



**HUMAN RIGHTS COMMISSION OF MALAYSIA
AN INDEPENDENT REPORT TO THE COMMITTEE ON THE
CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN (CEDAW)**

STATE PARTY: MALAYSIA

**TREATIES COVERED: CONVENTION ON THE ELIMINATION OF ALL FORMS
OF DISCRIMINATION AGAINST WOMEN**

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1.0 INTRODUCTION

- 1.1 The Human Rights Commission of Malaysia (hereinafter referred to as the Commission) is an independent statutory body operating under the Human Rights Commission of Malaysia Act 1999 (Act 597) with the purpose to promote and protect human rights in Malaysia.
- 1.2 The Commission's report to the CEDAW Committee highlights the observations by the Commission on the Government of Malaysia's responses and implementations on comments and recommendations on CEDAW made by the CEDAW Committee¹ and also in the Universal Periodic Review (UPR) in October 2013. Observations and opinions in this report are solely those of the Commission.
- 1.3 In developing this report, various consultations were held together with the Malaysian Government and Civil Society Organisations (CSOs) to share ideas, recommendations and information on CEDAW. The Commission also monitored laws and policies which have impacted women's rights in Malaysia.

2.0 BACKGROUND

- 2.1 CEDAW was ratified by Malaysia in August 1995 with reservations to Article 2(f), 5(a), 7(b), 9 and 16. In February 1998, the country withdrew its reservations in respect to Articles 2(f), 9(1), 16(1)(b), 16(1)(d), 16(1)(e) and 16(1)(h). In 2010 Malaysia withdrew its reservations to Article 5(a), 7(b) and Article 16(2) while maintaining its reservation to Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) on consideration that these Articles were in conflict with the Federal Constitution and Islamic Law (Shari'ah).
- 2.2 The Commission commends the Malaysian government's commitment to the Sustainable Development Goals 2030 (SDG) and its effort in incorporating those goals into the 11th Malaysia Plan.² The 2030 Agenda comprises of 17 transformative goals which consist of, amongst others, gender equality and empowerment of women and children. Goal 5 in particular focuses on the elimination of all forms of violence against women and girls in public and private spheres including human trafficking and sexual exploitation. This is the

¹ Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia, 31 May 2006, CEDAW/C/MYS/CO/2

² Malaysia Declares Commitments to achieving UN Sustainable Goals. *Malaymail Online*. 25 September 2016. <http://www.nst.com.my/news/2016/09/175804/msia-declares-commitment-achieving-un-sustainable-goals>

first time a global gendered framework for development has been adopted that is inclusive and builds upon human rights instruments.³ The implementation of the 2030 Agenda will give a fresh opportunity to accelerate progress in achieving gender equality and empowering women and girls and eliminating violence against women.⁴

3.0 DEFINITION OF DISCRIMINATION AGAINST WOMEN

3.1 The definition can be found under Article 1 of CEDAW that reads:

'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.'

4.0 SPECIAL PROTECTION MEASURES

Article 6: Appropriate measures to suppress all forms of trafficking and exploitation of women

4.1 Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015:

- a) The Commission welcomes the amendment made to the Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015⁵ (ATIPSOM). The amended Act strongly embodies the definition of trafficking in persons⁶ as defined by the Trafficking Protocols providing better protection to the victim, enabling them to move freely with the prospect to be gainfully employed⁶ and the redress mechanism set up for victims of trafficking.⁷ The Act also includes the definition for smuggling of migrants,⁸

³ Special Rapporteur on violence against women, its causes and consequences. A/HRC/32/42, at paragraph 38.

⁴ Ibid at paragraph 39.

⁵ Act 1385

⁶ Section 51A: Permission to move freely and to work.

(1) Subject to any regulations made under section 66, any person to whom an interim protection order has been granted, or any trafficked person to whom a Protection Order has been granted, may be given permission by the Council

(a) to move freely=or

(b) to be employed, engaged or contracted with to carry out work in any occupation during the period of the interim protection order or Protection Order, as the case may be.

(2) A foreign national who is granted permission to work under subsection (1) shall be subject to any restrictions and conditions as may be imposed by the relevant authorities relating to employment of foreign nationals in Malaysia.

⁷ Section 66A: Order for payment of compensation to the trafficked person.

⁸ Definition can be found under Interpretation as provided by Section 2 of the 2015 Act.

an act distinctive from trafficking. In addition, it also provides places of refuge to house the victims⁹ (shelters now may not necessarily be a place run by the government) and the appointment of protection officers to look after and protect the victims, preparation of reports and supervision.¹⁰

b) The Commission however regrets it was not consulted by the Attorney General's Chamber (AGC), the Ministry of Home Affairs (MOHA) and Ministry of Women, Family and Community Development (MFWD) on the amendments as the views, suggestions and recommendations from the Commission as the State's national human rights institution would assist in further strengthening the Act.

c) While the amendments strengthened the protection accorded to victims, it is not gender specific/sensitive. Hence, while the majority of men were forced into hard labour, women were left vulnerable and often trafficked for sexual exploitation.¹¹ Specific measures need to be taken to ensure women are not further victimised when they are rescued and are able to be reintegrated into society. Therefore, a sustainable protection solution should be developed in order to assist women victims to reintegrated back into the society.

4.2 The Commission calls for coordination on all political levels in Malaysia to pledge its commitment to effectively suppress trafficking and smuggling of women, regionally and internationally. Advocacy campaign on those issues should be amplified to target groups and civil society to ensure various levels of the society are aware of the danger, the relevant legislation and protection available to such victims. The Commission is dismayed by the lack of campaigns over the recent years by the MOHA, MFWD, Royal Malaysia Police (RMP) and other relevant agencies and would like to impress upon all on the importance of educating the public on the situations and dangers of trafficking and smuggling in Malaysia.

4.3 The Commission would like to reiterate its call to the government of Malaysia to accede to the remaining international conventions on Protection of the Rights of all Migrant Workers and Members of their family (1990); Convention relating to Status of Refugees (1951) and Protocols Relating to Status of Refugees (1967) and also the Convention against

⁹ Section 42(1): Place of refuge.

¹⁰ Section 43(2).

¹¹ 2015 Trafficking in Person Report by US Department of State.
<https://www.state.gov/j/tip/rls/tiprpt/countries/2015/243485.htm>

Transnational Organized Crime (Migrants Protocol)¹² to promote better protection to these vulnerable groups.

5.0 RIGHT TO HEALTH/DISABILITY AND WELFARE

Article 12: Health care and family planning

5.1 The Commission highly commends the efforts and initiatives undertaken by the Government to ensure that the public health sector in rural areas are constantly improved. In the district of Padawan, a rural area in Sarawak, in 2016 the Government has built a clinic and deployed three medical doctors together with four nurses to treat outpatients. Apart from that, the clinic also provided services relating to laboratory, pharmacy, and mother and children's healthcare.¹³ The Commission is of the view that such practice should be replicated in all districts to ensure people in rural areas receive the best healthcare. However, access to specialists is still limited and patients need to be referred to the Sarawak General Hospital. Thus, the Commission recommends that the Government deploy more doctors, nurses and specialist to rural areas in order for the people especially women and children receive the best healthcare.

5.2 HIV/AIDS:

- a) Infections transmitted by sex workers, men who have sex with men (MSM) and transgender persons are on the rise and females represent a significant number of those inflicted with HIV.¹⁴
- b) The Ministry of Health in its mid-term review of its 2011-2015 National Strategic Plan on HIV/AIDS reported its findings and highlighted programmes on the prevention of mother to child transmission which provide for screening, treatment, care and support for pregnant women with HIV and their spouses¹⁵ with the aim to eliminate incidence of vertical transmission by 2015.¹⁶ Screening for HIV on pregnant women was made available at all government health clinics and it was estimated that 68.5% mothers received treatment to reduce the risk of mother to child infection.

¹² Press Statement 26 May 2015.

¹³ <http://www.theborneopost.com/2016/01/24/healthcare-access-critical-for-rural-residents/>

¹⁴ National Strategic Plan Ending AIDS (2016-2030); Ministry of Health of Malaysia (2015).

¹⁵ Mid Term Review: The National Strategic Plan on HIV/AIDS 2011-2015. Disease Control Division, Ministry of Health Malaysia.

¹⁶ The National Strategic Plan on HIV/AIDS 2011-2015. Disease Control Division, Ministry of Health Malaysia.

- c) The 2016-2030 Strategic Plan also focuses on mitigating sexual transmission among Female Sex Worker (FSW) with four key activities and engagement with NGOs and various bodies of society:¹⁷
- Upscaling coverage on prevention services;
 - Condom and lubricant programming;
 - Linkage to Treatment, Care and Support, and
 - Risk elimination through Job Rehabilitation.
- d) Confidentiality of a person with HIV/AIDS have always been in conflict with the right of their spouse/partners' rights not to be infected. Women are at risk to be infected because of the unknown status of the husband as medical practitioners are bound by the code of ethics. The Commission recommends that in instances involving married couples or couples intending to get married, the medical profession should have certain exceptions in order to protect the uninfected spouse from being infected.
- e) The Commission observed that Malaysia does not have a specific legal framework to protect person living with HIV (PLHIV) although intervention and risk elimination aspect forms part of Strategic Plans from the MOH. The government should take necessary steps to further promote anti-discrimination law to protect PLHIV as the present Person with Disabilities Act 2008 institutes rights for persons with disabilities to access a range of public facilities, education and livelihood opportunities.¹⁸ As such, PLHIVs should be treated in accordance with specific legislation as PWDs are, to ensure that they are not discriminated. In this regard, the Commission feels that PLHIVs might benefit from being placed within a specific category of persons under the Person with Disabilities Act 2008 to ensure that they are protected and not discriminated especially when it comes to healthcare, education and livelihood.

5.3 Female Prisoners:

- a) Female prisoners make up a small portion of the prison population in Malaysia and the majority of them were imprisoned for drug related offences. In the recent study conducted by the Commission,¹⁹ there were 47, 958 prisoners in the country and 3, 116 were women as of

¹⁷ Pages 77-82.

¹⁸ The Policy and Legal Environments Related to HIV Services in Malaysia. Review and Consultation. United Nations Country Team, Malaysia (2014).

¹⁹ The Right to Health in Prison, Result of a Nationwide Survey and Report by the Human Rights Commission of Malaysia (2016).

October 2014. The Commission further notes that while the prison rules operate for both men and women, the women's prisons are required to comply with gender specific standards and issues that affects them.²⁰

- b) The Commission further observed that certain healthcare needs of women were often not met in the prison which include insufficient supply of sanitary napkins during menstruation and proper facilities for the disposal of sanitary napkins; and while there are medical screenings at the time of admission in the female prison, there is no standard policy for routine physical or gynaecological examinations.²¹
- c) The Commission is of the opinion that pregnant prisoners should receive necessary pre-natal and post-partum care and treatment that includes adequate diet, clothing and appropriate accommodation and through regular visits to places of detention, the Commission observed that such care was not necessarily available in all prisons. Pregnant prisoners are normally admitted to the nearest Government Hospital to give birth as the prison's medical facilities are not equipped to support delivery.²²
- d) The Commission recommends that adequate budget should be allocated to the Prison Department to be used for the hiring of personnel, obtaining proper equipment and system. The creation of an internal system to address issues concerning the inmates would eliminate the need for the Prison Department to rely on other government departments. Alternatively, smart partnership between the government departments would ease the process and ensure that inmates are not denied their rights to proper care.

²⁰ Page 89.

²¹ Page 90.

²² Page 92.

6.0 ACCESS TO JUSTICE

Article 11 & Article 13: Elimination of discrimination in Employment, Economic and Social Life

6.1 The Government of Malaysia in 2001 has taken a positive step in its effort to eliminate discrimination against women by including the word "gender" under Article 8(2)²³ of the Federal Constitution²⁴ which is consistent with the spirit of CEDAW.

6.2 The case of *Norfadilla bt Ahmad Saikin v. Chayed bin Basirun & Lain-lain*.²⁵

- a) The Court in that case gave judicial recognition to the principle of gender equality and non-discrimination against pregnant woman. Ms. Norfadilla (Respondent) was offered employment as a "Guru Sandaran Tidak Terlatih" (GSTT), but her offer was later rescinded when she admitted that she was three months pregnant during the briefing for the said position. She then filed her case against the Education Office, the State Director of the Education Department of Selangor, the Ministry of Education and the Government of Malaysia on the ground that her post was revoked on the sole ground that she was pregnant. She argued that the act was tantamount to gender discrimination and in contravention of Article 8(2) of the Federal Constitution.
- b) The High Court ruled that the act of revoking an offer of employment as a temporary teacher to a woman due to her pregnancy was unconstitutional and breached Malaysia's commitment and obligation as a state party to CEDAW. The respondent was awarded damages of MYR 300, 000. However the amount was reduced to RM 30, 000 upon assessment on quantum of damages as it went beyond punitive, vindictive, exemplary or retributory and has transcended to be a thoroughly handsome profit to the benefit of the plaintiff (government) given the fact that she was untrained and trainee teacher who had yet to join the service at the material time.²⁶

²³ Article 8(2) of the Federal Constitution:

"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."

²⁴ Constitution (Amendment) (No.2) Act 2001.

²⁵ [2012] 1 MLJ 832

²⁶ *To prevent profiteering, court slashes woman's gender equality case award by 90pc.* See more at: <http://www.themalaymailonline.com/malaysia/article/to-prevent-profiteering-court-slashes-womans-gender-equality-case-award-by#sthash.sEANvJRK.dpuf>

6.3 In 2014, the Court of Appeal held that CEDAW has no legal effect until it is enacted and included into the domestic law of Malaysia²⁷ and was of the view that although Article 8(2) of the Federal Constitution did not allow the State/Government to discriminate women, it did not impose a similar prohibition on a private agency.²⁸ The lack of commitment on the part of the Government to look into law against discrimination may have adverse effect in law and policy relating to women in the country especially towards career advancement and other employment opportunities.

6.4 The Commission observed that private sectors in Malaysia are still practicing discrimination and this is a rising concern that should be addressed by the government of Malaysia. In the recent survey conducted by Women's Aid Organisation (WAO), 44% of 222 women respondents stated that they lost a job, missed out on promotion, demoted or put through extended probation because they were pregnant; 49% said they feared losing their jobs or being side lined because of their pregnancy while 31% put pregnancy plan on hold fear losing their jobs or promotion.²⁹ The prevalence of discriminatory practices were due to the fact that the Employment Act 1955³⁰ did not provide adequate protection to pregnant employees within the private sectors. Gaps within the legislation are as follows:³¹

- a) While the provisions of s.42(1) of the Employment Act 1955 makes it an offence to terminate an employee while she is on maternity leave, pursuant to s.42(2) of the Act, an employer may terminate an employee with wages in lieu of notice four months immediately preceding her confinement. In addition, an employer may still terminate a female employee due to her pregnancy, as such an offence only involves the payment of meagre fine;³²
- b) There is no specific penalty for an offence of termination under s.42 nor for a breach of s.37(4) for the termination of a pregnant employee during the period she is entitled to maternity leave. Thus, the general penalty of a fine not exceeding ten thousand ringgit can be imposed. Such a

²⁷ Air Asia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318

²⁸ Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia & Anor [2004] 4 MLJ 466.

²⁹ More than 40% of women in the workforce experience pregnancy discrimination. *The Star Online*. 9 August 2016.

<http://www.thestar.com.my/news/nation/2016/08/09/more-than-40-of-women-have-experienced-pregnancy-discrimination-survey-reveals/>

³⁰ Act 265

³¹ Dr. J.K Bhatt. *Pregnancy and maternity Entitlements under the Employment Act 1955 – Are Women Workers in Malaysia being short-changed?* Malayan Law Journal Articles [2015] 5 MLJ Ixxxiii.

³² Section 99A of Act 265, employer liable for a fine not exceeding ten thousand ringgit.

fine is inadequate to protect women and does not send a strong message to employers to not discriminate women based on their pregnancy;

- c) The proviso to s 37(4) of the Act also excludes termination on the ground of closure of business, which is unfair and discriminatory of pregnant women;³³

6.5 The Commission further observed that while the legislation provides some measure and protection in relation to pregnant employees, it only protects the female employee during maternity leave and not pregnancy. This can be seen in the case of *Beatrice Fernandez v Sistem Penerbangan Malaysia*, *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun* and also *Air Asia Berhad v Rafizah bt Mohamed Aris*.

6.6 The Commission is of the opinion that the current law in its application is inadequate to protect and promote gender equality. A better approach would be the use of creative interpretation as can be seen in India, where international norms are used to interpret gender within CEDAW. Such an approach will provide better sensitivity for gender equality in Malaysia.

6.7 Legislation against sexual harassment:

- a) The Government of Malaysia in 2012 amended the current Employment Act 1955³⁴ to include provisions against sexual harassment. The principal Act was amended to include Part XVA that provides the mechanism in which the employers should respond to the complaint of sexual harassment. Section 2(g)³⁵ of the amended Act provides a definition on what amounts to sexual harassment. Section 81A³⁶ stated what amounted to a complaint of sexual harassment; inquiries

³³ Any employer who terminates the service of a female employee during the period in which she is entitled to maternity leave commits an offence:

Provided that for the purpose of this section, such termination shall not include termination on the ground of closure of the employer's business.

³⁴ Employment (Amended) Act 2012 (Act A1419) came into force on 1 April 2012.

³⁵ "sexual harassment" means any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment;

³⁶ 81A. For the purposes of this Part,

"complaint of sexual harassment" means any complaint relating to sexual harassment made--

- (i) by an employee against another employee;
- (ii) by an employee against any employer; or
- (iii) by an employer against an employee.

upon receipt of a complaint³⁷ and finding of inquiries³⁸ therewith. This legislation unfortunately did not address the rights and liabilities of the harasser and also the victim.³⁹

- b) The Code of Practice on the Prevention of and Eradication of Sexual Harassment in the Work Place 1999⁴⁰ (known as 1999 Practice Code) was introduced by the Ministry of Human Resource of Malaysia in 1999 to address issues of sexual harassment in workplace. The 1999 Practice Code describes what amount to sexual harassment under Article 4⁴¹ while Article 5 provides that "sexual harassment refer to sexual conduct which is unwanted and unwelcome to the recipient". However, the 1999 Practice Code is merely a guideline to advice the employer on what amount to sexual conduct and does not provide an avenue for the victim to act against the perpetrator.
- c) In *Mohd Ridzwan bin Abul Razak v Asmah binti Hj. Mohd Nor*⁴², the Federal Court of Malaysia made reference to the length of protection against sexual harassment under the newly amended Employment Act and also the 1999 Practice Code. The Court observed that the tort of sexual harassment at the time filing of the action did not exist⁴³. Consequently, the Court, had actively imported the tort of harassment into the Malaysian legal and judicial system, with sexual harassment being part of it.⁴⁴ It was further noted by the Court that while the Employment Act provides an avenue and mechanism in dealing with sexual harassment complaint and inquiries, it did not address the rights and liabilities of the perpetrator and also the victim⁴⁵ while the 1999 Practice Code did not give rise to a cause of action for the victim against the harasser.⁴⁶
- d) The Commission was recently informed by the Ministry of Human Resources (MOHR) that since the amendment to Employment Act in 2012, 80 cases of sexual harassment were reported

³⁷ Section 81B(1)-(5).

³⁸ Section 81C.

³⁹ *Mohd Ridzwan bin Abul Razak v Asmah binti Hj. Mohd Nor* [Federal Court of Malaysia, Appellate Jurisdiction], 2 June 2016.

⁴⁰ Further information can be obtain from the following link:

<http://www.ilo.org/dyn/travail/docs/1627/CODE%20OF%20PRACTICE%20ON%20THE%20PREVENTION%20AND%20ERADICATION%20OF%20SEXUAL%20HARASSMENT%20IN%20THE%20WORKPLACE.pdf>

⁴¹ Article 4 of the 1999 Practice Code states that sexual harassment is where "any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment: (i) that might, be on reasonable grounds, perceived by recipient as placing condition of a sexual nature on her/ his employment; or, (ii) that might, on reasonable grounds be perceives by the recipient as an offence or humiliation, or a threat to his/her well-being, but has no direct link to his her employment."

⁴² Judgment for this case was delivered by Suriyadi Halim Omar, FCJ on 2 June 2016.

⁴³ Para 36.

⁴⁴ Para 39.

⁴⁵ Para 36.

⁴⁶ Para 37.

to the MOHR from January until September 2016.⁴⁷ However, the number of complaints may not be accurate as not all victims choose to lodge a complaint with the MOHR and it should not be assumed that the number represents the actual situation. Sexual harassment victims carry the fear of harassment and may be subject to re-victimisation by the authorities and feel disgraced or ashamed when meeting with people. Thus, a different approach from the current complaints mechanism should be taken to enable the victim to obtain the necessary assistance.

- e) The Commission recommends that training on sexual harassment be made compulsory for employers and employees and it should not be limited to within the private sectors but also government agencies especially within the enforcement authorities. Such training will educate employers and employees on harassment; reduce the incidence of harassment; and at the same time provide assistance to the victims to step forward and end the harassment.

6.8 Domestic Violence

a) Domestic Violence (Amendment) 2012 (DVA 2012):⁴⁸

- i. DVA 2012 was amended to further promote and protect women in cases of domestic violence and at the same time to provide a cooling period for both parties where arguments were involved.⁴⁹ This amendment widened the scope of domestic violence to include emotional, mental and psychology abuse.⁵⁰ The amendment also provides an Interim Protection Order (IPO) or Protection Order (PO) to be filed at any district to protect a victim⁵¹ by way of an *ex parte* application.⁵²
- ii. The amendments further provided the power to arrest (without warrant) by the police in situations when there is a likelihood of actual physical injury or to protect the person(s).⁵³ However, while the Act was amended to protect victims of domestic violence, there remains gaps in the legislation and further improvement on the burden of proof especially in cases involving intimate partners is needed. Domestic violence in Malaysia is still viewed as a personal matter between spouses and this poses a major challenge for the government and civil societies. While it is the task of Ministry of Women, Family and Community Development (MWFC) to

⁴⁷ This information was conveyed to the Commission in its recent Roundtable Discussion on the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) on 12 October 2016.

⁴⁸ Act A1414.

⁴⁹ Hansard, 2nd and 3rd Reading (4 October 2011).

⁵⁰ Section 2(a) to (h) of Domestic Violence (Amendment) 2012.

⁵¹ Section 14 of Domestic Violence (Amendment) 2012.

⁵² Section 12A of Domestic Violence (Amendment) 2012.

⁵³ Section 7(1) and (2) of Domestic Violence (Amendment) 2012.

ensure a comprehensive implementation of the law against domestic violence and protection, other agencies and civil societies need to work together on measures for prevention and intervention in cases of domestic violence.

- iii. The Commission is also concerned that the Act has failed to widen the scope of protection to intimate partners who are not party to a marriage. Intimate partners who are abused are often stigmatised, receive less attention and assistance, due largely to the fact that they are not legally married. While various NGOs have made available assistance to the abused partners, effective legal protection and remedies are still lacking. Thus, the Commission calls upon the government to consider reviewing the current legislation to provide legal protection to both married and non-married partners who are abused.
- iv. There is still much concern on choices made by the abused women who choose to stay with her abusive husband and also the discrimination faced by Muslim women upon filing for divorce at the Shari'ah Court. The human factors and attitude represented by the authorities has shown no improvement, as the Shari'ah Courts are perceived as patriarchal and ineffective in protecting and assisting women who have been abused. There have also been complaints that the family support system provided by the *Bahagian Sokongan Keluarga* (BSK) by the Shari'ah Department has failed to ensure consistent alimony payments to the families. The Commission calls all religious authorities to change their approach and attitude to tackle violence in marriage and women who are abused and provide better assistance to them.
- v. For example, the Kuala Lumpur Hospital reported a rise in domestic violence cases in recent months. Emergency and Trauma Department head, Prof Datuk Seri Abu Hassan Asaari Abdullah stated that cases recorded can be as high as 150 cases a month involving rape, child abuse, molestation and sodomy and these victims will be referred to the one Stop Crisis Centre to be given further treatment and psychological services.⁵⁴ Spouses addicted to alcohol and drugs contributed to the main cause for women and children becoming victims of violence. In cases of rape, men's behaviour towards women and addiction to pornography were among factors that triggered rape in the household. The prevalence of violence in marriage is an issue that the Malaysian government has yet to address adequately in terms of intervention and protection against women.

⁵⁴ Domestic violence on the rise. *The Star Online*, 9 July 2016.
<http://www.thestar.com.my/news/nation/2016/07/09/hkl-rise-in-domestic-violence-cases/>

- vi. The Commission also calls upon the Malaysian government to extend its assistance to the refugees/asylum seekers who are victims of domestic violence and are unable to seek protection due to their status in Malaysia. The Commission would like to reiterate that Malaysia, as one of the State parties to the CEDAW must take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. General Recommendation No.19 of the CEDAW Committee further clarifies that violence against women nullifies their enjoyment of women human rights and fundamental freedoms and is a clear violation under Article 1 of CEDAW.⁵⁵

6.9 Violence Within Marriage and Marital Rape:

- a) The Commission welcomes the move in making it an offence under a new section 375A of the Penal Code for a husband to cause hurt or fear of death or hurt to his wife in order to have sexual intercourse with her,⁵⁶ nonetheless, the Commission is concerned that marital rape remains an exception to rape under section 375.⁵⁷
- b) The Commission strongly calls for the revocation of the exception under section 375 for the following reasons:
- i. Marital rape, being a violent and degrading act perpetrated by a spouse is no less repugnant than rape perpetrated by a stranger;
 - ii. Article 16(1) (c) of the CEDAW is clear that both spouses have equal rights in a marriage. A wife is not under the authority of her husband or subservient to her husband;
 - iii. Marital rape legitimises violence by a husband against a wife;
 - iv. Marital rape reinforces the inferiority of women and the superiority of men. Article 5(a) of CEDAW places an obligation upon the Government 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 inferiority or the superiority of either of the sexes...ö*;

⁵⁵ Special Rapporteur on violence against women, its causes and consequences. A/HRC/32/42.

⁵⁶ Section 375A provides that “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 year.”

⁵⁷ Exception to section 375 - 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 recognised in the Federation as valid, is not rape.

- v. Marital rape is a violation of the human rights of women. Article 2 of the UN Declaration on the Elimination of Violence against Women, defines "marital rape" as violence against women, which impairs upon a woman's right to the full enjoyment of human rights and fundamental freedoms. On 30 June 2004, Malaysia signed the Declaration on the Elimination of Violence against Women in the ASEAN region, which recognises that violence against women both violates and impairs their human rights and fundamental freedoms;
 - vi. On 18 November 2012, Malaysia adopted the ASEAN Human Rights Declaration (AHRD), which reaffirms the importance of ASEAN's effort in promoting human rights, including the Declaration of the Advancement of Women in the ASEAN Region and the Declaration on the Elimination of Violence against Women in the ASEAN Region.
- 6.10 The Commission welcomes the Government's commitment to improve women's rights and status in the country through the change of legislation, regulations, practices and shifting of mind sets that hinder the progress of women.⁵⁸ This move is in line with the Commission's recommendation to the Government to review and replace all discriminatory laws in Malaysia.

7.0 LABOUR PARTICIPATION, ECONOMIC AND SOCIAL BENEFITS

Article 11: Employment

- 7.1 Malaysia was ranked at 100 out of 135 countries surveyed by the World Economic Forum's Global Gender Gap in its 2012 Report. This ranking indicates that there is gender inequality in Malaysia which includes women's involvement in the economic field.
- 7.2 In the distribution of Labour Force, according to the 2011 data on female labour force,⁵⁹ there were 9.57 million (68.2%) women of ages 15-64; of this number, 4.98 million (52.1%) were outside of the labour force. There were 4.58 million (LFPR: 47.9%) in the labour force and out of this number 4.43 (96.7%) million were employed and only 0.15 million (3.3%) were unemployed, only 14.7% were professionals while 8.7% were technicians and associate

⁵⁸ The commitments were made by the Prime Minister of Malaysia, YAB Dato Seri Mohd Najib Bin Tun Haji Abdul Razak, who is also the Minister of Ministry of Women, Family and Community Development on 29 January 2013. See <http://www.bernama.com/bernama/v6/newsgeneral.php?id=924642>.

⁵⁹ Quoted from Ministry of Women, Family and Community Development, Statistics on Women, Family and Community 2012, Malaysia. p. 23.

professionals and a large number of the women in the workforce were service and sales workers, while 3.6% were managers.

7.3 According to the Number of Employed Persons by Industry and Sex 2011,⁶⁰ Malaysian women dominated in several fields of employment, among others; education, activities of households as employers; undifferentiated goods and services producing activities of households for own use, human health and social work activities and financial and insurance/*takaful* activities. In the field of education, 66.7% were women compared to only 33.3% men. However, the number of women in decision-making levels in the Education Sector in 2011 and 2012 such as primary school headmaster, secondary school principal and residential school principal was less than men. As of 31 January 2012, only 3,774 females held decision-making positions in the education system compared to 6,063 males.⁶¹

7.4 In the Number of the Registered Professionals by Sex in 2011 -2012,⁶² there was an increase in the percentage of registered women professionals from 2010 to 2011. In the existing data, only the dentistry profession is dominated by women with 63.2% in 2012 and 62.8% in 2011. Professions such as Professional Architects, Architects, Professional Engineers, Graduate Engineers, and Land Surveyor are still dominated by men. This is probably due to gender stereotyping in the labour market for technical workforces.

7.5 The Tenth Malaysia Plan (2011-2015) offers a policy to increase the number of women participation in the key decision-making level. According to the statistics on the number of women as Secretary General, Deputy Secretary General and Director General in 2011-2012, the number went down from 45 positions (out of 213 positions) in 2011 to 42 positions (out of 233 positions) as of March 2012.⁶³ According to the Minority Shareholder Watchdog Group Malaysian Corporate Governance Index 2011, there were only 8.4% of women on the boards of Malaysia's Public Listed Companies (PLCs). The above figures show that the number of women in leadership and management positions remains depressingly low.

⁶⁰ Ibid p. 16 and 17.

⁶¹ Ibid p. 73.

⁶² Ibid p. 18, 2011 and 2012 ó as at mid-year.

⁶³ Ibid p.69

7.6 The Government in response, launched the New Corporate Governance Blueprint 2011 targeted for the corporate sector to ensure that women make up at least 30% of those in decision-making positions by 2016. Companies were recommended to formulate policies to increase the number of women candidates as board members. The Blueprint also recommends for companies to disclose gender diversity policies in their annual reports, targets and measures to achieve 30% women participation by 2016.

7.7 The number of women in the Civil and Shari'ah judiciary has also been low. As of 18 March 2012, there were only 35.4% women represented in the Civil Judiciary. As of 2011, there were 24.1% women in Shari'ah Judiciary and this figure increased slightly to 25.4% in 2012.⁶⁴

7.8 The Commission would like to commend on the appointment of Ms. Noor Huda Roslan and Ms. Nenny Shuhaidah as judges of the Selangor Shari'ah High Courts of Malaysia on 27 June 2016. Their appointment were noted as the first women to attained the highest post in the Shari'ah judiciary that overcomes gender stereotyping issues often associated with Shari'ah administrations and the courts. In the same event, seven (7) female judges were appointed to Lower Shari'ah Courts, four (4) appointed as Registrar of the Shari'ah High Court and another four (4) as Assistant Registrar.⁶⁵

The government should, as per its commitment in its Universal Periodic Review (UPR)⁶⁶ in 2013 ensure that the empowerment of women is prioritised, especially with regard to increasing women's participation in labour force and increasing the number of women in key decision-making position.

7.9 The Commission applauds the decision of the Ministry of Women, Family and Community Development (MWFCD) on its move to introduce Gender Equality Act to give women equal rights with men.⁶⁷ This new Act set to operationalized Article 8(2) that emphasised non-discrimination on the grounds of gender. However, to date, there has been no progress in the

⁶⁴ Ibid p. 72, consisting of Chief Registrar of the State Syariah Court, Syarie Judges, Sulh Officers and Syariah Officers.

⁶⁵ *Dua Hakim Wanita Pertama Mahkamah Tinggi Syariah Malaysia dilantik*. Astro Awani, 27 June 2016. <http://www.astroawani.com/berita-malaysia/dua-hakim-wanita-pertama-mahkamah-tinggi-syariah-malaysia-dilantik-109363>

⁶⁶ Malaysia's Universal Periodic Report, 6 August 2013, A/HRC/WG.6/17/MYS/1, para 59.

⁶⁷ Ministry to hold discussions to formulate Gender Equality Act- Rohani. Bernama.com, 3 November 2016. <http://www.bernama.com.my/bernama/v8/ge/newsgeneral.php?id=1298885>

said Act although the MWFCD will embarked on consultations with relevant stakeholders to improvise the Act.

7.10 The Commission since 2010 has carried out a number of engagements with stakeholders on the issue of business and human rights. One of the key finding from these activities is the lack of awareness and recognition of the role and obligation of business to ensure that their operations do not in any way lead to human rights abuses. The Commission also observed that businesses are not accustomed to the concept of Corporate Social Responsibility (CSR) and the United Nations guiding Principle on Business and Human Rights (UNGP). The Commission recommends that the government through the enactment of laws and policies encourage business entities to respect human rights and incorporate human rights elements in their business activities.⁶⁸

8.0 CITIZENSHIP/NATIONALITY

Article 9: Nationality

8.1 Malaysia's reservation to Article 9(2) was made on the basis that the article was in contradiction to the Federal Constitution of Malaysia that refers to paternalistic values in granting citizenship. To date, the Malaysian Government has yet to review this reservation to include citizenship through a maternal link. A person can be a Malaysian citizen through operation of law under

⁶⁸Preface. Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia. Human Rights Commission of Malaysia. March 2015.

Article 14⁶⁹; by registration (of wives and children of citizens) under Article 15⁷⁰; or neutralisation under Article 19⁷¹ of the Federal Constitution.

⁶⁹ **Citizenship by operation of law**

14. (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

- (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
- (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

⁷⁰ **Citizenship by registration (wives and children of citizens)**

15. (1) Subject to Article 18, 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.

(2) Subject to Article 18, 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.

(3) Subject to Article 18, a person under the age of twenty-one years who was born before the beginning of October 1962, and whose father is (or was at his death) a citizen and was also a citizen at the beginning of that month (if then alive), is entitled upon application made to the Federal Government by his parent or guardian, to be registered as a citizen if the Federal Government is satisfied that he is ordinarily resident in the Federation and is of good character.

(4) For the purposes of Clause (1) residence before Malaysia Day in the territories comprised in the States of Sabah and Sarawak shall be treated as residence in the Federation.

(5) The reference in Clause (1) to a married woman is a reference to a woman whose marriage has been registered in accordance with any written law in force in the Federation, including any such law in force before Merdeka Day, or with any written law in force before Malaysia Day in the territories comprised in the States of Sabah and Sarawak:

Provided that this Clause shall not apply where the woman applies to be registered as a citizen before the beginning of September 1965, or such later date as may be fixed by order of the Yang di-Pertuan Agong, and is at the date of the application ordinarily resident in the States of Sabah and Sarawak.

⁷¹ **Citizenship by naturalization**

19. (1) Subject to Clause (9), 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 naturalization 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.

(2) Subject to Clause (9), the Federal Government may, in such special circumstances as it thinks fit, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalization to that person if satisfied

- (a) that he has resided in the Federation for the required periods and intends, if the certificate is granted, to do so permanently;
- (b) that he is of good character; and
- (c) that he has an adequate knowledge of the Malay language.

(3) The periods of residence in the Federation or the relevant part of it which are required for the grant of a certificate of naturalization are periods which amount in the aggregate to not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which include the twelve months immediately preceding that date.

8.2 In a consultation held in 2014⁷² with various government agencies and civil societies, the Ministry of Home Affairs (MOHA) indicated that several factors will be looked into to determine the status of a child, which includes:

- a) Citizenship status of the parents;
- b) Marriage status of the parents;
- c) Place of birth of the child; and
- d) Age factor of the child.

8.3 MOHA further commented that while Article 14(b)(1) of the Federal Constitution does not apply to a child of Malaysian women and foreign husband that were born in a foreign soil, the application of citizenship can be made under Article 15(2) of the Federal Constitution.

8.4 The Government in their reply on the different conferment of citizenship to a child of a Malaysian women on a foreign husband were as follows:

- a) Malaysia does not approve dual citizenship as stated in Article 24 of the Federal Constitution;
- b) Malaysia is among the countries that still refers its status of citizenship through paternal link and a child from a legal marriage is given privilege of that citizenship;
- c) Although citizenship can be granted based on special circumstances under 15A of the Federal Constitution⁷³, nevertheless, the Government has been very careful in granting citizenship due to the fact that Malaysia is an entry point for illegal immigrants. Hence, having a strict policy on citizenship is one way to control the number of illegal immigrants in the country.

8.5 The Commission is of the view that there is differential treatment with regards to awarding nationality under Article 14(1)(b) of the Federal Constitution to children by Malaysian fathers and non-Malaysian fathers. Children who were born by Malaysian father through a valid marriage will automatically assume the citizenship, regardless of whether the birth was in

⁷² The Consultation was held on 17 April 2014 with representative of Government agencies.

⁷³ Special power to register children

15a. Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

Malaysia or on foreign soil (provided the birth was registered at the Malaysian Embassy within one year).⁷⁴

- 8.6 However, a child by a Malaysian mother and foreign father will not automatically acquire the citizenship as the child will have to apply the citizenship under Article 15 of the Federal Constitution. This is seen as discrimination to women in Malaysia as they do not acquire equal privilege for their children to have similar citizenship as their mother.
- 8.7 The Commission is aware of the administrative procedure introduced in 2010 to allow Malaysian women who are married to foreigners to apply for Malaysian citizenship for children born outside the country. On a constitutional basis, however, discrimination persists against women with foreign spouses. Article 15 of the Federal Constitution provides that citizenship may be conferred on the foreign wife of a Malaysian man upon application to the Government. However, there is no similar provision for the foreign husband of a Malaysian woman. In view of these situations, the Commission urges the Government to review the provisions of laws generally and the Federal Constitution specifically to make these consistent with the principle of non-discrimination, in line with Malaysia's treaty obligations.
- 8.8 The Commission has urged the Malaysian Government to review this matter under Article 8(2) of the Federal Constitution that expressly states that there shall be no discrimination against its citizen on the ground of religion, race, descent and place of birth or gender in any law. Thus Articles 14 and 15 of the Federal Constitution should be read together with Article 8(2) to give a wider effect on gender equality in citizenship. In addition, the Commission urges the government to use the inherent powers provided for under Article 15A of the Federal Constitution to grant citizenship to children in special circumstances to ensure that the law on citizenship is not deemed discriminatory.

⁷⁴ Roundtable Discussion Report on Reservation to CEDAW, CRC and CRPD. Human Rights Commission of Malaysia (2015).

9.0 MARRIAGE AND FAMILY RELATIONS

Article 16(1)(a): Equal rights to enter into marriage

- 9.1 Islamic Law (or Shari'ah Law) and Civil Law in Malaysia exist as a parallel system. However, only Muslims are subjected to the Shari'ah Laws. The administration of Islamic law deals on with a limit number of matters relating to personal law of Muslim subjects such as marriage, divorce and division of property, amongst others; with the Shari'ah Courts being subordinate to the Civil Courts established under the Federal Constitution.⁷⁵ In Malaysia, although Islam is the religion of the Federation, all other religions may be practiced in peace and harmony in any part of the Federation.⁷⁶ The governance of Shari'ah Laws lies within the State authorities, and varies from one State to another. The reservations made on Article 16(1)(a), 16(1)(c) and 16(1)(f) of CEDAW were based on the argument that the said Articles were in contradiction with Shari'ah Law in Malaysia.
- 9.2 The two main principals under Article 16(1)(a) are equal rights to enter into marriage and also equal rights to choose their spouse for marriage.⁷⁷ The right to equal marriage was meant to protect women and children from force marriage and is adequately protected. For example, under s.13 of Islamic Family Law (Federal Territories) Act 1984⁷⁸ a marriage is only deemed valid and will be registered if both parties agree to the marriage.
- 9.3 On the other hand, for women in Islam there are limitations before one can enter into a marriage. For example, a women must obtain consent from her legitimate guardian (male) or *wali*⁷⁹ . Section 3 of Act 303 thus goes against an objective reading of the principal of equal rights to choose one's spouse under this Article 16(1)(a) as the s 3 of Act 303 allows for men to have polygamous marriages, but it does not apply to women.
- 9.4 While the Commission understands and respects the Government's stand to maintain the reservation under Article 16(1)(a) due to its apparent incompatibility with Shari'ah Law and also due to the possibility of the said article advocating same sex marriage, which is prohibited

⁷⁵ Dahlan, R; Faudzi, FS. *The Syariah Court: Its Position Under The Malaysia Legal System. Legal Herald (May 2015).*

⁷⁶ Article 3(1) of the Federal Constitution.

⁷⁷ Roundtable Discussion Report on Reservation to CEDAW, CRC and CRPD. Human Rights Commission of Malaysia (2015).

⁷⁸ Act 303

⁷⁹ The concept of male legal guardian or *wali* in Islam is that the *wali* shall be the father of the women and if he is dead, it shall be the grandfather; if he too is dead, it falls to the father's brother or if none, it falls onto the girl's brother or a younger brother.

under both Shari'ah and also civil law (Law Reform (Marriage and Divorce) Act 1976)⁸⁰, the government of Malaysia should consider lifting the said reservation whilst placing a proviso on its application to be within the understanding of Shari'ah Law and the civil law in Malaysia. The use of creative interpretation as such will show Malaysia's commitment to try to incorporate and adopt the principles under CEDAW in Malaysia.

9.5 Polygamous Marriage:

- a) While polygamous marriages are allowed under the Shari'ah Law in Malaysia, the rights and welfare of women and children may be at risk due to lack of care by the male spouse who are allowed to have polygamous marriages. Matters of religion and marriage of Muslims in Malaysia are subject to the Islamic state legislations and authorities. The Commission is particularly concerned that the right of women to provide consent and be heard when their spouse intends to contract into another marriage may not be adequately protected under the current enactments. While most state legislations in Malaysia concerning polygamous marriage requires a man to obtain permission of the court before he can enter into another marriage,⁸¹ the *Enakmen Pentadbiran Undang-Undang Keluarga Islam 1991* in the State of Perlis, however allows a man to contract into another marriage without the consent of the current wife as long as he obtains the consent from the Shari'ah Court in the State of Perlis.⁸²
- b) It is important to note that the fine imposed by the Shari'ah Courts for failure to obtain permission is often very low. For example in the State of Selangor, s.123 of the *Enakmen Undang-undang Keluarga Islam Selangor No. 4/1984 (pin.) 1988*, states that the fine imposed must not exceeded 1000 ringgit Malaysia and/or 6 months jail. In reality, the male spouse are rarely jailed, and the fine in itself is inadequate.
- c) In some instances, male spouses cross over into neighbouring countries such as the Thai border, which has less stringent Shari'ah Laws to register their polygamous marriage. Upon returning to Malaysia, not only does the first wife have no power to annul the polygamous marriage, the fine imposed upon the husband as mentioned above is trivial and does not deter others from doing the same. In certain circumstances, this marriages done at the border are not even

⁸⁰ Section 69(d) of the Law Reform (Marriage and Divorce) Act 1976: a marriage is void if the parties are not respectively male and female.

⁸¹ Example can be seen in the Islamic Family Law (Federal Territories) (Amendment) Act 2006 [*Act A1261*].

⁸² S. 23 of *Enakmen Pentadbiran Undang-Undang Keluarga Islam 1991*.

[http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen/State Enact Upd.nsf/f831ccddd195843f48256fc600141e84/84e498345d4728c1482574f8000a2064?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen/State%20Enact%20Upd.nsf/f831ccddd195843f48256fc600141e84/84e498345d4728c1482574f8000a2064?OpenDocument)

registered with the Islamic state authorities in Malaysia, thereby leaving the newly wed female spouse without any legal redress as her marriage is not formally recognised in Malaysia. Women in such situations are thus discriminated upon by the current system, giving their male counterparts the upper hand to abuse the system.

9.6 Rights to enter into marriage:

- a) In 2016, a medical student from the National Defence University of Malaysia, Nurul Shamimi Zainul Ariffin, was expelled for getting married while she was still a student in the university. She was sponsored by the Ministry of Defence and had a binding contract with her former sponsor, which prohibited her from getting married while still enrolled in the university. Her judicial review application in the High Court to challenge the decision of the university was rejected on the ground that Nurul Shamimi had voluntarily signed the contract and was aware that she was not allowed to get married while undergoing the five-year programme.⁸³ The Commission is deeply concerned with such terms in scholarship contracts, which the Commission deems violates the personal life of the female student to enter into marriage and start a family. Such terms are unwarranted, discriminatory of female students and should be void. The Commission calls for the Government of Malaysia to review its policies especially for Universities to ensure that all regulations promote gender sensitivity and do not restrict the rights of women.

Article 16(1)(b) : Free and full consent

9.7 Early and Forced Marriage:

- a) Child marriage is a grave human rights violation, which could significantly impact a child's rights to health, education, equality, non-discrimination and to live free from violence and exploitation. The best interests of the child must prevail and must not be superseded by traditional practices when it comes to child marriages. It has been reported in 2010 that 16,000 girls aged below 15 in the Malaysia have entered in State or Court sanctioned marriages⁸⁴. In 2015, the Shariah Court system received more than 1,000 applications from Muslims for

⁸³ *Expelled for getting married, student fails to challenge decision*. Free Malaysia Today (10 June 2016). Access on 13 June 2016 at 1.57pm. <http://www.freemalaysiatoday.com/category/nation/2016/06/10/expelled-for-getting-married-student-fails-to-challenge-decision/>

⁸⁴ Time to ban child marriage in Malaysia, Malaysiakini, 26 April 2016: <http://www.malaysiakini.com/news/339618>

permission to marry minors⁸⁵. The said statistic shows an alarming number of applications, and emphasises the growing problem of child marriages in Malaysia.

- b) The discriminatory nature of the law on marriage among females and males in Malaysia has created a gap that has been exploited by rapist who have married their rape victims in order to cover up and escape punishment for rape. The recent case of Ahmad Syukri Yusuf, who was granted a discharge not amounting to acquittal in July 2016 for statutory rape after he married his 14 year victim⁸⁶ is an example of the inadequate laws to protect female victims from being forced to marry their rapist. The Commission commends the action of the Minister of Women, Family and Community Development (MWFCD) in taking a pro-active stand in urging the Attorney General's Chambers to pursue the and as a result, the High Court reinstated the statutory rape case and issued an order for the case to be heard by the Session Court.
- c) From a theological aspect, the ruling of the National Fatwa Council in Malaysia following a discussion held on 21-22 October 2014 that child marriages are no longer seen as a healthy practice and are not *wajib* (obligatory) or *sunnah* (encouraged)⁸⁷ in Islam is a good step in discouraging child marriages on religious grounds, and further emphasises the need for better regulations to ensure that child marriages are not allowed.
- d) The discriminatory nature of the law on marriage among females and males in Malaysia has created a gap that has been exploited by rapists who have married their rape victims in order to cover up and escape punishment for rape. The recent case of Ahmad Syukri Yusuf, who was granted a discharge not amounting to acquittal in July 2016 for statutory rape after he married his 14 year victim⁸⁸ is an example of the inadequate laws to protect female victims from being forced to marry their rapist. The Commission commends the action of the Minister of Women, Family and Community Development (MWFCD) in taking a pro-active stand in urging the Attorney General's Chambers to pursue the and as a result, the High Court reinstated the statutory rape case and issued an order for the case to be heard by the Session Court.

⁸⁵ PAS MP suggests child marriage the answer for lustful teens, Malay Mail Online, 6 April 2016: <http://www.themalaymailonline.com/malaysia/article/pas-mp-suggests-child-marriage-the-answer-for-lustful-teens#sthash.yDmUdQW0.dpuf>

⁸⁶ <http://time.com/4438342/malaysia-rape-marry-victim/>

⁸⁷ Isu Perkahwinan Kanak-kanak: Kajian Dari Aspek Agama, Kesihatan dan Psikologi: <http://www.e-fatwa.gov.my/fatwa-kebangsaan/isu-perkahwinan-kanak-kanak-kajian-dari-aspek-agama-kesihatan-dan-psikologi>

⁸⁸ <http://time.com/4438342/malaysia-rape-marry-victim/>

- e) The Commission is concerned with the omission of any provisions addressing child marriages in the newly amended Child Act 2001. Despite recommendations by the Commission to amend all domestic laws to raise the legal age of marriage for all to 18 years, to be in compliance with the Child Act 2001 which defines children as those below the age of 18⁸⁹, no amendments have been forthcoming. Therefore, the government should consider providing for specific provisions on child marriages as it is detrimental to the basic rights of women and children.

Article 16(1)(c): Equal Rights during marriage and at its dissolution

9.8 Husband and wife have equal rights and responsibilities in marriage and upon dissolution. This responsibility is also mentioned in Islam and translated into the State Islamic law for example under s. 60 (Act 303), where the husband holds the responsibility to maintain the wife and children. Both husband and wife are given rights to dissolve the marriage while both maintain responsibility to the children. However, the Commission notes that the main problem in Malaysia has been the failure of the former husband to provide consistent alimony to his former wife and children.

9.9 There have been complaints that the family support system created by the *Bahagian Sokongan Keluarga* or Family Support Division of the Shari'ah Department in Malaysia has failed to ensure consistent alimony payments to the families. While there has been success in assisting the women and children in the payment, there are still many concerns on the effectiveness and consistency provided by the system. Data on this needs to be presented to the public so that it gains public confidence and creates awareness that a support system exist to assist women and children who are in need of alimony. Furthermore, the Shari'ah authorities must provide more stringent enforcement for the former husbands who fails to pay the alimony.

16(1)(g): The same personal rights as husband and wife

9.10 The government has reiterate its stands to reserve the remaining articles as the principles of equality should be considered within the realm of Shari'ah that guarantees spouse's complementary rights and responsibilities to preserve sanctity of marriage.⁹⁰

⁸⁹ Suhakam Press Statement, 18 April 2016,

http://www.suhakam.org.my/wp-content/uploads/2016/04/Press-Statement_SUHAKAM-Welcomes-the-Child-Amendment-Bill-2015.pdf

⁹⁰ Consideration of reports submitted by States parties under Article 18 of the Convention (Malaysia). CEDAW/C/MYS/3-5

9.11 Assessment on reservations to Article 16:

- a) The Commission is of the view that the stand by the Government of Malaysia to maintain the reservation based on the Shari'ah principle is not justified. Tools such as creative interpretation may be applied by the Government to ensure the principles in CEDAW are protected in Malaysia. By so doing, the Government will show its commitment towards its obligations as a State party to CEDAW. The conflicts between civil and Shari'ah jurisdiction, especially in child custody and unilateral conversion (into islam) by their former spouse in order to secure the custody of the child through Shari'ah courts has long plagued the Courts in Malaysia. For example the highly publicised cases of *Viran a/l Nagapan v Deepa a/p Subramaniam (Peguan Negara Malaysia & Anor, Intervener)*⁹¹ and *Indira Gandhi a/p Mutho v Inspector General Police*.⁹²
- b) While the courts in both the above-mentioned cases granted the custody of the child back to the mother and to remain in the religion of their mothers, both husbands failed to deliver the child; and the police on the other hand failed to locate the whereabouts of the former spouses.

9.12 Amendments to Law Reform (Marriage and Divorce) Act 1976:

- a) The Minister in the Prime Minister's Department, Datuk Seri Azalina Othman Said announced⁹³ that the amendment to Law Reform (Marriage and Divorce) (Amendment) Bill 2016 are taking place and the Bill first reading was held on 21 April 2016.⁹⁴ The amendments seek to give the right to the converting spouse to file a petition for divorce to dissolve his/her civil marriage under s.51(1) of the Act, whereas the current legislation does not give the spouse who has converted to Islam the right to dissolve the marriage.⁹⁵
- b) The proposed amendments also provide relief to a spouse who has converted into Islam with the same remedies in divorce matters. However, matters of dissolution of marriage in this situation applies only to civil court and the Shari'ah courts does not have any jurisdiction nor legal effect to dissolve, make order or provide ancillary relief in matters pertaining to divorce by these

⁹¹ [2015] 1 MLJ 583

⁹² Judgement of the Federal Court:

[http://www.kehakiman.gov.my/directory/judgment/file/01\(f\)-32-05-2015\(A\).pdf](http://www.kehakiman.gov.my/directory/judgment/file/01(f)-32-05-2015(A).pdf)

⁹³ Bill to address unilateral conversion tabled in Parliament. The Star Online (21 November 2016).

<http://www.thestar.com.my/news/nation/2016/11/21/amendments-to-law-reform-marriage-and-divorce-act-1976-tabled-for-first-reading/>

⁹⁴ MCA slams Perlis for passing law allowing unilateral conversions. *Malaymail Online*. (9 December 2016).

<http://www.themalaymailonline.com/malaysia/article/perlis-fatwa-on-child-conversion-to-go-back-to-state-assembly>

⁹⁵ Explanatory Statement, Law Reform (Marriage and Divorce) (Amendment) Bill 2016. (p.6)

applications. The Commission welcomes this amendment as it clarifies the Jurisdiction of the Courts in such matters.

- c) The amendment introduced a new section; s.88A on the status of the religion of the child if his father or mother converts to Islam. Subsection (1) provides that “... *religion of any child to the marriage shall remain as the religion of the parties before the conversion except when both parties agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she attained the age of eighteen years*”. While subsection (2) stated that “... *where the parties to the marriage professed different religion prior to conversion of one spouse to Islam, a child of the marriage shall be at liberty to remain the religion of either one of prior religious parties before the conversion to Islam*”.
- d) Although, the Commission was not consulted on the drafting of the Bill, nevertheless the Commission commends the move made by the government to safeguard the interest of a child in the spirit of Convention of Child Rights (CRC) and also to mitigate the situation of unilateral conversion, thus safeguarding the rights of the mother(s) who have been excluded in issues of conversion of their child.

9.13 Administration of the Religion of Islam Enactment 2006:

- a) The Commission is concerned with recent amendment made by the Perlis State Legislative Assembly on Administration of the Religion of Islam Enactment 2006 (the Enactment) to allow a child to be converted into Islam with the consent of one parent.⁹⁶ The amendment made a significant change to the Malay version of s.117 of the Enactment on conversion for children under the age of 18 years old from “father and mother” to “father or mother or guardian”. The amendment by the Perlis State Legislative draws concerns as it not only allows for unilateral conversion that may cause abuse to the legislation; but is also in contradiction with Article 12(4) of the Federal Constitution which provides that the word “parent”, though singular in nature shall be read as plural and vice versa under Article 160 Schedule 11th.⁹⁷

⁹⁶ MCA slams Perlis for passing law allowing unilateral conversions. *Malaymail Online*. (9 December 2016). <http://www.themalaymailonline.com/malaysia/article/perlis-fatwa-on-child-conversion-to-go-back-to-state-assembly>

⁹⁷ Section 2(95) of the Eleventh Schedule reads:

Construction of singular or plural—

words in the singular include the plural, and the words in the plural include the singular.

b) Although Islam is regulated by each state in Malaysia, the Commission is concerned with the manner in which the Islamic State Enactment have been introduced with total disregard for the amendments that are being introduced under the Law Reform (Marriage and Divorce) Act 1976, which aims to cure the problem of conflicting jurisdiction within the two legal systems in Malaysia. The Commission urges the Federal Government and also the State Government of Perlis to mitigate the act to prevent further gaps in both jurisdictions.

10.0 PARTICIPATION OF WOMEN IN POLITICS AND DECISION-MAKING

ARTICLE 7

10.1 While the Commission commends the introduction of the strategies under the National Plan of Action for the Advancement of Women regarding women's participation in politics by the Government, there is still a disproportionate number of women leaders. The representation of women at the lower House of Parliament following the General Election in May 2013, was merely 23 of out the 222 members, thus making up only 10.4% of the lower House of Parliament. This is also reflected in Cabinet, where only 3 out of 37 cabinet ministers and 7 out of 32 deputy ministers are women.⁹⁸

10.2 The Commission applauds the election of Hannah Teoh in 2013, as the youngest and first woman Speaker of any legislative assembly in the country.⁹⁹ However, this does not change the fact that the number of women represented in decision-making positions are alarmingly low in Malaysia.

10.3 The Commission believes that women's participation in government should be equal at all levels. The only exception of Syariah with regard to women's participation in government concerns the position of the head of state based on a presumptive consensus (ijma'). However, there is no clear authority in the sources to prevent equality even at this level. The prevalence of constitutional checks and balances and separation of power in modern constitutions, have altogether altered the material attributes of leadership. The rules of Islamic jurisprudence also hold that a substantial change in the effective cause and rationale (illah) of a ruling should be followed by a corresponding change and suitable ruling through ijtihad (to derive and deduce religious opinion about a matter that is not mentioned in the sources of Islam).¹⁰⁰

⁹⁸ Malaysia's Combined third to fifth periodic reports to the CEDAW Committee, 1 September 2016, CEDAW/C/MYS/3-5, paras 61-62

⁹⁹<http://www.thestar.com.my/news/nation/2013/05/31/subang-jaya-rep-hannah-yeoh-appointed-first-woman-speaker/>

¹⁰⁰ Annual Report of the Human Rights Commission of Malaysia (Suhakam), at page 108

10.4 Therefore, the government should, as per its commitment in its Universal Periodic Review (UPR)¹⁰¹ in 2013 ensure that the empowerment of women is prioritised, especially with regard to increasing women's participation in labour force and increasing the number of women in key decision-making position.

11.0 OPTIONAL PROTOCOL TO THE CEDAW

11.1 The Commission reiterates its call upon the Government of Malaysia to ratify the Optional Protocol to CEDAW that provides two procedures of complaints; namely the communication procedure and the inquiry procedure, which would enable a person to make a complaint under Optional Protocol when all domestic remedies have been exhausted.

12.0 CONCLUSION

12.1 The Commission hopes that the Government will continue to engage in implementing the concluding comments from the CEDAW Committee. In addition, the Commission encourages the Government to withdraw all the remaining reservations to CEDAW and to ratify the Optional Protocol to the CEDAW.

12.2 The Commission commends the steps taken by the Government to improve women's status within the social, economic, civil and political rights designed for citizens of Malaysia. Nevertheless, vulnerable groups such as migrant workers, asylum seekers, refugees and also stateless women continue to be left behind under the current domestic laws and policies with their basic human rights constantly being denied and abused. The Commission urges the Government of Malaysia to adopt a more receptive stance and approach in addressing rights of these marginalised groups that make a sizeable populations in Malaysia by allowing them equal access to formal educations, healthcare and employment, as well as right to live in a decent life free from poverty and discrimination.¹⁰²

¹⁰¹ Malaysia's Universal Periodic Report, 6 August 2013, A/HRC/WG.6/17/MYS/1, para 59

¹⁰² Written submission by the Human Rights Commission of Malaysia (SUHAKAM) (10 June 2016). A/HRC/32/NI/5