for consideration of the combined initial and second periodic report", CEDAW/C/MYS/Q/2/Add.1, 15 May – 2 June 2006, released 27 March 2006.

527 "Responses to the list of issues and questions for consideration of the combined initial and second periodic report", CEDAW/C/MYS/Q/2/Add.1, 15 May – 2 June 2006, released 27 March 2006, p3.

528 Musawah, "CEDAW and Muslim Family Laws: In Search of Common Ground", 2011, p33.

Limited legal criteria for entry into a polygamous marriage

Section 23 of the original Islamic Family Law (Federal Territories) Act 1984 provided five criteria which needed to be satisfied before a polygamous marriage could be permitted. The 1994 amendments to the law repealed the final criterion (in bold):

(a) *that the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;*

(b) *that the applicant has such means as to enable him to support as required by Hukum Syarak*[529] *all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage;*

(c) *that the applicant would be able to accord equal treatment to all his wives as required by Hukum Syarak;*

(d) *that the proposed marriage would not cause darar syarie [harm] to the existing wife or wives; and*

(e) ***[REPEALED] that the proposed marriage would not directly or indirectly lower the standard of living that the existing wife or wives and dependents had been enjoying and would reasonably expect to continue to enjoy were the marriage not to take place.***

Anecdotal evidence suggests that in many cases information such as that outlined above is not provided to the court and permission to marry is nevertheless granted.

The criteria for polygamy were further limited with the passing of the Islamic Family Law (Federal Territories) (Amendment) Act 2005. In the original 1984 law, a proposed polygamous marriage had to be shown to be "just **and** necessary". The 2005 amendments changed this to "just **or** necessary", thereby reducing the husband's burden of proof to justify a polygamous marriage in court.

Inconsistencies in the different state Islamic family laws

As noted in the first NGO CEDAW Shadow Report, some states have fewer requirements for entering into polygamous marriages therefore people may travel interstate to have their marriage registered if problems are encountered in their home state.

Permission of court can be granted retrospectively

In the original Islamic Family Law (Federal Territories) Act 1984 a polygamous marriage could only be entered into with the prior permission of the court. The 1994 amendments made it possible for a polygamous marriage to take place followed by a retrospective registration of the marriage.

> *23. (1) No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act:* ***Provided that the Court may if it is shown that such marriage is valid according to Hukum Syarak order it to be registered subject to section 123.***" [1994 amendments in bold text]

Penalties for illegal polygamy

Section 123 of the Islamic Family Law (Federal Territories) Act 1984 provides penalties for polygamous marriage without the consent of the court:

> *123. Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.*[530]

Although there are penalties for an illegal polygamous marriage, they are lenient and do little to deter illegal polygamy.

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529 "*Hukum Syarak*" means Islamic Law according to any recognised Mazhab (a school of religious law or thought).

530 One thousand Malaysian ringgit (RM) is roughly USD320.

High-profile case in 2010 of lenient punishment for illegal polygamist

In one high profile case, a Member of Parliament, Bung Mokhtar Radin, entered into a second marriage without the consent of a *Syariah* court. Bung Mokhtar Radin was initially sentenced to one month's jail, however this was overturned on appeal and he was merely fined RM1,000 by the *Syariah* High Court in Shah Alam. The jail sentence was overturned on the grounds that it was a first offence.

According to Selangor Chief Syarie Judge Mukhyuddin Ibrahim,

> "As this is a first offence and the appellant has a great responsibility to the family and society, I believe that a prison sentence will affect his responsibilities to the family. Also suffering by the family can lead to problems. In addition, the reputation and image of appellant as a member of parliament will be viewed negatively by society if the prison sentence [were] imposed."[531]

As a politician and someone with a high profile in Malaysia, it is disappointing that Bung Mokhtar was able to "get off lightly" after showing no respect for his first wife or the law.

Documented evidence of negative effects of polygamy on women in Malaysia

The CEDAW Committee, in its General Recommendation No. 21 stated:

> "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited."

These serious emotional and financial consequences of polygamy have been shown in research undertaken by Sisters in Islam and the Institute of Malaysian and International Studies (Ikmas) of the National University of Malaysia (UKM) between 2008 and 2010.

This research included surveying around 1,400 "first wives, second wives, husbands and children to examine the emotional, financial and social impact of polygamy on different members of the family, and whether the legal framework protects the interest of family members" in Malaysia.[532]

Some preliminary outcomes of this research were documented in a 2011 report by Musawah:

- "Nearly sixty-five per cent of first wives in the study were unaware of their husbands' intentions to marry another woman."
- "While eighty per cent of husbands thought they could be fair to all their wives and children, only thirty per cent of first wives agreed this was possible."
- "While thirty-one per cent of husbands were 'very satisfied' with their marriages to both first and second wives, only seven per cent of first wives reported they were 'very satisfied' and thirteen per cent of second wives reported to being 'very satisfied'."
- "Forty-four per cent of first wives had to take on additional jobs in order to support the family after their husbands took second wives. About forty per cent of them 'always' or 'often' felt financially insecure since their husbands' second marriage."
- "While sixty-three per cent of husbands thought they 'always' or 'often' shared their financial obligations fairly among their wives, over sixty per cent of first wives did not think so."
- "Over ninety per cent of children of both the first and second wives said they would not recommend polygamy as a form of marriage or family institution."[533]

[531] "Bung's jail time cut to RM1,000 fine," *The Malaysian Insider*, 11 August 2010.

[532] Musawah, "CEDAW and Muslim Family Laws", 2011, fn.429, p79.

[533] These preliminary findings were cited in Musawah, "CEDAW and Muslim Family Laws", 2011, p35.

Further preliminary findings are as follows:

- Twenty-eight per cent of first wives and forty-seven per cent of second wives were satisfied with their husbands' method of alternating nights between them.[534]
- Seventy per cent of first wives cited a need for more counselling after their husbands' second marriage, while about fifty-three per cent of them cited an increase in domestic violence.[535]
- Just over half of the second wives interviewed in the study said their husbands could be fair. Among first wives, only thirty-five per cent shared this view.[536]
- Sixty-five per cent of the husbands interviewed would recommend polygamy as a family institution. But only twenty-five per cent of first wives and about fifty per cent of second wives held this view.[537]

One of the researchers, Masjaliza Hamzah, was reported to have said,

> "Among the wives, the first wife is the most dissatisfied. She experiences the strongest effects as she is able to compare the polygamous marriage with when she was in a monogamous marriage. In many cases, they expressed sadness, a sense of being wronged and betrayal."[538]

There was also a concern among women that a second marriage wouldn't be registered, thus leaving women in fear of their status and their rights and those of their children.

Prevalence of polygamous marriages in Malaysia

With regard to the prevalence of polygamous marriages in Malaysia, the lead researcher of the project described above, Norani Othman, stated,

> "The record-keeping in a majority of the departments was very poor and we have to go back as far as 1990-2005 to get a good picture of the trend of polygamous marriages. In addition there are also gaps in the statistics for certain years."[539]

Norani Othman went on to state that information from the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia* (JAKIM)) showed that,

- Since 1990 the average annual percentage of Muslim polygamous marriages in each state was 2.5 per cent to 3.2 per cent of all registered marriages.

- If unregistered polygamous marriages are also included, since 1990 the average annual percentage of Muslim polygamous marriages in each state may be as high as 4.5 per cent to 5.7 per cent of all marriages.[540]

Other countries in which polygamy is prohibited

In the Kyrgyz Republic, Tajikistan, Turkey and Uzbekistan polygamy is prohibited. In countries including Saudi Arabia, Syria, Jordan, Egypt and Lebanon, women can include certain provisions in the marriage contract prohibiting the husband from taking another wife.[541]

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534 "Two in five of first wives in polygamous marriages forced to find extra income," *The Malaysian Insider*, 15 July 2010.

535 "Two in five of first wives in polygamous marriages forced to find extra income," *The Malaysian Insider*, 15 July 2010.

536 "The impact of polygamy in Malaysia," *The Nut Graph*, 21 July 2010.

537 "The impact of polygamy in Malaysia," *The Nut Graph*, 21 July 2010.

538 "The impact of polygamy in Malaysia," *The Nut Graph*, 21 July 2010.

539 Norani Othman, "Response to comments in article on polygamy," *The Malaysian Insider*, 16 July 2010.

540 Norani Othman, "Response to comments in article on polygamy," *The Malaysian Insider*, 16 July 2010.

541 Musawah, "CEDAW and Muslim Family Laws", 2011, p46.

Divorce

Application for divorce by wife

As outlined in the first NGO CEDAW Shadow Report, although the law provides that women may apply for divorce through *ta'liq*, *fasakh* or *khul'* there have been numerous difficulties faced by Muslim women with regard to lengthy and drawn out divorce proceedings.

Pronouncement of divorce by husband

The first NGO CEDAW Shadow Report also noted the contrast between the difficulties faced by wives seeking divorce compared to the ease with which husbands can divorce their wives. Only husbands are able to unilaterally divorce wives.

The original Islamic Family Law (Federal Territories) Act 1984 required that the husband or wife present a comprehensive application for divorce to the court before *talaq* (divorce) could be pronounced by the husband in court.

The 1994 amendments to the Islamic Family Law (Federal Territories) Act 1984 include a provision permitting divorce outside the court. Section 55A was inserted into the law, which states,

> *55A ...a man who has divorced his wife by the pronouncement of talaq outside the Court and without permission of the Court, shall within seven days of the pronouncement of the talaq report to the Court.*

There is at present no provision under section 55A that the court, in approving the divorce pronounced outside of court, make orders to ensure that the divorced wife's financial rights are secured. The court order in this case should cover the divorced wife's right to *iddah* maintenance, *mutaah* and *harta sepencarian*. There should be a presumption in the law that a husband who pronounces *talaq* without the permission of the court has divorced his wife without just cause.

Muslim women and men do not share the same rights with regard to the family home after divorce. Section 71 of the Islamic Family Law (Federal Territories) Act 1984 states,

> *(1) A divorced woman is entitled to stay in the home where she used to live when she was married, for so long as the husband is not able to get other suitable accommodation for her.*
> *(2) The right to accommodation provided in subsection (1) shall cease—*
> *(a) if the period of 'iddah has expired; or*
> *(b) if the period of guardianship of the children has expired; or*
> *(c) if the woman has remarried; or*
> *(d) if the woman has been guilty of open lewdness (fahisyah),*
> *and thereupon the husband may apply to the Court for the return of the home to him.*

Family Support Division in *Syariah* courts

A positive step forward in 2010 has been the reported establishment of a Family Support Division (BSK) in every *Syariah* Court in Malaysia. Deputy Minister in the Prime Minister's Department Datuk Dr Mashitah Ibrahim is reported to have said that the division will help women to get judicial enforcement:

> "BSK officers will help them (including) to track down their ex-husbands for whatever reasons that may be arising. This is because the divorce, if sought by the women, will be time-consuming, especially those involving alimony issues."[542]

The degree of effectiveness of the BSKs is not yet known.

[542] "Family Support Division to speed up Divorce Procedures in Syariah Court", *Bernama,* 7 April 2011.

Financial provisions

Nusyuz (Disobedience)

Islamic family laws contain provisions relating to the disobedience of wives. Section 65(1) of the Islamic Family Law (Federal Territories) Act 1984 provides that if a divorced woman is disobedient (*nusyuz*), she will not receive maintenance:

> *65. (1) The right of a divorced wife to receive maintenance from her former husband under any order of Court shall cease on the expiry of the period of 'iddah or on the wife being nusyuz.*

Section 59 (2) of the Islamic Family Law (Federal Territories) Act 1984 gives situations in which a wife can be considered *nusyuz* (disobedient):

> *(2) Subject to Hukum Syarak and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia—*
> *(a) when she withholds her association with her husband;*
> *(b) when she leaves her husband's home against his will; or*
> *(c) when she refuses to move with him to another home or place, without any valid reason according to Hukum Syarak.*
> *(3) As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be nusyuz.*

As expressed in a report on CEDAW and Muslim family laws written by Musawah,

> "many men do not fulfil the obligation to maintain the household, leaving women to fill in the gap while not removing their obligation of obedience. Where the arguments raise a link between a man's duty to provide maintenance and his privileged share of inheritance, they neglect to mention that his failure to provide maintenance does not disqualify him from double the share of inheritance."[543]

A further area of concern expressed in the 2005 NGO CEDAW Shadow Report is that wives can be accused of *nusyuz* when they leave the marital home to escape domestic violence.

Guardianship of children

Section 5 of the Guardianship of Infants Act 1961 gives each parent equal guardianship rights over the children, as well as Section 11, which requires judges and courts, in the exercise of their powers, to consider the wishes of both parents, where applicable.

However equal rights to guardianship of children only applies to non-Muslims. *Syariah* law only recognises the rights of men to be guardians.

The Malaysian government stated at its last review by the CEDAW Committee that *Syariah* law "provides that the mother shall be the best person entitled to the custody of her child whilst guardianship is vested in the father."[544]

Section 88 of the Islamic Family Law (Federal Territories) Act 1984 states that,

> *88. (1) Although the right to hadhanah or the custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order of preference, that is to say—*
> *(a) the father's father;*
> *(b) the executor appointed by the father's will;*
> *(c) the father's executor's executor;*
> *(d) the father's father's executor;*
> *(e) the father's father's executor's executor:*
> *Provided that he is a Muslim, an adult, sane, and worthy of trust.*

[543] Musawah, "CEDAW and Muslim Family Laws", 2011, p36.

[544] "Responses to the list of issues and questions for consideration of the combined initial and second periodic report: Malaysia", CEDAW/C/MYS/Q/2/Add.1, Pre-session working group, Thirty-fifth session, 15 May - 2 June 2006, released 27 March 2006, p4.

The CEDAW Committee's General Recommendation No. 21 states that,

> "States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children."[545]

In cases where one parent has converted to Islam, any question relating to the welfare, education and religion of a child should be jointly determined by both parties, with the best interests of the child as the paramount consideration. One parent's consent alone cannot suffice, as it deprives the other parent of their rights as an equal guardian of the child.

Children born within six months of marriage deemed illegitimate

The National Registration Department is responsible for issuing birth certificates. If a child is born of Muslim parents within 6 months of their marriage, that child is deemed to have been conceived out of wedlock and therefore illegitimate. This will be recorded on the birth certificate, which, instead of stating the father's name, will state "binti/bin Abdullah".

The National Registration Department (NRD) Director General Datin Jariah Mohd Said said that this practice is "based on a National Fatwa Council decision which was gazetted on Jan 28, 1981."[546] The *fatwa* states that, "the man cannot be recognized as the father of the unborn baby, the baby cannot inherit from him, cannot be his mahram (unmarriageable kin) and the man cannot be the baby's guardian."

Section 23(4) of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states,

> *For the purpose of subsection (3), any woman who gives birth to a fully developed child within a period of six qamariah months from the date of her marriage shall be deemed to have been pregnant out of wedlock.*

The repercussions of the insertion of "binti/bin Abdullah" in the birth certificate go beyond the stigma associated with being illegitimate and have an impact on guardianship and inheritance.

In late 2011, the Terengganu state government proposed to allow a father to have his name on the birth certificate of his child born within six months of his marriage.[547]

Inheritance

Male heirs are given a double share of inheritance under *faraid* distribution. However this is based on an assumption that men provide for the family and does not take into consideration that women in contemporary Malaysia work and can also provide for their family.

In the "Responses to the list of issues and questions for consideration of the combined initial and second periodic report" document from 2006, the Malaysian government stated that,

> "A woman's share under the faraid is one half of the man's share. The variation in inheritance is consistent with the variation in financial responsibilities of man and woman. Under Syariah a man is obligated to maintain his wife, his children and in some cases his needy relatives. Therefore, based on this responsibility accorded to men under the Syariah the men inherit more share than women in order to fulfil his obligations. The responsibility for the maintenance of his wife is neither waived nor reduced because of his wife's wealth or because of her access to any personal income gained from work, rent, profit, or any other legal means."[548]

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545 CEDAW Committee General Recommendation No. 21, paragraph 20.

546 "NRD explains the Fatwa Council ruling", *The Star*, 6 November 2011.

547 Letter to the Editor, "Respect a Child's Right to a Name, an Identity and Family", *Sisters in Islam*, 4 November 2011.

548 "Responses to the list of issues and questions for consideration of the combined initial and second periodic report", CEDAW/C/MYS/Q/2/Add.1, 15 May – 2 June 2006, released 27 March 2006, p5.

As a Musawah report puts it,

> "In terms of the lived realities of women and men, family structures in modern times have vastly changed. Whereas hundreds of years ago, extended families spent their lives in close proximity and women might have relied on male heirs to support them, the rise of the nuclear family and decline of close relations with extended family networks means that extended families can no longer serve as reliable support mechanisms. In addition, the idea that male family members will fulfil their responsibilities to take care of women is only theoretical. This idea has no grounding in reality, since the men often do not support those who are given lesser shares of inheritance and there is no accountability in laws or in practice to ensure that the men fulfil their responsibilities."[549]

Harta sepencarian

The traditional view on *harta sepencarian* is that a wife may claim one-third of the properties acquired by the husband during the marriage in recognition of her contributions in looking after the family.

As noted in the Malaysian NGO CEDAW Shadow Report of 2005, Section 23(9) of the Islamic Family Law (Federal Territories) (Amendment) Act 2005 allows "any party" to claim *harta sepencarian* before a polygamous marriage is contracted.

In the "Responses to the list of issues and questions for consideration of the combined initial and second periodic report" document of 2006, the Malaysian government stated that this amendment enhances the protection for women:

> "To enhance protection for women, the reviewed provision in the model law relating to the IFL contains a provision on the distribution of the harta sepencarian before the court grants permission or orders for the registration of a polygamous marriage. This provision ensures that women in Malaysia is guaranteed the right to equal distribution of properties jointly acquired by husband and wife during the subsistence of the marriage. [sic]"[550]

However, the government's rationale that this increases protection for women does not take into account that this provision could be abused by husbands, as a husband who is going to marry a new wife would be able to seek the sale of the matrimonial home and divide the proceeds. As the Joint Action Group for Gender Equality noted, "This would be grossly unjust to the existing wife and children."[551]

Conversion of religion during marriage

Women's groups in Malaysia have long been receiving requests for assistance from non-Muslim women whose spouses have converted, or are planning to convert, to Islam.

These women have grave concerns about the impact such a conversion will have on their rights, which are based on the civil law marriage they entered into, and what options they have once the conversion has occurred. Their fears centre on issues of divorce, division of assets, maintenance and inheritance. Custody and guardianship of children, and the ability to have an equal say in determining their religion and upbringing, are also matters of great concern.

At the Malaysian government's last appearance before the CEDAW Committee in 2006, the Committee stated:

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

Inconsistencies and conflicts within the dual legal system remain.

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549 Musawah, "CEDAW and Muslim Family Laws", 2011, p39.

550 "Responses to the list of issues and questions for consideration of the combined initial and second periodic report", CEDAW/C/MYS/Q/2/Add.1, 15 May – 2 June 2006, released 27 March 2006.

551 "Memorandum to Ahli Dewan Negara to Review the Islamic Family Law (Federal Territories) (Amendment) Bill 2005", Submitted by the Joint Action Group on Gender Equality (JAG), 8 December 2005.

Often the Malaysian government cites that the *Syariah* courts are governed by legislation in each state and therefore is not responsible for what happens under state law, however as the CEDAW Committee has noted in its General Recommendation No. 28,

> "The decentralization of power, through devolution and delegation of government powers in both unitary and federal States, does not in any way negate or reduce the direct responsibility of the State party's national or federal Government to fulfil its obligations to all women within its jurisdiction. In all circumstances, the State party that ratified or acceded to the Convention remains responsible for ensuring full implementation throughout the territories under its jurisdiction."[552]

Issues within marriages registered under civil law should be dealt with under civil law

Marriages between non-Muslims in Malaysia are registered under the civil law – the Law Reform (Marriage and Divorce) Act 1976. This law should be amended to specifically protect the rights of non-converting spouses, usually women, when their spouses convert to Islam.

For a marriage solemnised or registered under civil law, all issues arising out of the marriage must be settled according to those civil laws, not state Islamic law enactments. It is unjust for a non-Muslim spouse to unexpectedly find themselves and their marriage subject to laws other than those they had agreed to at the time of marriage.

State Islamic law enactments such as Section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 stipulate that a *Syariah* High Court's civil jurisdiction relates to "actions and proceedings in which all the parties are Muslims."

Shamala a/p Sathiyaseelan's case highlights the problems associated with the dual legal systems in a case of conversion.

Case study: Shamala a/p Sathiyaseelan

In the Malaysian NGO CEDAW Shadow Report submitted to the CEDAW Committee in 2006, the case of Shamala a/p Sathiyaseelan was raised. Shamala is a Hindu mother whose husband converted to Islam in 2002 after about 4 years of marriage. He then converted their two infant children to Islam without her knowledge or consent.

Shamala filed for custody from the civil High Court and obtained an interim order from the court for custody. However before the interim custody order was made, the husband had appeared in the High Court and asked for an adjournment. During this time he did not disclose that he had applied to the *Syariah* court for a *hadanah* (custody) order.

In May 2003, Shamala's husband obtained an ex parte *hadanah* (custody) order from the *Syariah* court, when custody proceedings were already underway in the civil court.

In July 2004, the civil High Court granted custody of the children to their mother, on condition that she raise her children as Muslims and not expose them to her own Hindu faith.

The judge dismissed Shamala's application for a declaration that the conversion of her two children to Islam by her husband violated her equal right, as their parent, to determine their religious upbringing.

The judgement stated that since the children are now Muslims, the *Syariah* Court is the only forum qualified to determine the validity of their conversion, even though the judge acknowledged that the *Syariah* Court has no jurisdiction to hear Shamala's case since she is not a Muslim. As a result, Shamala did not have any avenue to seek justice.[553] She left the country and to date has not returned to Malaysia.

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[552] CEDAW Committee General Recommendation No. 28, paragraph 39.

[553] Judgement of Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor, High Court Malaya, Kuala Lumpur, Faiza Tamby Chik J, 13 April 2004, available at: www.cljlaw.com/public/cotw-041126.htm

Five constitutional questions were due to be deliberated by the Federal Court in 2009:

a. the validity of the conversion;
b. the conflict between *Syariah* and civil laws governing conversion and family matters;
c. whether the Administration of Islamic Law (Federal Territories) Act 1993 runs contrary to the Federal Constitution when a parent converts a minor;
d. whether the High Court or the *Syariah* Court has the authority to make conflicting orders; and
e. where would the non-Muslim parent seek remedy when the Muslim spouse had converted their child from a civil marriage.

However, these issues were not addressed by the Federal Court. In November 2010, the Federal Court unanimously rejected considering these constitutional questions. The ostensible reason for the lack of deliberation on these issues was that Shamala remains out of the country and therefore out of the court's jurisdiction.

Unfortunately the judges fail to realise that in past court decisions, Shamala's equal rights as a parent were denied and she was told to raise her children in a religion that was not her own. She was understandably compelled by circumstances to flee the country with her children. The Federal Court did not give due regard to the circumstances that caused Shamala to flee and yet she had turned to this Court to resolve the vexed question that confronts her and others.

In order to avoid conflicts of jurisdiction and the exploitation of the judicial system through 'jurisdiction shopping', the relevant enactments should clearly state that the *Syariah* court has no jurisdiction to hear any matters relating to a civil marriage. This is crucial as there are instances, such as in Shamala's case, where the *Syariah* court and the civil court each issued conflicting orders to the respective spouses. Such conflicts between the courts would inevitably erode public confidence in our legal system generally and the judicial process in particular.

Provisions must be incorporated in the Law Reform (Marriage and Divorce) Act 1976 that stipulate that all issues be resolved after conversion under the civil laws under which the marriage was solemnised.

Custody

According to the Islamic Family Law (Federal Territories) Act 1984, a Muslim woman can lose custody of her children "by her gross and open immorality,"[554] however this provision is only for mothers, not fathers. Although custody may be granted to mothers, it is fathers who are the "primary natural guardians" of children.

We urge that courts should grant custody without caveats such as that imposed on Shamala, who was told she would lose custody of her children if there are grounds to believe that she would influence their new religious beliefs, even though the children were converted without her knowledge or consent. The boundaries of conduct in respect of such a caveat are not clear, yet the consequences of its violation are grave.

Maintenance for a former spouse in the case of one spouse's conversion to Islam

Section 77 of the Law Reform (Marriage and Divorce) Act stipulates the maintenance provisions to be paid by the husband to the wife or former wife. This provision should continue to apply irrespective of either spouse's conversion to Islam. If the husband converts, his obligation to pay maintenance to his current or previous non-Muslim spouse remains. If it is the wife who converts, she would still be eligible to apply for maintenance from the non-Muslim husband.

Section 81 provides that an order for maintenance will be valid until the death of either spouse, or the spouse in whose favour it was made, depending on whether the maintenance was unsecured or secured, respectively. This provision should continue to apply irrespective of either spouse's conversion to Islam.

554 Section 83(b), *Islamic Family Law (Federal Territories) Act 1984*.

Under state Islamic law enactments a husband is only bound to maintain his former wife for the *iddah* period of 3 months (unless she is pregnant), after which her family or *Baitulmal* will take care of her. However, this state Islamic law provision should not apply in the case of a converting husband as he ought to still be bound to fulfil his marriage obligations under the civil laws. His conversion to Islam must not be permitted to impinge on his non-converting wife's rights and expectations embodied in the civil marriage contract.

Provisions of state Islamic law enactments cannot be imposed on the non-Muslim wife. Furthermore, the rationale for this provision is inapplicable in this instance since, as a non-Muslim, the non-converting wife has no legal structure of support as neither her family nor *Baitulmal* has any obligation to provide for her once she is divorced. A converting spouse must therefore pay maintenance in full according to civil laws, even after conversion.

Religion of children

Article 12(4) of the Federal Constitution states that, "the religion of a person under the age of 18 years shall be decided by his parent or guardian."

It is unfortunate that in several court cases, judges[555] have interpreted this provision in an "overly simplistic literal" way by asserting that this shall mean one parent may convert a child.

Academic Dr Azmi Sharom has noted,

> "[I]f taken to its logical conclusion what it can lead to is a child being converted by one parent one day and then converted again by the other parent the next day. Surely this ridiculous situation was not what the article intended and surely it can be implied that the word 'parent' means both parents."[556]

We oppose the practice of children being unilaterally converted to Islam without the consent of the non-converting parent, as has happened to Shamala and other women, including Indira Ghandi.

Case study: Indira Ghandi

In 2009, Indira Ghandi's husband, who converted to Islam and is now known as Mohd Ridzuan Abdullah, converted their three children even though they were not present at the time of application.

In 2010, Indira was granted custody of the children. The father still lives with one of the children and refuses to give up the child. In July 2010, the Ipoh High Court granted an order for a full trial to review the children's conversion to Islam.

While we support an individual's absolute right to profess and practise the faith of their choice, we are alarmed when a change of faith impinges on his or her spouse's rights, such as the right of decision making with respect to their children, and causes injustice.

If the parents cannot jointly agree on the child's religion, the *status quo* before the parent's conversion should be maintained, i.e. the child's religion at that time should be preserved and the child alone should have the right to choose their religion upon reaching the age of 18. Each parent, whether or not they have custody of the child, should have the right to educate the child in their respective religion.

The government authorities' and the courts' recent interpretation and practice have not upheld an individual's absolute right to profess and practise their religion although the right is constitutionally guaranteed. Therefore, a court's determination that a child's religion is Islam will persist, and the child will effectively be unable to ever profess any other faith. This has specific implications because being Muslim, unlike the other religions, carries with it obligations that are enforceable by law.

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555 Federal Court of Malaysia, Putrajaya, (Civil Appeals No. 02-19-2007(W), NO. 02-20-2007(W), NO. 02-21-2007(W)) Between Subashini A/P Rajasingam (Appellant) and Saravanan A/L Thangathoray (Respondent), Appeals from Court of Appeal, (Civil Appeals No. W-02-955-2006, W-02-1041-2006) Coram Nik Hashim Bin Nik Ab. Rahman, FCJ, Abdul Aziz Bin Mohamad, FCJ and Azmel Bin Haji Maamor, FCJ, 27 December 2007, available at: www.malaysianbar.org.my/selected_judgements/subashini_a/p_rajasingam_v_saravanan_a/l_thangathoray_2007_fc.html

556 Dr Azmi Sharom, "Sore need for plurality in law", *The Star*, 18 November 2010.

Inheritance after conversion

Section 2 of the Distribution Act 1958 provides that the Act shall not apply to the estate of any person professing the Muslim religion, and non-Muslims are generally not allowed to inherit under *faraid* principles of asset distribution. As a result, the non-converting next of kin of a Muslim convert is adversely affected by the conversion, as they fall between the cracks and are unable to inherit under either civil law or according to *faraid* principles.

The Distribution Act 1958 should be amended to provide for situations where one spouse of a civil law marriage converts to Islam and dies intestate, in order to safeguard the right of the deceased's non-Muslim next of kin to inherit.

Furthermore, the principle of reciprocity must be respected as the converting spouse, as a Muslim, still enjoys the right to inherit from his non-Muslim family members.

Recommendations to the Malaysian Government regarding Article 16 of CEDAW

Discrimination faced by women under both civil and Islamic family law

Age of marriage

- The minimum age for marriage must be set at 18 years for all, with **no exceptions**. Amend Section 10 and Subsection 21(2) of the Law Reform (Marriage and Divorce) Act 1976 and Section 8 of the Islamic family law accordingly. Until this reform takes place, establish a register for the documentation of underage marriages under the Registrar for Marriages to enable monitoring of the number of underage marriages and the justifications given.

Economic dependency

- Identify target groups in both rural and urban areas where it is most evident that women suffer from a 'double burden' and carry out parenting programmes about shared and equal parenting. The content of these programmes, currently the responsibility of the National Population and Family Development Board, should be publicly available and NGOs should be afforded an opportunity to participate in the designing of course materials.

- The contents of the parenting classes must be evaluated to ensure that they stress the importance of male responsibility in the family, especially in the areas of family planning and the upbringing of children. These classes must support women's right to work and not reinforce stereotypes of women's role as a homemaker.

- Consider a National Childcare Strategy. It appears evident from the poor response to the government's offer of tax incentives to corporations that set up Childcare Centres at the workplace that a different strategy should be employed. Emphasise to the public and private sector that childcare is a societal responsibility, the government must strive for legislating laws that require employers to contribute and facilitate in providing childcare for their employees. The private sector and the government should share the costs of such programmes by offering on-site and community childcare for employees' children. The government should subsidise and make affordable quality childcare available to low-income parents including single mothers.

- Concerted efforts must be made to register the large number of unregistered childcare centres[557] in line with the Care Centres Act 1993.

- The government must initiate studies in the following areas to provide accurate data to enable reform where necessary:
    a) Tax benefits for single mothers.
    b) Greater availability of affordable childcare both in the workplace and residential areas.
    c) Parental (maternity and paternity) benefits.

[557] "Unlicensed childcare centres", *The Star*, 4 February 2012.

d) Employment policies supporting traditional and non-traditional gender roles.
e) Housing policies benefiting families with children.

- When children are involved, divorce law must be based on the best interests of the child, including the preservation of family and economic stability for the children. The Law Reform (Marriage and Divorce) Act and the Islamic family laws must be amended to include a formal articulation of the value of a homemaker's contribution to the family. In line with this, the courts must recognise the value of a homemaker and her corresponding contribution to the matrimonial assets throughout the duration of marriage.

Guardianship

- All forms requiring signatures of guardians must be edited to include the words: 'guardian: father/mother', where the signature of either is legally recognised and all appropriate officers/personnel need to be educated on the Guardianship of Infants Act 1999.

Divorce

- Institute a family court system for civil and Islamic family law matters which will have the objective of resolving family disputes in an efficient and amicable manner. The goal is to prevent further injury to family members, which occurs when they are forced into taking a confrontational stance. A family court system will have comprehensive jurisdiction over all matters related to family:[558]
  a) Divorce, judicial separation and nullity
  b) Custody, care, control and access to children
  c) Division of matrimonial assets
  d) Domestic violence (Interim Protection Orders and Protection Orders)
  e) Maintenance for dependent spouses
  f) Maintenance for dependent children
  g) Adoption

Discrimination faced by women under civil law

Divorce

- Compel training for and certification of all members of conciliatory bodies in marriage counselling, specifically about the dynamics of domestic violence. Amend Section 106 of the Law Reform (Marriage and Divorce) Act to include specific qualifications for the staff of the conciliatory bodies.

- Sensitise the judiciary in gender issues, especially judges working in family disputes. This is especially important for women who apply for mutual divorces and give up property claims for fear of custody battles of their children.

- A woman's paid and unpaid contributions, such as housework, must be taken into consideration by judges while processing divorce cases.

Unregistered marriages

- Implement a national computerised system for registering marriages under the Registration of Marriages Department. All religious institutions must have access to the database.

- Establish strict rules and procedures to ensure the legality of marriages solemnised through religious ceremony, custom or usage.

- Enforce the Compulsory Marriage Registration Act.

- Monitor and penalise religious or customary institutions that conduct illegal and unregistered marriages.

- Prosecute polygamists to the full extent of the law as a deterrent to others.

- A woman who unknowingly finds herself in a polygamous marriage should be entitled to apply for a speedy divorce with fair maintenance and property for herself and her children.

[558] *Memorandum on Setting Up a Family Court in Malaysia*, Bar Council Family Law Committee, 2002.

- Develop a provision for women in de facto marriages to claim for maintenance, especially where children are involved.[559]

- Increase public awareness on the necessity of registering one's marriage and the negative impacts of polygamy.

Division of property

- Both husband and wife are entitled to receive a fair portion of the property shared by the couple during the period the couple lived together. Amend Section 76 of the Law Reform (Marriage and Divorce) Act, to include couples whose marriages have been declared null and void by the court.

Maintenance

- Women's financial and non-financial contributions, including housework and childcare, must be given equal weight upon division of matrimonial assets. Amend Section 76 of the Law Reform (Marriage and Divorce) Act accordingly.

- Adopt provisions in the Law Reform (Marriage and Divorce) Act and Islamic family law that would require men who are delinquent in paying maintenance to their ex-wives or children to pay the legal fees incurred by the recipient of the payments during the enforcement procedures. This reform would permit more women to pursue legal action against their ex-husbands who fail to make court ordered payments.

- Amend the Law Reform (Marriage and Divorce) Act to allow both men and women to file and pursue applications for enforcement of maintenance payments without legal representation.

- Establish a National Child Support Agency that would function as an independent body to assess, review, enforce and arrange child support payments. It would be a federal department to serve the needs to Muslim and non-Muslim applicants, and would utilise state instruments to assess the husband's financial capacity in determining the amount of maintenance payment. Although the current law allows for salary attachments upon conferment of a maintenance order, this provision has not been utilised to its fullest. The use of this law by judges and lawyers is essential for women's right to maintenance.

- Until this reform takes place, implement a mechanism to recover payments from defaulting husbands. For example, a bailiff system can be introduced to recover payments from defaulting husbands, thereby preventing lengthy and costly court procedures which are traumatic and too expensive for women. Yet another system that can be explored is a setting up of a collecting agency which will receive and collect from all husbands who are issued maintenance order.

- The government in collaboration with women's NGOs should be encouraged to create a database on the number of defaulting cases.

- Amend Section 95 of the Law Reform (Marriage and Divorce) Act to mandate that fathers continue to pay maintenance for their children's expenses until the children reach the age of 23. This revision will reduce the financial burden on mothers and perhaps encourage fathers to remain more connected to their children.

Discrimination faced by women under Islamic family law

- Overall, one of the primary causes of discrimination encountered by women is the lack of a uniform set of laws. Therefore, Parliament should mandate that all Malaysian states and federal territories adopt a uniform set of Islamic family laws. The uniform law also should guarantee reciprocity among the *Syariah* courts in different states, such that court orders in one state would apply to the same person in a different state. These reforms would prevent people from escaping legal responsibilities or court orders in one jurisdiction by moving to another jurisdiction in Malaysia. Also, in the preparation of a standard codification or uniform law, what is equally important is the need to ensure that the uniform law must involve an enlightened and progressive interpretation of the *Syariah*.

- Amend provisions in the Islamic family law that discriminates against women, using as basis the principles of equality, justice, freedom and virtues prescribed by the *Qu'ran*.

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[559] De facto marriages are defined as marriages that are not registered. For example, a man can enter into several de facto marriages and not be considered polygamous given that the marriages are not legally recognized.

Right to enter into marriage

- A woman should not require the consent of a *wali* to enter into marriage. Repeal Section 13 of the Islamic family law.

Polygamy

- Enforce the deterrent punishment for husbands entering into polygamous marriages without the permission of the court.
- A polygamous marriage should not reduce, directly or indirectly, the standard of living of the man's existing wife (or wives) and children. Reinstate Section 23(3) of the original Islamic Family Law (Federal Territories) Act 1984.
- An order for maintenance payments and division of matrimonial assets must be made before the court grants permission to enter into a polygamous marriage. Amend Section 23 of the Islamic family law.
- Allow a woman to obtain a divorce if the husband enters into a polygamous marriage without her consent and/or her knowledge. Amend the statutory *ta'liq* agreement to recognise this right.
- Establish procedures for the court to obtain evidence to prove the husband's ability to fulfil all the conditions specified under Section 23(4)(e) of the original Islamic Family Law (Federal Territories) Act 1984.

Divorce

- *Talaq* divorces should only occur in the courts through a judicial process, and any pronouncements outside of court will be deemed invalid. Repeal Section 124 of the Islamic family law. Until this reform takes place, mitigating actions should be taken prior to registration for all divorces pronounced without the permission of the court. This includes matters of: custody, maintenance, division of matrimonial assets (*harta sepencarian*), entitlement of *muta'ah* (financial compensation for women who are divorced under unjust circumstances)
- Increase the penalties for entering into a *talaq* divorce outside of court to a fine of up to RM5,000 and/or imprisonment for up to one year. Amend Section 124 of the Islamic family law accordingly.
- Abolish the conciliatory committee process set forth in Sections 47(5) through 47(15) of the Islamic family law.
- Limit the *Hakam* arbitration proceedings to a maximum of six months. If the arbitration fails, the court should record a judgement for the case immediately at the end of the six month period.
- Supporting evidence from police and medical reports should be accepted for proving spousal abuse in a *fasakh* or *ta'liq* divorce proceedings.
- Testimony offered by family members or female witnesses must be honoured by the *Syariah* Courts.

Maintenance of wife and children

- Develop an effective mechanism to enforce and provide sufficient maintenance to wives and children. This could be on similar lines with the recommendations for women under the civil law, for example the establishment of a National Child Support Agency.
- Until this reform takes places, all Family Support Division (*Bahagian Sokongan Keluarga*) officers under the *Syariah* Judiciary Department Malaysia must be granted *tauliah* to enable the enforcement of court orders.
- Establish speedy court proceedings in order to ensure that women are not traumatised further and forgo their right to maintenance in order to avoid the traumatic experience.
- Fathers and mothers should both be equally responsible for maintenance and custody of children born out of wedlock. Amend Sections 80 and 85 of the Islamic family law.

- Increase public awareness on the rights of women to claim maintenance, as most women are unaware that they are entitled to difference kinds of maintenance.

Nusyuz

- Repeal Sections 59(2) and (3) of the Islamic family law concerning *nusyuz* of a wife. Until this reform takes place, the courts should require that all allegations of *nusyuz* be proven by the husband with strong corroborative evidence.

Delay in obtaining a divorce and ancillary relief

- Procedures for maintenance, divorce and division of property cases must be efficient and expeditious. Eliminate the requirement to certify a couple's attendance at religious counselling prior to filing for a divorce.

- Until this reform takes place, a woman should not be penalised for her husband's negligence or deliberate efforts to frustrate a wife's divorce petition. The religious counselling requirement must be limited to a maximum of three months; and the failure of the husband to attend counselling sessions must not adversely affect the woman's right to file for a divorce.

Division of property

- Women's non-financial contributions, such as childcare and housework, and her financial contributions must be given equal value in determining the division of marital property. Amend Section 58 of the Islamic family law.

Guardianship

- Women are entitled to equal rights to guardianship of their children as men. Amend Section 88 of the Islamic family law.

- At the moment, women have equal rights to guardianship of children by way of an administrative circular. All concerned personnel must be educated on the content and implementation of the circular.

Custody

- Remarriage should not affect women's rights to custody of children unless the remarriage is against the best interest of the child. Amend Section 83(a) of the Islamic family law.

Inheritance

- Look into other concepts, besides *Hukum Faraid*, that are not prohibited under Islamic law, including the concepts of testamentary bequests and that of trusteeship of property allowed under the Islamic system of *waqf*.

- Clarify the status of a civil marriage upon conversion of a spouse and review the Law Reform (Marriage and Divorce) Act 1976 accordingly.

- Review procedures and issues of jurisdiction in matters involving the conversion of a spouse to Islam to ensure ancillary matters of maintenance, custody and guardianship can be settled efficiently in one venue.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 19

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 19: VIOLENCE AGAINST WOMEN[560]

The CEDAW Committee released General Recommendation No. 19 in 1992. In this document, the CEDAW Committee articulates that gender-based violence, "which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

a) The right to life;

b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;

c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;

d) The right to liberty and security of person;

e) The right to equal protection under the law;

f) The right to equality in the family;

g) The right to the highest standard attainable of physical and mental health;

h) The right to just and favourable conditions of work."[561]

Key issues in this chapter:

- Although the Domestic Violence Act 1994 has been in operation since 1996, **the implementation of this law has been poor**. For example, obtaining an Interim Protection Order against a perpetrator of domestic violence may take anywhere between 24 hours and 3 months. In addition, the implementation of the legislation is inconsistent across states and there are problems with the way in which cases are dealt with by the police, the welfare department and the courts.
- In 2011, amendments to the Domestic Violence Act were passed by parliament. The **definition of domestic violence was expanded to include ''psychological abuse, including emotional injury''**. While this is a positive amendment, many other problems remain with the legislation.
- **Marital rape is still not considered a criminal offence**. In 2006, the Penal Code was amended and the concept of rape within marriage was introduced into the legislation. However, this amendment is problematic as the definition of marital rape is based on potential or actual physical harm, rather than the act of rape itself, and the term rape is not even used. An earlier exception was left to remain in the Penal Code, which states "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."
- In the Penal Code, **rape with an object is not considered rape** – it is considered an "unnatural offence".

560 The text of the CEDAW Committee General Recommendation No. 19 is available here: www2.ohchr.org/english/bodies/cedaw/comments.htm

561 CEDAW Committee, General Recommendation No. 19, paragraph 7.

- **The State carries out violence against women as punishment for crimes under *Syariah* law**. For example, women found guilty of *musahaqah* (lesbianism) can be punished by whipping. In 2009, Kartika Sari Dewi Shukarno was sentenced by the Pahang Syariah Court to six strokes of the rotan for drinking beer in a hotel nightclub two years previously (the caning sentence was later commuted to a community service order). In 2010, three women were caned for engaging in 'illicit sex'.
- **Transwomen report high levels of violence and harassment** by religious enforcement officers and police.
- Women **refugees and asylum seekers are vulnerable to violence and harassment owing to their precarious legal status**. The Malaysian government has not ratified the 1951 UN Refugee Convention or established mechanisms for the protection of the rights of refugees and asylum seekers.

Statistics on violence against women

Police Reports	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Domestic Violence	3468	3107	2755	2555	3101	3093	3264	3756	3769	3643	3173
Rape	1217	1386	1431	1479	1760	1931	2454	3098	3409	3626	3595
Incest	213	246	306	254	334	295	332	360	334	385	unavailable
Abuse of Domestic Workers	56	66	39	40	66	37	45	39	unavailable	unavailable	unavailable
Child Abuse	146	150	123	119	148	189	141	196	unavailable	203	257
Outrage of Modesty (Molestation)	1234	1393	1522	1399	1661	1746	1349	2243	2131	2110	2054
Sexual Harassment in the Workplace	112	86	84	82	119	102	101	195	unavailable	unavailable	unavailable

Source: Royal Malaysian Police and Ministry of Women, Family and Community Development

Prevalence of violence

Prior to 2009, the Ministry of Women, Family and Community Development reported annually on statistics related to violence against women as part of a booklet on statistics on women in Malaysia. The 2009 and 2010 booklets no longer contain these statistics.[562]

Additionally, there was a struggle in 2010 for NGOs to obtain statistics on crimes involving violence against women from the Royal Malaysian Police, who attempted to make the statistics confidential and only released the information after the attempt to conceal the data was publicised.[563]

Domestic Violence

In the five year period of 2006 until 2010, there was a yearly average of about 3,500 reports of domestic violence. However, factoring in the often considerable under-reporting of domestic violence, this figure may be much higher.

Rape

As last reported to the CEDAW Committee in 2006, the number of reported rapes continues to rise each year, with only a small decrease from 2009 to 2010. The latest numbers equate to 10 women being raped every day.[564] As is the case with domestic violence, many rapes go unreported. Furthermore, there are no reports for marital rape because this has not been criminalised.

Sexual Harassment

The statistics from the Royal Malaysian Police include 'outrages of modesty', including physical molestation. In 2010, the number of cases reported was 2,054. Although the numbers seem low, anecdotal evidence suggests that sexual harassment is common.

Abuse of Migrant Domestic Workers

The work of domestic workers is usually isolating. This isolation means that the women are trapped in homes and are vulnerable to abuse.

There have been significant numbers of cases of abuse of domestic workers. There are reports from the Indonesian Embassy in Malaysia which state that 100 abused domestic workers are given shelter there every month.[565] Many of these women report being beaten, tortured and sexually assaulted or raped by their employers.[566] Migrant Care reported that in 2007, 46 Indonesian domestic workers had died without an explanation from police as to the cause of death.[567] It is in this context that the Indonesian government chose to impose a suspension of domestic worker immigration to Malaysia in 2009.[568]

The statistics reported by the Royal Malaysian Police relating to abuse of domestic workers are fewer than the reports received by NGOs. According to Malaysian officials, there are 50 cases per year in which migrant domestic workers are abused.[569] The Royal Malaysian Police have however neglected to release statistics for the years 2008 to 2010, which covers the period when domestic worker abuse was prominent in the news.

There have been some high profile cases of deaths of domestic workers at the hands of their employers. In November 2008, the employer responsible for the shocking injuries to Nirmala Bonat was sentenced to 18 years' jail.[570] In October 2009, domestic worker Mautik Hani died from injuries and her employers

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562 Ministry of Women, Family and Community Development, *Statistics on Women, Family and Community – Malaysia*, 2009, 2010 and 2011.

563 Tashny Sukumaran, "IGP has no idea what women's group wants", *Free Malaysia Today*, 5 April 2011.

564 Royal Malaysian Police statistics as reported in "A rape every 2.5 hours", *The Malay Mail*, 19 May 2011.

565 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p39.

566 Frankie D'Cruz, "Maid Abuse in Malaysia: Tortured Souls in Our Homes", *The Malay Mail*, 12 June 2009.

567 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p39.

568 Human Rights Watch, "Indonesia/Malaysia: End Wage Exploitation of Domestic Workers", 10 May 2010.

569 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p38.

570 "Nirmala Bonat case: Housewife found guilty, 18 years jail", *The Star*, 27 November 2008.

were arrested.[571] In June 2011, Isti Komariyah died and it was reported that she had bruises and scars and was emaciated.[572] Her employers were charged with her murder.[573]

The government has since 2009 promoted *Talian Nur* as a hotline available for abused migrant domestic workers. This hotline was first established in 2007 and was initially intended for the reporting of all forms of abuse and the seeking of general advice and assistance.[574]

Violence against women perpetrated by the State

Violence against transwomen by police and religious officers

Transwomen (male to female transgender people, also referred to as *Mak Nyah*) report high levels of violence and harassment by religious enforcement officers and police. In one case, a transwoman who had undergone sexual reassignment surgery was raped. The police in this case did not accept the report of rape because the officer stated that, "It is not a real vagina and therefore, she cannot be raped."[575]

As mentioned previously in the chapter on Article 5 of CEDAW in this report, in 2007, a case came to light of the beating of a *Mak Nyah* by religious department officers in Melaka which resulted in serious injury and her hospitalisation. Amnesty International reported that,

> "On 30 July, Ayu, a transsexual, was seriously beaten by officials from the Melaka Islamic Religious Affairs Department (JAIM). They reportedly punched and kicked her, rupturing a pre-existing hernia. A JAIM official stated that Ayu was detained for committing the 'offence' of 'men dressing as women in a public space', which is punishable by a fine of 1,000 ringgit (USD300), a six-month prison sentence or both under the Melaka Syariah Offences Act."[576]

In October 2010, a transgender woman who worked as a hair stylist in Melaka was allegedly forced to remove all clothing, including underwear, in front of religious officers. As mentioned previously in the chapter on Article 5 of CEDAW in this report, Rahimin Bani, director of the Melaka religious department (JAIM) reportedly said,

> "We were carrying out our duties under the State religious laws... Abdul Qawi was wearing a woman's bra and panties and we did not strip with the intention to embarrass him... He may feel his rights as a person had been violated, but as Muslims we have the responsibility to ensure he does not go astray."[577]

Further information about violence against transwomen can be found in the chapter in this report on the CEDAW Committee's General Recommendation No. 28.

Caning of women for offences under state-level *Syariah* law

Women are expressly excluded from being whipped under Section 289 of Malaysia's Criminal Procedure Code. However, in 2009, Kartika Sari Dewi Shukarno, was sentenced by the *Syariah* Court in the state of Pahang to six strokes of the *rotan* and fined RM5,000 for drinking beer in a hotel nightclub two years previously. In March 2010, the caning sentence was commuted to a community service order.

In February 2010, three women were whipped after being found guilty of illicit sex by the Federal Territory *Syariah* High Court. Malaysian Home Minister Datuk Seri Hishammuddin Hussein stated that the caning of women protected the sanctity of Islam. The caning was reported thus:

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571 "It's murder: Indonesian maid dies of alleged abuse (Updated)", *The Star*, 26 October 2009.

572 "Maid may have been starved to death", *The Star*, 9 June 2011.

573 "Couple charged with maid's murder", *New Straits Times*, 16 June 2011.

574 It must be noted that there is a significant concern with *Talian Nur* as the phone number appears on the telephone bill, leaving the caller vulnerable if it is discovered that she has called a helpline.

575 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p262.

576 Amnesty International, *Amnesty International Report 2008 - Malaysia*, 28 May 2008.

577 "Religious department firm against cross-dressing", *Malay Mail*, 21 April 2011.

News article:

The Star, ''3 women caned for having illicit sex'', 18 February 2010

PUTRAJAYA: Three Muslim women were caned last Tuesday for engaging in illicit sex, said Home Minister Datuk Seri Hishammuddin Hussein.

They were the first women in Malaysia to receive such punishment under syariah law.
Two of them where whipped six times and the third was given four strokes of the rotan at Kajang Prison.

The issue of caning of women has ignited a fierce debate in the country after 32-year-old Kartika Sari Dewi Shukarno was sentenced to be caned for drinking beer in July last year.
The sentence against her has yet to be executed.

Hishammuddin said he decided to bring to public attention the punishment meted to the three women because there had been "too much hype" over Kartika's sentence. "People are saying that no woman has been caned before and that Kartika should not be caned. Today I am announcing that we have already done it [caned women]. There is no hidden agenda, **we are merely executing our responsibility**," he told a press conference at his office yesterday.

Hishammuddin said all three women did not suffer any cuts or bruises following the caning but had confessed that the punishment had left a deep impact on them. "**They have all repented. They are also hoping that others will not go against the teachings of the religion**," he said, adding that the sentence was meted out according to Islamic rules.

The three women were found guilty of committing illicit sex by the Federal Territory Syariah High Court, which issued the caning order between December last year and last month.

Hishammuddin said one of the women was released on Sunday after spending a month in prison and another was expected to be released over the next few days. The third woman is currently serving her jail term and would be released in June.

He said the Prisons Department had consulted experts from the Islamic Development Department (Jakim), the Syariah Department and the Attorney-General's Chambers before carrying out the sentence.

He said the ministry agreed on the procedure for the caning of Muslim women offenders for syariah offences on Dec 4. They include thorough checks before and after the caning, ensuring that the women were not pregnant and were appropriately dressed according to the Islamic dress code. He said 13 people, including officials from Jakim, the Syariah Court and the A-G's Chambers, were present during the procedure.

''I hope there will be no more issues arising from the caning sentence which can be imposed by the Syariah Court on Muslim women to protect the sanctity of Islam,'' he added. "The punishment is aimed at getting the offenders to repent and seek Allah's forgiveness. It is also meant to educate Muslims to follow the teachings of Islam."

Legal reform – domestic violence, rape, sexual harassment

Domestic Violence

The Malaysian government asserted that changes were pending to the Domestic Violence Act 1994 (DVA) during the 2006 discussions with the CEDAW Committee.[578] It was several years after this, in 2011, that the amendments were tabled in parliament.

[578] Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 10am*, CEDAW/C/SR.731, released on 20 June 2006, paragraph 20.

The 2011 amendments are not comprehensive and fall far short of the reform that is needed to fully protect women from domestic violence. There are many remaining areas of concern, for example:

- Stalking and intimidation are common forms of domestic violence and are still not recognised in the definition of what constitutes domestic violence in the DVA.
- The category of victims/perpetrators is still limited to familial relationships and the DVA does not cover intimate partner violence.
- Domestic violence is still not recognised as an offence in the Penal Code and perpetrators are charged under the 'hurt' provisions in the Penal Code. This does not reflect the serious, persistent and often repetitive nature of domestic violence.

There are some positive changes in the amendments to the DVA. These positive changes include:

- The addition of "psychological abuse, including emotional injury" to the definition of domestic violence.
- Making domestic violence a seizable offence, which allows the police to investigate and arrest immediately.
- The automatic attachment of the power to arrest to every protection order when violence is likely. This enables the police to arrest a perpetrator when a protection order has been violated.
- A protection order may be made to prohibit or restrict the perpetrator from communicating by any means with the protected person.

However reform of the Domestic Violence Act is incomplete without amendments to the Penal Code. It is under the Penal Code that perpetrators can be charged for causing 'hurt'. The Penal Code must be reformed to include domestic violence, including psychological abuse, as a separate offence. The existing Penal Code provisions with elements of psychological abuse, for example Section 44,[579] Section 350,[580] Section 351[581] and Section 355,[582] are not utilised by the police even after reports are made by victims.

Currently, the hurt provisions under which perpetrators can be charged do not include punishment that is commensurate with the continual nature of domestic violence or the extreme vulnerability and danger experienced by victims who are abused in their own homes by their intimate partners.

A further issue of concern is the lack of standardised implementation of the DVA across the country and the treatment some women receive from the police. Complaints received in Penang, for example, demonstrate that there have been several cases in which service providers have been reluctant to help the complainants obtain protection orders, due to the misconceived belief that the woman "will change her mind and withdraw the report anyway".

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579 Penal Code, Section 44: "The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

580 Penal Code, Section 350: "Whoever intentionally uses force to any person, without that person's consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other."

581 Penal Code, Section 351: "Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault."

582 Penal Code, Section 355: "Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment for a term which may extend to two years or with fine or with both."

The following case study from a women's human rights NGO in Kuala Lumpur highlights the diversity in the police response to domestic violence.

Case study: Anita

Anita is 24 years old. She met her husband when she was 20 and married him against her family's wishes. The marriage was never registered and was simply done by the act of tying the *thali* around the neck without any customary ceremony either. Anita's husband began abusing her in the second year of the marriage. She was often slapped, kicked, punched and hit using other objects such as a helmet. Her husband would constantly accuse her of being a prostitute and having an affair with other men. He would also force her to have sex, even when she was sick, and refused to give her any money. Anita was also not allowed to go anywhere alone, and had to follow her husband at all times.

After years of abuse, Anita left her husband and went back to her parent's house. There, although her husband would occasionally come to harass and threaten her, because of her family's support and protection, she was kept safe and her husband did not dare to hurt her. After a while, she left her family's house and moved to another city to attend college. One day while she was waiting for the bus, she was found by her husband who attempted to drag her into his car. While this was happening, Anita saw a policeman pass by and asked him for help. The policeman responded by shouting at her to follow her husband. Anita once again begged with the police officer and asked him to help her and explained that she did not want to follow her husband. The policeman then responded "now you want to go inside the car or you want me to arrest you?" Anita felt helpless and felt that she was forced to go with her husband.

The moment he brought her back home, he began abusing her physically and emotionally. He also forced her to have sex with him against her will. She was kept confined inside the house and her mobile phone was taken away and she was given his mobile phone. She could not remember the phone number of any of her family members and could not call anyone for help. Her husband had also warned her that he had alerted other people in the neighbourhood to make sure that she did not leave the house. He also told her that he would be able to find her no matter where she went. Anita's only contact with the outside world was her brother-in-law, and this brother-in-law was the one who eventually helped her to escape and brought her to a women's shelter.

Anita was initially very scared to make a police report. She was under the belief that her husband has a lot of contacts and knows a lot of people and as such she was afraid that going to the police might lead her husband to come after her. The social worker at the shelter explained the importance of lodging a police report and getting an Interim Protection Order (IPO) so Anita did agree to make a police report. The front desk officers were very helpful and sympathetic to her situation.

Marital rape

In its 2006 Concluding Comments, the CEDAW Committee requested Malaysia to "enact legislation criminalizing marital rape."[583] In 2006, a new subsection was included in the rape provisions in the Penal Code. The new Subsection 375A of the Penal Code states,

> *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.*

This new subsection is flawed as the definition of this crime makes no mention of the term rape and is based on potential or actual physical harm, rather than the rape itself. Furthermore, an exception to Subsection 375A of the Penal Code remains in the law, which states,

> *Exception—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.*

583 CEDAW Committee Concluding Comments: Malaysia, 2006, paragraph 22.

Therefore the Penal Code continues to **not recognise rape within marriage as a crime**.

The penalty for causing "hurt or fear of death or hurt" within marriage (a maximum of five years) is much less than the penalty for rape. Section 376 of the Penal Code gives the penalty for rape:

> *Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.*

In its 2006 appearance before the CEDAW Committee, a Malaysian government representative stated that the,

> "Parliamentary Select Committee had concluded that marital rape could not be made an offence, as that would be inconsistent with sharia law. As a compromise, the Select Committee had proposed that hurting or threatening to hurt a wife in order to compel her to have relations would constitute an offence."[584]

Rape with an object

In the Penal Code, rape with an object is not considered rape – it is considered an "unnatural offence". Rape with an object should be moved to the section of the Penal Code which deals with rape. Section 377CA of the Penal Code states,

> *Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping.*

Sexual Harassment

The 2005 NGO CEDAW Shadow Report noted that in 1999, a Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was launched. However this code is only voluntary for employers to follow and its implementation has been ad hoc. The aim of the Sexual Harassment Code of Practice is to "encourage the development and implementation of policies and practices which will ensure a safe and healthy working environment".[585]

Human Resources Deputy Minister Datuk Maznah Mazlan is reported to have said in parliament, "Since the Sexual Harassment Code of Practise in 1999 at workplaces was implemented, the labour department has received and investigated 300 cases".[586] This is an extremely low number of cases for a 12 year period.

The overwhelming majority of Malaysian employers have not adopted the Sexual Harassment Code of Practice – only 1,671 employers nationwide had implemented the code between 1999 and 2011.[587]

In July 2010 an Employment Amendment Bill 2010 was brought before parliament with new provisions which compel employers to examine claims of sexual harassment at the risk of facing a fine if complaints are ignored. In October 2010 the amendments to the law were not passed and further changes were made. In June 2011 the Employment Amendment Bill 2011 was brought before parliament for a second reading. The bill was passed in October 2011.

There are several problematic elements in the sexual harassment provisions in the Employment (Amendment) Act 2011, which are outlined as follows:[588]

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584 Committee on the Elimination of Discrimination against Women, *Summary Record of the 731st Meeting held on 24 May 2006 at 3pm*, CEDAW/C/SR.732, released on 13 July 2006, paragraph 54.

585 Ministry of Human Resources, "Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace", 1999.

586 "Sexual harassment cases on the rise", *New Straits Times*, 8 July 2011.

587 "Sexual harassment cases on the rise", *New Straits Times*, 8 July 2011.

588 The Joint Action Group for Gender Equality highlighted these problems in a Letter to the Editor, "Employment Act amendments piecemeal and unjust", *Malaysiakini*, 8 November 2011. Significant concerns with the legislation were also highlighted by Charles Hector, charleshector.blogspot.com/2011/10/why-sexual-harassment-proposed.html.

- Upon receiving a complaint of sexual harassment, the employer "shall inquire into the complaint". The only exception to this is when the complaint is made against an employer who is the sole proprietor – in this case the inquiry shall be conducted by the Director General of the labour department. It should be the case that an independent body with the necessary skills and knowledge inquires into complaints.

- The law allows the employer to decide on whether or not an inquiry should be conducted. The employer can decide against holding an inquiry if "(a) the complaint of sexual harassment has previously been inquired into and no sexual harassment has been proven; or (b) the employer is of the opinion that the complaint of sexual harassment is frivolous, vexatious or is not made in good faith."589 Should the employer decide against holding an inquiry, the complainant can refer the matter to the Director General who, upon reviewing the matter, may agree with the employer or instruct the employer to conduct the inquiry. Although the employer will then have to hold an inquiry, the objectivity of the inquiry is at risk given that the employer was not willing to carry out the inquiry in the first place.

- The law is silent about the right to appeal a decision of the employer or the Director General not to conduct an inquiry or the decision following an inquiry into a complaint.

- There is no possibility of compensation or an apology to victims of sexual harassment. In the case that an inquiry by the Director General finds that sexual harassment did take place by the sole proprietor, the options available to the victim are to resign and be entitled to "(a) wages as if the complainant has given the notice of the termination of contract of service; and (b) termination benefits and indemnity."[590]

- In the case of an inquiry by the employer finding that sexual harassment did take place, the perpetrator may be dismissed, downgraded or receive a "lesser punishment" as the employer "deems fit". If the perpetrator is a person other than an employee, the employer shall "recommend that the person be brought before an appropriate disciplinary authority to which the person is subject to."[591] If the perpetrator is a contract worker or a visitor to the workplace, there is no punishment.

The inclusion of sexual harassment provisions in employment legislation in such a superficial way disregards the rights of victims and demonstrates a lack of understanding of the complexities of sexual harassment.

The government should enact separate comprehensive sexual harassment legislation which includes the creation of an independent tribunal to examine sexual harassment claims inside and outside the workplace.

Violence against migrant women

Abuse of Migrant Domestic Workers

In Malaysia, legislation that specifically protects migrant workers is still non-existent. Malaysia established a Memorandum of Understanding (MoU) in 2006 with Indonesia, the source of most of Malaysia's migrant domestic workers. The new MoU signed in 2011 lacks labour protections and complaint resolution measures.[592] Dr. Irene Fernandez of the NGO Tenaganita wrote that there was nothing to celebrate with the new MoU and "the state remains complicit in creating slavery-like practices" for domestic workers.[593]

The lack of a minimum wage or regulation on recruitment agency practices for repayment of fees can create such extreme financial hardship for domestic workers that they are more likely to endure abusive

589 Section 81B (3) of the *Employment (Amendment) Act 2011*.

590 Section 81E (2) of the *Employment (Amendment) Act 2011*.

591 Section 81B (1) of the *Employment (Amendment) Act 2011*.

592 Human Rights Watch, "Indonesia/Malaysia: New Pact Shortchanges Domestic Workers", 31 May 2011 and Human Rights Watch, "Indonesia/Malaysia: Proposed Labor Pact Lacks Key Reforms", 4 March 2010.

593 Irene Fernandez, "Malaysia – Indonesia MOU: Complicity in Violence, Abuse and Trafficking", *Malaysia Today*, 1 June 2011.

situations.[594] Thus, recognition of migrant workers under Malaysian labour laws, and the resulting basic labour protections, would be a positive step towards protecting domestic workers from abuse. Although Malaysia's criminal law theoretically protects migrant domestic workers from physical abuse, the loss of the work visa upon termination of the employment and the resulting inability to work legally combined with lengthy trials and the monthly expense of special immigration passes makes pursuing justice next to impossible.[595] The CEDAW Committee recommended that Malaysia implement effective avenues for redress of domestic worker complaints of abuse and legislation to ensure the rights of the workers, but this has not been done.[596] In order for migrant workers to be fully protected, the amendment of immigration laws and labour laws is necessary.

More information on the discrimination faced by migrant domestic workers in Malaysia can be found in the chapter of this report on the CEDAW Committee's General Recommendation No. 26.

Women in detention

A press release from the Joint Action Group for Gender Equality details the hostile treatment of female detainees at Kepala Batas police station in Penang. On 25 June 2011, political activists were arrested, detained and subsequently subjected to verbal and physical abuse, including sexual harassment at the hands of the police.[597]

A survey of other news reports shows that abuse of women in detention by the police is common. In one recent case, there was public outcry when the police chained and "cattle-branded" a group of migrant women accused of working as prostitutes.[598] One reason the police used to justify their actions was claiming that the women had "wrecked many marriages", making it seem that the intention of the treatment was humiliation and punishment, although the women had yet to be proven guilty of any crimes.

The worst detainee reports come from immigration detention centres, where the deplorable conditions – overcrowding, lack of sanitary facilities, malnutrition – have created a dangerous atmosphere that results in physical harm and death for some detainees.[599] There have been reports of abuse by guards and the death of a girl caused by the negligence of the guards.[600]

Violence against refugee women

Refugee women are at greater risk of sexual and gender based violence. By not legally recognising refugees, the State is complicit in this violence. Barriers to seeking help include the need for personal documentation when visiting hospitals and police – without this the women may be arrested.[601] UNHCR has reported that in 2009, 236 cases of sexual and gender based violence were reported.[602]

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594 Human Rights Watch, "Indonesia/Malaysia: New Pact Shortchanges Domestic Workers", 31 May 2011.

595 Human Rights Watch, "Indonesia/Malaysia: Proposed Labor Pact Lacks Key Reforms", 4 March 2010.

596 CEDAW Committee Concluding Comments: Malaysia, 2006, paragraph 26.

597 Letter to the Editor by the Joint Action Group for Gender Equality, "Police sexually harassed PSM women detainees", *Malaysiakini*, 24 September 2011.

598 "Malaysia Police Slammed for Cattle-branding women", *The Jakarta Post*, 4 June 2011.

599 SUARAM, "Malaysia Human Rights Report: Civil & Political Rights 2009", 2010, pp144-48.

600 SUARAM, "Malaysia Human Rights Report: Civil & Political Rights 2009", 2010, pp145-46.

601 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p45.

602 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p45.

Excerpt from newspaper article:

The West Australian, **''Hard life for refugees in Malaysia'', 17 May 2011**

Tan Tian Maw sits in an office on the outskirts of Kuala Lumpur, hands trembling in her lap, and describes how she was raped by two Malaysian policemen...

"She hasn't had any trauma counselling," her lawyer, Latheefa Koya, explains. "No one has really helped her."...

The Burmese mother of two says she was riding a friend's motorbike in November last year when she was pulled over by two police officers who asked her for the bike's licence.

When she couldn't produce it, she says she was dragged into the patrol car where the pair took turns raping her. Doctors confirmed an assault had taken place.

The UNHCR helped file a complaint with the Malaysian police, who initially claimed the rapists were fake police officers. They then said the patrol car was stolen.

Later, they conceded the pair were real officers but could not be identified and repeatedly questioned her about the ownership of the bike.

"No investigation has taken place," Ms Koya says. "Nothing will happen. And this is not unusual. This is standard for refugees. There is a lot of police abuse, even with Malaysians but worse with refugees. We're talking extortion, deaths in custody, shootings. They call it 'extrajudicial killings' because they're not being killed as part of a death sentence. They are shot in the course of arrest or something like that."

Human Rights Watch has stated that the "Malaysian Immigration Act 1959/1963 **fails to differentiate between refugees, asylum seekers, trafficking victims, and undocumented migrants**. While other laws and policies provide some protections for some groups, the government does not effectively or consistently screen alleged immigration offenders; resulting in **many ostensibly protected individuals end up arrested, detained, and deported**."[603]

There have been numerous cases documented of refugees and asylum seekers being placed in detention. In 2007, Amnesty International highlighted the detention of 217 Chin refugees in Kuala Lumpur. This number included five pregnant women and ten children.[604]

In June 2010, the UN Working Group on Arbitrary Detention undertook a mission to Malaysia. The resultant report states:

> "The Working Group believes that detention of migrants should be decided upon by a court of law, on a case-by-case basis, and pursuant to clearly and exhaustively defined criteria in legislation under which detention may be used. The Government should not use immigration detention for asylum-seekers, refugees and vulnerable groups of migrants, including unaccompanied minors, families with minor children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, or people with serious and/or chronic physical or mental health problems."[605]

SUHAKAM noted in its 2010 Annual Report that "[a]sylum seekers and refugees continue to be arrested, detained and sentenced for immigration offences – even including those who have documents from the United Nations High Commissioner for Refugees (UNHCR)."[606]

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603 Human Rights Watch, *World Report 2011: Events of 2010*, p332.

604 Amnesty International, "Malaysia: UA 162/07 Fear of forcible return/ill-treatment", 27 June 2007.

605 Report of the Working Group on Arbitrary Detention: Mission to Malaysia, A/HRC/16/47/Add.2 , 8 February 2011, paragraph 72.

606 *SUHAKAM Annual Report 2010*, p18.

The SUHAKAM Annual Report goes on to note that "the Commission reiterated [to the government] that Malaysia, as a member of the United Nations and the Human Rights Council, is obligated to protect and assist asylum seekers and refugees, even though it has not acceded to the relevant international conventions."[607] SUHAKAM has recommended that the government ratify the UN Refugee Convention.

The Malaysian government rejected all of the recommendations from the Universal Periodic Review process in 2009 which urged Malaysia to consider ratifying the Refugee Convention.

Conditions in detention centres have been reported to be dangerous by the Malaysian Human Rights Commission, SUHAKAM. The SUHAKAM Annual Report of 2009 stated that it had "received complaints about deaths linked to unhygienic conditions in Immigration detention centres. SUHAKAM has recommended that sanitary facilities be upgraded, with special attention given to food preparation since contamination was the likely cause of death in the cases reported."[608]

SUHAKAM also recommended that "Nutritious food be prepared according to dietary recommendations and for special needs of inmates like the elderly, children and pregnant women", indicating that pregnant women and children were not given food and care according to their needs.[609]

Case studies

The following case studies highlight some of the experiences of refugee women in Malaysia.

Case study: Mya's story[610]

I was five months pregnant [and I have] two children – three years old and six years old... On the 10th of May 2007 – a week after we moved into the flat – around midnight, we heard men banging and kicking our door... There were ten of them [RELA officers]... The officers took all our UNHCR cards away. We were allowed back into our flat and they told us to pack our basic necessities... When we got there [to the carpark], many Indonesians were already placed into a waiting lorry. We were told to wait for the lorry to return.

The lorry came back after an hour to fetch us...the journey took less than 30 minutes. Finally we arrived at a Rela office... [T]hey told us that we were going to be sent to a detention camp... [W]e were marched to the lorry... My bladder was going to burst as my baby was pressing on it in my womb... [One of the officers said, pointing at the floor] "if she wants to urinate, she'll have to do it here, in the truck"... He laughed at me. [I had to] urinate into [a] bag in the truck in the middle of everyone. The humiliation. I cried while I was doing that. I was ashamed. I felt humiliated that all those men were watching me urinate.

At about 3am, we reached Semenyih detention camp... Our belongings and money were taken away from us. I felt like a prisoner. I was a prisoner! The men and women were separated... There were neither beds nor furniture and everyone sleeps on the floor... they ration the water...

I was there for 18 days... I am an innocent person running for my life. It is the same with all of us here. We are all running for our lives...

[T]here was not enough food for my children and they were served with the same malnutritious meals as adults...

For the women it was very bad. One thing visitors would bring for us women detainees was sanitary napkins. If you don't have visitors, you don't have sanitary napkins... It was so demeaning, so unnecessarily demeaning to women.

607 *SUHAKAM Annual Report 2010*, p18.

608 *SUHAKAM Annual Report 2009*, p32.

609 *SUHAKAM Annual Report 2009*, p34.

610 This is an excerpt from "Mya's Story" in Tenaganita, *The Revolving Door: Modern Day Slavery – Refugees*, 2008, pp29 – 34.

Case Study: Mariah's Story[611]

Mariah was taken from her apartment late one night by officers in a police van and taken to Jinjang police station, along with other Burmese nationals. After processing at the police station the men and women were loaded into two lorries.

"Suddenly, the two male officers came towards us and smiled. They lifted our skirts and touched our legs. We struggled, and tried to move our legs, but they grabbed hold of our legs and continued to touch our legs up to our thighs. One of them lifted my dress and put his hand unto my brassiere and started to rub and fondle me. 'Please stop, please stop,' we pleaded with them."

The women were then taken to another police station where the detainees were given inadequate food. "We were not given any drinking water. Our only source of water – for washing and drinking came from the toilet and shower. Twice daily, from 5am to 7am and from 1pm to 3pm, the water would be turned on."

Mariah was then taken to Lenggeng Detention Camp, where there were insect infestations and insufficient food for all the detainees. Sanitary napkins weren't provided to the women.

Mariah and other women were then taken to the Thai border in an unmarked van and taken to the jungle where they were repeatedly raped.

Case Study: Moe's Story[612]

Moe is a refugee. She and her siblings along with their mother had come to Malaysia many years ago in search of their father whom they had lost contact with. This search eventually amounted to nothing but Moe and her family decided to remain in Malaysia nonetheless. She attended school in Malaysia up until secondary school when she was asked to quit due to her being undocumented.

Moe's marriage to her husband was arranged by a mutual friend and her family. She has been married to him for twelve years and has two children with him. Prior to their marriage, her husband would often come by and bring fruits and jewellery.

The abuse started right after they were married. During the first year of the marriage, her husband kept her confined in the house. Moe's husband is addicted to alcohol. Her husband had once broken her nose when he hit her with a plastic pipe while she was pregnant. On another occasion, when Moe left a spoon on the table causing ants to gather, her husband hit her and her three month old daughter in the head causing the child to require stitches on her forehead. Moe's husband also abused her with various objects such as belts, bicycle pumps, knives, chairs, broomsticks and more. He also verbally abused her often using vulgar words and this would often be triggered by something very insignificant, like having an item in the house out of its proper place.

Two years after they were married, Moe made a police report against her husband. The police initially locked him up for one month but had eventually released him as it was deemed then that because he was stateless, no further action could be taken. As a result, Moe saw that she had little choice but to go back to her husband.

One day, Moe's husband found strands of hairs in the bathroom. This triggered him to start shouting at her. Before he could hit her, Moe left her house early on the pretext of picking up the children from school. When she got home, her husband resumed to abuse her. He began shouting and screaming, and also began to kick her hard on her chest until she was bruised. The next day, Moe called the UNHCR for help. They told her that she could go to a women's shelter with her children.

Several days after Moe arrived at the shelter, she was taken to a police station to file a police report. The police told her that they would not be able to help her or take any action against her husband since he is stateless.

While Moe was staying at the shelter, her husband continued to threaten and harass her. He has also shown up at the shelter several times to threaten Moe and he has also brought several other husbands to the location. He has even issued threats towards UNHCR, accusing them of breaking up the family.

Moe is still staying at the shelter. She and her children are waiting to be resettled to a third country by UNHCR. She is unable to go out since her husband is constantly looking for her. She is also unable to receive assistance from the police or any other government authorities.

611 This is an excerpt from "Mariah's Story" in Tenaganita, *The Revolving Door: Modern Day Slavery – Refugees*, 2008, pp45–60.

612 Moe's story is based on the experiences of a refugee woman who sought help from a women's refuge in Malaysia.

Recommendations to the Malaysian Government regarding the CEDAW Committee's General Recommendation No. 19

- Put in place mechanisms to monitor not only the prevalence of gender based violence but to analyse emerging trends and areas of concern. Make this information publicly available.
- Amend the Penal Code to include domestic violence as a separate criminal offence.
- Expand the Domestic Violence Act to include violence perpetrated in unmarried partnerships, including same-sex partnerships.
- Review all of the provisions of the Domestic Violence Act and the Penal Code, Criminal Procedure Code and Evidence Act to ensure that these laws protect women from violence and taking into account complexities of domestic violence, including its sustained and repetitive nature.
- Amend the Penal Code to criminalise marital rape:
    - Amend Subsection 375A of the Penal Code to ensure that it is the act of rape within marriage which is criminalised, not merely the potential or actual physical harm caused, and
    - Remove the exception to Subsection 375A of the Penal Code, which explicitly states that sexual intercourse within marriage can never be considered rape.
- Amend the Penal Code to criminalise rape with an object as rape, not as an "unnatural offence". This will mean moving this provision from Section 377CA to Section 375 of the Penal Code.
- Enact a separate, comprehensive sexual harassment law that establishes an independent tribunal to assess claims and provide women redress.
- Review all aspects of the investigation process for cases of gender based violence to ensure speedy redress and gender sensitive responses to these cases, especially for cases of domestic violence and rape. Available provisions in the Penal Code that address psychological abuse must be utilised with immediate effect, with the necessary training and information of service providers.
- Ensure that the police do away completely with the face to face identification parade and use a one-way mirror as a matter of practice in all cases involving rape and sexual assault.
- Review the rules of evidence in court to remove any loopholes and provisions that continue to cause trauma to survivors who testify especially involving the cross examination of rape survivors' past sexual history, disclosure of survivors' identity and the need for burden of proof and corroboration in rape cases.
- Allocations of resources for accessible victim support, restitution and compensation must be made available in the criminal justice system.
- Allocations are needed in the State's annual budget to ensure that there are enough resources for all the agencies involved in combating violence against women. These include budgets for more staff, setting up of shelters and a fund for women and children in crises.
- Provide shelters specifically designated for survivors of domestic violence and sexual assault equipped with trained personnel who can counsel and offer appropriate care.
- Implement compulsory ongoing training programmes for all public officers (including the police, welfare officers, medical personnel and the judiciary) on issues of violence against women. Training modules on gender, violence against women and rights of migrant workers developed in consultation with the relevant NGOs should be included as part of the curriculum in police training schools.

- Develop a more concerted and consistent approach to public education on issues of violence against women. Media campaigns are needed to increase awareness of women's rights and to bring about a mindset change on issues of domestic violence, rape, sexual harassment and rights of migrant domestic workers.

- Amend laws, policies and regulations that leave migrant domestic workers vulnerable to abuse. This includes removing the imposition of special visas (which cost RM100 per month) for those seeking legal redress and awaiting completion of court proceedings. Amend the recruitment policy which is based on a single entry policy as it deters migrant domestic workers from seeking redress for fear of deportation.

- All migrant domestic workers should on arrival be given an orientation on their rights and provided emergency telephone numbers and other resources for dealing with crises and abuse.

- Develop a multi-agency approach to handle all cases of abuse in cooperation with the police, welfare, the courts, immigration, hospitals and NGOs. The existing multi-agency networks should be enhanced and broadened to encompass all forms of violence against women.

- Promote and support education regarding the human rights of women in detention, including public education about the conditions and gender sensitive training for lawyers, judges, law enforcement officers and personnel in detention centres.

- Investigate and prosecute persons accused of violating the human rights of women in detention.

- Provide effective redress for violence perpetrated by police personnel, religious authorities, family members and any other institutions or members of the public against lesbians, bisexual women and transgender people.

- Enforce the law against all State and non-State actors for vigilantism against those whose sexuality or gender identity is perceived to not conform with heteronormativity.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 26

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 26: WOMEN MIGRANT WORKERS[613]

The CEDAW Committee released its 26th General Recommendation on women migrant workers in 2008. It recognises that the "position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof."[614] In Malaysia, migrant domestic workers are women. These women experience a violation of their rights in numerous ways. "While States are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to. That includes the promotion of safe migration procedures and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle."[615]

These human rights are articulated in General Recommendation No. 26: "All women migrant workers are entitled to the protection of their human rights, which include the right to life, the right to personal liberty and security, the right not to be tortured, the right to be free of degrading and inhumane treatment, the right to be free from discrimination on the basis of sex, race, ethnicity, cultural particularities, nationality, language, religion or other status, the right to be free from poverty, the right to an adequate standard of living, the right to equality before the law and the right to benefit from the due processes of the law."[616]

Key issues in this chapter:

- Malaysia's Employment Act 1955 **explicitly denies domestic workers the same rights as other workers**. Domestic workers are not entitled to maternity protection, rest days or holidays. Hours of work and conditions of service are also not protected. There is no minimum wage.
- Many domestic workers in Malaysia are from Indonesia. In May 2011, an amended memorandum of understanding (MoU) was signed between Malaysia and Indonesia. The MoU is intended to clarify rights and conditions of work for domestic workers. In this MoU, it was reported that domestic workers should have one day off per week, or be paid one and a half days' wages in lieu of a day off. Domestic workers will be permitted to keep possession of their own passports however employers may take them for "safekeeping".[617] Employers must also pay wages into the domestic worker's bank account however cash payments are still permitted. **In every so-called ''protection measure'' for domestic workers in the MoU, there seems to be a way out of each measure, leaving the domestic worker vulnerable to abuse and exploitation**.
- There is **no standard contract for migrant domestic workers** and no monitoring mechanisms to reign in errant agents and employers.
- The isolating nature of domestic work and the lack of legal protection leaves domestic workers **vulnerable to abuse**.

613 The text of the CEDAW Committee General Recommendation No. 26 is available here: www2.ohchr.org/english/bodies/cedaw/comments.htm

614 CEDAW Committee General Recommendation No. 26, paragraph 5.

615 CEDAW Committee General Recommendation No. 26, paragraph 3.

616 CEDAW Committee General Recommendation No. 26, paragraph 6.

617 "New MoU on maids inked", *The Star*, 31 May 2011.

Migrant domestic workers in Malaysia

There are about two million registered migrant workers in Malaysia.[618] Of this number, it has been approximated that there are around 300,000 registered migrant domestic workers in Malaysia in 250,000 households.[619] Ninety per cent are from Indonesia while the rest are from the Philippines, Thailand, Myanmar, Vietnam and Cambodia.[620] Some NGOs estimate that there may be a further 300,000 undocumented migrant domestic workers.[621]

Malaysia is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Many domestic workers come to Malaysia from poorer countries in order for Malaysian women to be able to go out to work. It is deeply unfortunate that Malaysia is so heavily reliant on migrant domestic workers. Although their work enables Malaysian women to go out to work rather than stay at home to look after children, and although it does provide domestic workers a source of income, the country's reliance on domestic workers is problematic for several reasons:

- Employing women domestic workers from poorer countries perpetuates the stereotype of domestic chores being 'women's work';
- Employing women domestic workers from poorer countries reinforces class and race hierarchies which are prevalent in the country, and means that some women are valued over others; and
- The constant demand for domestic workers also puts a cap on the potential of women from poorer countries, as some may see working as a domestic worker to be their only employment option and forego further education to come to Malaysia to work.

Domestic workers **regularly have fundamental rights violated**, including:

- Article 11(1)(c) of CEDAW concerning the right to job security and all benefits and conditions of service.
- Article 11(1)(e) of CEDAW concerning the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.
- Article 11(1)(f) of CEDAW relating to the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Domestic workers in Malaysia are discriminated against in many ways. Domestic workers are not recognised as workers under Malaysian laws, they are not afforded the same labour protections as other workers and they are at risk of a range of rights violations and abuses owing to this lack of protection.[622]

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618 CARAM Asia, *Remittances: Impact on Migrant Workers' Quality of Life*, October 2010, p35.

619 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p38.

620 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p38.

621 US Department of State, *Trafficking in Persons Report 2011*, p244.

622 The 2011 Human Rights Watch *World Report 2011: Events of 2010* has highlighted this lack of protection on p332: "Despite announcements to the contrary, some 300,000 migrant domestic workers in Malaysia still lack important protections. Domestic workers are excluded from key protections under Malaysia's Employment Act, including limits on working hours, public holidays, a mandatory day off per week, annual and sick leave, maternity protections, and fair termination of contracts."

Case study from a Human Rights Watch report:

"I wanted to make a new life and try my luck so that my kids would have a different life than their mother... But I was mistreated by my employers. I began work at 5 a.m. and sometimes finished around 2 or 3 a.m. I never got a day off. The door was always locked, I could never go out alone. I slept in the dining room.

"My full salary was deducted [to pay initial recruitment fees] for six and a half months. If I didn't finish [a task quickly], my employer would hit me...she usually shouted and screamed at me. Once when I was hanging clothes, I had a black eye and my neighbor asked me what happened. My employer had beaten me. That evening the police came and arrested my employers."

As told by an Indonesian domestic worker, Kuala Lumpur, February 2010.[623]

Lack of protection from the State

General Recommendation No. 26 of the CEDAW Committee clarifies the responsibilities of destination countries for women migrant workers: "States parties should ensure that constitutional and civil law and labour codes provide to women migrant workers the same rights and protection that are extended to all workers in the country, including the right to organize and freely associate."[624]

Employment laws do not protect domestic workers' rights

Malaysia's Employment Act 1955 does not afford domestic workers the same rights as other workers. The Employment Act contains labour protections concerning leave and entitlements however, the First Schedule of the Employment Act specifically excludes domestic workers from being covered by the following provisions:

- Maternity protections, including leave and allowance entitlements,[625]
- One rest day per week,[626]
- Provisions limiting hours of work, including specifying that employees should not work more than five consecutive hours without a period of leisure of not less than thirty minutes and employees should not work for more than 48 hours in one week,[627]
- Paid public holidays,[628]
- Annual leave entitlements,[629]
- Sick leave,[630]
- Termination, lay-off and retirement benefits.[631]

Notice of contract termination for employees under the Employment Act takes into account the length of time in service and can extend from four to eight weeks.[632] Domestic workers are excluded from these notice periods and for them, there is a blanket 14 day period of notice of termination, regardless of length of employment.[633]

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623 Human Rights Watch, *Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East*, 2010, p1.

624 CEDAW Committee General Recommendation No. 26, paragraph 26(b).

625 Maternity protections are covered under Part IX of the Employment Act 1955. Domestic workers are explicitly excluded.

626 Rest days are covered in Section 59, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

627 Hours of work are covered in Section 60A, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

628 Holidays are covered in Section 60D, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

629 Annual leave is covered in Section 60E, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

630 Sick leave is covered in Section 60F, Part XII of the Employment Act 1955. Domestic workers are explicitly excluded.

631 Termination, lay-off and retirement benefits are covered under Part XIIA of the Employment Act 1955. Domestic workers are explicitly excluded.

632 Length of notice required for terminations of contracts is covered under Section 12 of the Employment Act 1955.

633 Section 57 of the Employment Act has a separate section outlining the length of notice to terminate a contract specifically for "domestic servants": *Subject to any express provision to the contrary contained therein, a contract to employ and to serve as a domestic servant may be terminated either by the person employing the domestic servant or by the domestic servant giving the other party fourteen days' notice of his intention to terminate the contract, or by the paying of an indemnity equivalent to the wages which the domestic servant would have earned in fourteen days: Provided that any such contract may be terminated by either party without notice and without the paying of an indemnity on the ground of conduct by the other party inconsistent with the terms and conditions of the contract.*

Malaysia's Workmen's Compensation Act 1952 also excludes "domestic servants" from the list of occupations which fall under the category "workman", therefore leaving domestic workers without recourse to compensation for injury suffered in the course of their employment.

As Tenaganita's Executive Director Dr. Irene Fernandez has commented, "The Employment Act does not recognise her as a worker but as a servant. This non-recognition opens the gate to exploitation."[634]

The current situation in Malaysia for migrant domestic workers is in direct conflict with the CEDAW Committee's General Recommendation No. 26, which states that,

> "States parties should ensure that constitutional and civil law and labour codes provide to women migrant workers the same rights and protection that are extended to all workers in the country, including the right to organize and freely associate. They should ensure that contracts for women migrant workers are legally valid. In particular, they should ensure that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations."[635]

Pressure has been exerted on the government to include domestic workers in labour laws to no avail

Malaysia's national human rights institution, SUHAKAM, has recommended to the Malaysian government that it "amend labour laws to include 'domestic work' under legal coverage."[636]

The Malaysian Bar Council has also called for the codification through legislation of domestic workers' rights "as the imposition of a statutory obligation will have far greater weight, and will allow the Ministry of Human Resources to enforce the provisions and prosecute those who breach them. Codification will also make these provisions applicable to all domestic workers, both local and foreign. Furthermore, without statutory provisions, there is no threat of strong sanctions and harsh penalties for offending employers, and instances of exploitation will thus continue unabated."[637]

The Malaysian government has stated in the international arena that domestic workers should not be afforded labour rights

Prior to the 2011 International Labour Conference, governments were invited to send comments about the proposed international standards for decent work for domestic workers. These comments were compiled into a report. In this publication, the Malaysian government is reported to have stated that,

> "Domestic workers cannot be equated to other workers in general,"[638]
> and,
> "Domestic work is not seen as ordinary employment. The rights of householders should also be considered."[639]

The Malaysian government's statements throughout the report for the International Labour Conference consistently reflect its perception that domestic workers should not be afforded the same rights as other workers.

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634 "Treat domestic workers right - or they won't come", Letter to the Editor from Dr Irene Fernandez, *Malaysiakini*, 7 September 2011.

635 CEDAW Committee General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/W.P.1/R, paragraph 26(b).

636 *SUHAKAM Annual Report 2010*, p17.

637 Lim Chee Wee, President, Malaysian Bar, "Press Release: The Time is Ripe for Fair and Equal Rights for Domestic Workers", 31 May 2011.

638 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p40.

639 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p6.

The Malaysian government was reported to have:

- Requested that domestic workers be ineligible for maternity benefits afforded to other workers,[640]
- Recommended that the text of the international standards "should specify that domestic workers may ask their employers to hold their travel and identity documents for safe-keeping,"[641]
- Recommended that conditions of service remain as per individual contracts,[642] and
- Recommended that "Employment agencies should be allowed to deduct fees from the remuneration of domestic workers, provided that it is done in a fair and equitable manner that is agreeable to both parties."[643]

In June 2011, a Convention Concerning Decent Work for Domestic Workers and a Recommendation Concerning Decent Work for Domestic Workers was adopted at the International Labour Conference. Malaysia not surprisingly **abstained** during the vote for both the convention and the recommendation.

Vulnerability of domestic workers to abuse

The work of domestic workers is usually isolating. This isolation means that the women are trapped in homes and are vulnerable to abuse.

The CEDAW Committee's General Recommendation No. 26 highlights the fact that migrant domestic workers are vulnerable to abuse.[644] The Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families also highlights the specific vulnerabilities of migrant domestic workers:

> "At the heart of their vulnerability is **isolation and dependence**, which can include the following elements: the isolation of life in a foreign land and often in a foreign language, far away from family; lack of basic support systems and unfamiliarity with the culture and national labour and migration laws; and dependence on the job and employer because of migration-related debt, legal status, practices of employers restricting their freedom to leave the workplace, the simple fact that the migrants' workplace may also be their only shelter and the reliance of family members back home on remittances sent back from the domestic work. Women migrant domestic workers face additional risks related to their gender, including gender-based violence. These risks and vulnerabilities are further aggravated for migrant domestic workers who are non-documented or in an irregular situation, not least because they often risk deportation if they contact State authorities to seek protection from an abusive employer."[645]

According to Malaysian officials, there are 50 cases per year in which migrant domestic workers are abused.[646] This figure contrasts with the reports from the Indonesian Embassy in Malaysia that 100 abused domestic workers are given shelter there every month.[647] Migrant Care reported that in 2007, 46 Indonesian domestic workers had died without an explanation from police as to the cause of death.[648]

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640 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p47.

641 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p35.

642 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p40.

643 International Labour Conference, 100th Session 2011, "Decent Work for Domestic Workers: Fourth Item on the Agenda" (ILC.100/IV/2A), p51.

644 CEDAW Committee General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/W.P.1/R, paragraph 20.

645 Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on migrant domestic workers, CMW/C/GC/1, paragraph 7.

646 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p38.

647 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p39.

648 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p39.

There have been some high profile cases of deaths of domestic workers at the hands of their employers. In November 2008, the employer responsible for the shocking injuries to Nirmala Bonat was sentenced to 18 years' jail.[649] In October 2009, domestic worker Mautik Hani died from injuries and her employers were arrested.[650] In June 2011, Isti Komariyah died and it was reported that she had bruises and scars and was emaciated.[651] Her employers were charged with her murder.[652]

The government has since 2009 promoted *Talian Nur* as a hotline available for abused migrant domestic workers. This hotline was first established in 2007 and was initially intended for the reporting of all forms of abuse and the seeking of general advice and assistance.[653]

The risk of domestic worker abuse is heightened by immigration policies in which the visa is linked to the employer. Human Rights Watch has noted that,

> "As the immigration sponsor, the employer can typically have the domestic worker repatriated at will, provide or withhold consent on whether she can change jobs... In practice, termination of employment often means the worker is obliged to leave the country immediately with no opportunity to seek redress for abuses or settlement of unpaid wages."[654]

In 2011, amendments to the Employment Act 1955 introduced a new section into the law, which makes the termination of the employment of a domestic worker very easy and potentially open to abuse.[655]

Restrictive employment contracts

Owing to the fact that work permits are linked to particular employers, if a work permit is revoked, the migrant worker must leave the country or face becoming an undocumented 'illegal' migrant. Employers must renew employment passes on a yearly basis. If the employer fails to renew the employment pass then the domestic worker becomes undocumented and is then at risk of arrest, fines or deportation.

Owing to the emphasis on contracts rather than legislative protections, many domestic workers are exploited and can be made to work up to 18 hours a day, seven days a week.[656]

Health checks, pregnancy and marriage ban

Migrant domestic workers are subject to many restrictions which are stipulated in their employment contracts. They are subjected to health checks, they are not permitted to marry Malaysians and should they become pregnant their work visas are cancelled.

Employment contracts which permit retrenchment on the basis of pregnancy contravene Article 11(2) of CEDAW.

The CEDAW Committee's General Recommendation No. 26 explicitly calls on States parties to "lift bans that prohibit women migrant workers from getting married to nationals or permanent residents, becoming pregnant or securing independent housing (article 2 (f))"[657]

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649 "Nirmala Bonat case: Housewife found guilty, 18 years jail", *The Star*, 27 November 2008.

650 "It's murder: Indonesian maid dies of alleged abuse (Updated)", *The Star*, 26 October 2009.

651 "Maid may have been starved to death", *The Star*, 9 June 2011.

652 "Couple charged with maid's murder", *New Straits Times*, 16 June 2011.

653 It must be noted that there is a significant concern with *Talian Nur* as the phone number appears on the telephone bill, leaving the caller vulnerable if it is discovered that she has called a helpline.

654 Human Rights Watch, *Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East*, 2010, p9.

655 Section 57(b) of the *Employment (Amendment) Act 2011*: *(1) If the service of a foreign domestic servant is terminated— (a) by the employer; (b) by the foreign domestic servant; (c) upon the expiry of the employment pass issued by the Immigration Department of Malaysia to the foreign domestic servant; or (d) by the repatriation or deportation of the foreign domestic servant, the employer shall, within thirty days of the termination of service, inform the Director General of the termination in a manner as may be determined by the Director General. (2) For the purpose of paragraph (1)(b), the termination of service by a foreign domestic servant includes the act of the foreign domestic servant absconding from his place of employment.*

656 Human Rights Watch, "Indonesia/Malaysia: End Wage Exploitation of Domestic Workers: Ensure Minimum Pay in Labor Pact, Monitor Recruitment Fees", 10 May 2010.

657 CEDAW Committee General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/W.P.1/R, paragraph 26(a).

After health checks are carried out, according to the 2010 UNGASS report on Malaysia, "there is no referral system for migrants who are HIV positive or considered unfit, which hinders potential follow up, care and treatment in migrants' country of origin."[658]

No day off

Migrant domestic workers are not afforded any days off under employment laws in Malaysia.

In Singapore, from January 2013, a change in the law will see migrant domestic workers provided with a day off per week. Singaporean Minister of State for Manpower, Tan Chuan-Jin said that a day of rest per week is a basic right. He said, "More than physical rest, it is an important mental and emotional break from work."[659]

Recruitment fees deducted from domestic workers' wages

Human Rights Watch has noted that, "Domestic workers must typically turn over the first six to seven months of their salary to repay exorbitant recruitment fees charged by private labor brokers for placing them in their jobs. When salary deductions to repay recruitment fees are taken into account, the Indonesian domestic workers only earn an average of 300 to 450 ringgit (USD89-133) a month over a two-year contract."[660]

Domestic work equated to trafficking

The latest US Department of State report on trafficking noted that,

> "Domestic workers throughout Malaysia are subject to practices indicative of trafficking such as restrictions on movement, deceit and fraud in wages, passport confiscation, or debt bondage at the hands of agents or employers. Passport confiscation is widespread, and there were reports that employers also opened joint bank accounts as a form of control on workers... Malaysian employers reportedly did not pay their foreign domestic workers three to six months' wages in order to recoup recruitment agency fees and other debt-bonds charged to employers."[661]

Passports

Employers keeping passports is common in Malaysia and thought to stop the 'problem' of 'runaway' domestic workers. There is no provision in the MoU between Indonesia and Malaysia which categorically bans the keeping of passports by employers. The CEDAW Committee's General Recommendation No. 26 explicitly calls on States parties to "ensure that employers and recruiters do not confiscate or destroy travel or identity documents belonging to women migrants."[662]

No minimum wage

There is no minimum wage in Malaysia. Monthly wages for migrant domestic workers have been known to be as low as RM350.[663]

There is a clear wage differential between domestic workers from different countries, based on the MoUs between these countries and Malaysia. Indonesian domestic workers, who are the biggest in number, receive very low wages.

Memorandum of Understanding signed in 2011 between Malaysia and Indonesia does not protect domestic workers

In 2006, an MoU was signed between Malaysia and Indonesia regarding domestic workers. In 2009, Indonesia suspended sending its domestic workers to Malaysia after cases of abuse of Indonesian domestic workers surfaced.

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658 *UNGASS Country Progress Report – Malaysia*, March 2010, p54 (UNGASS is the acronym for the United Nations General Assembly Special Session on HIV/AIDS).

659 "Weekly day off for maids a must from next year", *The Straits Times*, 6 March 2012.

660 "Indonesia/Malaysia: End Wage Exploitation of Domestic Workers: Ensure Minimum Pay in Labor Pact, Monitor Recruitment Fees", 10 May 2010.

661 US Department of State, *Trafficking in Persons Report 2011*, p243.

662 CEDAW Committee General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/W.P.1/R, paragraph 26(d).

663 Cecilia Ng, *Gender and Rights: Analysis for Action*, Good Governance and Gender Equality Society, Penang (3Gs) and Women's Development Research Centre (KANITA) Universiti Sains Malaysia, 2011, p37.

In May 2011, an amended MoU was signed between Malaysia and Indonesia. The newspapers reported that in this memorandum,

- domestic workers should have one day off per week, although it is possible for the domestic worker to be paid one and a half days' wages in lieu of a day off;
- domestic workers will be permitted to hold on to their own passports, however employers may have them in their possession for "safekeeping"; and
- employers must also pay wages into the domestic worker's bank account however cash payments are still permitted.[664]

In every so-called 'protection measure' for domestic workers there seems to be an 'out' clause for the employers with regard to each measure.

Human Rights Watch has noted that, "bilateral labor agreements normally represent an improvement on the status quo but, like standard contracts, offer fewer and weaker protections than those in national labor laws, and have unclear enforcement mechanisms and penalties."[665]

Domestic workers from Cambodia

After the Indonesian government stopped sending women to Malaysia to work as domestic workers in 2009 after a spate of highly publicised cases of abuse, many women from Cambodia came instead. Since 2008 between 40,000 and 50,000 women from Cambodia came to Malaysia to work as domestic workers.[666]

Many Cambodian domestic workers experienced abuse before they left Cambodia and many were recruited even though they were below 18 years of age. Upon arrival, many also experienced abuse at the hands of their Malaysian employers. A report by Human Rights Watch documented some of this abuse and noted that,

> "Onerous recruitment fees and deceptive lending practices set the stage for exploitation. Recruitment agents target the poorest families and sometimes provide upfront loans of cash and sacks of rice as incentives for migrating. Migrants must repay these loans, along with exorbitant recruitment and training fees, by handing over the first six or seven months of their salary once they begin work in Malaysia. This arrangement makes it difficult for a worker to leave her workplace in Malaysia if she encounters abuse."[667]

The following case studies from an NGO working with women survivors of violence in Kuala Lumpur highlight some of the abuse faced by two Cambodian domestic workers in Malaysia.

Case study: *M*

M comes from a farming family in Cambodia. She has six siblings, and she is the youngest. She attended school for seven years.

In 2009, one of her friends wanted to come to work in Malaysia. She invited *M* to come with her. *M* asked her father permission, but her father initially refused. After much persuasion, her father agreed that she could come to work in Malaysia.

An agent took both of them and their fathers to a training school in Phnom Penh. There were many young girls in the school. The teacher said all the girls were waiting their turn to go to work in Malaysia.

M stayed at the school for five months. During her stay, she needed to do housework, including cooking and cleaning, and she was not allow to go out. She was never paid for her work in the school.

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664 "New MoU on maids inked", *The Star*, 31 May 2011.

665 Human Rights Watch, *Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East*, 2010, p13.

666 "Cambodian maids made to suffer by recruiters, says report", *The Star*, 7 November 2011.

667 Human Rights Watch, *"They Deceived Us at Every Step": Abuse of Cambodian Domestic Workers Migrating to Malaysia*, 2011, p11.

The other girls at the school were about her age (14), the youngest was 12 years old.

After five months, the teacher informed *M* that she would be going to Malaysia soon. The teacher gave her a passport, but all the information in the passport was incorrect, except the photo. She told the teacher, "This is not my passport. Not my age, not my name." She was scolded by her teacher and was told that from now onwards, this would be her identity and to not create any problems.

M came to Malaysia in January 2011 with four other Cambodian girls. After arriving at the airport, they waited at the airport for few hours until the agent picked them up and drove them to an agency in Subang Jaya.

M worked with her employer for a year. Her employers deprived her of proper food, made her work from 5am until 11pm, and always scolded her, verbally abusing her.

M escaped the abusive situation and found another job in a restaurant and worked there undocumented for three months.

She told one of the customers (whom she trusted) her story, and he was concerned for safety. He helped her go to the Cambodian Embassy where she was able to receive help. Her plan is to go back to Cambodia and continue her studies.

Case study: *T*

T came to Malaysia from a fishing village in Cambodia. She has seven siblings, and she never went to school.

One of her relatives asked her father whether he wanted her to come to work in Malaysia. *T*'s father agreed to send her to work in Malaysia. According to *T*, she didn't want to work in Malaysia, but she felt that it was not right for a child to disagree with their parent and that it is the child's responsibility to take care of the parents and the family. She was 17 at this time.

According to *T*, many girls from her province had been asked to work in Malaysia. There are many agents who travel from village to village to get young girls to work overseas. According to *T*, for every girl the agents bring to Phnom Penh, the agent will be given RM500 or more. Some parents will get money from the agent. Her parent borrowed USD100 from the agent, which the agent was going to deduct from her monthly salary.

T was sent to a school in Phnom Penh. According to the teacher at the school, the school needs to change from one venue to another every month. There was no training or education conducted in the school. *T* stayed at the school for two weeks before she came to Malaysia.

T worked with her employer in Malaysia for 18 months. During this time she received no salary. The employer used a hanger to hit her on three occasions and *T* was always scolded and humiliated by her employer.

T escaped and found shelter at a Malaysian NGO.

T was terrified when she came to the shelter. She insisted that the social worker search her bag. She said, "Saya tak mau nanti orang sini kata saya ambil atau curi barang." The social worker refused to search her bag and tried to tell her that there is no need for anyone at the shelter to do a search. *T* begged the social worker to do a search, so the social worker had no choice but to glance in her bag. *T* looked relieved and relaxed considerably after that. The social worker felt that *T*'s employer or agent must have put a lot of fear in her, for her to show such behaviour.

T wants to go back to Cambodia, however she does not want to go back to her village. She is scared that her parents will scold her for coming back empty-handed and she is afraid that the agency will contact her family members and accuse her of running away with a man in order to 'taint' her character.

Domestic workers from the Philippines

The Philippines government has stipulated that its domestic workers in Malaysia must have a day off per week and receive a monthly minimum wage of over RM1,200,[668] which is much higher than the wages received by Indonesian and Cambodian workers.

In the employment contracts of domestic workers from the Philippines, it is specified that the domestic worker must have at least 8 hours of continuous rest per day and that the domestic workers' passport must remain in her possession.

2011 amendments to the Employment Act

In 2011, amendments to the Employment Act 1955 were brought before parliament. The Employment Amendment Bill 2011 states "In the case of a domestic servant, the employer shall, upon the request of his domestic servant, obtain approval from the Director General for the payment of wages of the domestic servant to be paid in legal tender or by cheque." The bill also states that "The request by the employee... may be withdrawn by the employee at any time, by notice in writing, to the employer."

These new provisions neglect to take into account that domestic workers may not have the bargaining power to negotiate the payment of wages into a bank account.

The amendments also do not mandate at least one rest day per week for domestic workers even though Human Resource Minister had acknowledged previously that domestic workers should be afforded a day off a week.

Perceptions of migrant domestic workers

A study was undertaken by CARAM Asia that compared the experiences of domestic workers in Hong Kong and Malaysia. Among the findings of the study, "it was found that the average Hong Kong employer viewed and treated their FDWs [foreign domestic workers] as workers, Malaysians were more likely to view them as 'servants'."[669]

In addition, "The higher compliance obligations and 'perhaps better public education' of Hong Kong employers is attributed to the fact that 47% of Hong Kong employers had some knowledge of employment laws. The alarmingly low number of Malaysian employers - 6% - with knowledge of the law indicated that employers were not adequately informed of FDWs legal rights and employers' responsibilities."[670]

Recommendations to the Malaysian Government regarding the CEDAW Committee's General Recommendation No. 26

- The government must recognise migrant domestic workers as workers in national legislation. Amend immigration and labour laws to provide comprehensive and equal labour protections for domestic workers that are extended to all workers, including regulations on hours of work, rest days, leave provisions, health and safety codes, compensation for workplace injuries and the right to organise and freely associate.
- Lift bans that prohibit women migrant workers from getting married to nationals or permanent residents or becoming pregnant.
- Investigate and prosecute criminal abuses against migrant domestic workers such as physical and sexual abuse, forced labour, and trafficking into domestic servitude, keeping the best interests of the victim as the key factor of the investigation.
- Ensure that migrant workers have the ability to access remedies when their rights are violated. Put in place easily accessible dispute resolution mechanisms, protecting both documented and undocumented women migrant workers from discrimination or sex-based exploitation and abuse.

668 CARAM Asia, *Remittances: Impact on Migrant Workers' Quality of Life*, October 2010, p36.

669 CARAM Asia, *Malaysia vs. Hong Kong: Employers Perception and Attitudes towards Foreign Domestic Workers*, 2010, p9.

670 CARAM Asia, *Malaysia vs. Hong Kong: Employers Perception and Attitudes towards Foreign Domestic Workers*, 2010, p9.

- Introduce flexibility into the process of changing employers without deportation in cases where workers complain of abuse. Migrant domestic workers must be afforded the right to work while seeking redress in the country.

- Ensure that women migrant workers have access to legal assistance and to the courts and regulatory systems charged with enforcing labour and employment laws, including through free legal aid.

- Prohibit salary deductions from workers' remuneration to repay recruitment fees.

- Ensure that employers and recruiters do not confiscate identity documents belonging to women migrants.

- Take steps to end the forced seclusion or locking in the homes of women migrant workers. Police officers should be trained to protect the rights of women migrant workers from such abuses.

- Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or is fired for complaining about abuse.

- Provide mandatory awareness-raising programmes concerning the rights of migrant women workers and gender sensitivity training for relevant public and private recruitment agencies and employers and relevant State employees, such as criminal justice officers, border police, immigration authorities, and social service and health-care providers.

- Adopt regulations and design monitoring systems to ensure that recruiting agents and employers respect the rights of all women migrant workers. The government should closely monitor recruiting agencies and prosecute them for acts of violence, coercion, deception or exploitation.

- Ensure that linguistically and culturally appropriate gender-sensitive services for women migrant workers are available, including language and skills training programmes, emergency shelters, health-care services, police services, recreational programmes and programmes designed especially for isolated women migrant workers, such as domestic workers and others secluded in the home, in addition to victims of domestic violence.

- Adopt policies and programmes with the aim of enabling women migrant workers to integrate into the new society. Such efforts should be respectful of the cultural identity of women migrant workers and protective of their human rights, in compliance with the Convention.

- Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 28

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 28: STATE OBLIGATION TO ELIMINATE ALL FORMS OF DISCRIMINATION AGAINST ALL WOMEN[671]

At the heart of all of our efforts for a just and equal society is to level the playing field so that no woman is left to face discrimination in her life. Everyone in Malaysia must be able to live without fear and prejudice. The core principles guiding these efforts must be the concepts of substantive equality, non-discrimination and state obligation, which make up the underlying framework of CEDAW. The strength of the CEDAW Convention is that it can be applied beyond literal readings of the text. The CEDAW Committee's General Recommendation No. 28 recognises that the Convention can be applied to areas of discrimination which had not been identified at the time of its drafting.[672]

General Recommendation No. 28 was produced to clarify the scope and meaning of Article 2 of the Convention, which provides the framework for incorporating the provisions of CEDAW into domestic legislation.

In Malaysia, the CEDAW framework of equality and non-discrimination has not been implemented into domestic legislation, which in turn has implicitly condoned the continued discrimination in many areas of women's lives. The effects of this absence of a legal framework of equality and non-discrimination have been examined in previous chapters, however in this chapter we are highlighting that the impact is greater on some areas of women's human rights. One such area is sexuality rights.

Sexuality rights is understood to mean the right to bodily integrity; the right to sexual behaviour and practices; and the right to sexual identity and relationships.[673] In the case of Malaysia, women who are transgender, or who identify as lesbian or bisexual, face discrimination in many areas of their lives, based on their non-adherence to gender stereotypes.

In expounding on Article 2 of CEDAW, General Recommendation No. 28 (paragraph 9) reinforces the obligation of States to take steps to eliminate stereotyped roles for men and women:

> "Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States parties protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women."

Although Malaysia has a history of sexual diversity[674] in recent years, tolerance and respect for such diversity has waned considerably in the public space, which in turn has perpetuated physical and emotional attacks on anyone who does not appear to 'fit' heteronormative stereotypes. The use of hate speech and humiliation tactics is further compounded by the existence of Penal Code provisions and municipal by-laws against 'indecent behaviour'. Since the adoption of laws on *Syariah* criminal offences in each state from the 1980s onwards, 'moral offences' have been criminalised.

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671 The text of General Recommendation No. 28 is available here: www2.ohchr.org/english/bodies/cedaw/comments.htm

672 Paragraph 8 of General Recommendation No. 28: "Article 2 calls on States parties to condemn discrimination against women in 'all its forms', while article 3 refers to appropriate measures that States parties are expected to take in 'all fields' to ensure the full development and advancement of women. Through these provisions, the Convention anticipates the emergence of new forms of discrimination that had not been identified at the time of its drafting."

673 tan beng hui, International Women's Rights Action Watch Asia Pacific, *IWRAW Asia Pacific Occasional Papers Series, No.11: Exploring the potential of the UN treaty body system in addressing sexuality rights*, 2007, p2.

674 Michael G. Peletz, *Gender Pluralism: Southeast Asia since Early Modern Times*, Routledge, New York and Oxford, 2009.

Transgender women, or transwomen – women who were born male but identify themselves as women, whether or not they have undergone sexual reassignment surgery – face discrimination in Malaysia. Transgender men, or transmen – men who were born female but identify themselves as men, whether or not they have undergone sexual reassignment surgery – also face discrimination in Malaysia.

Both transwomen and transmen face discrimination based on their gender, as they do not conform to traditional gender stereotypes. As Malaysian activist and researcher Angela M Kuga Thas has noted,

> "Both transgenders embody the female body and feminine mannerisms in one form or another, and as a result, are equally susceptible to the types of gender-based discrimination, abuse and violence – physically, emotionally and mentally – suffered and experienced by women and girls. Many have experienced violations of their human rights with no legal recourse, whether under civil or syariah laws. **They are deemed inferior to men in the same way as women are deemed inferior to men**."[675]

Women of diverse sexual orientations (who may identify themselves as lesbian or bisexual) are also discriminated against, as they too do not conform to gender stereotypes. Both civil and *Syariah* laws criminalise non-heteronormative sexual practices between consenting adults in Malaysia. In many Malaysian states, *musahaqah* (lesbianism) is deemed a crime.

It should be noted here that some people may not identify with either gender and express themselves neither as a woman nor a man. Furthermore, human sexuality and identity are fluid concepts and using particular terms to refer to groups of people has its limitations, however such terms are useful for the purposes of identifying and addressing the different types of discrimination that people face (see glossary for definitions of terms used in this chapter).

Throughout this report, discrimination based on sexual orientation and gender identity has been touched upon (see the chapters on Articles 1 – 4, 5, 10, 11, 12, 13, 15, 16 and General Recommendation No. 19). This chapter seeks to draw together the key concerns related to discrimination based on sexual orientation and gender identity.

Key concerns in this chapter:

- In Malaysia, the CEDAW framework of equality and non-discrimination has not been implemented into domestic legislation, which in turn has implicitly condoned the continued discrimination in many areas of women's lives. In the absence of a legal framework of equality and non-discrimination, the impact is greater on some areas of women's human rights. Women's sexuality rights, including the right to sexual behaviour and practices and the right to sexual identity and relationships, are stifled in Malaysia. Women who are transgender, or who identify as lesbian or bisexual, face discrimination in many areas of their lives, based on their non-adherence to gender stereotypes. For example:
    - Educational institutions **punish students for failing to adhere to heteronormative gender stereotypes**.
    - The judiciary, the legal profession, the police, Islamic religious affairs department officers and State authorities **do not have an adequate level of knowledge on the right to equality and non-discrimination** so that the human rights of transpeople and women in same-sex partnerships are respected, protected and promoted.
    - There is **no avenue for redress for victims of discrimination and violence on the basis of sexual orientation and gender identity**.
    - Section 21 of the Minor Offences Act 1955 allows for women and transpeople to be charged for **indecent behaviour**.
    - The Penal Code **criminalises sex ''against the order of nature''.**
    - State *Syariah* laws **criminalise same-sex consensual sexual relations between women**.
    - State *Syariah* laws **criminalise 'cross-dressing'**, and these laws are used by authorities to arrest and harass transgender women merely for expressing themselves.

[675] Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p259.

Gender stereotypes reinforced in the education sector

In Malaysia, students experience discrimination in schools and colleges on the basis of their sexual orientation and gender identity. Often this discrimination stems from overt school policies. A report of the United Nations High Commissioner for Human Rights has highlighted that schools should confront prejudice against students of diverse sexual orientations and gender identities:

> "Some education authorities and schools discriminate against young people because of their sexual orientation or gender expression... LGBT youth frequently experience violence and harassment, including bullying, in school from classmates and teachers. Confronting this kind of prejudice and intimidation requires concerted efforts from school and education authorities and integration of principles of non-discrimination and diversity in school curricula and discourse."[676]

Case study: Expelled from school for a lesbian relationship[677]

A was expelled from her secondary school when she was 16 when the school discovered that she had a relationship with a fellow school mate. A's girlfriend's parents who found out warned A about seeing their daughter and brought the matter to the school administration. A was initially suspended from the school hostel and later was asked to leave the school at the end of that schooling year. A was not allowed to finish her final examination (SPM) in that school. A was told by the principal that A had a "disease" and she would not like A to continue staying in the hostel as A would spread the "disease" to the other students.

A's parents begged the school administration to allow A to stay and complete her studies. The principal had one condition. A needed to see a psychiatrist and provide a report to prove that she is "okay". A complied. However, A never saw the report and A's name was not included in the students name list the following year.

A later found out that the report never got to the hands of the principal. A went to the hospital to get a copy of the report and begged the principal to allow her finish her studies. The principal didn't budge. She told A that the school was trying to weed out lesbianism.

Malaysian government school handbook lists homosexuality and 'gender confusion' as offences

A government-issued school student handbook contains punishments for homosexuality and 'gender confusion'. This handbook is provided to the students and outlines different sorts of offences, including: serious/heavy offences (*kesalahan berat*); moderate offences (*kesalahan sederhana*); and light offences (*kesalahan ringan*) (see Pictures 8 and 9).

The public school handbook states that homosexuality and 'gender confusion' is deemed a 'serious offence' and possible punishments include:

- stern warning;
- whipping (1 – 3 times on padded derrière using a light *rotan*/cane);
- compensation;
- suspension (no longer than 14 days);
- expulsion; or
- court.[678]

[676] Report of the United Nations High Commissioner for Human Rights, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity", A/HRC/19/41, 17 November 2011, paragraph 58.

[677] Case study written by Thilaga Sulathireh. This case documentation is part of research being conducted by Knowledge and Rights with Young people through Safer Spaces (KRYSS) for the International Gay and Lesbian Human Rights Commission (IGLHRC) to document violence and discrimination faced by lesbians, bisexual women and transgenders in Malaysia. The research in Malaysia is part of a collaborative regional research project in Asia undertaken by IGLHRC and partners.

[678] Translated excerpt from "Buku Peraturan Disiplin: Sekolah Menengah, Wilayah Persekutuan Kuala Lumpur" (Disciplinary Rule Book: Secondary School, Federal Territory of Kuala Lumpur), Jabatan Pelajaran Wilayah Persekutuan Kuala Lumpur (Department of Education), 2008, p74.

Camps for school boys with 'effeminate tendencies'

In April 2011, it was reported that 66 school boys with 'effeminate tendencies' were sent to a four-day camp in Besut to 'curb' their behaviour. One of the mainstream daily newspapers, the *New Straits Times*, maintained a consistent use of the word 'sissies' in reports about this camp.[679]

Anti-LGBT campaign permitted in government schools

An NGO advocating for Malay rights, *Jaringan Melayu Malaysia*, has announced that it will hold an anti-LGBT campaign in 30 schools in Malaysia.[680] The group said that this campaign would be undertaken with the aid of Parent Teacher Associations (PTAs) and teachers.[681] The president of *Jaringan Melayu Malaysia*, Azwanddin Hamzah said, "Free and perverse sex are not basic rights," and "We involve the PTAs because they are closer to the students and the parents and can suggest how to conduct campaigns in schools."[682]

University requesting information on students who are 'gender confused'

In 2011, students of Universiti Teknologi Mara (UiTM) Sabah received an email which requested information from them about other students deemed 'gender confused'. Such a practice is akin to a witch-hunt.

The email received by students of Universiti Teknologi Mara (UiTM) Sabah:

Kepada:
Semua
Ketua Bahagian/Unit
Pensyarah
Majlis Perwakilan Pelajar
Penasihat Persatuan
UiTM Sabah

Tuan/Puan

Untuk makluman Bahagian Hal Ehwal Pelajar UiTM Sabah di dalam proses untuk mengumpulkan maklumat berkenaan pelajar yang kecelaruan jantina (Pondan, Pengkid). Sehubungan dengan itu pihak kami memohon kerjasama tuan/puan untuk memanjangkan maklumat seperti di bawah selewat - lewatnya 30 September 2011 untuk tindakan pihak kami selanjutnya.

Maklumat yang diperlukan adalah:
Nama:
No Pelajar:

Translation:

Sir/Madam

For your information the student affairs department of UiTM Sabah is in the process of gathering information of students who are gender confused (*pondan*, *pengkid*). Therefore, we request your cooperation in sending us the following information by September 2011 for our action.

Information needed:
Name:
Card number:

679 "Besut boot camp for 66 sissies", *New Straits Times*, 18 April 2011.

680 "JMM Libatkan Sekolah Dalam Kempen LGBT", *mstar.com.my*, 31 March 2012.

681 "Bid to check LGBT movement", *The Sun*, 16 January 2012.

682 "Bid to check LGBT movement", *The Sun*, 16 January 2012.

Case study: Experiences of a transwoman in college[683]

"I am a 25 year old Malay Muslim. I was born in Ipoh but I have lived in Seremban for the last seven years. Since I was 16 years old, I started to identify as a woman. I started to take hormones which I bought from the pharmacy. My siblings had no problem with me dressing as a woman, but my father did not like it. He used to scold me and beat me, so I was forced to run away on two occasions to the house of a friend. After I completed my high school education, I moved to Seremban in order to study architecture at the college here.

"I found it incredibly difficult to study at college as a trans-woman. Firstly, I had no other trans-women friends on the campus. Secondly, I was forced to share a room (as were all of the other students) with a member of the same sex as me. Because my identify card says that I am male, I was made to share a room with a guy. I asked the Principal of the college if he could make an exception for me. I felt that they should demonstrate some flexibility in my situation. I should have been allowed either to share a room with other female friends, or to rent accommodation outside of the campus. As the college rules did not permit students to rent elsewhere, I was forced to stay on campus. I also found the studying very difficult as there was a tendency to separate the college classes according to gender. This did not work out at all for me, and I found being forced to study alongside only men very uncomfortable. I also faced dilemmas every day, such as which toilet I should use on campus. Eventually, the campus environment became so uncomfortable for me that I was no longer able to continue with my studies. I had completed two years of the three year course, but I could not face it any more."

Discrimination in employment

Paragraph 22 of the CEDAW Committee's General Recommendation No. 28 states that,

> "Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices."

Research published in 2002 about *Mak Nyahs* (transwomen) in Malaysia indicated that over 60 per cent of the 507 respondents earned less than RM500 a month.[684] Many found obtaining well-paid employment difficult owing to the stigma and blatant discrimination against them.

Transmen and *pengkids* also face difficulty in obtaining well-paid employment owing to stigma and discrimination, as they do not adhere to traditional stereotyped gender roles.[685]

683 Equal Rights Trust, "The Mak Nyahs of Malaysia: Testimony of Four Transgender Women", *The Equal Rights Review*, Volume 7, 23 August 2011, p4, available at: www.equalrightstrust.org/ertdocumentbank/ERR7_testimony.pdf

684 Research undertaken by Teh Yik Koon, *The Mak Nyahs: Malaysian Male to Female Transsexuals*, 2002, cited in Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p268.

685 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p270.

Case studies: Employment experiences of *pengkids*[686]

Transmen and *pengkids* face difficulties securing employment primarily due to their appearance. During job interviews, many transmen and *pengkids* have been told to change their appearance.

V, a pengkid, said that during a job interview with a bank, the interviewer told him, "if you dress like a girl, I will hire you now." The interviewer further "suggested" that V should wear baju kurung and heels if he wants to work at the bank. V declined the job. V was also rejected a job at a newspaper. He was told by the interviewer that it will be difficult to hire him because of his appearance. At another interview at a factory, he was told they don't hire lesbians because they give a lot of problems. V shared that many pengkids suffer financially and sometimes are forced to conform to the dress code set by companies.

U, a pengkid from Penang, shared that some factories in Bayan Lepas, Penang turn away pengkids attending interviews at the security post of the factories itself.

X is in his early 20s and graduated in theatre. X has auditioned for plays, hosting gigs on television, television series and commercials. However, he never gets the parts because he is not a biological male. Sometimes X doesn't even get to audition for male parts because he is not a biological male. When he auditions for female roles, he is rejected because they are looking for a "certain type of girl."

T, a transman in his early 40s, is financially dependant on his family because he has a hard time finding jobs, especially now that he is older. He said during interviews he has been asked if he likes to dress the way he does and the question is always accompanied by a look on the interviewers' faces. Those interviews are usually short, he explained.

Besides that, transmen are also subjected to sexual harassment at work. S is contemplating leaving his current job because of verbal sexual abuses and advances by his co-workers.

Case study: Employment experiences of a transwoman[687]

"I am a 24 year old Malay Muslim. I was born in Kelantan, but I moved to Seremban ten years ago. I moved to Seremban when I was only 14 years old because I had been orphaned when I was seven, and I was forced to remove myself from my remaining family seven years later because no-one accepted me. From the age of 12, I realised that I liked to wear female clothes and to do the jobs which are traditionally done by women, like cooking and cleaning, and I enjoyed wearing make-up. I had been living with my foster father and my brother in Terengganu but this was no longer possible for me. I came to Seremban because this is where my mother was from, and I therefore felt a connection to this place. I wanted to start a new life here.

"I felt responsible for providing financial support to my foster father and my younger brother, so I needed to earn money as soon as possible. My family was so poor, and my foster father was also sick and in need of medication which we were struggling to afford, so I was forced to finish school and start work. I tried working in other jobs first, but I faced too many problems. For example, when I worked in a restaurant, they told me that with a face like mine, I could only work at the back of the restaurant and only deserved five ringgit a day whilst the other workers were earning 50 ringgit a day. I did not want to continue living with this injustice so I decided it would be better for me to be a sex worker, and I have remained in that work since I was 15 years old."

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686 Case studies written by Thilaga Sulathireh. This case documentation is part of research being conducted by Knowledge and Rights with Young people through Safer Spaces (KRYSS) for the International Gay and Lesbian Human Rights Commission (IGLHRC) to document violence and discrimination faced by lesbians, bisexual women and transgenders in Malaysia. The research in Malaysia is part of a collaborative regional research project in Asia undertaken by IGLHRC and partners.

687 Equal Rights Trust, "The Mak Nyahs of Malaysia: Testimony of Four Transgender Women", *The Equal Rights Review*, Volume 7, 23 August 2011, pp3-4, available at: www.equalrightstrust.org/ertdocumentbank/ERR7_testimony.pdf

Access to healthcare

The discriminatory treatment transwomen and transmen receive in hospitals leads some to self-medicate with over the counter medication. A Malaysian transwoman who was granted refugee status in Australia owing to the discrimination she faced in Malaysia stated that,

> "If I am sick and go to the hospital, they will put me in the men's ward. Any prescription or receipt they give me will be issued in the name of [applicant's former name]. The pharmacy calls out that name and it is very embarrassing for me to answer to that name in front of everyone. People laugh at me and I worry that someone will try to beat me or assault me because I am transgender."[688]

The CEDAW Committee has previously recognised discrimination against lesbian, bisexual, transgender and intersex women in access to healthcare services. In its Concluding Observations to Costa Rica in July 2011, the CEDAW Committee expressed concern "at information received indicating that some of these women are victims of abuses and mistreatment by health services providers and law enforcement officials." The CEDAW Committee urged Costa Rica "to intensify its efforts to combat discrimination against women based on their sexual orientation and gender identity, including by launching a sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and health services providers, in order to avoid abuses and mistreatment of these women."[689]

Violence based on perceived sexual orientation or gender identity

Transwomen report high levels of violence and harassment by religious enforcement officers and police. In one case, a transwoman who had undergone sexual reassignment surgery was raped. The police in this case did not accept the report of rape because the officer stated that, "It is not a real vagina and therefore, she cannot be raped."[690]

As mentioned previously in the chapters on Article 5 and General Recommendation No.19 in this report, in 2007, a case came to light of the beating of a *Mak Nyah* by religious department officers in Melaka which resulted in serious injury and her hospitalisation. Amnesty International reported that,

> "On 30 July, Ayu, a transsexual, was seriously beaten by officials from the Melaka Islamic Religious Affairs Department (JAIM). They reportedly punched and kicked her, rupturing a pre-existing hernia. A JAIM official stated that Ayu was detained for committing the 'offence' of 'men dressing as women in a public space', which is punishable by a fine of 1,000 ringgit (USD300), a six-month prison sentence or both under the Melaka Syariah Offences Act."[691]

In October 2010, a transgender woman who worked as a hair stylist in Melaka was allegedly forced to remove all clothing, including underwear, in front of religious officers. Rahimin Bani, director of the Melaka religious department (JAIM) reportedly said,

> "We were carrying out our duties under the State religious laws... Abdul Qawi was wearing a woman's bra and panties and we did not strip with the intention to embarrass him... He may feel his rights as a person had been violated, but as Muslims we have the responsibility to ensure he does not go astray."[692]

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688 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 38.

689 CEDAW Committee Concluding Observations to Costa Rica, CEDAW/C/CRI/CO/5-6, 11-29 July 2011.

690 Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p262.

691 Amnesty International, *Amnesty International Report 2008 - Malaysia*, 28 May 2008.

692 "Religious department firm against cross-dressing", *Malay Mail*, 21 April 2011.

Case study: Violence against a transwoman[693]

"The biggest challenge we face is from the religious authorities in Malaysia. They arrested me once. On that particular night, I was not working, so I went to my friend's bridal boutique. I was just sitting on the steps outside, waiting for my friend to come with me to get some food. A group of guys on motorbikes suddenly appeared and took me by surprise. They came up to me and grabbed me – I thought they were robbers trying to steal from me, so I tried to shut the outside gate of the shop. They stopped me, and pushed me against the wall. I asked why they were doing this, and what was happening to me. I asked them who they were and what they wanted, but they just told me to be quiet. They started to grope me, and I tried to push them away but I did not manage because they were too big. I looked across the road and saw another friend of mine being beaten up by some other guys. At that point, the men holding me identified themselves as representatives of the Religious Department.

"I was then told I must wait for a van to arrive. While I was waiting, they continued to beat up my friend. It was very bad – I saw it all. While I was sitting waiting for the van, one of the men sat next to me and started to grope me once again. The van finally arrived and took me to the Religious Department in Seremban. When I got there, I was put in a room, and they told me to take off my clothes which they wanted as 'evidence'. I did not want to do this because I had nothing else to wear. Other staff from the Religious Department kept coming into the room. They touched my face and commented on my breasts. Eventually I was given the opportunity to telephone a friend to come and offer bail for me. She arrived with a spare set of clothes for me to change into. My friend gave a verbal assurance for me, and I was then allowed to leave."

Fear of abuse and violence has a huge impact on lives. For example, the lack of appropriate toilet facilities for transmen and transwomen means that many don't go to public toilets for fear of being abused when they enter all-male or all-female toilets. The result is that they can develop urinary tract infections.

Case studies: Fear of violence and harassment[694]

Most transmen and pengkid refrain from going to public toilets due to fear of harassment and being questioned (being questioned draws attention to them). If a transman were to enter a female toilet they will usually be asked to leave, reminded that they are in the wrong toilet, endure stares and shocked reactions from toilet attendants and visitors. Similarly in men's toilets, some transmen have been questioned and harassed for impersonating men.

Y has been harassed in the men's toilet three times. The first time, a group of curious men confronted Y and asked him if he was really a guy and wanted Y to prove that he is indeed a man. They made calls to their friends to inform their friends that a "girl" is in the toilet. His friend, who accompanied him to the toilet, managed to ease the tension.

In an interview, Z shared that frequently being questioned at and in the toilet made him avoid the public toilets. He would hold his urine in until he goes home, a similar routine practiced by many transmen and pengkids - do your business before you leave the house and once you return home. Now, Z has problems controlling his urine. Kidney problem and UTI are common problems for transmen.

693 Equal Rights Trust, "The Mak Nyahs of Malaysia: Testimony of Four Transgender Women", *The Equal Rights Review*, Volume 7, 23 August 2011, pp5-6, available at: www.equalrightstrust.org/ertdocumentbank/ERR7_testimony.pdf

694 Case studies written by Thilaga Sulathireh. This case documentation is part of research being conducted by Knowledge and Rights with Young people through Safer Spaces (KRYSS) for the International Gay and Lesbian Human Rights Commission (IGLHRC) to document violence and discrimination faced by lesbians, bisexual women and transgenders in Malaysia. The research in Malaysia is part of a collaborative regional research project in Asia undertaken by IGLHRC and partners.

Harassment of women on the basis of sexual orientation

Many women who identify themselves as lesbian or bisexual, or who have relationships with women face harassment in their everyday lives.

Case studies: Harassment of lesbian and bisexual women[695]

Case study 1

B had a relationship with a girl from a local university who was staying on campus. B drives and because her mother worked in the same university she had easy access into the campus. They would go out and hang out in the car after late night dates.

One night, B and her ex-girlfriend hung out in the car and made out. As they were about to leave, B was stopped by a security guard and he started knocking on the B's car. B freaked out and assumed that he must have watched her and her ex- girlfriend make out in the car. The security guard asked if he could get into B's car. Shocked, B agreed. B was afraid her ex-girlfriend might face disciplinary actions from the school. The security guards started lecturing them and threatened to take their identification cards. He also told them that there is a merit system and he may get a promotion if he reports this "case".

B quickly assured him that it will never happen again and begged him to let them go. He agreed to let them go if they would re-enact whatever that both B and her ex-girlfriend did in the car. B could not think of anything else to get out of the situation and agreed to re-enact the situation with him outside the car. The security guard went out of the car and watched them kiss for 5 seconds only.

The following time B went to see her ex-girlfriend; she was stopped by 6 security guards who made remarks like, "Oh, this is the girl!!!" "This is the girl who looks boyish!!!"

Case study 2

C and her ex-girlfriend parked at a quiet place after a date. They were just talking in the car and it was just two of them there. Soon, a few police officers drove by and stopped. After interrogating, one police officer kept playing with and pulling down his zip (pants). C quickly, bribed the police officers so that they would leave.

Case study 3

D is in a relationship with an Indian girl. Both she and her girlfriend are always cautious of holding hands in public as they have both encountered strangers coming up to both of them and asking them unnecessary questions. Strangers would approach her girlfriend and ask her girlfriend in her mother tongue if she is seeing D and if she is a lesbian. D doesn't understand Tamil but her girlfriend would stop holding hands and they would both walk off very quickly to another place.

Case Study 4

In celebration of the PRIDE festival, a PRIDE party was organized in Kuala Lumpur in August 2009. Unfortunately, an undercover journalist from Harian Metro (local newspaper) sneaked in to the party and reported it in the paper two days later along with a couple of blurry photos taken from her camera phone. The article made front page news on Harian Metro. The journalist wrote in her article entitled, "Malay girls celebrating deviant festival – Lesbian Festival" that those who attend the party were dancing erotically, consumed alcohol, and were kissing each other publicly. She specifically pointed out that there were young Malay girls who were engaging in those "immoral activities". The news was later translated and republished in The Star, an English language newspaper.

In 2010, due to overwhelming negative reports in the media on lesbian parties and lesbians in general, a lesbian party was raided. This was a rare occasion as usually only gay clubs get raided. A minor who attended the party was picked up but a lawyer and a few activists who were there quickly sorted that out.

[695] Case studies written by Thilaga Sulathireh. This case documentation is part of research being conducted by Knowledge and Rights with Young people through Safer Spaces (KRYSS) for the International Gay and Lesbian Human Rights Commission (IGLHRC) to document violence and discrimination faced by lesbians, bisexual women and transgenders in Malaysia. The research in Malaysia is part of a collaborative regional research project in Asia undertaken by IGLHRC and partners.

Case Study 5

When H's parents found out that she was a lesbian, they immediately stopped her allowance. H was in her second year at the university. Her parents also stopped talking to her and started treating her as a stranger. This went on for three months. As a result, H decided to leave home and move to a new city. She managed to finish studies.

Case Study 6

At 19 years old, O decided to sit her parents down and tell them about her sexual orientation. It didn't go well but her parents came around. Her parents even allowed O's lovers to live in their house. Everything was fine until O refused to go to Australia to finish her last year of studies. Her parents brought up her sexual orientation, insulted her and said that she is a disgrace to the family. She had to leave the house.

Case Study 7

In 1998, K's parents found out that K is bisexual and since then she has been monitored and all her privileges (car and telephone) have been taken away.

Case Study 8

When L's ex-girlfriend's parents learned that she was dating their daughter, they threatened L to stay away from their daughter and warned her that she may lose her job. L took measures to protect herself and had to disclose her sexual orientation to her immediate boss.

Malaysian transwoman granted refugee status in Australia

Transwomen face many forms of discrimination throughout their lives. It has been estimated that there are around 50,000 to 100,000 transwomen in Malaysia.[696]

The seriousness of the discrimination faced by transpeople in Malaysia was recognised when, in February 2010, a transwoman was granted refugee status in Australia.

The visa applicant's claim was initially rejected by the Australian Department of Immigration and Citizenship owing to a lack of evidence submitted with the original visa application. However, the Australian Refugee Review Tribunal upheld the appeal after hearing more evidence. In her statement to the Refugee Review Tribunal, the transwoman highlighted the challenges she faced in Malaysia, and in doing so shed light on the challenges also faced by many others in this country who do not conform to gender stereotypes.

In her statement to the Refugee Review Tribunal, the applicant stated,

> "In Malaysia I do not count as a person. I am not considered to be a man because I look like a woman. I am not considered to be a woman because my identity card says that I am a man. I have no rights to obtain employment or open a bank account, or even to get health insurance in my name. Because I can't open a bank account I can't purchase a house. If I am sick and go to the hospital, they will put me in the men's ward. Any prescription or receipt they give me will be issued in the name of [applicant's former name]. The pharmacy calls out that name and it is very embarrassing for me to answer to that name in front of everyone. People laugh at me and I worry that someone will try to beat me or assault me because I am transgender. It is not possible for me to change my identity card to say that I am a woman.
>
> "I cannot live in Malaysia. There is nobody to take care of me and I am not allowed to work because of my identity. I was arrested three times just because of who I am and I was forced to pay money just so that I wouldn't be put in jail. I did not do anything wrong but Malaysian society and the government thinks that there is something wrong with who I am. I do not want to work as

[696] John Godwin, "Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action", UNDP, July 2010, p19.

> a prostitute and that is the only life for me there. I am a transgender person I am being persecuted by the government and by the authorities in Malaysia who will not allow me to survive."[697]

In its published decision, the Australian Refugee Review Tribunal found that "the visa applicant ... was vulnerable in Malaysia due to her socio-economic circumstances, brought about principally by the lack of an identity card that would enable her to access every day services, circumventing prejudice and discrimination on a daily basis."[698]

The Tribunal went on to note that "it is clear that a person in the visa applicant's circumstances, where she is unable to work to meet her basic needs and is **marginalised in society to the extent that she would not be able to subsist, would be vulnerable to serious harm from both individuals and the State at large**..."[699]

"The Tribunal finds, therefore, that the visa applicant would face a real chance of serious harm in Malaysia because she is a transgender woman in Malaysia without familial or financial support or protection were she to return now or in the reasonably foreseeable future."[700]

"The **Tribunal finds, therefore, that the applicant has a well-founded fear of persecution** for a [Refugee] Convention based reason."[701]

Yogyakarta Principles

In 2006, a seminar of human rights law experts was held in Yogyakarta, Indonesia at Gadjah Mada University. Present at this seminar were judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies and NGOs. The Yogyakarta Principles were adopted at this seminar – a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The introduction of the Yogyakarta Principles states that,

> "The Yogyakarta Principles affirm binding international legal standards with which all states must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright."[702]

The introduction to the Principles reflects the situation in Malaysia today:

> "Many states and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality."[703]

Fatwas against non-heteronormative identities

Fatwa against transpeople seeking sex reassignment surgery

Transgender women and transgender men face discrimination if they seek to undergo sexual reassignment surgery. In 1982, the National Fatwa Council decided that,

1. *Sexual change from male to female or vice versa through operation is prohibited by Islamic law.*
2. *A person who is born male remains a male even though he has successfully changed to female through operation.*
3. *A person who is born female remains a female even though she has successfully changed to male through operation.*[704]

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697 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 38.

698 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 49.

699 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 66.

700 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 68.

701 Australian Refugee Review Tribunal Decision Record, RRT Case Number 0903346, 5 February 2010, paragraph 69.

702 www.yogyakartaprinciples.org/principles_en.pdf

703 www.yogyakartaprinciples.org/principles_en.pdf

704 Decided at the 4th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 13 – 14 April 1982, www.e-fatwa.gov.my/fatwa-kebangsaan/pertukaran-jantina-daripada-lelaki-kepada-perempuan

The Council of Malay rulers in the Council's 126th Meeting held on 24 February 1983 also agreed to the prohibition of sex change operations.

Fatwa ruling against ''women imitating men''

The Malay term used in the *fatwa* is *pengkid*, which targets Muslim Malay women and girls with a masculine appearance and/or mannerisms.

In October 2008, the National Fatwa Council ruled that "*pengkids*, women whose appearance, behaviour and sexual inclination are like men is forbidden in Islam."[705] Among the reasons given for this *fatwa* is that *pengkids* are likely to become lesbians.

The National Fatwa Council "urged the public to educate young girls properly especially in matters pertaining to dressing, behaviour and appearance so that this phenomenon can be prevented ... as this act contradictory to nature and sunnatullah (God's laws). [sic]"[706] According to Harussani Idris Zakaria, a member of the Fatwa Council, boys should behave like boys and girls should behave like girls.

Similar to the *fatwa* on female circumcision (see chapter on Article 5 of CEDAW), the *fatwa* on *pengkids* has not yet been gazetted by states in Malaysia so is not considered law. However, the sentiment is nevertheless concerning, and especially so because it comes from the authority of the National Fatwa Council, which advises Malaysian states.

In some states, namely Perlis and Sabah, *Syariah* laws criminalise women impersonating or dressing like men.

Contrary court decisions on gender and name change for transpeople

There is no law in Malaysia that prohibits a change of gender on an identity card, the main identification document used in Malaysia. However, two transwomen were unable to change their name and gender on their identity card at the National Registration Department and took their cases to court. One was successful and the other unsuccessful.

Court prohibits gender change in 2011

In 2011, Mohd Ashraf Hafiz Abdul Aziz, 25, who underwent a sex change procedure in Thailand in 2009, was prohibited by the Kuala Terengganu High Court from changing her name to Aleesha Farhana and being legally recognised as a woman.[707] Tragically, Aleesha passed away a short time after the judge handed down the decision on her case.

Court permits gender change in 2005

The decision in 2011 departed from a previous judgement in 2005, in which a transgender woman from Kuala Lumpur successfully applied to the court for an official gender change (*JG v Pengarah Jabatan Pendaftaran Negara 2005*).[708] In this case, the judge permitted that: the plaintiff, who was born male but identifies as a female and underwent gender reassignment surgery, be declared as a female; and that the registration department be directed to change the last digit of her identity card to a digit that reflects a female gender.

Government's position on gender change

The Attorney General's Chambers have a clear position that gender cannot be changed on an individual's identity card. In a court case in which a group of transwomen sought leave for the court to review the constitutionality of a section of *Syariah* law in the state of Negeri Sembilan that prohibited 'cross-dressing', the Attorney General's Chambers submission asserted,

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[705] Decision at the 83rd Muzakarah (Conference) National Committee of the Fatwa Council of Malaysia Islamic Religious Affairs held on 22 – 24 October 2008, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-wanita-menyerupai-lelaki-pengkid

[706] Decision at the 83rd Muzakarah (Conference) National Committee of the Fatwa Council of Malaysia Islamic Religious Affairs held on 22 – 24 October 2008, www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-wanita-menyerupai-lelaki-pengkid

[707] "Shahrizat sad ministry was not able to help Ashraf", *The Sun*, 30 July 2011.

[708] "'Courts have precedence on transgender name change'", *Malaysiakini*, 1 August 2011.

> "Through registration at birth, all the Applicants were registered as males regardless of their contention that medically or psychologically they are not. There is no provision which allows such recognition. Further, the Applicants have had identity card [sic] issued to them. **It is our submission that the particulars on the identity card are conclusive evidence to establish the identity of a person including his gender**. Most unfortunately for the Applicants, in the eyes of the law, they are viewed and recognized only as males. **The presence of any evidence to contradict this does not make the Applicants females in law**."[709]

Case studies: Discrimination faced when applying for identity cards[710]

In an interview with a pengkid in Penang, we learned that the National Registration Department of Penang asks pengkids who look "too pengkid" to wear a headscarf when their photos are taken for their identification cards. This has been verified with the department in Penang.

Similarly, a transwoman in Kuala Lumpur was asked to tie her hair for her photo when she renewed her passport. The reason given, because she is a biological male, she has to tie her hair. One of her friends, who accompanied her, questioned the "policy" because she just recently renewed her passport and she was not asked to tie her hair. The officer asked for her passport so that they could "rectify" the mistake. She refused to give them her passport.

Laws that discriminate on the basis of sexuality and gender identity

Minor Offences Act 1955 (Section 21)

The control of women's sexuality is a tool to control women's autonomy and freedom of expression. Under the Minor Offences Act, women, men and transgender people have been charged for indecent behaviour. The penalties have included fines ranging from RM25 to RM50 or a two week jail term.

In March 2012, three women were charged for indecent behaviour for pole dancing in a nightclub in Seremban and fined RM25 each.[711] The women, who were allegedly "dressed scantily", were charged under Section 21 of the Minor Offences Act 1955, which states,

> *Any person who is found drunk and incapable of taking care of himself, or is guilty of any riotous, disorderly or indecent behaviour, or of persistently soliciting or importuning for immoral purposes in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, shall be liable to a fine not exceeding twenty-five ringgit or to imprisonment for a term not exceeding fourteen days, and on a second or subsequent conviction to a fine not exceeding one hundred ringgit or to imprisonment for a term not exceeding three months or to both.*

The magistrate who passed the sentence advised the three women to not tarnish the image of their families by indulging in the activity again.[712]

There is further anecdotal evidence about transwomen allegedly wearing 'revealing clothing' being charged for indecent behaviour under this law, which is fairly wide and open to abuse.

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709 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, Paragraph 5.9

710 Case study written by Thilaga Sulathireh. This case documentation is part of research being conducted by Knowledge and Rights with Young people through Safer Spaces (KRYSS) for the International Gay and Lesbian Human Rights Commission (IGLHRC) to document violence and discrimination faced by lesbians, bisexual women and transgenders in Malaysia. The research in Malaysia is part of a collaborative regional research project in Asia undertaken by IGLHRC and partners.

711 "Three women fined RM25 each for pole dancing", *The Star*, 28 March 2011.

712 "Three women fined RM25 each for pole dancing", *The Star*, 28 March 2011.

Penal Code

The Penal Code, covering all states in Malaysia, continues to criminalise acts "against the order of nature" even if these are sex acts between two consenting adults, and the punishment can extend to 20 years' imprisonment and whipping.[713]

Government representatives, the Attorney General's Chambers, stated in a court submission that a non-heteronormative "'lifestyle' is peculiar to our society and...contrary to law, religion and public morality."[714] It is important to note that homosexuality is not against the law (the civil law Penal Code), rather it is "unnatural offences" (oral and anal sex) that are deemed illegal, which of course are not exclusive to homosexuality. Nevertheless the existence of these laws and their high-profile use in the cases brought against opposition leader Anwar Ibrahim have led to a climate of fear in Malaysia.

Syariah Criminal Offences enactments

Muslim transwomen and transmen are at constant risk of arrest in Malaysia, merely because they are still seen as the biological sex they were born as, biologically male or biologically female.

All states of Malaysia have their own *Syariah* Criminal Offences enactments which criminalise acts such as a man dressing as a woman. There are two states that criminalise women dressing as men – Perlis and Sabah.

To cite an example of these laws, Section 28 of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states that,

> *Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.*

In the state of Sabah, Section 92 of the Criminal Offences Enactment 1995 criminalises a "male posing as woman or vice versa."[715]

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[713] Under a section titled "Unnatural Offences" in the Penal Code, the following are listed as offences:

377A. Carnal intercourse against the order of nature. *Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Explanation—Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.*

377B. Punishment for committing carnal intercourse against the order of nature. *Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.*

***377C. Committing carnal intercourse against the order of nature without consent,* etc.** *Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.*

377CA. Sexual connection by object. *Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping. Exception—This section does not extend to where the introduction of any object into the vagina or anus of any person is carried out for medical or law enforcement purposes.*

377D. Outrages on decency. *Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.*

[714] Statement by the Attorney General's Chambers in the *Application for Judicial Review R2-25-301-12/11: In the matter of the decision made by the Deputy Inspector General of Police on 3 November 2011 banning functions and events of Seksualiti Merdeka*, 10 January 2012, paragraph 18.

[715] Section 92 of the *Sabah Syariah Criminal Offences Enactment 1995*.

The Mak Nyah community of Negeri Sembilan (a state in Malaysia) released a press statement in November 2010 in which the concerns about the *Syariah* Criminal Offences laws are outlined. Below is an excerpt from the press statement:

"We [the Mak Nyah community] have suffered mental distress, physical violence and even sexual molestation at the hands of the religious officers who enforce these laws. We are stripped of a life of dignity and deprived of our personal liberty, and we fear for our lives. We are unable to step out of our homes without the fear of getting harassed, abused or arrested. We are no longer able to go out or to eat and drink in public without the fear of harassment and abuse from the religious officers who enforce these laws. We demand that the religious authorities of the State of Negeri Sembilan and all of its officers stop harassing, victimising and persecuting us for who we are.

"In Negeri Sembilan where we live, we are forced to walk around without our brassieres as it is used as evidence against us upon arrest. We are "advised" by the religious officers to just wear t-shirts, track bottoms or men's shorts. Despite following these instructions, we are still arrested on the basis that we physically look like women. We are sexually molested or our breasts are groped when the religious officers who enforce these laws insist on checking if we are wearing brassieres. We are sometimes made to change our clothes in full view of the religious officers.

"We are instructed to plead "Guilty" by the religious officers and even by the state's Legal Aid Bureau. Without proper legal advice, we plead "guilty" and as a result we are sentenced with heavy fines and sometimes we even face imprisonment. Under such laws, it is impossible for us to live and earn a living. Sometimes, we are also compelled to attend mandatory religious counseling sessions. We are Mak Nyahs. No amount of "counseling" or coercion can ever change that. All we ask is to be left alone and for respect of our personal and private lives. Such mandatory counseling we consider to be an infringement of our personal liberty.

"We also suffer hardships in obtaining employment as we are discriminated against by employers on the basis of who we are. We suffer rejection in schools and in some institutions of higher learning. At the latter, we are sometimes required to attend boot camps in order to make us more "manly"."[716]

High court grants leave to review constitutionality of one state's 'cross-dressing' law

Section 66 of the *Syariah* Criminal (Negeri Sembilan) Enactment 1992 criminalises any male who wears women's attire or poses as a woman.

On Friday 4 November 2011, the Seremban High Court handed down its decision to grant leave for the constitutionality of Section 66 of the *Syariah* Criminal (Negeri Sembilan) Enactment 1992 to be reviewed by the court.[717]

The four transwomen applicants argued that Section 66 is discriminatory as it criminalises them – originally biologically male persons who identify as women who may or may not have had gender reassignment surgery – for expressing their true gender identity. Section 66 contravenes Malaysia's Federal Constitution which enshrines fundamental liberties including freedom of expression and prohibits discrimination on the basis of gender.

Objections of the Attorney General's Chambers to the judicial review

During the leave hearing on 3 October 2011 for the judicial review of Section 66 of Negeri Sembilan's *Syariah* Criminal Offences Enactment, Senior Federal Counsel Tuan Noor Hisham together with Tuan Ruhazlan appeared for the Attorney General and presented their objections. The objections were as follows:[718]

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716 Press Statement by the Mak Nyah Community of Malaysia, "Stop the Violence and Persecution towards us", 30 November 2010.

717 "Four get leave to challenge law barring cross-dressing", *Malaysiakini*, 4 November 2011.

718 The objections are presented in the statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011.

The Attorney General's Chambers argued that applications for judicial review must be preceded by evidence that the applicant has been aggrieved by a 'decision' of a public authority, and that under the rules of the High Court an application cannot be based on 'investigations' during the performance of a statutory function. The Attorney General's Chambers' submission stated, "We respectfully submit that there was no 'decision' by the Respondents which had aggrieved the Applicants. At no time did the Respondents made [sic] any decision which had affected and/or altered the Applicants' rights."[719]

However, this objection of the Attorney General's Chambers is misconceived as each 'investigation' under Section 66 requires the exercising of discretion, which is in effect a 'decision', which therefore validates this application in the Seremban High Court. Furthermore, there is an element of urgency in this case as the applicants continue to be at risk of arrest under an unconstitutional law.

In its second objection, the Attorney General's Chambers argued that the "application is an abuse of the process of the court" because "the Applicant is trying to frustrate the criminal prosecution of the syariah court for an offence" under Syariah law.[720] *The Attorney General's Chambers argued that:*

a) the case should not be heard in the civil court and is within the Syariah court's jurisdiction, and
b) the case is "against public interest", as the policing of morals must continue to be undertaken by authorities and Section 66 is an important tool in this policing. The Attorney General's Chambers stated that the "courts cannot make a declaration that will have effect on the essential fabrics [sic] of our society. The gender status of a person is what God has assigned to him or her at birth, as reflected in the Birth Certificate. The courts must weigh the interest of the Applicants as against the implication of it to the society as a whole."[721]

However, this objection of the Attorney General's Chambers is misconceived as the case before the court is concerned with the constitutionality of Section 66 and therefore the legality of actions involving Section 66. The interpretation of the Federal Constitution is a matter for the civil courts. Also, this is a case that involves considerable 'public interest' in that it affects a large population of transpeople who are at risk of arrest for expressing their identity.

In its third objection, the Attorney General's Chambers argued that the application is "frivolous and vexatious because the rights, to which the Applicants are seeking, are not legislated in this country."[722] *The submission continues: "The Applicants' through their application is [sic] indirectly seeking from the court to recognize them as 'female trapped in the body of a male'. It is pertinent to note that there is no law which governs and recognize transvestites such as Applicants [sic]".*[723] *"Through registration at birth, all the Applicants were registered as males regardless of their contention that medically and psychologically they are not. There is no provision which allows such recognition. Further, the Applicants have had no identity card issued to them. It is our submission that the particulars on the identity card are conclusive evidence to establish the identity of a person including his gender. Most unfortunately for the Applicants, in the eyes of the law, they are viewed and recognized only as males. The presence of any evidence to the contrary to contradict this does not make the Applicants females in law."*[724]

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719 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 3.8.

720 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 4.5.

721 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 4.21.

722 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 5.7.

723 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 5.8.

724 Statement by the Senior Federal Counsel, Attorney General's Chambers, *In the High Court in Malaya at Seremban, In Negeri Sembilan Darul Khusus, Malaysia, Application for Judicial Review No. 13-1-2011. In the matter of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992*, 8 April 2011, paragraph 5.9.

However, this objection of the Attorney General's Chambers is misconceived as the application is not frivolous and vexatious as the applicants will continue to be adversely affected by the existence of Section 66 and they will continue to be susceptible to arrest, detention and prosecution. The transpeople psychologically identify themselves as women and this will not change. The Federal Constitution enshrines fundamental rights and liberties for all citizens and to deny transpeople these rights and liberties is unconstitutional.

In a positive decision, the Seremban High Court judge noted that these objections from the Attorney General's Chambers did not have a basis and thus permitted leave for the judicial review of Section 66, which will take place in 2012.

Laws that discriminate on the basis of women's sexual orientation

Paragraph 31 of General Recommendation No. 28 states that, "Certain groups of women, including women deprived of their liberty, refugees, asylum seeking and migrant women, stateless women, lesbian women, disabled women, women victims of trafficking, widows and elderly women, are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices." Muslim lesbian women in Malaysia can be charged for engaging in same-sex relationships.

In the following states of Malaysia, *Syariah* Criminal Offences enactments criminalise same-sex sexual relationships between women (*musahaqah*):[725]

- Perlis
- Kedah
- Pulau Pinang
- Perak
- Wilayah-Wilayah Persekutuan (Federal Territories, including Kuala Lumpur)
- Selangor
- Negeri Sembilan
- Melaka
- Johor
- Terengganu
- Kelantan
- Sabah
- Sarawak

Musahaqah does not just relate to sexual acts between women, it encompasses their identity.[726]

As an example of a state's law against *musahaqah* is Section 26 of the *Syariah* Criminal Offences (Federal Territories) Act 1997 states,

> *Any female person who commits musahaqah 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 whipping not exceeding six strokes or to any combination thereof.*

Response of SUHAKAM to discrimination on the basis of sexual orientation and gender identity

The Malaysian national human rights institution, SUHAKAM, has noted its concern over the violation of rights of on the basis of sexual orientation and gender identity. However the language used by SUHAKAM seems to keep such communities at arms-length: "There can be no justification in harming [LGBT people], no matter how different they are or how unacceptable their LGBT-related actions are to the majority."[727]

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[725] Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, pp337-342.

[726] Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p258.

[727] *SUHAKAM Annual Report 2010*, p16.

In 2010, meetings were held between SUHAKAM officials and religious groups and people of diverse sexual orientations and gender identities. The SUHAKAM Annual Report noted that "The meetings provided a good platform for the Commission to conduct further research on LGBT rights, taking into consideration religious and cultural sensitivities as well as the majority view."[728]

The Chairperson of SUHAKAM reportedly stated that sexuality rights "is a sensitive issue. We need to look at it with understanding. In fact, at the Asia Pacific Forum in Bali, I was the first to take the floor to discuss this issue. I [told the delegates] I had a personal dilemma dealing with these issues. We need to protect human rights, but at the same time, we live in a society that is not ready to embrace these communities. Suhakam is not dismissing it, but we will need to look into the issues within our cultural and religious context."[729]

Media portrayals of sexual diversity

In a memorandum to SUHAKAM in June 2010,[730] concerns were raised by NGOs about the portrayal of lesbians in the media. The memorandum stated,

> "We refer to the articles published in Kosmo! ("Parti Lesbian Berleluasa") and the Harian Metro ("Aksi Panas Pengkid, Lesbian") dated 2nd and 16th May respectively. We, the undersigned, are enraged by the usage of disparaging words such as "songsang" (deviant), "lucah" (lewd) and "jijik" (disgusting) in the newspaper reports to describe the queer community. The words used by Kosmo! and the Harian Metro and echoed by other newspapers (such as The Star, 3 May 2010) are heavily loaded with moral connotations and paint the queer community unjustifiably and unfairly as deviants and morally tainted."[731]

Neither SUHAKAM nor any government representatives have sought to censure the media in its discriminatory reporting.

On 5 April 2012, the Information Department of the federal government banned, via an announcement on its Facebook page, the portrayal of lesbian, gay and transgender characters on State-owned radio and television.[732] The following day, the Information, Communications and Culture Minister Rais Yatim clarified that there was no such ban. He also noted however that the Ministry reserves the right to select media content deemed suitable for the general public.[733]

Film censorship guidelines

In 2010, the film censorship board adapted its guidelines on the portrayal of LGBT characters – homosexual and transgender characters are required to either repent, die or be punished at the end of any film.[734]

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728 *SUHAKAM Annual Report 2010*, p57.

729 "Suhakam chief: 'We're an independent entity'", *The Nut Graph*, 30 August 2010.

730 *Memorandum on Ill Representation and Discrimination of the Queer Community in the Media*, 10 June 2010. Endorsed by All Women's Action Society (AWAM), Annexe Gallery, Asian-Pacific Resource & Research Centre for Women (ARROW), Centre for Independent Journalism (CIJ), Malaysian Bar Council, Positive Malaysian Treatment Access & Advocacy Group (MTAAG+), Straten Malaysia, Suara Rakyat Malaysia (SUARAM), Titled World, Women's Candidacy Initiative (WCI), Women's Aid Organisation (WAO) and individuals.

731 Other examples of news articles using derogatory language targeted at LGBT groups can be found in Angela M Kuga Thas (with research assistance from Thilaga Sulathireh), "CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia", *Equality Under Construction: Malaysian Women's Human Rights Report 2010/11*, Persatuan Kesedaran Komuniti Selangor (EMPOWER), Petaling Jaya, Malaysia, 2012, p265.

732 The posting on www.facebook.com/penerangan on 5 April stated: "Berkuatkuasa serta merta, stesen radio dan televisyen diminta menghentikan rancangan yang menyiarkan watak pondan, lelaki lembut serta watak yang bercanggah dengan norma masyarakat beragama kerana dikatakan menyokong dan meningkatkan gejala Lesbian, Gay, Biseksual dan Transeksual (LGBT) ketika ini."

733 "Confusion over flip-flop on 'gays on TV' ban", *Malaysiakini*, 6 April 2012.

734 Lee, Julian C. H., *Policing Sexuality: Sex, Society and the State*, Zed Books, London 2011, p108.

Banning of Seksualiti Merdeka *(sexuality independence) in 2011*

On 3 November 2011, the Malaysian police banned a festival called Seksualiti Merdeka (sexuality independence). Seksualiti Merdeka has been held annually since 2008 and it provides a safe space for all people of diverse sexual orientations and gender identities to come together to share knowledge about human rights.

The banning of the festival runs contrary to Principle 20 of the Yogyakarta Principles, which declares that,

> "States shall under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights."[735]

Comments by individuals about Seksualiti Merdeka reported in the press ranged from baseless and illogical to inciting hatred against marginalised groups. Malaysia's home minister is reported to have said that the festival, which includes art exhibitions, theatre and music performances and workshops and a book launch,[736] would threaten national stability.

An elected member of parliament, Ibrahim Ali MP, was reported to have claimed that the festival is attempting to promote "animal" culture,[737] while the deputy PM alleged that it is "deviationist".[738] There were also allegations that the festival was a "pesta seks bebas" (free sex party).[739]

When speaking about Seksualiti Merdeka, former Prime Minister Mahathir Mohamad said that freedom must be limited. He was reported to have said, "We don't need this sexuality thing. We don't need men marrying men, women marrying women and blatant exhibitionists (here)... What will happen to us when people decide to walk naked on the streets? We can't stop them. If they (people) decide as seen in some countries to have sex in public, what will happen to us?"[740]

Such misinformed opinions and blatant fear-mongering is irresponsible at best and dangerous at worst. People of diverse sexual orientations and gender identities are among the most stigmatised and vulnerable in Malaysian society. Condemnatory statements by various elements of government perpetuate discriminatory attitudes and hinder the reporting of human rights abuses from those whose rights have been violated, leading to an environment in which continued violence and oppression is condoned.

Hate speech against people of diverse sexual orientations and gender identities has been recognised in the Concluding Observations to the Russian Federation's report for the International Covenant on Civil and Political Rights. In 2009, the United Nations Human Rights Committee noted "with concern the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including hate speech and manifestations of intolerance and prejudice by public officials, religious leaders and in the media."[741]

Relevant to the case of Seksualiti Merdeka is the banning of an LGBT pride march in Moscow in 2006. In 2010, the European Court of Human Rights fined the Russian Federation for violating rights related to assembly and discrimination in banning the event. Prior to the event there had been threats against the participants of the march. The European Court of Human Rights found that the "authorities effectively

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735 Principle 20 of the Yogyakarta Principles, www.yogyakartaprinciples.org/principles_en.pdf

736 Ironically, the book to be launched was titled *Policing Sexuality: Sex, Society and the State*, written by Julian C. H. Lee, published by Zed Books, 2011.

737 "Seksualiti Merdeka 2011 cuba promosi budaya 'binatang' – Ibrahim Ali", Utusan Malaysia, 3 November 2011.

738 "'Seksualiti Merdeka' programme a deviationist activity – Muhyiddin", *New Straits Times*, 3 November 2011.

739 "Seksualiti Merdeka not a 'free sex party', says Marina", The Star, 7 November 2011.

740 "Hisham: Activities will affect nation's stability", *New Straits Times*, 5 November 2011.
This quote seems in concert with Mahathir's previous comments, including stating that "the British people accept homosexual ministers. But if they ever come here bringing their boyfriend along, we will throw them out. We will not accept them." Quote from Human Rights Watch World Report 2002, available at www.hrw.org/legacy/wr2k2/lgbt.html

741 United Nations Human Rights Committee, Concluding Observations on the report submitted by the Russian Federation on the International Covenant on Civil and Political Rights, CCPR/C/RUS/CO/6, 2009, paragraph 27.

endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order."[742] In the same way, by banning the event the Malaysian authorities endorsed the prejudice and intolerance of those who protested against Seksualiti Merdeka, including the right-wing Malay group, Perkasa.

Kuala Lumpur High Court denies leave to review legality of ban

In December 2011, the Seksualiti Merdeka organising committee sought leave for the court to review the legality of the actions of the police in banning the event in 2011. On 1 March 2012, the Kuala Lumpur High Court decided that leave for such a review would not be granted.

The ban was declared by the Deputy Inspector General of Police at a press conference on 3 November 2011. At this press conference, the Deputy Inspector General of Police stated that the event was being investigated under two laws. The first is Section 27A(1)(C) of the Police Act 1967, which allows police to enter a private place and order people to disperse if the activity is "likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace." The second is Section 298 of the Penal Code, regarding activities causing disharmony, disunity, feelings of enmity, hatred or ill-will or prejudicing the maintenance of harmony or unity, on the grounds of religion.

As argued by the lawyer for the Seksualiti Merdeka organising committee, Honey Tan Lay Ean, the banning of the events of Seksualiti Merdeka took place under the misunderstanding that the events were 'deviationist' and would threaten national security, after the police received complaints in this vein about the event.

Similarly, prior to the banning of the 2006 LGBT pride march in Moscow mentioned above, the Russian government received petitions against the event. The government cited these protest petitions from religious clerics as reasons why the event would cause instability, however the European Court of Human Rights found that,

> "The Court cannot accept the Government's argument that these petitions should be viewed as a general indication that the Pride March and the picketing had the potential to cause public disorder."

The European Court of Human Rights also found that "the mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat."[743]

Returning to the Malaysian case of Seksualiti Merdeka, the banning directly impacted citizens' rights enshrined in the Federal Constitution, including:

- The right to freedom of speech and expression (Article 10(1)(a) of the Federal Constitution);
- The right to assemble peaceably (Article 10(1)(b) of the Federal Constitution);
- The right to form associations (Article 10(1)(c) of the Federal Constitution); and
- The right to equality and non-discrimination on the basis of gender (Article 8 of the Federal Constitution).

There was no opportunity for the members of the Seksualiti Merdeka organising committee to be heard before the police made the decision to ban the event.

It is unfortunate that the judge, Justice Rohana Yusuf, decided that the arguments by the Attorney General's Chambers had merit and decided in their favour. The Attorney General's Chambers had argued that the decision of the police to ban the events was legitimate because police were carrying out investigative functions. The second argument centred on the Attorney-General's Chambers contention that "the rights advocated by SM event are not rights recognized under the Constitution and/or rights which are contrary to law and public morality."[744]

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[742] Alekseyev v. Russia, Application nos 4916/07, 25924/08 and 14599/09, Council of Europe: European Court of Human Rights, 21 October 2010, paragraph 76.

[743] Alekseyev v. Russia, Application nos 4916/07, 25924/08 and 14599/09, Council of Europe: European Court of Human Rights, 21 October 2010, paragraph 75.

[744] Submission by the Senior Federal Counsel, Attorney-General's Department, *In the High Court of Malaya at Kuala Lumpur, Application for Judicial Review No.: R2-25-301-12/11 In the matter of the decision made by the Deputy Inspector General of Police on 3 November 2011 banning functions and events of Seksualiti Merdeka*, 10 January 2012, paragraph 9.

In concluding his submission, Senior Federal Counsel of the Attorney-General's Chambers stated that,

> "At this juncture, the Court is invited to take a judicial notice that such 'lifestyle' is peculiar to our society and to a certain extent may lead to giving recognition to acts which are contrary to law, religion and public morality (ex. homosexuality). As such, it is respectfully submitted that if the purpose of SM is clearly by necessary implication would appear to be advocating something which would be contrary to law, religion and public morality, then the court is entitled to make a finding that this application is frivolous at the outset and does not merit for further argument at the substantive stage."[745]

It is disappointing that the Attorney General's Chambers takes this view and endorses the ill-informed, restrictive and oppressive actions of the police.

It is pertinent to note also that homosexuality is not against (civil) law in Malaysia, rather it is sexual acts including anal and oral sex that are deemed illegal under the Penal Code, which are also performed by heterosexual couples. Furthermore, it is misleading for the Attorney General's Chambers to state that homosexuality is 'peculiar' to Malaysia, as the Southeast Asian region, including Malaysia, has a well-documented history of sexual diversity.[746]

In the wake of the Seksualiti Merdeka ban, in November 2011, the states of Pahang and Melaka indicated that they will be increasing the penalties for homosexuality so that Muslims could be charged under both state and federal laws, thereby increasing their jail sentences. The Chief Minister of Melaka, Mohd Ali Rustam, stated that the act of supporting homosexuality should also be criminalised. He is quoted as saying, "We want to put it in the enactment so that we can enforce it and bring them to our sharia (Islamic law) court. Then we can charge them for promoting or supporting these illegal activities."[747]

In 2012, a government backbencher called for the establishment of a homosexual rehabilitation centre to "find a solution to combat these activities from getting rampant just like the efforts we take to combat drugs."[748]

Deputy Minister in the Prime Minister's Department, Mashitah Ibrahim, also said in parliament that the government was working with NGOs to curb the "spread" of the LGBT "problem".[749] This involves training volunteers to approach the LGBT community and encouraging NGOs to establish anti-homosexuality campaigns.[750]

CEDAW Committee's response to other countries regarding discrimination on the basis of sexual orientation and gender identity

In its Concluding Observations to the Singapore Government in July 2011, the CEDAW Committee called upon Singapore to,

> "Put in place, without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate women, including those based on sexual orientation and gender identity, in conformity with the provisions of the Convention. Such measures should include efforts, in collaboration with civil society, to educate and raise awareness of this subject, targeting women and men at all levels of the society."[751]

It would be pertinent to recommend the same to the Malaysian government.

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745 Submission by the Senior Federal Counsel, Attorney-General's Department, *In the High Court of Malaya at Kuala Lumpur, Application for Judicial Review No.: R2-25-301-12/11 In the matter of the decision made by the Deputy Inspector General of Police on 3 November 2011 banning functions and events of Seksualiti Merdeka*, 10 January 2012, paragraph 18 and 19.

746 Michael G. Peletz, *Gender Pluralism: Southeast Asia since Early Modern Times*, Routledge, New York and Oxford, 2009.

747 "States eye harsher laws for Muslim gays", *The Malaysian Insider*, 11 November 2011.

748 Datuk Baharum Mohamad (Barisan Nasional – Sekijang) quoted in "Call to establish homosexual rehab centre", *The Sun*, 22 March 2012.

749 "Campaign to curb homosexuality", *Free Malaysia Today*, 22 March 2012.

750 "Campaign to curb homosexuality", *Free Malaysia Today*, 22 March 2012.

751 CEDAW Committee Concluding Observations to the Singapore Government, 11 – 29 July 2011, CEDAW/C/SGP/CO/4, paragraph 22.

Recommendations to the Malaysian Government regarding the CEDAW Committee's General Recommendation No. 28

- Put in place without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, including those based on sexual orientation and gender identity, in conformity with the provisions of CEDAW. Such measures should include efforts, in collaboration with civil society, to educate and raise awareness of this subject, targeting women and men at all levels of the society.

- Educate the judiciary, the legal profession, the police, Islamic religious affairs department officers and other State authorities on the right to equality and non-discrimination so that the human rights of transpeople and women in same-sex partnerships are respected and promoted.

- Immediately repeal laws that criminalise sexual orientation, gender identity and gender expression; recognise LGBTIQ rights as human rights; and harmonise national laws, policies and practices with the Yogyakarta Principles:
    - Repeal the Penal Code and state *Syariah* Criminal Offences enactments that criminalise same-sex consensual sexual relations,
    - Repeal Section 21 of the Minor Offences Act 1955, which is used to control the sexuality of women and transpeople, and
    - Repeal the state *Syariah* Criminal Offences enactments that criminalise "cross-dressing" for immoral purposes, which are used to arrest and harass transpeople.

- Enact a gender equality law, which should include provisions for the establishment of an anti-discrimination commission vested with powers to advise the government, hear complaints and deliver decisions and guidelines on all aspects of gender equality.

- Establish structures, institutions and mechanisms for more effective public education on human rights. Educate citizens on constitutional provisions for the protection of the human rights of citizens and non-citizens, and educate the public on the spirit and core values of the Universal Declaration of Human Rights and the Yogyakarta Principles. This includes taking all necessary measures to:
    - Ensure sex education in schools is non-judgmental, just and fair. Teachers are responsible for ensuring that pregnant schoolgirls are not discriminated against or stigmatised. Parents should be encouraged to discuss sex openly with their children and be non-judgemental in their approach.
    - Develop positive public service messages to promote the human rights of LGBT. These messages should be disseminated by both public and private media stations to debunk stereotyped views.

- Education institutions must not punish students for failing to adhere to gender stereotypes. Schools and universities should actively promote the human rights of people of diverse sexual orientations and gender identities.

- Establish an ongoing dialogue and awareness-raising programme to increase knowledge and sensitivity among religious groups, government authorities, media and other institutions about sexual orientation and gender identity issues.

- Take action against institutions that promote and encourage discrimination, violence and persecution of any minority community on the basis of gender identity, gender expression or sexual orientation.

- Dismantle all State institutions or initiatives that were established with the purpose of regulating and monitoring adults' sexual or moral behaviour in consensual situations.

- Officially recognise transgender people as having legitimate identities by establishing an enabling environment through policies and laws for their socio-economic advancement:

- Conduct comprehensive research into the special needs of transpeople in consultation with them. Their rights to healthcare, education and employment should be afforded and protected.
- Recognise transpeople officially as a community with legal identities as people. Expand on the categories of gender for identification purposes to include the options of transman, transwoman and non-gender specific.
- Provide adequate facilities for transpeople (separate facilities for transwomen and transmen) in hospitals and prisons, and toilet facilities in all government agencies and private entities, as well as in public areas.
- Ensure that medical health personnel are sensitised and ready to address the health needs of transpeople.
- Encourage, facilitate and provide for the political participation of transpeople.

Picture 1
The middle coach of every three-coach commuter train in the Klang Valley is designated for "Ladies Only" (photograph taken by Sarah Thwaites).

By SYED AZHAR and ISABELLE LAI
The Star 13/3/11

KOTA BARU: A hair salon owner is fuming after she was issued a summons for allowing an employee to wear a three-quarter-sleeved blouse while on duty at her salon on March 6.

The owner, who declined to be named, said she was upset because her employee was washing a client's hair when the Kota Baru Municipal Council enforcement officer raided her salon.

"I would not mind paying the fine if my employee was not wearing a headscarf, which is a violation of the business permit conditions, but it is ridiculous to issue a summons for wearing a three-quarter-sleeved shirt.

"She was washing my client's hair and it would be messy if she was wearing a long-sleeved shirt," she said.

The salon owner was issued a summons under the municipal Trade and Industry 1989 By-law.

She also accused the council of double standards as other establishments had workers who did not wear headscarves.

"Why only target my salon when the others clearly flout the law and should be issued with summonses?" she asked.

MCA central committee member Datuk Ti Lian Ker said the council's action was "unconventional" and "unbecoming".

"This is sending the wrong signal to the world about Malaysia," he said, blaming the PAS-led Kelantan government for the actions of the council.

Failing short: The hair salon employee who wore a three-quarter-sleeved blouse while on duty.

"Most people prefer to take the 'easy way out' for fear of repercussions from local authorities.

"This is not the first time that such a summon had been issued," he said, adding that many often paid up because they did not want trouble with the local authorities.

Ti said this could also give the wrong impression that people were condoning such laws.

The Kelantan Government has recently come under heavy criticism after banning the sale of lottery tickets.

Picture 2
Newspaper clipping: "Salon owner fined for letting employee wear 'inappropriate' blouse", *The Star*, 13 March 2011.

Picture 3
The original poster for an event in conjunction with International Women's Day 2011. Note the logo of a woman in the top left corner (poster reproduced with the kind permission of *Kakiseni*).

Picture 4
The amended poster for an event in conjunction with International Women's Day 2011. Note that the logo in the top left corner has been replaced after the Ministry of Women, Family and Community Development expressed its disapproval and requested the removal of the image of the woman (poster reproduced with the kind permission of *Kakiseni*).

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警夜店取締賣淫女郎 額頭胸部畫√打X

社會 02/06/2011 17:46

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轉寄 列印 字体: 小 中 大

1.女子的額頭上被打"X"。
2.其中一名女子的胸前被警員畫上勾。
3.這名女子的胸前則被打叉。

（檳城2日訊）武吉阿曼警方北上取締夜店，有別于檳警方在涉嫌賣淫女子手臂上寫號碼記錄，反在她們額頭及胸部上畫勾和打叉，30名落網女子被帶出時，放眼望去"是對又是錯"，引人注目。

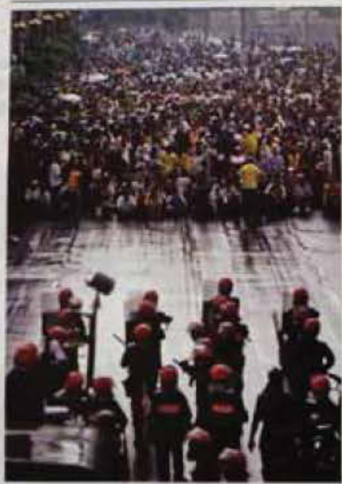
一般上檳州警方反風化取締組在突擊夜店后，為了方便調查及避免落網外籍女子趁機逃脫，都會在她們手臂或手掌上，用麥克筆寫下號碼作記錄。

Picture 5
Screen shot of news article in China Press (2 June 2011), depicting the women who were marked with either a tick or a cross during a raid by police on an entertainment venue (http://www.chinapress.com.my/node/221873).

The Economist July 16th 2011

ion of trust

thority is still at the seedling stage. Yet lately there have been nightly televised exposés of the gulf between official reassurances and the worrying reality. Even the belated stress tests raise eyebrows: they will be undertaken by the utilities themselves and checked by two regulatory agencies that previously failed to supervise the utilities properly. On July 13th Mr Kan said he wants Japan to reduce nuclear power on safety grounds, if not to get rid of it altogether. A few months ago such a policy was unthinkable, because of the risk of power shortages. The public increasingly supports it—but not Mr Kan. ■



Political affray in Malaysia

Taken to the cleaners

SINGAPORE

An overzealous government response to an opposition rally

MALAYSIA is one of South-East Asia's stabler nations; but a rally in Kuala Lumpur on July 9th in demand of electoral reform turned surprisingly nasty, leading to the arrest of more than 1,600 people. The police fired tear gas and water cannon into the crowd [redacted] All those arrested were released fairly quickly, but Amnesty International, a London-based human-rights group, called it "the worst campaign of repression in the country for years". The government's reaction showed a lot of nervousness about how much opposition it can tolerate.

Fair Elections, is a loose alliance of NGOs and activists (bersih means "clean"). It argues that all candidates should be given access to the mainstream media and that indelible ink should be used to stop people voting more than once. It all sounds uncontroversial, but not to the government. Bersih was declared illegal on July 1st and about 200 activists were rounded up [redacted]

Perhaps the government was looking back nervously to the first Bersih march, in 2007. On that occasion, too, thousands protested against the Barisan Nasional (BN) coalition government and demanded reform. Subsequently, in the 2008 general election, the BN lost its largest share of votes since 1957 when it started ruling the country after the British left. The current prime minister, Najib Razak, deputy prime minister in 2007 before taking over the top job in an internal party coup, must have feared that the second Bersih rally might be a similar portent. He has to hold an election before 2013, but wants to do so earlier to win his own mandate. Opposition politicians were quick to join Bersih. The pre-eminent leader of the opposition, Anwar Ibrahim, was shoved to the ground and injured in the affray.

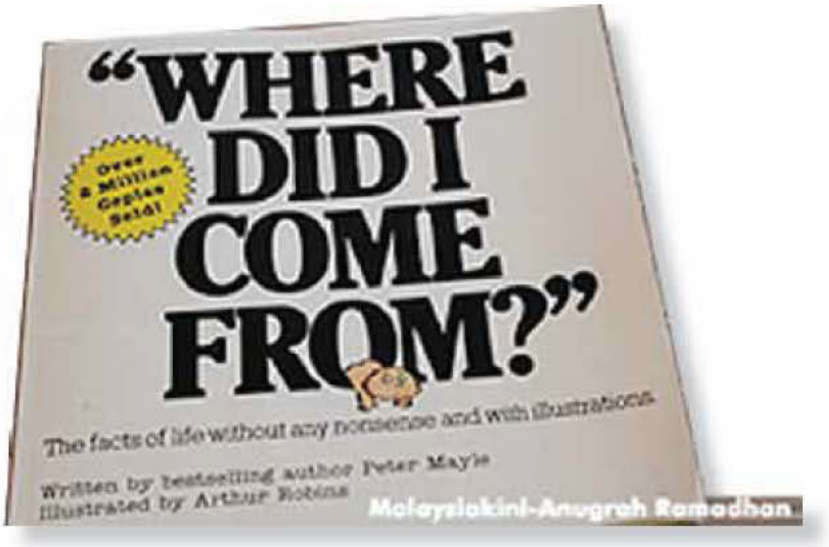
None of this bodes well for Malaysia. [redacted] Few old laws were left untouched in the attempt to round up suspects before the march. It was reported that 30 people arrested in Penang were investigated under Section 122 of the Penal Code for the charge of waging war against the king. Dragging in the constitutional monarch, Tuanku Mizan Zainal Abidin, seemed particularly desperate, reminiscent of the abuse of the monarchy's position in neighbouring Thailand. On the eve of the rally, the king came out with a statement reminding everyone that "street demonstrations bring more bad than good, although the original intention is good."

Mr Najib defended the police and accused the marchers of sowing chaos. Dismissing the motives of Bersih, he cast it as a desperate attempt by Mr Anwar to grab power. The immediate upshot is that Mr Najib may choose to delay calling for an election for some time, to let things settle down. He presumably hopes that if he waits long enough, people will have forgotten about this ugly incident.

Picture 6
Article about BERSIH 2.0 in *The Economist* ("Political affray in Malaysia: Taken to the cleaners", *The Economist*, July 16-22, 2011, page 30). Note that the Malaysian government censored this print version of the article and all copies sold in Malaysia contained blacked out sentences. The full version of the article can be read here: http://www.economist.com/node/18959359.

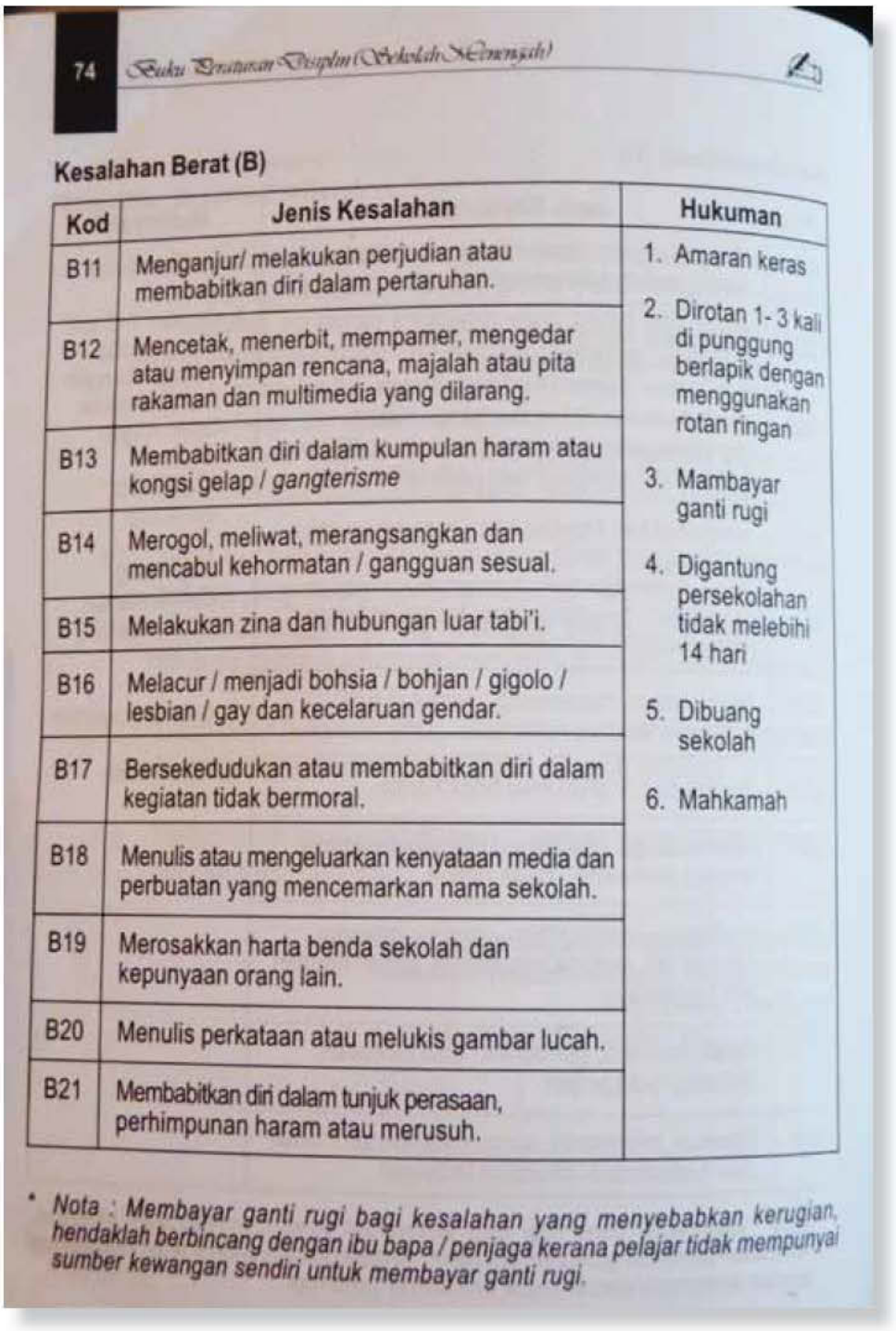
The three blacked out sections in the article read as follows:

- *First censored section:* "...and one man died of a heart attack."
- *Second censored section:* "The march itself was then banned, although the authorities offered Bersih a stadium to meet in—and then withdrew the offer."
- *Third censored section:* "The heavy-handed police tactics have provoked a lot of anger; the government has conceded an official investigation into claims of police brutality. In one instance (caught on film), police seemed to fire tear gas and water cannon into a hospital where protesters were sheltering from a baton charge."



Picture 7
The front cover of the banned children's book on the human reproductive system, which was first published about 30 years ago (image reproduced with the kind permission of *Malaysiakini*).

Picture 8
Front cover of the Disciplinary Rule Book for secondary school students in Kuala Lumpur.



74 Buku Peraturan Disiplin (Sekolah Menengah)

Kesalahan Berat (B)

Kod	Jenis Kesalahan	Hukuman
B11	Menganjur/ melakukan perjudian atau membabitkan diri dalam pertaruhan.	1. Amaran keras 2. Dirotan 1- 3 kali di punggung berlapik dengan menggunakan rotan ringan 3. Mambayar ganti rugi 4. Digantung persekolahan tidak melebihi 14 hari 5. Dibuang sekolah 6. Mahkamah
B12	Mencetak, menerbit, mempamer, mengedar atau menyimpan rencana, majalah atau pita rakaman dan multimedia yang dilarang.	
B13	Membabitkan diri dalam kumpulan haram atau kongsi gelap / *gangterisme*	
B14	Merogol, meliwat, merangsangkan dan mencabul kehormatan / gangguan sesual.	
B15	Melakukan zina dan hubungan luar tabi'i.	
B16	Melacur / menjadi bohsia / bohjan / gigolo / lesbian / gay dan kecelaruan gendar.	
B17	Bersekedudukan atau membabitkan diri dalam kegiatan tidak bermoral.	
B18	Menulis atau mengeluarkan kenyataan media dan perbuatan yang mencemarkan nama sekolah.	
B19	Merosakkan harta benda sekolah dan kepunyaan orang lain.	
B20	Menulis perkataan atau melukis gambar lucah.	
B21	Membabitkan diri dalam tunjuk perasaan, perhimpunan haram atau merusuh.	

* *Nota : Membayar ganti rugi bagi kesalahan yang menyebabkan kerugian, hendaklah berbincang dengan ibu bapa / penjaga kerana pelajar tidak mempunyai sumber kewangan sendiri untuk membayar ganti rugi.*

Picture 9
The page from Disciplinary Rule Book for secondary school students in Kuala Lumpur that outlines the possible punishments for homosexuality and 'gender confusion' (see B16).

Picture 10
The logo of Seksualiti Merdeka 2011 (image reproduced with the kind permission of Seksualiti Merdeka, www.seksualitimerdeka.org).

GLOSSARY

ASEAN	Association of Southeast Asian Nations
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AICHR	ASEAN Intergovernmental Commission on Human Rights
Bisexual	Refers to a person who is attracted to both men and women
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
DVA	Malaysia's Domestic Violence Act
Fatwa	A ruling on a point of Islamic law declared by a religious authority
FGM	Female genital mutilation, also referred to as female circumcision
Gay	Refers to a person who is attracted to others of the same sex
Gender expression	Refers to the external manifestation of one's gender, usually expressed through 'masculine', 'feminine' or gender variant dress, appearance, mannerisms, speech patterns and behaviour. Gender expression is not necessarily an indication of sexual orientation or gender identity.[752]
Gender identity	Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[753]
JAKIM	Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia*)
Lesbian	Refers to a female who is attracted to other females
LGBTIQ	Lesbian, gay, bisexual, transgender, intersex, queer
MWFCD	Ministry of Women, Family and Community Development (*Kementerian Pembangunan Wanita, Keluarga dan Masyarakat*)
MoU	Memorandum of Understanding
NGO	Non-government organisation
Pengkid	Refers to someone who identifies as somewhere on the spectrum between butch and a transman. Some *pengkids* identify themselves as male and often have ambiguous or gender neutral names. They wear attire typically regarded as men's. Some bind their chest and usually take on masculine mannerisms. This term is commonly used by the Malay community in Malaysia.

[752] International Gay and Lesbian Human Rights Commission, "Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW", p39.

[753] www.yogyakartaprinciples.org/principles_en.pdf

PR	Permanent residency
RM	Malaysian Ringgit – currency used in Malaysia (at the time of writing USD1 equated to approximately RM3)
RELA	People's Volunteer Corps *(Ikatan Relawan Rakyat Malaysia)* – a paramilitary unit formed in 1972
Sexual orientation	Sexual orientation is understood to refer to each person's capacity for emotional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.[754]
SOGI	Sexual orientation and gender identity
SUHAKAM	The Human Rights Commission of Malaysia
Syariah	In each state of Malaysia, there are *Syariah* criminal laws as well as Islamic family laws. These laws apply only to Muslims.
Transgender	An umbrella term for people whose gender identity, expression or behaviour is different from that typically associated with their sex at birth. Transpeople may be heterosexual, lesbian, gay or bisexual.[755]
Transman	Female to male transgender. May or may not have undergone sex reassignment surgery.
Transsexual	Refers to a person whose gender identity is different from their assigned sex at birth. Often transsexual people alter or wish to alter their bodies through hormones or surgery in order to make it match their gender identity.[756]
Transwoman	Male to female transgender. Referred to as *Mak Nyah* in Malaysia. May or may not have undergone sex reassignment surgery.
UPR	Universal Periodic Review – involves a review of the human rights records of United Nations countries every four years.

754 www.yogyakartaprinciples.org/principles_en.pdf

755 International Gay and Lesbian Human Rights Commission, "Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW", p40.

756 International Gay and Lesbian Human Rights Commission, "Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW", p40.

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