



UNITED NATIONS
MALAYSIA



KITA
INSTITUT KAJIAN ETNIK
INSTITUTE OF ETHNIC STUDIES

UNDERSTANDING ICERD

IN THE WIDER CONTEXT OF
THE FEDERAL CONSTITUTION,
HUMAN RIGHTS AND
MALAYSIAN SOCIETY



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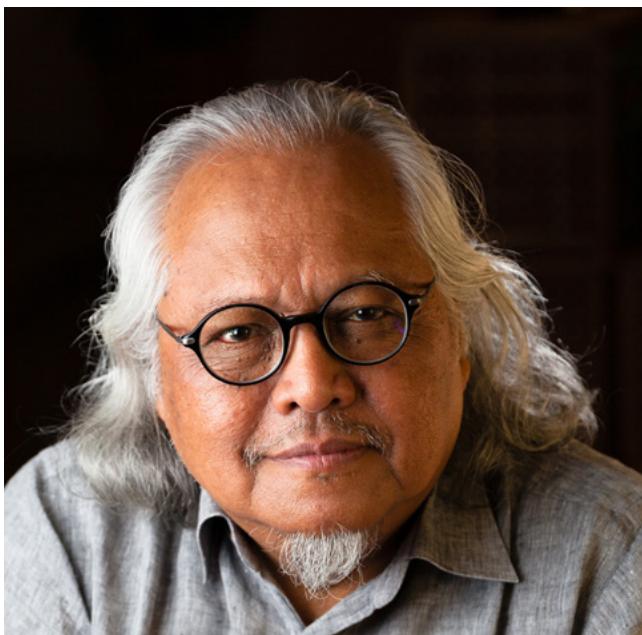
ISBN: 978-967-0741-63-5

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FOREWORD



On 5 July 2011, the Institute of Ethnic Studies, National University of Malaysia (KITA-UKM) submitted and presented a research-based report on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to the Department of National Unity and National Integration (JPNIN), under the Prime Minister's Department, Malaysia. It was commissioned and funded by JPNIN with the objective to study the appropriateness if Malaysia were to sign the Convention and what would be the possible implications upon the society at large. Based on four months of field research, the findings of the report offered a set of pros and cons articulated by respondents from the research if Malaysia were to sign ICERD. This report has limited distribution.

Almost a decade after, in 2020, another report on ICERD also initiated by KITA-UKM through the effort of Professor Datuk Dr Denison Jayasooria has been compiled and completed. It's a more detailed and nuanced report based on a series of important events related to ICERD that took place between the last quarter of 2018 and the whole of 2019, both inside and outside the Malaysian Cabinet and subsequently in Parliament. It also happened on the streets.

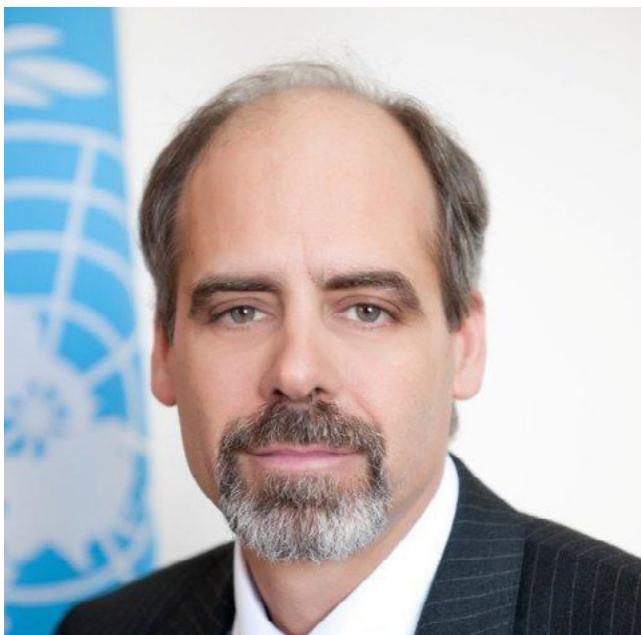
The present 2020 report painstakingly prepared by Professor Jayasooria is different from the earlier one of 2011. It is broader in scope and sociologically sensitive. The title, *Understanding ICERD in the Wider Context of the Federal Constitution, Human Rights and Malaysian Society*, encapsulates what the report offers. Its strength is that it has ICERD, the debate and activities around it embedded into the sociological milieu of Malaysia's multi-ethnic society against the global backdrop of UN human rights position and discourse.

One can agree or disagree with ICERD. I believe, however, everyone will agree if I say that this report is very informative and pleasant to read. Only someone with the dedication and tenacity of Professor Jayasooria could produce such a report. Congratulations to him and his research team. Please enjoy reading the report.

Distinguished Professor Datuk Dr Shamsul Amri Baharuddin

Director, Institute of Ethnic Studies (KITA)





Dear friends,

I have had the pleasure and honour to represent the United Nations in Malaysia since May 2017. Throughout this time, it has been an interesting and exciting journey in a unique country with its multitude of race, religion and culture.

I have, in many ways, been impressed with Malaysia's development achievements throughout the last decades. From the rapidly declining poverty rate due to inclusive growth strategies and the comprehensive roll-out of social safety net programmes; the almost universal literacy rate and long life expectancy due to a broad range of social services that have reached the most remote corners of the country and the policies to foster 'unity in diversity' in a country that is among the most multi-ethnic on the globe.

In recent years, these achievements have been complemented among others by a focus on important aspects of good governance, such as anti-corruption and freedom of media. These are essential components for Malaysia to become a fully developed nation.

However, a misunderstanding of one of the core international human rights conventions, i.e. the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), led to controversies and strong opposition to any discussions on the Convention.

ICERD is chronologically the first of the nine core conventions of the United Nations, which, with its focus on non-discrimination and the promotion of understanding among ethnic groups, elaborates the core principle on which the Charter of the United Nations is founded - the "dignity and equality inherent in all human beings". It is also among the most universally accepted, with to date 182 States parties of a total of 193 United Nations Member States.

ICERD encourages "positive discrimination policies" and other measures to redress imbalances and promote equality. Indeed, the "leave no one behind" principle of the Sustainable Development Goals (SDGs) is also derived from the principle of non-discrimination and is manifested among others in SDG 10 (Reducing inequalities) and SDG 16 (Peaceful societies). ICERD, thus, becomes a normative instrument not only in international law, but also for inclusive and equitable development.

I express my hope that this booklet will shed light on the importance of ICERD and contribute to an informed discussion about and better understanding of this crucial Convention.

Stefan Priesner

*United Nations Resident Coordinator
for Malaysia, Singapore and Brunei Darussalam*

Abbreviations	Full term (translation and/or meaning)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
KITA-UKM	<i>Institut Kajian Etnik, Universiti Kebangsaan Malaysia</i> (Institute of Ethnic Studies, National University of Malaysia)
KOMAS or Pusat KOMAS	<i>Pusat Komunikasi Masyarakat</i> (A human rights popular communications centre focused on the ratification of ICERD)
LGBT	Lesbian, gay, bisexual, and transgender
MARA	<i>Majlis Amanah Rakyat</i> (A Malaysian Government agency that was formed to aid, train and guide Bumiputra in the areas of business and industry)
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
MRSM	<i>Maktab Rendah Sains MARA</i> (MARA Junior Science College)
MP	Member of Parliament
NEP	New Economic Policy
NGO	non-governmental organization
SUHAKAM	<i>Suruhanjaya Hak Asasi Manusia Malaysia</i> (Human Rights Commission of Malaysia)
OIC	Organisation of Islamic Cooperation
PAS	<i>Parti Islam Se-Malaysia</i> (Malaysian Islamic Party)
PH	<i>Pakatan Harapan</i> (Alliance of Hope)
SDG	Sustainable Development Goal
UDHR	Universal Declaration of Human Rights
UiTM	<i>Universiti Teknologi MARA</i> (A public university based primarily in Shah Alam, Malaysia, that accepts only Bumiputra)
UMNO	United Malay National Organisation
UN	United Nations
UPR	Universal Periodic Review
YB	<i>Yang Berhormat</i> (Honourable; a reference in Malay language to a Member of Parliament)

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INTRODUCTION

This report, *Understanding ICERD in the Wider Context of the Federal Constitution, Human Rights and Malaysian Society*, documents the events and arguments surrounding the proposed ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 2018 when the Pakatan Harapan (PH) (Alliance of Hope) was in power at the federal level. This document includes the views of those who wanted Malaysia to ratify ICERD and also those who objected to its ratification.

At the outset it is important to underline that, in retrospect, it is clear that public discussions were dominated by misunderstandings. There was very little space for an open, rational discussion on all the critical matters raised. Moreover, public discussion and reactions were all too often politically driven.

Now that the dust has settled on this matter, this text attempts to document all the views expressed by those who proposed ratification and those who opposed it. It also aims to make all materials on ICERD available for more considered and informed discussion as well as make them available in the Malay language for a wider readership.

This text, therefore, can be viewed as an introduction on this topic, capturing the key features and arguments in order to facilitate an ongoing discussion on ICERD ratification by the Malaysian Government. It is written in an easy reading style and written by a sociologist drawing on data and materials from social media, Parliament records, human rights documents and legal scholarship.

The methodology used was to capture the events as well as the views of personalities (parliamentarians, politicians, civil society leaders and academics) who spoke up and who were recorded in social media from September to November

2018. References to the social media postings are given in the document for further study and review.

This text is divided into four chapters, a conclusion and appendices with the contents outlined as follows:

Chapter 1 sets the context for the conversation on ICERD. These include the views of the Cabinet Minister who made the initial statements and a detailed account of the parliamentary discussions, as well as some comments in social media at the time.

It is strongly felt that the discussion on ICERD must be anchored on the Federal Constitution and on human rights. Therefore, in Chapter 2, we discuss the Federal Constitution, the historical discussions in the making of the Constitution and negotiations among the various communities, key features pertaining to human rights as well as ethnic relations.

It was also felt that many Malaysians are not well exposed to the United Nations and the human rights mechanisms. Therefore, Chapter 3 provides an introduction to the United Nations, its declarations, conventions and its institutions. The Human Rights Council and the ratification process are also presented. In this chapter, we also review some Islamic

views on human rights and their compatibility, including a discussion on universality versus cultural relativism concerns.

Chapter 4 focuses on ICERD and its relevance for Malaysian society. While some readers might want to fast-forward from Chapter 1 to Chapter 4, the author strongly feels that ICERD must be understood in the context of the Federal Constitution and the universal human rights instruments.

In the Conclusion, there is an attempt to draw some pointers towards the impact on Malaysia if ICERD is ratified as well as if it is not. The aspiration is that readers will be able to review all the matters on this theme and draw their final conclusions.

The appendices provide useful resource materials, specifically the full text of ICERD, a UN text explaining the special measures (General Recommendation No. 32) and the Federal Constitutional provisions of Article 153.

Feel free to contact me on this work. I am happy to meet up for discussions and reviews. And I am open to hearing arguments in support and disagreement in an effort to build a better Malaysia for all.

Denison Jayasooria
Subang Jaya (21 March 2021)



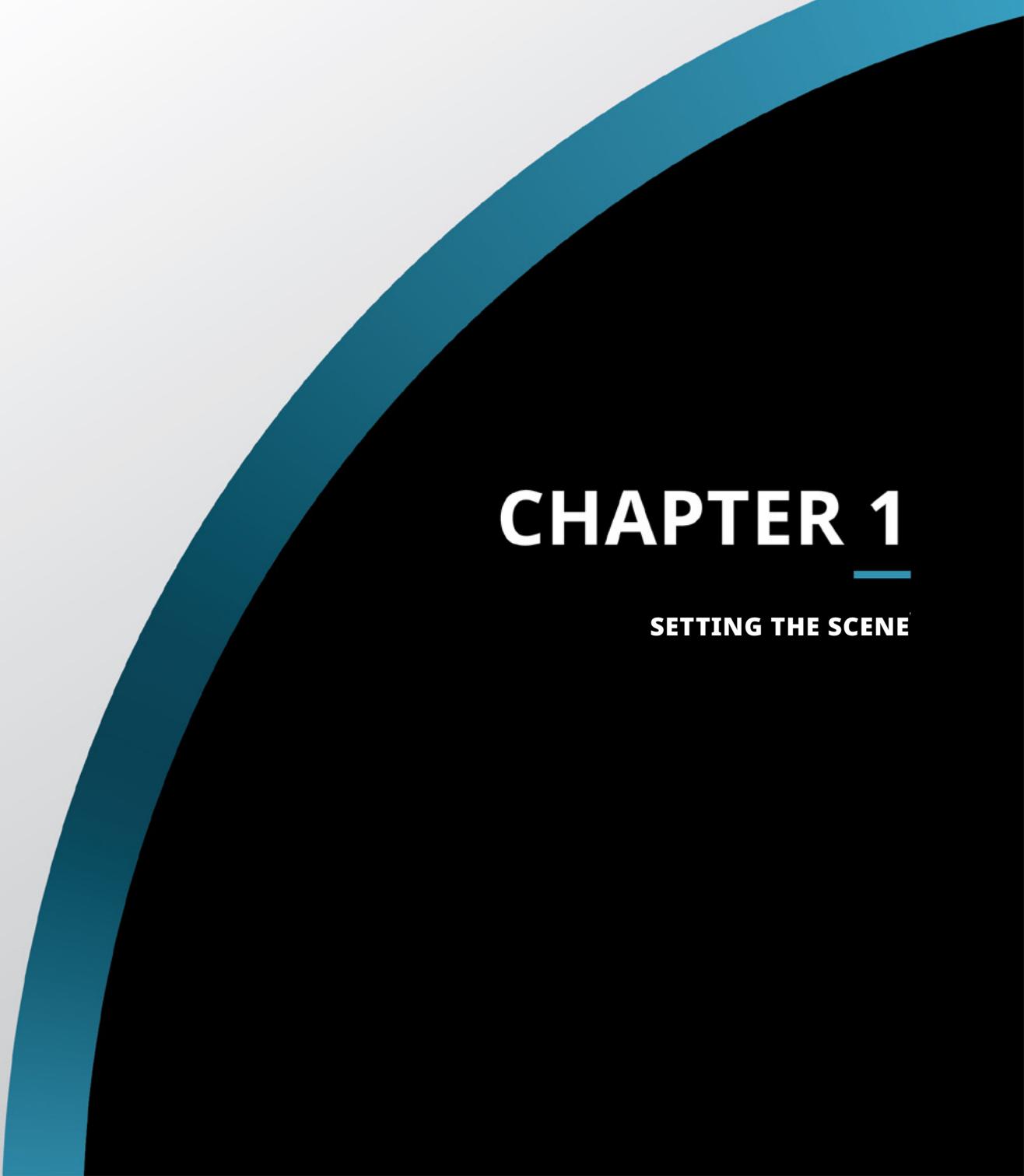
ACKNOWLEDGEMENTS

A special word of thanks to the United Nations Country Team in Malaysia, especially Mr Stefan Priesner, Dr Richard Marshall, Ms Juanita Lourdes Joseph and Mr Ahmad Hafiz Osman, and to Ms Shivani Verma and Ms Hanae Hanzawa in the Regional Office for their comments and corrections.

Thanks also to Distinguished Professor Datuk Dr Shamsul Bharuddin, Founding Director of the Institute of Ethnic Studies (KITA), for the foreword and valuable insight.

Thanks to Professor Dato Dr Shad Faruqi, Professor Dr Ong Puay Liu, Professor Dr Mansor Mohd Noor, Associate Professor Dr Sharifah Munirah Alatas, Mr Eugene Yap, Commissioner Jerald Joseph and the KOMAS team and Edwin Rajasooria Jayaratnam for reading the draft and for your valuable comments. Thanks also to Jocelyn Jayasooria for proofreading the text.

Appreciation to Haris Zuan of the Institute of Malaysian and International Studies, National University of Malaysia (IKMAS-UKM) for translating this text into the Malay language.



CHAPTER 1

SETTING THE SCENE

PREFACE

On 28 September 2018, Tun Dr Mahathir Muhamad delivered a speech at the United Nations General Assembly as the then Prime Minister of Malaysia after the 14th General Election. In that speech, he made a firm commitment on Malaysia's role in promoting the principles of the United Nations such as "truth, human rights, rule of law, justice, fairness, responsibility and accountability, as well as sustainability". He further affirmed "that the new Government of Malaysia has pledged to ratify all remaining core United Nations instruments related to the protection of human rights" (Mahathir Muhamad 2018).

A Minister in the Prime Minister's Department, YB Senator Waytha Moorthy, announced on 24 October 2018 that the Government would ratify six treaties including ICERD in the first quarter of 2019. The Minister affirmed that "the ratification of conventions including ICERD is in line with Pakatan Harapan (PH)'s manifesto" (Waytha Moorthy 2018). He further assured that he would hold dialogues with the main stakeholders on the ratification of ICERD.

However, by November 2018, it was reported that heated arguments had emerged in Parliament when YB Senator Waytha Moorthy was answering questions on the Budget 2019 (Parliament 2018). Members of the opposition raised questions on ICERD ratification, which culminated in a strong exchange of words. The questions raised were related to the affirmative action policies and the social contract, namely: Is there a time frame stipulated on this matter that will affect Article 153 of the Federal Constitution and would the United Nations pressure Malaysia to remove Article 153?

Arising out of the mounting pressure both in Parliament and a proposed street protest, the Cabinet decided on 23 November 2018 not to ratify ICERD. The Prime Minister's Office issued a statement indicating that the Government

had decided not to ratify ICERD. This statement reaffirmed that "the Government will continue to defend the Federal Constitution that contains the social contract that has been agreed upon by representatives from all races during the formation of this country" (Boo Su-Lyn 2018).

Eighteen non-governmental organizations (NGOs) led by Pusat Komunikasi Masyarakat (Pusat KOMAS), an NGO working on ethnic issues, issued a joint statement that expressed disappointment over the change of policy towards non-ratification and also indicated that "myths and misconceptions were not adequately addressed" (Komas 2018).

Pro-Muslim-Malay NGOs, with the support of Parti Islam Se-Malaysia (PAS) and United Malay National Organisation (UMNO), continued with an anti-ICERD rally on 8 December 2019 despite the Prime Minister's statement of no ratification. Some of the organizations involved called this a celebration rally as the Government had already overturned the earlier decision. It was a large gathering with some stating the crowds were over 500,000, but the Police estimated it at 55,000 people.

WHAT IS THE CHRONOLOGY OF ICERD EVENTS?

Pusat KOMAS provided a chronology of events from from 29 September to 23 November 2018. This is from the first general announcement of ratification of United Nations treaties to specific announcements of ICERD ratification, mounting contestation and final announcement not to ratify. It traces the various stages of development, especially of the mounting pressure not to ratify ICERD.



Diagram 1

UMNO and PAS brought together the largest get-together since the 9 May 2018 elections “using the predictable card of race and religion, with key themes including Malay supremacy and the ‘rights’ of the Malays and Bumiputera” (Ida Lim 2018). “The rally portrayed the United Nations (UN) convention as an attack on Islam’s constitutional position as the religion of the Federation” (Ida Lim 2018).

This anti-ICERD campaign was mounted on three fronts. First, several parliamentarians mounted an aggressive debate in Parliament on the question of ratification. Second, at the level of mass mobilization and walking the streets of Kuala Lumpur - the turnout of more than 50,000 people at the anti-ICERD rally. Third, social media writers objected to ICERD ratification.

WHAT HAPPENED AT THE PARLIAMENTARY DISCUSSION ON ICERD?

On 19 November 2018, Minister YB Senator Waytha Moorthy, while making concluding comments on the 2019 Budget, was asked a number of questions by Opposition Members of Parliament (MPs), namely YB Dato Seri Reezal Merican, MP for Kepala Batas, Penang; YB Dato Seri Ismail Sabri Yaakob, MP for Bera, Pahang; and YB Tan Sri Dato Hj Noh Omar, MP for Tanjung Karang, Selangor (Parliament 2018).

All the questions raised by the MPs were important and required objective and rational answers. Unfortunately, the parliamentary discussion turned into an emotive political exchange on the different views as opposed to a calm discussion on the topic at hand. Since then, there has been no other formal platform to discuss these matters involving parliamentarians, Government agencies, academics and civil society.

In the parliamentary question and answer session, one could narrow the questions into four key questions. These are important questions that require comprehensive answers. However, this was not done in the parliamentary conversation as per the parliamentary recording and Hansard report.

The first question in Parliament was on determining the real motive on why the PH Government wanted to ratify ICERD. This is because the statement by the Prime Minister at the

United Nations General Assembly was general and made without any mention of any of the conventions. Should the Government not consider other low hanging conventions? One MP indicated that only 15% of countries had ratified all nine core human rights conventions.

The second key question was concerning the timeline of special measures. Article 1:4 indicates a timeline and expiry date. The Minister was asked: Do you feel that Article 153 is a temporary provision?

The third question was: How effective are reservations made in the ratification process?

The fourth question made reference to Article 22 of ICERD and complaints referred to the International Court of Justice (ICJ). Could Malaysia be pressured to abandon Article 153?

In this text, there is an attempt to answer these questions from the understanding of the Federal Constitution and the United Nations human rights provisions in chapters 2, 3 and 4.

WHAT THEMES WERE DISCUSSED IN SOCIAL MEDIA?

During this period of the ICERD discussions and the subsequent months, a number of issues and matters were discussed on social media pertaining to human rights, which had a bearing on ICERD adoption. Also, there was an attempt by certain groups to push back the human rights agenda by the PH Government.

In their writing, Ahmad Yazid Othman, Lukman Sheriff Alias and Aidil Khalid (2018) stated that ratification of ICERD would result in the abolition of special institutions such as Majilis Amanah Rakyat (MARA), which has a mandate for business and educational opportunities such as a science college (MRSM) and university-level education through Universiti Teknologi MARA (UiTM). The Malays will lose their Malay reserve land reserve status, which is provided for in the Federal Constitution, and this will be the end of the Royal Malay Regiment.

In a similar vein, the National Ummah Unity Convention, which was held on 25 August 2019 in Kuala Lumpur, also raised a number of concerns. Aminuddin Yahaya, Chair of

Gerakan Pembela Ummah, delivered a speech in which he made reference to the “push for universal human rights and values” by certain human rights groups, which he saw as a negative move. He also identified human rights as one of the three “major threats” to Islam in Malaysia (Emmanuel Santa Maria Chin 2019).

Yahaya is quoted by social media journalist Emmanuel Santa Maria Chin (2019) as saying that this trend “would result in Islam being seen as unfair and ultimately side-lined”. This erosion would result in the rejection of religious values that will be replaced by universal values with “negative elements such as the practice of LGBT between men and women, the freedom to apostate and speak without limits, and other issues will be detrimental not only to individuals, but the country,”. Furthermore, “the push by certain quarters to amend laws, such as the Sedition Act, and the repealing of the death penalty was also detrimental to the development of Malays, Islam and the Malay Rulers” (Emmanuel Santa Maria Chin 2019).

REFLECTIONS BY MPS ON WHY RATIFICATION FAILED

Social media journalist Vinodh Pillai (2019) documented the reflections of YB Khairy Jamaluddin a year after the failure of the ratification. YB Khairy Jamaluddin pinpointed this to a lack of humility on the part of the PH Government. According to Khairy, “ICERD obliges parties to eliminate racial discrimination in all forms, including in public institutions as well as in Government policies” (Vinodh Pillai 2019).

On the issue of lacking humility, it could be pointed out that the PH Government after the election victory in May 2018 felt that it was ready to move forward the reform agenda but did not recognise the groundswell from the Malay-Muslim citizens. In the ratification process, the new Government did not critically review the implications for Malaysia and why

Malaysia under the previous Barisan National Government had not done it before.

However, YB Maria Chin Abdullah had a different assessment of why ICERD ratification failed. She believed it was due to a well-coordinated disinformation campaign including hurtful and hateful messages targeting different communities in Malaysia. Maria Chin further affirmed in her article that “despite the Government, the Bar Council and civil society organizations later clarifying that the provisions of Article 153 were not incompatible with ICERD as stated under Article 1 (4) and 2 (2) of the Convention. Khairy missed the opportunity to speak out against the spread of disinformation” (Maria Chin Abdullah 2019).

IS THE ICERD DISCUSSION IN MALAYSIA RECENT?

The discussion on ICERD ratification is not a new theme in Malaysian society. KOMAS has been active on this matter as far back as 27 March 2009, when KOMAS hosted the Malaysian NGO forum entitled “Understanding and Engaging with the UN Durban Review on Looking at Racism, Racial Discrimination, Xenophobia and Related Intolerances”. On 15 April 2009, during the Durban Review Conference in Geneva, 44 NGOs led by KOMAS called for the Government to ratify ICERD without any reservation. More recently, on 21 March 2016, KOMAS launched the Malaysian Racial Discrimination Report 2015. KOMAS has been at the forefront of advocating for Malaysia to ratify ICERD.

At the academic level, the Institute of Ethnic Studies, National University of Malaysia (KITA-UKM) hosted a number of roundtable discussions and undertook a study on ICERD ratification (between 15 December 2010 and 14 March 2011), led by Professor Ong Puay Liu, including publications. The ICERD study, which was funded by the Department of National Unity and Integration in the Prime Minister's Department, called on the Federal Government to ratify ICERD.

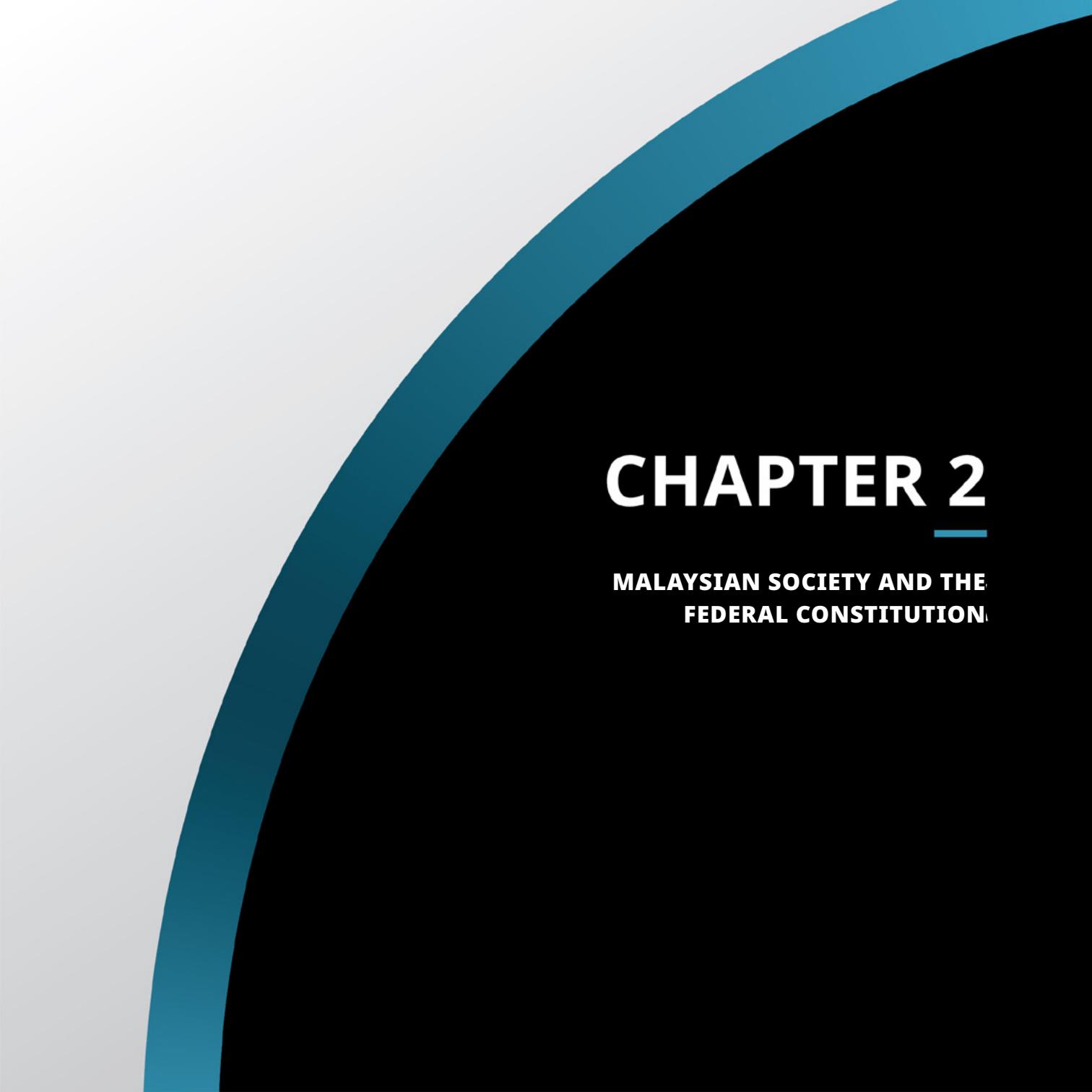
The first KITA-UKM roundtable discussion on ICERD was held on 22 March 2010. Emeritus Professor Michael Banton, a former chair of the Committee on the Elimination of Racial Discrimination (CERD) and Professor of Sociology, was the guest speaker. A second roundtable discussion was held on 16 July 2012, and the findings were published in the UKM Ethnic Studies Paper series no.21 entitled “Issues pertaining to Malaysia's ratification of ICERD”. Here too there is a call for the ratification of ICERD.

The Human Rights Commission of Malaysia also has been calling for the ratification of international status. Its strongest statement was issued by Tan Sri Razali Ismail, Chair

of the Human Rights Commission of Malaysia (SUHAKAM) on 31 October 2018. He said, “SUHAKAM underscores that racial discrimination of any form must have no place in multiracial and moderate Malaysia, as all Malaysians deserve to live peacefully and enjoy the benefits of civilized values”. He added that “SUHAKAM regrets that many opinions have misinterpreted whether deliberately or otherwise the spirit of ICERD, and accordingly cautions those who push for polarization and superiority, or pre-eminence of one race or one religious belief over another, to stop if Malaysia is to be seen to be unhesitating to the elimination of racial discrimination”. He noted that “SUHAKAM believes accession to the Convention is possible with political will and courage. SUHAKAM looks forward to a collective decision in Cabinet on this matter in keeping with the pronouncement of the Prime Minister” (SUHAKAM 2019).

The matter of ratification of ICERD was raised during the Universal Periodical Review (UPR) in 2009, 2013 and 2018, where United Nations Member States called on Malaysia to ratify all the remaining core human rights treaties. Malaysia, in response in 2018, affirmed that it would speed up the deliberations for the ratification of ICERD. Therefore, the discussion on ICERD ratification has already been a long, drawn-out process in public discussions and private deliberations.

In this context of public debate on ICERD ratification, the discussions in social media underscore that this report should set the ICERD discussion in the wider context of the Federal Constitution of Malaysia and human rights discourse. The attempt here is to demystify the misconceptions surrounding ICERD ratification.

The background features a large, sweeping curve that divides the page into two main sections. The upper-left section is a light grey gradient, while the lower-right section is solid black. A thick teal line follows the curve, separating the two sections.

CHAPTER 2

**MALAYSIAN SOCIETY AND THE
FEDERAL CONSTITUTION.**

In the Malaysian context, the discussion on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) must begin with a clear understanding of the Federal Constitution. All Malaysians, irrespective of representing differing political views and persuasions, whether they are religious conservatives or secular proponents, whether they are representing majority or minorities communities, whether they are advocating nationalist or multicultural perspectives, all turn to the Federal Constitution to defend their convictions and positions. Therefore, our reference point in the Malaysian discussions on Malaysia's direction must be the Federal Constitution.

Professor Shad Saleem Faruqi referred to the Federal Constitution as the “document of destiny” in a 2008 publication. In his most recent book on the Constitution, he sees it not just as a legal document but as “a political, historical, economic, cultural and moral testament of the framework assumptions of society” (Shad Faruqi 2019:23).

The Federal Constitution is “the supreme law of the Federation” as per Article 4 (1) as it is clearly stated that “any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency be void”. This is different than the United Kingdom of Great Britain and Northern Ireland, where Parliament is supreme as there is no written Constitution. Malaysia is governed according to the Federal Constitution and no other legal system.

Therefore, as citizens of Malaysia, we must have a basic knowledge of this document. Tun Mohamed Suffian Bin Hashim in the preface to his 1976 book wrote, “the citizen should know something about the constitution”. Yet Richard Malanjum in his foreword to Professor Shad Faruqi's publication on the Constitution wrote, “constitutional literacy within the citizenry and the bureaucracy is rather low” (Shad Faruqi 2019:v).

It is in this context that a discussion on human rights and ICERD must be firmly based on a clear and comprehensive understanding of the Federal Constitution. We need to find answers to five critical questions on this theme:

- **How was the Federal Constitution formulated?**
- **Does the Federal Constitution contain key fundamental liberties and human rights provisions?**
- **What is Article 153? And why is this subject matter so politically sensitive?**
- **Can these provisions be changed easily?**

HOW WAS THE FEDERAL CONSTITUTION FORMULATED?

Joseph M Fernando (2002) gives us a good historical background on the making of the Constitution. This review is helpful for us to capture the key events in order to understand the role played by the founding fathers of Malaya in 1957 and of Malaysia in 1963.

The local political leaders were led by Tunku Abdul Rahman, who was a royal prince, a British-trained lawyer and President of the United Malay National Organisation (UMNO). His party, together with the leaders of the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC), negotiated the handing over of power from the British to Malaysians. A key dimension was the drafting of the Federal Constitution, which was undertaken by the Reid Commission.

According to Fernando, it was the Alliance that requested a non-Malayan commission. This was expressed “in the 1955 election manifesto, the Alliance stated that their preference for a non-Malayan commission largely because they felt that such a body would be able to avoid local prejudices and perform with complete impartiality” (2002:103). This was also conveyed at the first London talks that took place in January in 1956, where the matter was discussed.

The British Government appointed a five-member commission. The five members were Lord Reid (United Kingdom) as Chair, Sir William Mckell (Australia), B Malik (India), Abdul Hamid (Pakistan) and Sir Ivor Jennings (United Kingdom). The commission held 118 public and private hearings between June and October 1956” (Shad Faruqi 2019:15). “The commission received 131 memorandums and held more than 100 hearings throughout Malaya listening to individuals and organizations” (Joseph M Fernando 2002: 114 & 115).

In drafting the Federal Constitution, the Reid Commission drew lessons from India, Ceylon, Australia and the United States of America. It is said that “the commission borrowed heavily from the provisions on fundamental rights, in the Indian Constitution”, especially on the matter of fundamental rights which were grouped under seven categories: right to equality; right against exploitation; right to freedom of religion; cultural and educational right; right to property and right to constitutional remedies (Joseph M Fernando, 2002:133).

One of the major challenges faced by the Reid Commission was balancing the various interests and competing demands made by the different communities. In this context “the commission ... attempted to strike a just balance between the principal demands of the Malays and the non-Malays” (Joseph M Fernando 2002:142). This was drafted into Article 153 pertaining to the special position of the Malays and the legitimate interest of other communities. In this context, it is important to note that on contentious issues, especially those “which touched on fundamental rights, the commission adopted most of the compromises reached by the Alliance parties” (Joseph M Fernando 2002:124). A second London Conference was held in 1957 to review the Federal Constitution.

It was the Alliance political party, comprising UMNO, MCA and MIC, which in 1957 accepted the final draft with the endorsement of the Malay Sultans, who made the necessary changes thereby making it acceptable to the Sultans as well as three major communities as a common building document.

As Professor Shad Faruqi points out, the salient features of the new Constitution “provided for the following: a supreme Constitution; an independent judiciary with powers of judicial review; a federal system of Government with a heavy central bias; a Westminster style of parliamentary democracy; and a constitutional monarchy at both state and federal levels. There were partially entrenched fundamental rights; extensive power to Parliament to suspend basic rights during times of subversion and emergency; special protection for the rights of Malay Rulers; protection for Malay special position; liberal rights of citizenship for all persons born in the Federation; and linguistic, cultural and religious rights for non-Malays” (Shad Faruqi 2019:15). It is also important to note that “the spirit that animated the Constitution was one of tolerance, compassion and compromise” (Shad Faruqi 2019:17).

A second Constitutional drafting process took place in 1962 called the Cobbold Commission on the formation of Malaysia, with the Commission investigating the views of the people of Borneo, namely Sabah and Sarawak. New features were incorporated to accommodate the interests of the natives of Sabah and Sarawak, for example in Article

153. Furthermore, the 1963 document had an international dimension as it involved Malaya, the United Kingdom, Sabah, Sarawak and Singapore. It is significant to say that the issues and dynamics were then enlarged. Earlier, the key concerns were Malays and non-Malays in the Federation, but Sabah and Sarawak added a new dimension. What was included were the concerns of indigenous people, namely the natives of Sabah and Sarawak, including a religious dimension, as many native groups in Sabah and Sarawak are Christians in contrast to the Malays and some native groups who are Muslims. “Sabah and Sarawak have a clear cultural, linguistic, ethnic and religious distinctiveness from Peninsular Malaysia” (Shad Faruqi 2019:21). It was the Alliance political party comprising UMNO, MCA and MIC, which in 1957 accepted the final draft with the endorsement of the Malay Sultans, who made the necessary changes thereby making it acceptable to the Sultans as well as three major communities as a common building document.

DOES THE FEDERAL CONSTITUTION CONTAIN KEY FUNDAMENTAL LIBERTIES AND HUMAN RIGHTS PROVISIONS?

It is important to note that the Federal Constitution is also rights. Although the phrase used in the Federal Constitution is different, namely Fundamental Liberties, it has the same impact as bill of rights. While there are some limitations to these rights, the Federal Constitution provides sufficient legal protection for citizens of Malaysia. We could see many parallels with the Universal Declaration of Human Rights. Therefore, the language of human rights is embedded within the Federal Constitution.

In the words of Professor Shad Faruqi, it is in the Federal Constitution that there is a balance between “the might of the state with the rights of citizens. It protects our liberties and explains our obligations” (2019:vii). These provisions have similar human rights concerns as seen in the Universal Declaration of Human Rights (UDHR), which we will discuss in the next chapter.

The Fundamental Liberties section of the Federal Constitution contains nine articles (Articles 5 to 13) and many more subclauses. They are presented with salient points in Table 1. This section on fundamental rights of citizens also contains restrictions by the State, such as the power to detain, but it also grants citizens the right to be produced before a Magistrate, to know the grounds for their arrest and to ask for a lawyer (Article 5).

In addition, Article 8 is key as it refers to equality before the law irrespective of religion, race, descent, place of birth and gender. It is also stated that there “shall be no discrimination against citizens” except as expressly authorized – Article 8 (2). Articles pertaining to civil and political rights such as freedom of expression, assembly and association contained in Article 10 are important. Article 11 covers matters pertaining to religious freedom as well as restrictions to propagation.

The Constitution has restrictions to human rights as found in Article 10 on freedom of speech, assembly and association. The Constitution also provides provisions to restrict fundamental liberties, such as Article 149, where there are special powers to act “against subversion, action prejudicial to public order” and Article 150 on preventive detention powers.

There are also other rights of citizens contained in the Federal Constitution, such as citizenship rights and rights pertaining to elections, including the right to contest and vote.

Table 1 provides a brief summary of the rights of citizens, or Fundamental Liberties, as found in Part 2 of the Federal Constitution.

FEDERAL CONSTITUTION	COMMENTS
Part 2 FUNDAMENTAL LIBERTIES (A 5 – A13)	
<p>A5 Liberty of the person</p> <ul style="list-style-type: none"> A5 (2) Right to ‘writ of habeas corpus’ A5 (3) Right to know ground of arrest A5 (3) Right to a lawyer A5 (4) Right to be produced before a Magistrate within 24 hours 	<p>These civil rights are essential, but certain laws might restrict these freedoms based on Federal Constitution A149 and A151, which provide for detention without trial.</p> <p>A5 (2) has a provision that the Court could demand for the imprisoned individual to be produced in court and valid reasons stated for that person's detention.</p> <p>There must be judicial independence & space for judicial review to determine if the State overextends its powers.</p> <p>Enforcement must produce suspects within 24 hours before a Magistrate.</p>
<p>A6 Slavery and forced labour prohibited</p>	<p>Prohibition and protection.</p>
<p>A7 Protection against retrospective criminal laws and repeated trials</p>	<p>Key provision.</p>
<p>A8 Equality</p> <ul style="list-style-type: none"> A8 (2) Forbids discrimination on 5 grounds (religion, race, sex, descent or place of birth) A8 (5) (c) Protection for aboriginal people of Malay Peninsula (land and jobs in public service) 	<p>Article 8 on equality before the law and the Federal Constitution prohibiting discrimination is a very important provision.</p> <p>However, the Federal Constitution also provides for special measure as in A153 for the benefit of specific communities.</p>
<p>A9 Prohibition of banishment and freedom of movement</p>	<p>A freedom of movement but qualified in the Federal Constitution.</p>
<p>A10 (1) (a) Freedom of speech and expression</p> <p>A10 (1) (b) Freedom of assembly</p> <p>A10 (1) (c) Freedom of association</p>	<p>Important aspect of democratic freedom of speech, assembly and association.</p> <p>However, the Constitution provides for provisions for restricting this freedom.</p> <p>There must be judicial independence and space for judicial review to determine if the State overextends its powers.</p>
<p>A11 Freedom of religion</p> <ul style="list-style-type: none"> A11 (4) There are some restrictions on propagation to Muslims 	<p>Religious freedom guaranteed to all.</p>
<p>A12 Rights in respect of education</p> <ul style="list-style-type: none"> A12 (2) Rights of all religious groups A12 (4) Religion of person below 18 determined by parents A 	<p>Right of religious groups to maintain educational institutions.</p> <p>Right of government to establish and fund Islamic institutions.</p> <p>Protection from religious instructions.</p> <p>Religion of person below 18 determined by his parent or guardian.</p>
<p>A13 Right to property</p>	<p>Private ownership of property as a right.</p>

OTHER CONSTITUTIONAL RIGHTS

A14-22 Citizenship rights	Citizenship rights are constitutional rights.
A47-48 Right to contest	Participation in the electoral process is key as a candidate.
A119 Right to vote	The right to elect the government of your choice. On 16 July 2019, this was extended to 18 years of age from the previous 21 years of age with automatic registration.
A67 Right not to be taxed without the authority of Parliament	A protection on citizens.
A89 Protection on Malay reserve and customary lands	A protection for Malays and a change only possible with 2/3 majority voting in state assembly and Parliament.
A161-161E Special protection for the rights of Sabah and Sarawak in the federal line-up	Protection and restrictions on language, land and position. The sub-ethnic communities define who is a native.
A136 No unequal treatment in the civil service.	In A153 the reservation of places in civil service for particular groups at the intake but no discrimination for promotions. A 153 (5)
A152 On national language and community languages	<p>Malay is the national language. The script will be determined by Parliament.</p> <p>No prohibition to the use of any other languages.</p> <p>Federal and state governments “to preserve and sustain the use” of any other community language.</p>

Table 1 Summary of Fundamental Liberties

WHAT IS ARTICLE 153? WHY IS IT SO POLITICALLY SENSITIVE?

One of the major political issues in the formulation of the Federal Constitution in 1957 was how to address the disadvantaged position of the Malay community, and later in 1963, the natives of Sabah and Sarawak. Political understanding and consensus were achieved through the principles of bargaining, accommodation, moderation and compromise. Input was sought from the political and community leaders of that time from the Malay, Chinese and Indian communities in 1957 and subsequently from the leaders Sabah and Sarawak in 1963.

Tun Mohamed Suffian Bin Hashim recognised that “one of the most important decisions made by the non-Malay leaders, was to recognise the weakness of the Malay community in the economic field and the need in the interests of national unity to remove that weakness, for Malay poverty is a national problem rather than merely a Malay problem. To give effect to that decision Article 153 has been written into the constitution” (1976: 289 & 290). Professor Andrew Harding also noted that “the social contract is a compromise which balances the rights and interests of different communities and the constitution” (2012: 71).

Article 153 and Features

We need to recognise that Article 153 is a key component of the Federal Constitution, and in the ICERD ratification, it is one of the issues raised by those who objected ratification. There is a need to therefore discuss this matter in a comprehensive way and apply these reflections to ICERD ratification. Please refer to Appendix 3 for the full text of Article 153.

There are three important aspects for our reflection. First, there are two parts to Article 153, namely the special position and the legitimate interest. Often this matter is neglected and Article 153 is promoted as just a focus on special position. In Article 153, there is a balance as it is the Yang di-Pertuan Agong who will protect both provisions.

Second, the special position and legitimate interest are targeting and addressing different ethnic communities. The distinction is between the Malays and natives of Sabah

and Sarawak on the one hand and the other communities who are citizens of Malaysia. Furthermore, the term here is “special position” and not “special or a separate set of rights”.

Third, the Constitutional provisions have a number of guiding principles, such as:

- **Special position is narrowed to only four areas, namely civil service jobs, educational opportunities, business opportunities in Article 153 (2) and educational institutions in Article 153 (8A).**
- **The measures must not deprive other citizens.**
- **The special measures must be “deemed reasonable”.**

PROVISIONS	COMMENTS
A 153 (1) Responsibility of the Yang di-Pertuan Agong to safeguard special position and legitimate interest Yang di-Pertuan Agong's role is guided by Article 40 upon the advice of the Cabinet.	It is the dual responsibility of the Malaysian King to protect the interests and rights of all communities (Malays and natives of Sabah and Sarawak and also the other communities). This is a balancing dimension of the Federal Constitution. Often, when Article 153 is referred to, the focus is on the special position of Malays. Article 153 is more inclusive with reference to legitimate interest of other communities.
A 153 (2) Three special position measures are referred to here, namely: (a) proportion of positions in the public service (b) educational and training opportunities including scholarships (c) business permits and licences. The fourth provision is A 153 (8A) To ensure reservations in educational institutions	In the understanding of the social contract (although the term is not in the Constitution), it is said that the Malays agreed to grant full citizenship to non-Malays. Article 153 (2) under the special position makes provision for only three aspects, namely in civil service positions, educational opportunities and finally in business. In all three areas, due to the historical disadvantaged position that the Malays and natives faced during the Colonial period, these measures were agreed upon to ensure a level playing field. A guiding principle is "deem reasonable". A fourth provision was added on 10 March 1971 – to make provision for students in any course of study if there are insufficient numbers of qualified Malays and natives. Provision for reservations.
A 153 (3) Reference to general directions	Given by the Yang Di-Pertuan Agong.
A 153 (4)	Assurance that Clause 1 or 3 will not deprive any personnel of any public office.
A 153 (5) Reference to Article 136	While there could be special position on civil service intake, there is none on promotions once in the service.
A 153 (6) Reservations in business	Reference to general guidelines and the notion of "deem reasonable".
A 153 (7) & A 153 (8) Restriction	No deprivation of others in the special position.
A 153 (9) (9A)	Restriction on Parliament not to restrict any business or trade reservations.
A 153 (10)	Reference to state provisions.

Table 2 Summary of Article 153

Article 153 and reservation of jobs in the civil service: An early rationale or formula

Tun Suffian described in detail the historical background of the British civil service when they took political control of Malaya. All top posts went to the British officials followed by English-speaking Indians and Ceylonese (1976:295). Tun Suffian clarified that the early quota imposed was only for certain top civil service positions and not for all. He noted, “Government has imposed a quota only in respect of Division One officers in the following services: in Malaysian Home and Foreign service 4 Malays to 1 non-Malay; 3 to 1 in the judicial and legal services; 3 to 1 in the customs service and 4 to 1 in the police service” (1976:295). This means about 80% Malays and 20% non-Malays in Home Ministry and Police; 25% in judicial and legal services and also in customs.

According to Tun Suffian, the quota applies to only four services in only senior civil service positions such as Division One positions. Tun Suffian also provided a very useful table on this with this basic information on the number of Malays and non-Malays serving as Division One officers in 1968. Of the 3,839 civil servants, 2,447 (63.7%) were non-Malays and 1,392 (36%) were Malays.

However, today, there is a very low representation of non-Malays in the civil service. Government officials have indicated that the low interest by non-Malays is due to better prospects in the private sector or due to self-employment. One can now observe that it is a reversal of the situation that was described by Tun Suffian. Therefore, the contemporary challenge is one of low non-Malay participation in the public sector and this matter must be addressed to ensure fair balance in representation.

Holding Article 153 in balance

Article 153 on the “special position” must be kept in balance with the “legitimate interest” also referred to in Article 153 and with the spirit of the Federal Constitution on the principle of equality before the law, as found in Article 8. Andrew Harding rightly noted that these special provisions and arrangements “does not embody Malay dominance but a pluralistic democracy” (2012:71). Harding elaborated further by stating that “Article 153 is not a licence to ignore the Constitution or the right of citizens or to indulge generally in official or institutionalised discrimination” (2012:72).

CAN THESE PROVISIONS BE CHANGED EASILY?

Often in public discussions, a number of conservative politicians and activists have indicated that pro human rights groups and their politicians will eventually weaken the social contract and replace the special position of the Malays and the position of Islam in Malaysia.

However, in the Federal Constitution, there are specific provisions on race, religion and royalty that are built in as protection mechanisms. One major safeguard is even with a 2/3 majority in Parliament some matters cannot be changed without the consent of the Conference of Rulers (Article 38). This special provision is a protection and should assure us from the usual political rhetoric that all will be lost. There are implications for ICERD ratification that we can review in the ratification process.

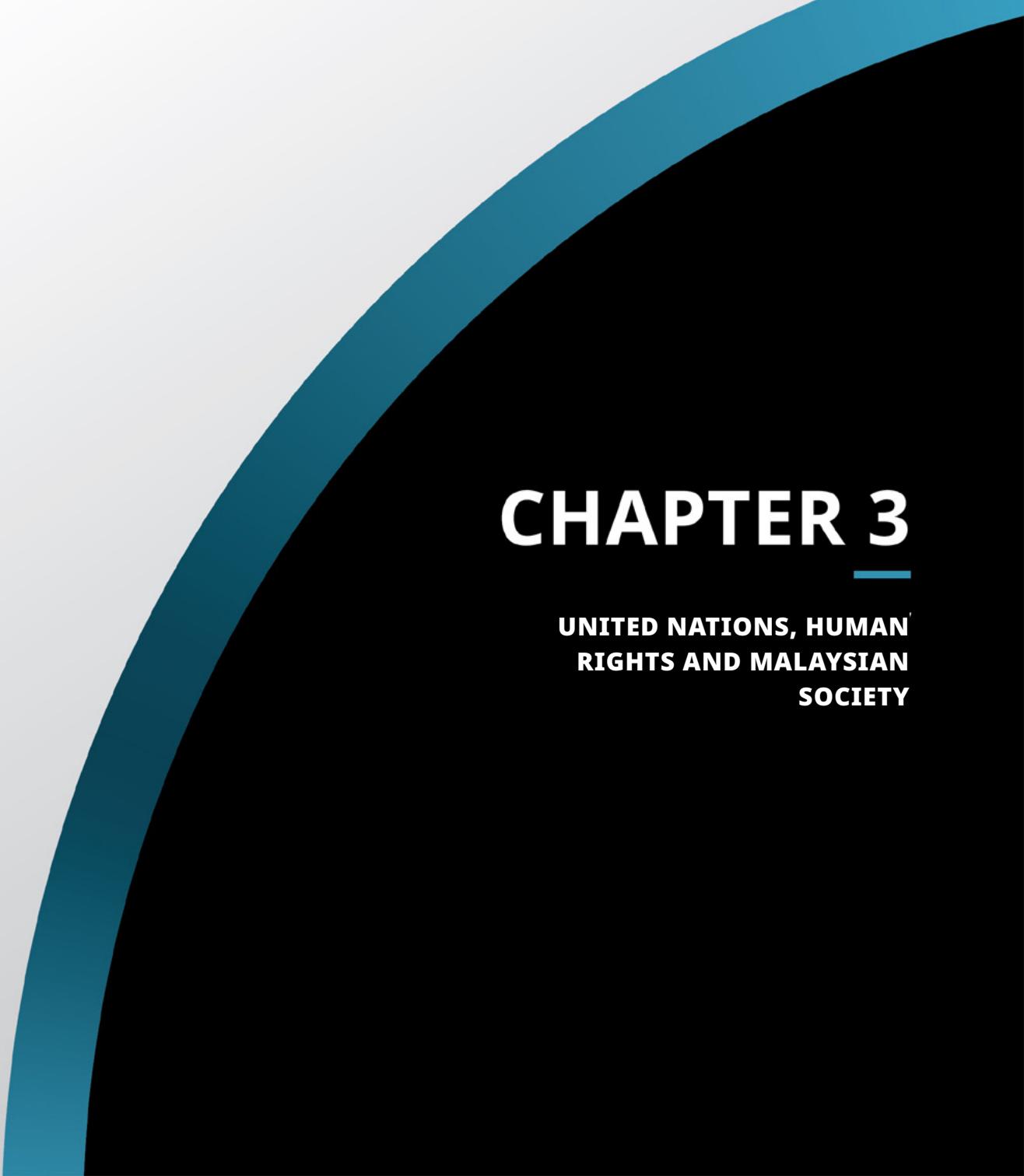
There are a number of specific references in the Federal Constitution on safeguards and protection as listed below:

- **Article 38 (5): “The Conference of Rulers shall be consulted before any change in policy affecting administrative action under Article 153 is made.” Matters pertaining to implementation can be discussed.**
- **While elected officials in either House of Parliament or state assembly can speak on any matter without fear of being persecuted, no one can advocate for the abolishment of the constitutional position of the Yang di-Pertuan Agong or any of the state rulers. This matter is discussed in Article 63 (5) on privilege of Parliament and in Article 72 (5) on state assembly.**
- **In the case of amendments to the Constitution, some specific references cannot be passed without the consent of the Conference of Rulers as indicated in Article 159 (5) pertaining to Article 10 (4), any laws under Part 111, Article 38, 63 (4), 71 (1), 72 (4), 152 or 153.**
- **Explanation to the references cited in Article 159 (5)**
 - **Article 10 (4): Provision for Parliament to enact laws to prohibit questioning certain laws related to national language (A152) and social position (Article 153)**
 - **Part 111 pertaining to citizenship matters**
 - **Article 38: Provision on the Conference of Rulers**
 - **Article 63 (4): Reference to Sedition Act 1948 and Emergency (Essential Powers) Ordinance No 45, 1970 and their application in parliamentary proceedings**
 - **Article 71 (1): Rights of the State Rulers**
 - **Article 72 (4)**
 - **Article 152: National language**
 - **Article 153: Special position and legitimate interest**

Recently, Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah advised citizens to exercise their rights and freedoms with responsibility. In conjunction with the Majesty's official birthday, he called on Malaysians to recognise that there is a line and limit to their rights and freedoms, which are guaranteed in the Federal Constitution. His advice is that citizens must not play up sensitive issues in the interests of any party.

Therefore, we must keep the fundamentals of national unity in mind. The King's advice is about politics. In this context, he said, "if political polemics were left prolonged, sooner or later it will start taking its toll on the people. Believe me, the unity, peace and harmony that have been built over these 62 years, if we ever lost it, will be very difficult to get back. My advice is, let bygones be bygones, forgive and forget past disputes so that the broken relationship can be fixed and restored" (MM 2019).





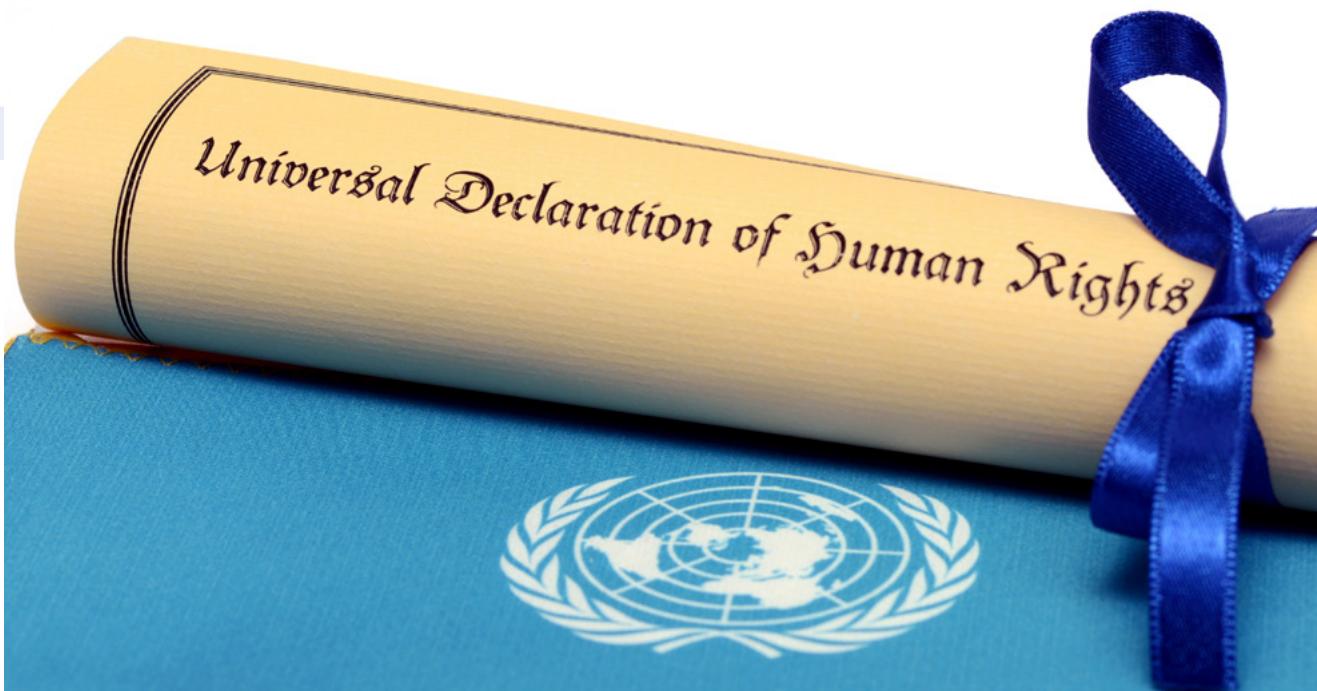
CHAPTER 3

**UNITED NATIONS, HUMAN
RIGHTS AND MALAYSIAN
SOCIETY**

In this chapter, we will seek to understand the human rights agenda at the global and national level. In Malaysia, there are two forces at work, those who are pushing the nation towards greater human rights compliance based on global standards and those who are pushing back in the name of cultural relativism and in defence of religion, ethnicity and royalty.

Here, we want to discuss general matters pertaining to human rights. Therefore, in this chapter, we will need to find answers for three critical questions:

- **What are the core human rights conventions and who are the global actors? How did it emerge on the global scene and what role does the United Nations have in this?**
- **How has the Malaysian Government responded to human rights issues and its global obligations?**
- **How has the establishment of the Human Rights Commission of Malaysia (SUHAKAM) enhanced human rights in Malaysia?**



WHAT IS THE GLOBAL HUMAN RIGHTS MOVEMENT AND THE UNITED NATIONS?

Founding of the United Nations

To understand the establishment of the United Nations (UN), we need to review the historical circumstances in 1945, the need for the International Court of Justice (1946) and the need for the Universal Declaration of Human Rights (UDHR) in 1948. At the end of the Second World War, nations made a commitment to peace and the dismantling of colonialism. The horrors and devastation of two world wars saw the need for global governance and a place for all nations of the world, especially with the establishment of new nations. In this context, we must note that Indonesia in 1945, the Philippines in 1946, and India in 1947 obtained independence, respectively, from the colonial powers. These nations became UN Members soon after. Malaya got independence in 1957 and also joined the UN.

At the founding of the UN in 1945, there were 51 Member States, including with three Asian countries, namely China, India and the Philippines and eight Muslim nations, namely Egypt, Iran, Iraq, Lebanon, Liberia, Saudi Arabia, Syria and Turkey. It was not all Western nations, as these reflect the ethnic, cultural and religious diversity as they all became members of a global governance. Five nations, namely China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America, became permanent members of the Security Council. This was part of the post Second World War global architecture.

The starting point for the United Nations position and approach to human rights is the Charter of the United Nations. We can trace back to the San Francisco Conference where the Charter was agreed upon in 1945. The objective of world leaders then was to create “a more peaceful and secure world” (Shapiro & Lampert: 2014, p. xix).

World leaders at the founding of the UN through the UN Charter made a clear statement on human rights by reaffirming “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” and by “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (Shapiro and Lampert 2014:114). We can therefore conclude that the UN Charter “embraced the notions of fundamental civil rights, justice, international law, social process, self-determination, lack of discrimination and larger freedoms for all” (Shapiro and Lampert 2014:114).

All Member States of the United Nations, which now number 193 and of which 57 are also members of the Organisation of Islamic Cooperation (OIC), have on joining the UN accepted the UN Charter and its commitment to the promotion and protection of human rights. The UN has over 44,000 workers located throughout the world with four headquarter locations in New York, Geneva, Vienna and Nairobi.

The Universal Declaration of Human Rights (UDHR)

The global community in 1945, after two devastating world wars, sought to identify key values and principles that would serve as minimum standards for all countries to abide by for global peace and solidarity. Mary Ann Glendon noted that “as far as the Great Powers of the day were concerned, the main purpose of the United Nations was to establish and maintain collective security in the years after the war” (2001:xv).

The UN set up a drafting committee to formulate the Universal Declaration of Human Rights. The drafting committee had nine members who were from Australia, Canada, China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The chairperson was Eleanor Roosevelt (United States of America). The composition of the drafting team was reflective of wider representation of the nations and not just Western nations or colonialists. The drafting committee instituted a consultative process in the formulation.

When the UDHR was finally tabled at the United Nations for adoption on 10 December 1948, there were only 58 nation States who were then members of the United Nations. Ten of the 58 were Islamic nations. They were Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey and Yemen.

Of the 58 members, 48 members voted in favour of the UDHR, including nine Islamic nations in 1948 (Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Syria, Turkey and Yemen). Eight countries abstained and two were absent. Of the eight who abstained, six were from the Soviet bloc plus Saudi Arabia and South Africa. Nevertheless none of the nations voted against the UDHR in 1948.

The issues then with the Soviet Union was that they were taking a “different path, subordinating the individual to the state, exalting equality over freedom and emphasizing social and economic rights over political and civil liberties” (Mary Ann Glendon 2001:xviii).

While some in Malaysia have disputes with the UDHR, it is clear that a vast majority of the Islamic nations have voted in favour of the UDHR. We also noted that the Soviet bloc did not vote on the UDHR, and when it came to two major Covenants, namely Covenant on Civil and Political Rights (1966) and Covenant on Economic, Social and Cultural Rights (1966), the majority of the nations of the world have ratified them, including Muslim and post-Soviet countries. On civil and political rights, 173 Member States have ratified the covenant, leaving six who have signed and only 18 who have not. In the case of economic, social and cultural rights, a total of 170 have ratified the covenant, four have signed and 23 have not. The UDHR and the two covenants now form the foundation of global human rights laws upon which all other declarations and conventions are built.

The UDHR today is “the single most important reference point for cross-national discussion of how to order our future together on our increasingly conflict ridden and interdependent planet”. (Mary Ann Glendon 2001:xvi & xvii). We can note that “the Universal Declaration charted a bold a new course for human rights by presenting a vision of freedom as linked to social security, balanced by responsibility, grounded in respect for equal human dignity and guarded by the rule of law” (Mary Ann Glendon 2001:235). The UDHR became a global standard by which all countries including the west are now being judged if they violate the basic principles of the UDHR. All have a moral obligation to abide by it.

It is said that this declaration “helped spark a revolution” (Shapiro and Lampert 2014:218) in terms of the number of human rights treaties and conventions that have been subsequently created on the foundations of the UDHR. It is also said that the UDHR “heralded a new movement in the history of human rights” (Mary Ann Glendon 2001:174).

Some Features of the UDHR

There are a total of 30 articles. Here, it is the State or Government that is the duty bearer to ensure that it does not violate its role as a protector of the rights of the people. The State promises every member of the society that it will protect their rights. Today, we note that some States do not uphold many of its fundamental human rights obligations.

This is universal and applicable to all as per UDHR Article 2 “without distinction of any kind: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

FEATURES	COMMENTS
Preamble	Inalienable rights for all, universal respect for all, dignity & equality of all.
Article 1 Free, equal with dignity & rights	This is the heart of the UDHR “ALL Human Being”. Uniqueness of humanity – “reason & conscience” . Spirit of solidarity with humanity – “Spirit of Brotherhood.
Article 2 Rights & freedoms for all	This qualifies Article 1 – that all – “without distinction of any kind : race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Article 3 & 4 Right to life, liberty & safety No slavery or servitude	A major departure for Colonial period and slave ownership including workers held in servitude including contemporary human trafficking.
Article 5 No torture, cruel, inhumane, degrading treatment or punishment	There is a review of punishment including caning or whipping no longer acceptable. Torture as a way for investigating or securing confession is unacceptable.
Article 6 Right to an identity	Birth certificate and identification cards are a human rights matter.
Article 7 All are equal before the law & protection	Equality is key to UDHR and closely related to A1 & 2. This is equal protection against any discrimination.
Article 8, 9, 10,11,12	About effective remedy, arbitrary arrest, public hearing, innocent until proved guilty.
Article 13 & 14 Freedom of movement	Movement & asylum.

Article 15 Rights to nationality	Everyone has this right even to change nationality.
Article 16 Rights to marriage & family	Equal rights in marriage.
Article 17 Right to property	All have this rights.
Article 18, 19 & 20 Right to freedom of religion & opinion & assembly	Freedom of thought, conscience & religion. A controversy is the freedom to change religion or belief. Freedom of opinion. Freedom for peaceful assembly.
Article 21 Right to participate in government	Participation in public office and government as a matter of rights.
Article 22, 23, 23, 24, 25, 26 & 27 Right to socioeconomic & cultural development	Right to social security, work, rest & leisure, health, education & cultural life.
Article 28, 29 & 30	Rights and duties.

Table 3 UDHR Features and Comments

Among some Islamic groups in Malaysia, they have difficulties with Article 18 of the UDHR. The article reads “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief”.

While this might sound controversial in Malaysia, the right to religious freedom is a fundamental right. And other commentators conclude that the UDHR and the Federal Constitution are consistent with each other. In the Federal Constitution, there is only the restriction to “propagation of any religious doctrine or belief among persons professing the religion of Islam” (Article 11 (4)). However, Muslim groups in Malaysia have been exercising their right to propagate Islam to non-Muslims in Malaysia.

Universality versus Cultural Relativism

In an article in the *New Straits Times*, Azril Mohd Amin (2018) of the the Centre for Human Rights Research and Advocacy (CENTHRA), cites historical, cultural relativism and inconsistencies in practice as evidences in building a case for why the UDHR is not universal. He claims that the UDHR is a “colonial document reflecting a colonialist philosophy” because the main signatories were still practising racial segregation or were still colonialist nations (Azril Mohd Amin 2018).

There are some arguments for application for culture-specific aspects, but the global community in 1945 after a devastating world war opted for universal application. The UN leaders sought to identify key values and principles that would serve as minimum standards for all countries to abide by as a global community. The 1948 Member States voted in favour of the UDHR and also subsequent nations joining the UN have endorsed it as the UDHR is part of the UN Charter having universal application.

On the matter of universality versus cultural relativism, Malaysian human rights lawyer, Andrew Khoo, provides an important argument. He states, “If values of equality of rights and dignity were not universal, then there would be no point speaking out and standing up for the Palestinians in Gaza, the Rohingya in Myanmar, the Uighurs in China, or for religious minorities in Europe. If we did, someone would turn around and say, ‘Ah, but you don’t understand our unique history, our culture, our way of life. We are different. And we don’t want you introducing foreign influences into our society’ “ (Andrew Khoo 2018).

Therefore, “the core principles of human rights first set out in the UDHR, such as universality, interdependence and indivisibility, equality, non-discrimination, and that human rights simultaneously entail both rights and obligations from duty bearers and rights owners, have been reiterated in numerous international human rights conventions, declarations, and resolutions” (United Nations 2021).

Core Human Rights Conventions & Ratification by Member States

Table 4 on the ratification of UN conventions by 193 Member States shows us that there is a very strong willingness of many countries to benchmark their national laws and practices with UN global benchmarks. We do recognise that Member States are not perfect, but ratification of the conventions and a review of their reports to the relevant committees is one step towards global compliance.

Of the nine core conventions, seven have over 85% of the countries ratifying the conventions (three have over 90% and one has 100%) and two have below 32%. Therefore, global acceptance of universal standards and benchmarks of the core human rights instruments is significantly high.

In the case of Malaysia, we have ratified only three out of the nine core human rights conventions, namely Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and finally Convention on the Rights of Persons with Disabilities. Therefore, we have only ratified about 30.3% and our track record on ratification is low. This matter was repeatedly raised during the UPR review processes and we return to this later in this chapter.

	UN CONVENTIONS	RATIFIED (OUT OF 197 MEMBER STATES)	RATIFIED (% OF TOTAL)	SIGNED	NOT SIGNED OR RATIFIED	MALAYSIA
1	International Convention on the Elimination of All Forms of Racial Discrimination	182	94.8%	4	12	-
2	International Covenant on Civil and Political Rights	173	89.6%	6	18	-
3	International Covenant on Economic, Social and Cultural Rights	170	88%	4	23	-
4	Convention on the Elimination of All Forms of Discrimination against Women	189	98%	2	6	YES
5	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	167	86.5%	6	24	-
6	Convention on the Rights of the Child	196*	100%	1	0	YES
7	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	55	28%	13	130	-
8	International Convention for the Protection of all Persons from Enforced Disappearance	61	31.6%	49	87	-
9	Convention on the Rights of Persons with Disabilities	180	93%	8	9	YES

**Three non-member states have ratified namely Holy See, Malta & Switzerland.*

Table 4 Core Human Rights Ratification

UN Human Rights Institutions

Human rights are at the heart of the UN's global agenda and central to the mission of the UN. Human rights work today is part of the United Nations Secretariat, with a staff of some 1300 people directly in human rights work globally and its headquarters in Geneva, as well as an office in New York.

The United Nations Commission on Human Rights was established in 1946 to promote and protect fundamental rights and freedoms as part of the global UN agenda from the very beginning. The work of the Commission was replaced by the UN Human Rights Council, which was established on 15 March 2006 by the UN Assembly. The Council is made up of representatives from 47 United Nations Member States, who are elected for a two-year term by the UN General Assembly on a rotation basis.

In an effort to strengthen the human rights enforcement and monitoring mechanism, the UN in 1993 established the Office of the High Commissioner for Human Rights, who is

the principal human rights official of the United Nations. One major initiative of the UN Human Rights Council is the Universal Periodic Review (UPR) mechanism, which serves to assess the human rights situations in all United Nations Member States. This is a key human rights instrument of the global community. This review could have implications for trade, investments and cooperation among Member States.

Over time, the UN has formulated declarations and conventions. Declarations are aspirational statements, collectively agreed upon with no obligations for implementation. However, a convention is a treaty between the UN, the country and global community. Member States that ratify a convention agree to fulfil its obligations and will be held accountable to the treaty body through a reporting process.

HOW HAS THE MALAYSIAN GOVERNMENT RESPONDED TO HUMAN RIGHTS ISSUES AND ITS GLOBAL OBLIGATIONS?

Malaysia joined the UN in 1957. Since then, it has had an active presence in the UN, having served on the Security Council and the Human Rights Council and playing a very active role in peacekeeping. Malaysia has made global commitments as a member of the UN, along with Member States.

By joining the UN, Malaysia has accepted the commitments to human rights in the UN Charter and the UDHR. It has conformed to the UN expectations in the delivery of the Millennium Development Goals (2000 – 2015) and more recently, the Sustainable Development Goals (2015 to 2030). Malaysia has voluntarily signed declarations as well entered into binding treaties by ratifying UN conventions. Malaysia has welcomed independent rapporteurs who have issued independent assessments on the state of human rights in Malaysia. A review of these will show Malaysia's global obligations, which it is fulfilling and is obligated to fulfil. All these actions are viewed as being consistent with the Federal Constitution.

Party to Human Rights Declarations

Over the years, Malaysia has endorsed human rights declarations. While declarations are not binding documents, nonetheless they contain key principles and rights that are based on universal human rights standards. What we must remember is that Malaysia shared the aspirations along with the global community on three very important declarations. We must review these and recapture the spirit of solidarity Malaysia had with the global community. These declarations can guide our understanding of human rights and the international pledges that Malaysia has made.

Three such declarations are significant. These are:

- ***Declaration on the Right to Development (1986)***

The General Assembly in 1986 voted on this with 146 Member States in favour, one (the United States) against and eight abstaining (mostly developed nations). The focus here is on a rights-based approach to development. Article 1 of the declaration declares development as a human rights. It also sets in Article 2 the active participation of all beneficiaries. It makes development a major responsibility of the State. It also calls on States to address “all forms of racism and racial discrimination” (Article 5). It is significant that Malaysia was among 146 nations of the world to endorse this declaration by voting in favour.

- ***Declaration on the Rights of Indigenous People (2007)***

It is very significant that Malaysia is among 144 Member States that on 13 September 2007 voted in favour of this declaration at the General Assembly. There were 11 abstentions and four votes against (Australia, Canada, New Zealand and the United States).

This declaration is the most significant declaration on indigenous people and has become a very strong advocacy tool. The declaration affirms that indigenous people are equal to all people (Article 2) and must be free from discrimination (Article 2) and not subject to forced assimilation or destruction of their cultures (Article 8). A very important principle of consultation

and engagement is provided for in Article 10, namely “the free, prior and informed consent” of the indigenous people. Article 26 affirms their “right to the lands, territories and resources which they have traditionally owned, occupied...”

- ***Declaration on the Rights of Human Rights Defenders (1999)***

This was adopted by the General Assembly on the 50th Anniversary of the UDHR. Here, the focus is on human rights defenders and their rights to exercise their rights to promote and defend human rights at local, national and global levels. In many contexts, the human rights defender is subjected to arbitrary arrest and abuse by state officials who seek to restrict fundamental liberties. The declaration reiterates the place and space for peaceful activities.

The declaration was unanimously adopted in 1998 and amended in 2015. Madeleine Sinclair (2015) documents that Malaysia in 2015 was among 117 countries that voted to strengthen the provisions of protection of human rights defenders. This is clearly a global witness of Malaysia's global stand on this matter, which must have significance in domestic policy in Malaysia, too, as we abide by the declaration's aspirations.

Ratification of Human Rights Conventions

Malaysia has ratified three out of the nine core human rights conventions, which is only 33%. However, the ratification of conventions, placing reservations and the reporting process can illustrate Malaysia's commitment to benchmark itself against global standards. There is a global and national call for Malaysia is to ratify more UN core conventions in order to burnish its standing in the global community. Based on Malaysia's reporting to the treaty body, Malaysia has taken a slow compliance in the required four-year reporting by a Member State.

- ***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)***

Malaysia ratified CEDAW with reservations based on conformity to Islamic or Syariah law with reference to Article 16 (a), (c), (f) and (9) on the rights of Muslim women in relation to Muslim men, namely in entry into marriage, on rights and responsibilities, on guardianship and adoption, and on personal rights.

The Women's Aid Organisation (WAO), in their review of CEDAW in 2019, acknowledged the positive changes since ratification but also noted shortcomings and challenges. Malaysia's latest reporting and review in Geneva with the CEDAW committee took place on 20 February 2018. However there was an eight-year delay in submitting this report, which is regretted by the CEDAW committee.

The CEDAW committee's major concern is to "the existence of a parallel legal system of civil law and multiple versions of Syariah law, which have not been harmonized in accordance with the Convention ... which leads to a gap in the protection of women against discrimination, including on the basis of their religion" (CEDAW 2018:3).

- ***Convention on the Rights of the Child (CRC) (1989)***

"Malaysia acceded to the Convention in 1995. As a step towards realizing the rights of the children, the Government passed the Child Act in 2001 and developed a National Policy for Children and its Plan of Action in 2009, amongst many other efforts. The Malaysian Government also ratified the Optional Protocol 1, which covers involvement of children in armed conflict, and Optional Protocol 2, covering sale of children, child prostitution and pornography. Malaysia has yet to ratify Optional Protocol 3, covering communication procedure which sets out an international complaints procedure for child rights violations.

"Furthermore, the Government still maintains its reservations on five core articles under the Convention, which are: Article 2 (the rights under CRC to each child within their jurisdiction, without discrimination of any kind); Article 7 (the right to be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality); Article 14 (the right of the child to freedom of thought, conscience and religion); Article 28(1) (a) (the right to free and compulsory primary education to all children); Article 37 (the right of not being subject to cruel, inhuman, degrading treatment or punishment and deprived of liberty unlawfully or arbitrarily)" (Ask Legal 2019).

There was a nine-year delay in Malaysia making a submission of its report to the CRC committee. Malaysia submitted its report on 25 January 2007 and the concluding remarks on 2 February 2007. Since then, Malaysia has not made any reports to the CRC committee, which is already a 12-year delay.

One possible reason is the difficulty Malaysia is facing on this dual legal system. The CRC committee recommends “that the State party conduct an international comparative study on the implications of the dual legal system of civil law and Syariah law and, based on the results of this assessment, take necessary measures to reform this dual system with a view to removing inconsistencies between the two legal systems in order to create a more harmonious legal framework that could provide consistent solutions, for example, to family-law disputes between Muslims and non-Muslims. The Committee also recommends that the State party undertake a comprehensive review of the national legal framework with a view to ensuring its full compatibility with the principles and provisions of the Convention” (CRC Committee 2007).

- ***Convention on the Rights of Persons with Disabilities (CRPD)***

Malaysia ratified this Convention in 2010 with reservations to Articles 15 and 18, and Malaysia has not signed the Optional Protocols to this Convention. However, SUHAKAM notes that this “ratification of the CRPD is a step towards proving Malaysia’s readiness to translate these rights into action” (SUHAKAM 2019a). Malaysia has yet to submit its report to the CRPD committee. It is now about eight to nine years behind schedule.

Universal Periodical Review (UPR)

The UPR is a peer review system introduced by the United Nations where every Member State undergoes review of their human rights situation. Reports are presented every four years. There is an opportunity for countries to state actions they have taken and an opportunity for Member States to make comments. So far, Malaysia has undergone UPR reviews in 2009, in 2013 and most recently on 8 November 2018 (UPR 2009, 2013 & 2018).

In the most recent review undertaken on 8 November 2018, a total of 268 recommendations were received. Malaysia has formally accepted 147 or 54% of them and will report in four years’ time on actions it has undertaken to address these concerns. This is a peer group global accountability process. Three parties play an important role namely governments, UN agencies and civil society organizations from the respective countries. All reports are published on the UN website, and all stakeholders participate in the review process with Member States playing an active role.

Malaysia as a Member State of the UN is already conforming with global human rights standards and is being held accountable on its human rights track record. What is significant is that every Member State can accept or reject the recommendations. However, they need to state their reasons for this.

A quick review of the 147 recommendations will give us some indications of how Malaysia responded to the global community assessment of the state of human rights in Malaysia. The 147 recommendations are organized thematically into seven categories in Table 5.

THEME	NO	COMMENTS
Ratification of human rights conventions	8	The call is to review and consider ratification of conventions.
Strengthening human rights mechanism	13	The call for effective national mechanisms is crucial including independent inquiry.
National legislation	17	The call is for stronger legislative protection for democratic participation and addressing discrimination including impartial panel.
Socioeconomic development	44	Socioeconomic development in line with SDGs is a major call. There is a focus on eradicating poverty, health care, education and vocation training.
Target groups	43	A number of targets groups are specifically mentioned such as women, children, people with disabilities, HIV/AIDS, minorities, indigenous people, and migrant workers. The call is for protections as well as access to services.
Death penalty	12	There is a specific call to end the death penalty.
Human trafficking	10	Calls to check and address human trafficking is another area of major global concern. There is a call to implement the national action plan.
	147	

Table 5 UPR (2018) Recommendations

Out of the 268 recommendations, a total of 121 or 45.1% were not accepted. It is significant to note the kind of aspects rejected by the Malaysian Government. Specific commitment to ratification was not accepted; call to adopt anti-discrimination laws was not accepted; call to ensure Shariah law is compliant with CEDAW was not accepted; and all recommendations pertaining to LGBT were not accepted. These are some areas that Malaysia has told the global community that it would not consider for the time being.

Addressing the accepted list of 147 recommendations will require the collective efforts of many agencies. Whatever the case, Malaysia has made a commitment, and we should ensure that Malaysia will be able to honour these over the next four years when Malaysia will be called up to provide a report of the achievements.

Special Rapporteurs' Reports on Malaysia

The United Nations Human Rights Council consists of independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. They make visits at the invitation of Member States.

In the last two years, four special rapporteurs have visited Malaysia. Some brief comments on their reports will assist to assess the state of human rights in Malaysia and the kind of recommendations that were made to change the human rights record, consistent with UN and global benchmarks.

- ***Special Rapporteur on cultural rights***

The Special Rapporteur, Professor Karima Bennoune, made the visit from 11 to 22 September 2017. This visit was hosted by the Ministry of Tourism and Culture. The Rapporteur appreciated the Government's commitment to diversity, such as celebrations, open houses and a home stay programme in fostering inter-ethnic and interreligious understanding. An area of concern was the rise and impact of fundamentalism and extremism on women and their cultural rights. Another concern was indigenous people's ability to exercise customary rights on their land. The report concluded with a call for more moderate voices and concerted action to ensure the country's diverse cultures are preserved. The Rapporteur "expressed concern at what they saw as the growing Islamization and Arabization of the society and polity..." Another matter of concern identified was "discrimination against the 500,000 to 800,000 Shia Muslims".

- ***Special Rapporteur on the sale and exploitation of children***

The Special Rapporteur, Ms Maud de Boer-Buquicchio, visited Malaysia from 24 September to 1 October 2018, facilitated by the Ministry of Women & Family Development. There was concern raised in the report for the high demand for commercial sex as Malaysia remains a destination and transit source for other countries.

Another area of concern was child marriage. The report noted that there is no proper mechanism to identify and assist child marriage victims. It was also noted that a lack of reliable disaggregated data and difficulties in reconciling different legal systems are shortfalls impacting the implementation. Other affected groups are populations affected by mega projects, people living in informal settlements especially in East Malaysia including refugees and asylum seekers, transgender and gender nonconfirming persons.

- ***Special Rapporteur on drinking water and sanitation***

The Special Rapporteur, Mr Leo Heller, visited Malaysia from 14 to 27 November 2018, facilitated by the Ministry of Water, Land and Natural Resources. The rapporteur noted that the Orang Asli Indigenous peoples faced some technical problems in the use of technology and water systems, especially the inappropriateness of the level of technology and poor maintenance. In this context, the Rapporteur recommended a participatory process of involving the community for key decision-making, especially on use of technology solutions.

- ***Special Rapporteur on extreme poverty and human rights***

The Special Rapporteur, Professor Philip Alston, visited Malaysia from 13 to 23 August 2019. In his report, he raised six thematic concerns, eight target groups and concluded with 11 recommendations. He was hard hitting on the measurement of poverty indicating a very low and unrealistic poverty line. He called on the Government to establish a meaningful poverty line consistent with international standards and to give greater focus to the bottom 15 to 20 in the socioeconomic ladder. Other concerns raised focused on indigenous people and other marginalized communities like stateless, refugees, migrant workers and people with disabilities needing greater attention.

Sustainable Development Goals (SDGs), (2015 - 2030)

In September 2015, Malaysia participated with the countries of the world supporting the 2030 Agenda with the Prime Minister making a commitment at the UN General Assembly to implement it in national development policies and to localize the SDGs. The SDGs are 17 goals covering economic, social and environmental concerns clearly related to human rights with the theme of “leaving no one behind”. Peace and justice is an important component together with stakeholder engagement, namely the government, civil society, private sector and academia.

In the SDGs there is a very strong commitment towards non-discrimination. SDG 5.1 aims to end all forms of discrimination against women and girls. SDG 10.2 is about ensuring inclusion for all irrespective of race and ethnicity among the nine key variables identified. In SDG 16.b, there is a commitment for duty bearers “to promote and enhance non-discriminatory laws and policies for sustainability”.

In July 2017, Malaysia presented its first Voluntary National Review (VNR) after hosting two national gatherings on SDGs where various stakeholders participated. Malaysia established the National SDG Steering Committee and nominated five civil society organizations as members. The Government has been in contact with stakeholders although the National SDG Roadmap has been delayed. Malaysia, however, incorporated the SDG goals into the Eleventh Malaysia Plan and strengthened it further in the Mid-Term Review of the Eleventh Malaysia Plan. It is now in the process of localizing SDGs. The Economic Planning Unit previously and now the Ministry of Economic Affairs has engaged civil society in this process especially the Malaysian CSO-SDG Alliance.

However, there continues to be many concerns, such as shortcomings in the integration of the SDGs, lack of disaggregated data, and lack of capability among the stakeholders on SDG implementation. Although four years have passed, broad-based awareness on this global agenda to ensure no one is left behind has not been effectively carried out nationally. The long overdue National SDG Roadmap, which has been in preparation since 2016, has not been officially released. The Department of Statistics Malaysia, however, has been undertaking data gathering and analysis on SDG targets and indicators.

Malaysia is now in preparation for the presentation of its second VNR in July 2021. The Economic Planning Unit of the Prime Minister’s Department has started the engagement process with all stakeholders in the report writing to recognise the progress, challenges and opportunities.

The Parliament of Malaysia in October 2019 established an All Party Parliamentary Group Malaysia (APPGM) on SDGs. Six members of the Lower House and two from the Upper House have voluntarily joined this group along with academicians, think tank groups and civil society to form the secretariat. They are undertaking a pilot project in 10 parliamentary constituencies in 2020 and another 20 constituencies in 2021 on localizing SDGs at the parliamentary level and monitoring delivery. The Ministry of Finance allocated RM1.6 million in 2020 and another RM5 million in 2021 to undertake projects to address local issues identified from an SDG framework.

HOW HAS THE ESTABLISHMENT OF THE HUMAN RIGHTS COMMISSION (SUHAKAM) ENHANCED HUMAN RIGHTS IN MALAYSIA?

In 1991, the Paris Principles on independent National Human Rights Institutions for the Promotion and Protection of Human Rights were developed. This theme was consolidated in the 1993 Vienna Human Rights World Conference by creating a national culture of human rights where tolerance, equality and mutual respect thrive.

Malaysia began playing an active role in the United Nations Commission on Human Rights (UNCHR) between 1993 and 1995, when Malaysia was elected as a member of the Commission by the United Nations Economic and Social Council. During this time, Malaysia was honoured as Chair of the 52nd session of the UNCHR, a role played by Tun Musa bin Hitam, the former Deputy Prime Minister of Malaysia, who later in 2000 became the first Chair of the Malaysian Human Rights Commission (SUHAKAM). Malaysia served two more terms in the UNCHR from 1996 to 1998 and again from 2001 to 2003.

It was in this context that “Tan Sri Musa, in 1994, first suggested to the Malaysian Government that the time was right for Malaysia to establish its own independent national human rights institution. Several factors influenced this proposal: the growing international emphasis on human

rights and recognition that it crosses boundaries and sovereignty; Malaysia’s active involvement in the United Nations system; the changing political climate in Malaysia with a more politically conscious electorate and dynamic civil society. By the mid-1990s, seven Asian countries, including two from ASEAN – Indonesia and the Philippines – had already established national human rights institutions, while Thailand was in the midst of setting up its own.” (SUHAKAM 2019)

SUHAKAM was established by Parliament under the Human Rights Commission of Malaysia Act 1999, or the SUHAKAM Act. The Act was gazetted on 9 September 1999. The inaugural meeting of SUHAKAM was held on 24 April 2000. This is the 20th year since the founding.

Defining Human Rights

The SUHAKAM Act defines human rights in two ways. First, in the interpretation section, “human rights refers to fundamental liberties as enshrined in Part 11 of the Federal Constitution”. Professor Shad Faruqi noted that the SUHAKAM Act defines human rights in “an incredibly restrictive view of human rights. It does grave injustice to the many humanising provisions of laws outside of Part II that seek to safeguard the dignity and freedoms of all Malaysians” (Shad Faruqi 2008:392).

However, in section 4(4) of the SUHAKAM Act, where the functions and powers of the Commission are discussed, it is clearly stated: “For the purpose of this Act, regard shall be had to the UDHR 1948 to the extent that is not inconsistent with the Federal Constitution” (Shad Faruqi 2008:395). Professor Shad Faruqi refers to this as “an admirable provision” and

goes on to state “that the narrow view of human rights in section 2 is in conflict with the expansive view of human rights in section 4 (4)” (Shad Faruqi 2008:395). However, reference to the UDHR in the SUHAKAM Act is very significant.

In section 2, human rights is defined as just part 2 of the Federal Constitution, which is the Fundamental Liberties. However, in section 2, as there is a reference to the UDHR, then the understanding is much wider. The Malaysian Parliament had agreed to make reference to the UDHR and provided the space for human rights to be defined in a broad and comprehensive way as long as it was not inconsistent with the Federal Constitution. We have reviewed in Chapter 2 of this publication that the Federal Constitution is a rights-based document and we can foster a more holistic understanding of human rights in Malaysian society.

Appointment of Human Rights Commissioners

The term of office is three years for Commissioners and can be renewed for another term with a maximum of two terms only. Appointments of the Chairman and Commissioners were originally made by the Yang di-Pertuan Agong on the advice of the Prime Minister. However, in order to fulfil the conditions of the Paris Principles of independence and security of tenure, the SUHAKAM Act was amended in 2009 to add a new 11A, which states that a five-member committee, comprising the Secretary to the Government, the Chairman of SUHAKAM commission and three members of civil society, will advise the Prime Minister on the appointments of the Commissioners.

Powers to conduct Public Inquiries

SUHAKAM has powers to conduct public and national inquiries on complaints received or to act on its own on public interest consistent to human rights under “the function of inquiring into complaints about human rights infringements is subject to the conditions imposed by section 12 of the Act. Section 12 empowers SUHAKAM to act on its own motion to inquire into allegations of infringement of human rights, in addition to acting on complaints submitted to it” (SUHAKAM website).

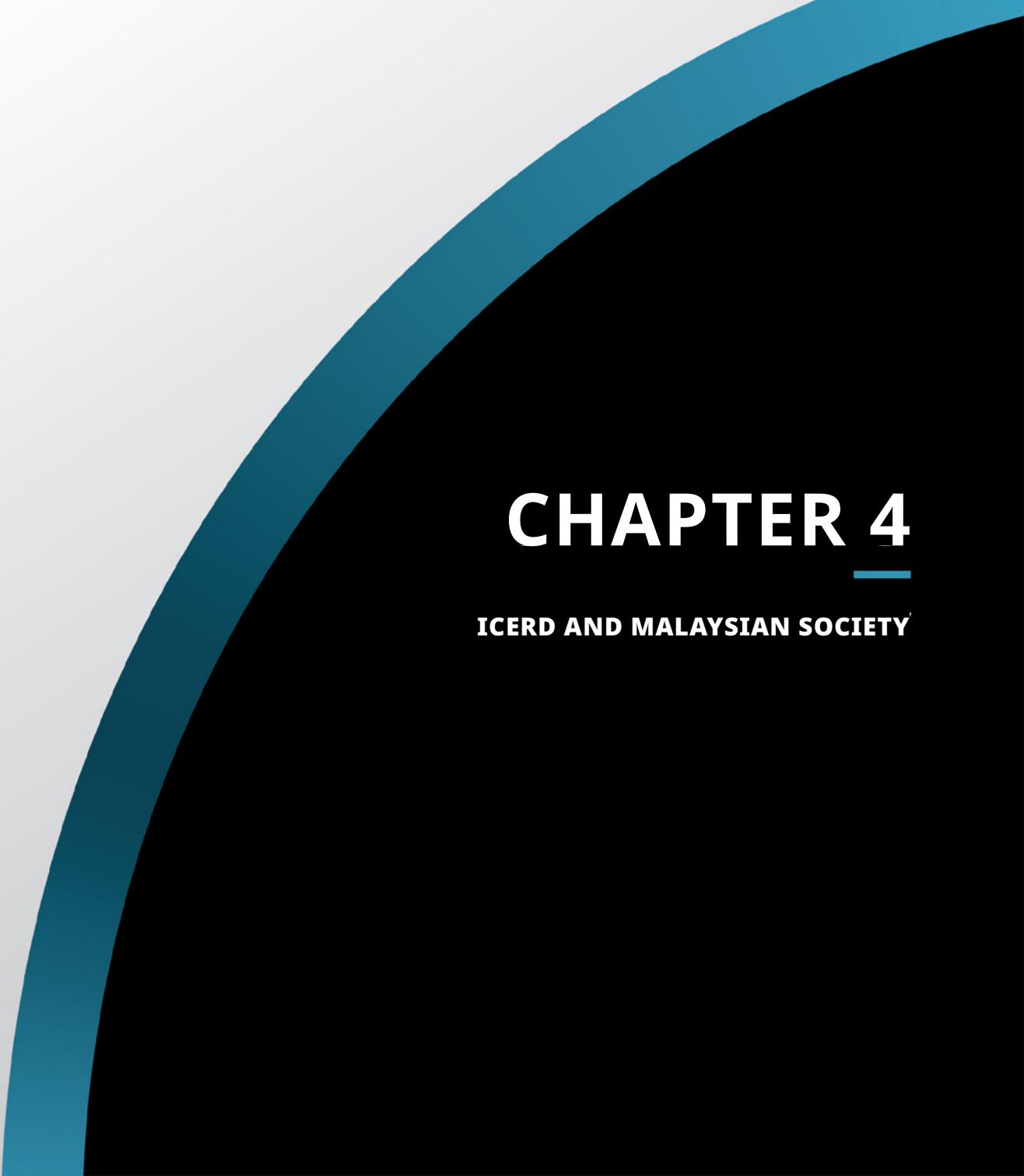
Over the past 20 years, SUHAKAM conducted 12 public inquiries of which one was a national inquiry. A majority of these were complaints on policing such as excessive use of force or abuse of power.

All the inquiries were conducted according to the legal provision with opportunities for all sides to make their submissions, and for the Commission to collect and report on evidence and publish its concluding position. There are no legal provisions available to the Commission to compel the agencies to adopt the recommendations or take action on the violators. The Commission’s findings are merely an advisory note to the Government.

SUHAKAM Annual Report debated in Parliament

The SUHAKAM Annual Report was for the first time debated in Parliament on 5 December 2019, after 19 years of its establishment. This is regarded as a historical day and a major step forward in mainstreaming human rights. YB Liew Vui Keong, the Minister in the Prime Minister’s Department, read the resolution and introduced the SUHAKAM report, noting the commitment of the Government to promote and protect human rights in Malaysia. However, this practice was not continued in 2020.

In addition to debating the SUHAKAM report, it is also significant to note that Parliament has established Parliamentary select committees, namely the Special Select Committee on Human Rights and Constitutional Affairs and the Special Select Committee on Gender Equality and Family Development. This is the right step to ensure greater accountability, transparency and good governance.



CHAPTER 4

ICERD AND MALAYSIAN SOCIETY

Having reviewed the Federal Constitution of Malaysia, we can note the fundamental commitment toward equality and a rights-based approach to citizenry. There is a clear commitment to a balanced understanding, avoiding extreme positions with specific reference to religious freedom, cultural and linguistic rights, socioeconomic development between special position and legitimate interest. These were negotiated among the communities on the principle of fairness and accommodation. The wider discussion on human rights reveals Malaysia's global commitments and how Malaysia's public policies internationally and domestically are already heavily embedded in human rights.

It is in this context of public discussion that we need to review what ICERD is. Why did the international community enact such a convention, and what would be the implications for Malaysia if we signed up and ratified ICERD? We are confronted with a number of questions for which we will seek answers from the ICERD document. There are eight questions for which we will find answers:

- **Why was ICERD introduced?**
- **How many countries have so far ratified ICERD, and among them, how many are Muslim majority countries?**
- **What are the features of ICERD?**
- **What are General Recommendations No 32 and No 35?**
- **How have OIC Member States responded to ICERD?**
- **Are there countries with special measures?**

The full text of ICERD is available as Appendix 1 and General Recommendation No 32, which refers to the meaning and scope of special measures under ICERD (effective derogations countries have applied in the context of left behind groups), as Appendix 2. This has special resonance for Malaysia, and it is of utmost importance that we read the document in full and be aware of all the relevant articles and provisions

WHY WAS ICERD INTRODUCED?

After the UDHR (1948), ICERD is the first of the nine core human rights conventions. It was adopted by the UN on 21 December 1965. The preamble of the Convention provides the context of why ICERD was enacted. There were three significant global events that precluded the ICERD.

First, the UN passed a resolution on 20 November 1963 adopting the UN Declaration on the Elimination of All Forms of Racial Discrimination. This Declaration provides the conceptual framework for ICERD. There are 11 articles. The references are similar to the ICERD articles that we will review briefly.

Second, there was a global movement then to support Nelson Mandela and the global fights against apartheid and segregation. Mandela was first arrested in 1961 and in 1964 was sentenced to life imprisonment. He spent a total of 27 years in prison and became the global symbol for the fight against racism and racial segregation.

Third, the ICERD preamble indicated that the UN condemned colonialism and all practices of segregation and discrimination associated with it. The dismantling of the colonial powers began at the end of the Second World War. This aspiration is consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted by General Assembly resolution 1514 (XV) of 14 December 1960.

Therefore, the UN and the global community affirmed that all human beings have equal rights, which is based on their declarations in the UN Charter and UDHR. In this context, any doctrine of superiority by race was unacceptable and all States had a responsibility to ensure non-discriminatory practices. It can also be said that there are close correlations between non-discrimination and peaceful societies.

HOW MANY COUNTRIES HAVE SO FAR RATIFIED ICERD?

The latest count gives 182 countries that have ratified ICERD and four who have signed it. The number ratifying are 94.8% of Member States of the United Nations. There are currently only 12 Member States that have taken no action on this. These are Brunei Darussalam, Kiribati, Malaysia, Myanmar, the Democratic People's Republic of Korea, Saint Kitts and Nevis, Saint Lucia, Samoa, South Sudan, Tuvalu and Vanuatu. Of these 12, the most significant are Brunei Darussalam, Myanmar, the Democratic People's Republic of Korea and Malaysia. The other remaining states are mostly small island states. Our neighbour Singapore ratified it on 27 November 2017.

Of the 57 member countries of Organisation of Islamic Cooperation (OIC), 55 or 96.4% have ratified ICERD. The only two that have not are Brunei Darussalam and Malaysia.

Therefore, the aspiration for the global community is to benchmark non-discrimination using the ICERD mechanism. There is therefore an urgent need for Malaysians to honestly review ICERD and see for themselves if we can support ICERD. We need to also determine if the politicization of ICERD is the real problem at hand.

WHAT ARE THE KEY FEATURES OF ICERD?

ICERD consists of a preamble and 25 articles divided into three parts.

The preamble has 12 paragraphs. The first four sentences link ICERD to four earlier UN documents, namely the UN Charter (1945), the UDHR (1948), the declaration granting independence to colonial countries (1960) and the UN declaration against discrimination (1963). The next three sentences focus on the meaning of discrimination, that racial superiority is unacceptable, and that there can be no discrimination based on race, colour or ethnic origin. The next set of sentences are about State obligations by calling on governments to act against racial superiority and undertake measures for elimination of racial discrimination in society.

Part One of ICERD contains seven articles. Article 1 contains the definition and scope of racial discrimination prohibited by ICERD, and Articles 2–7 are about States parties' obligations to ensure no discrimination takes place in the society. These seven articles are the most significant and important ones in understanding what ICERD is all about.

Three articles of great significance are Article 1:1 which defines the term “racial discrimination”, and Article 1:4 and Article 2:2, which make reference to “special measures”.

In Part Two of ICERD, the focus is on the establishment of a monitoring body, the Committee on the Elimination of Racial Discrimination (CERD) and its work. Articles 8–16 provide the details on how CERD operates and how the State submits reports.

Part Three of ICERD provides other technical matters, as well as details of the ratification process. Articles 17–25 provide the details. Two of these articles have significant implications. Article 20:1 provides details on reservations, and Article 22 pertains to the referral of an unresolved dispute to the International Court of Justice for a dispute settlement.

Listed below in Table 6 is a summary of the key features of ICERD. The full text of ICERD is provided in Appendix 1 for review and study.

Articles	Features	COMMENTS
Part One A1-A7	Definition (A1) & State Obligations (A2-7)	State party obligations, namely responsibility of the Government on non-racial policies, programmes and institutions.
A1:1	Defining racial discrimination	<p>“Any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin”.</p> <p>It is about not seeing people differently and this prevents people being treated equally. Universal and applies to citizens and non-citizens.</p> <p>‘Religion’ is not one of the categories as only five categories or variables indicated. However, there could be implications when a group's ethnic identity is closely related to religion as in the case of Malays and the Rohingya community in Myanmar.</p>

A1:4	Special measures are deemed not racial discrimination	ICERD permits special measures to certain racial or ethnic groups for equal enjoyment. However, there are some conditions: these special measures are not separate rights but are time-bound special measures (till objectives are achieved).
A2	Public policies on eliminating racial discrimination	No act or practice of racial discrimination by any public authority or public institutions.
A2:2	Special and concrete measures	These measures could be social, economic, cultural and other fields. There is a justification for these in order to create “full and equal enjoyment of human rights and fundamental freedoms”. These measures must not become “unequal or separate rights for different racial groups after the objectives have been achieved’.
A3	No racial segregation	State parties to prevent racial segregation and apartheid.
A4	No racial superiority	No propaganda or organizations “based on ideas or theories of superiority of one race or group”. No inciting racial discrimination by public authorities or public institutions.
A5	Equal opportunities for all	Equal enjoyment of rights in five areas: 1) rights to equal treatment, 2) right to security, 3) political rights, 4) civil rights, and 5) economic, social and cultural rights.
A6	Combating prejudices	Promoting understanding, tolerance and friendship through education and training.
Part Two A8 - A16	Monitoring Committee (CERD)	Details about a monitoring body, the Committee on the Elimination of Racial Discrimination (CERD). Details on how CERD operates and how the State submits reports.
Part Three A17 - A25	Ratification process	Provides other technical matters as well as details of the ratification process.
A20:1	Reference to reservations	State parties can make ratification. Other State parties will decide on it to see if acceptable or not. But the decision of Member States are respected on this matter. Malaysia has undertaken this process as in the case of ratification of CEDAW and CRC where Malaysia made a number of reservations.
A22	Global dispute mechanism (ICJ)	Reference to the International Court of Justice (ICJ) for a dispute settlement.

Table 6 ICERD Articles, Features and Comments

WHAT IS GENERAL RECOMMENDATION NO 32?

General Recommendation No 32 on “the meaning and scope of special measures in ICERD” was adopted by CERD in August 2009 at the Seventy-fifth Committee Meeting. Full text of this document is available in Appendix 2.

It is based on a thematic discussion hosted by CERD to discuss further the special measure in the ICERD document, namely Articles 1:4 and 2:2.

The justification for special measure is identified namely “by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms” (CERD 2009:4). In this document, special measure are also described as “affirmative measures”, “affirmative action” or “positive action”. However, the term “positive discrimination” due to its contradictory nature should be avoided.

The clear concern is the special measures becoming a separate set of rights for different racial groups. Therefore, a key limitation is that once the objectives are achieved the special measures should be discontinued. Therefore, State parties will have to justify the need for special measures being undertaken by providing “relevant statistical and other data on the general situation of beneficiaries, a brief account of how the disparities to be remedied have arisen and the results to be expected from the application of measures” (CERD 2009:10).

WHAT IS GENERAL RECOMMENDATION NO 35?

General Recommendation No 35 is on combatting racist hate speech. It was adopted by CERD on 26 September 2013 (CERD 2013). This recommendation arose after a discussion on the causes and consequences of racist hate speech. Reference to incitement can be found in ICERD Article 4 where there is a reference to racial superiority. While ICERD does not directly refer to racial hate speech, hate speech can create a climate of racial hatred and discrimination. We need to take note of this for relevance in the Malaysian context too.

HOW HAVE OIC COUNTRIES RESPONDED TO ICERD?

A quick review of the 57 OIC member countries is necessary. A review of their track record on ICERD ratification, their reservations and their reporting to the CERD will give us a picture of how Islamic countries have responded to ICERD ratification.

On the matter of ICERD ratification

There are 57 countries that identify as Islamic or Muslim majority States. They are members of the Organisation of Islamic Cooperation (OIC). Of these countries, 55 or 96.4% have ratified ICERD and only two have not ratified it, namely Brunei Darussalam and Malaysia (see Table 7).

	COUNTRY	RATIFICATION	RESERVATIONS
1	Afghanistan	Yes 1983	On Article 2
2	Albania	Yes 1994	
3	Algeria	Yes 1972	
4	Azerbaijan	Yes 1996	
5	Bahrain	Yes 1990	On Article 22 and does not recognise Israel
6	Bangladesh	Yes 1979	
7	Benin	Yes 2001	
8	Brunei Darussalam	No	
9	Burkina Faso	Yes 1974	
10	Cameroon	Yes 1971	
11	Chad	Yes 1977	
12	Comoros	Yes 2004	
13	Djibouti	Yes 2011	
14	Egypt	Yes 1967	On Article 22
15	Gabon	Yes 1980	
16	Gambia	Yes 1978	
17	Guyana	Yes 1977	Guided by their Constitution

18	Guinea	Yes 1977	
19	Guinea-Bissau	Yes 2010	
20	Indonesia	Yes 1999	On Article 22
21	Iran (Islamic Republic of)	Yes 1968	On Article 22 and does not recognise Israel
22	Iraq	Yes 1970	On Article 22 and does not recognise Israel
23	Jordan	Yes 1974	
24	Kazakhstan	Yes 1998	
25	Kuwait	Yes 1968	
26	Kyrgyzstan	Yes 1997	
27	Lebanan	Yes 1971	On Article 22
28	Libya	Yes 1968	On Article 22 and does not recognise Israel
29	Maldives	Yes 1984	
30	Mali	Yes 1974	
31	Malaysia	No	
32	Mauritania	Yes 1988	
33	Morocco	Yes 1970	On Article 22
34	Mozambique	Yes 1983	On Article 22
35	Niger	Yes 1967	
36	Nigeria	Yes 1967	
37	Oman	Yes 2003	
38	Pakistan	Yes 1966	
39	Palestine (Non UN)	Yes	
40	Qatar	Yes 1976	
41	Saudi Arabia	Yes 1977	Provisions must not be in conflict with Islamic Shariah and on Article 22
42	Senegal	Yes 1972	
43	Sierra Leone	Yes 1967	
44	Somalia	Yes 1975	
45	Sudan	Yes 1977	

46	Suriname	Yes 1984	
47	Syria (Suspended)	Yes 1969	On Article 22 and does not recognise Israel
48	Tajikistan	Yes 1995	
49	Togo	Yes 1972	
50	Turkey	Yes 2002	On Article 22
51	Turkmenistan	Yes 1994	
52	Tunisia	Yes 1967	
53	Uganda	Yes 1980	
54	United Arab Emirates	Yes 1974	Does not recognise Israel
55	Uzbekistan	Yes 1995	
56	Yemen	Yes 1972	On Article 22

Table 7 OIC Members and ICERD Ratification

On the matter of ICERD reservations

Of these 55 Islamic countries, 16 nations have listed 22 reservations when they ratified ICERD as indicated in Table 7 and Table 8.

Reservation articles and themes	Number of OIC member states	Comments
Article 22	14	This is the highest reservation.
Does not recognise Israel	6	Bahrain, Iran (Islamic Republic of), Iraq, Libya, Syria and United Arab Emirates
No conflict with Islamic law	1	Saudi Arabia made reference to no conflict with Islamic Shariah.
No conflict with national constitution	1	Guyana made this reference.
	22	

Table 8 Reservation Details by OIC Member States

There are four types of reservations as shown above in Table 8.

The first reservation pertains to Article 22 as they want all disputes to be settled within their nation and not be referred to the International Court of Justice.

Article 22 of ICERD states: “Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

The second reservation is non-recognition of the state of Israel. Six countries have stated that in ratifying ICERD it does not mean they recognise the state of Israel. However, Saudi Arabia did not list this as one of their reservations.

As the third reservation, Guyana stated its ICERD commitments will be in line with its national constitution.

Fourth, only Saudi Arabia made reference to compliance to Islamic ‘Shariah’ but made no specific reference to any articles which were in conflict with ‘Shariah’.

On the matter of ICERD and human rights conventions among OIC members

In reviewing the ratification process, one can state that none of the 55 OIC countries had any objections or placed reservations in the name of Islam.

Egypt has ratified eight human rights conventions including ICERD. Egypt has a reservation on Article 22 on referral to ICJ. Nothing else. Egypt ratified ICERD on 1 May 1967.

Indonesia has ratified nine UN human rights conventions. Indonesia is the country with the largest Muslim population in the world. They ratified ICERD on 25 June 1999. Indonesia makes only one reservation on Article 22 on dispute and referral to ICJ must have the country consent. Indonesia made no reservations in the name of Islam.

Iran has ratified five human rights conventions including ICERD. On 29 August 1968, Iran ratified ICERD. Interestingly, Iran made no reservations.

Saudi Arabia has ratified five of the UN human rights conventions. They ratified ICERD on 23 September 1997. It placed as reservation: “The Government of Saudi Arabia declares that it will implement the provisions provided these do not conflict with the precepts of the Islamic Shariah.” Their second reservation is on Article 22 that if there is a dispute any referral of the case to the ICJ must have the countries approval.

Turkey has ratified eight UN human rights treaties including ICERD. It signed ICERD on 13 October 1972 and ratified it on 16 September 2002. Its reservation is that it will implement only in its national territory and with countries it has diplomatic relations. It has a reservation on Article 22 on referral to ICJ. Here, too, there is nothing on Islam.

Gambia ratified ICERD on 29 December 1978 with no reservations. Gambia has ratified all nine core human rights conventions. The Gambian Government has been restoring human rights since January 2017. A significant act by the Gambian Government is to take Myanmar to the International Court of Justice over human rights violations of Rohingya people. The ICJ on 23 January 2020 made an order to Myanmar to take concrete steps to prevent the genocide of the Rohingya. A small IOC member state like Gambia using the international mechanisms to hold another state accountable is indeed striking. This is illustrative of the global accountability mechanisms for the protection of human rights. Gambia brought Aung San Suu Kyi before the ICJ to hold her and her Government accountable for the genocidal acts against Rohingya Muslims.

Palestine (an observer to the UN) has ratified six human rights conventions. Palestine ratified ICERD in 2014 and has used this process to file a complaint against Israel, which is regarded as the first inter-State complaint. Although CERD has no enforcement powers, Israel had to reply to the complaint. Israel did reply, stating the complaint was baseless and one-sided. However, the debate and discussions continue with regards to Palestine's claims. What is significant is how a Muslim majority country, Palestine is using the ICERD mechanism to address human rights violations by Israel and hold Israel accountable. This shows the value of human rights mechanisms as a vehicle to champion justice.

On the matter of OIC and human rights compliance

The OIC has an active Independent Permanent Human Rights Commission (IPHRC), which was established in 2008. It hosted a seminar in Istanbul, Turkey on 17 and 18 October 2018 to draw out "effective measures to fight all forms of discrimination based on race or religion".

At this seminar, Mr Abdülhamit Gül, Minister of Justice of the Republic of Turkey, "condemned all theories of race supremacy, and added that current international mechanisms of protection against discrimination are not sufficient, which necessitates appropriate reforms to establish a fair international system. Mr Gül emphasized that the Muslim world must also do its part in this reform process to fight against discrimination, including Islamophobia. In this regard, he highlighted the rich heritage of human rights in Islam that must serve as a comprehensive guide to fight discrimination and racism in all its forms.

This seminar also stressed "the need to scale up international efforts to build a shared understanding to combat all forms of racism, which continues to plague many societies in its various manifestations and seriously undermines as well as adversely affects people's human rights. The importance of promoting pluralism, respect for cultural diversity, active, and meaningful intercultural dialogue for enhancing healthy multicultural societies was also emphasized."

These discussions at Istanbul hosted by the OIC and in the press release by OIC acknowledge that the themes of racism, and discrimination from an Islamic perspective do not seem to contradict international human rights standards. This is clearly illustrated in the OIC's commitment to fight discrimination, including Islamophobia. The OIC statements and position greatly differs from the current political rhetoric in Malaysia as expounded by some political and NGO leaders from the Muslim community.

On the matter of the Cairo Declaration on Human Rights

The Cairo Declaration was adopted at the Islamic Conference of Foreign Ministers, Cairo, in 1990. It was endorsed by all OIC Member States.

Article 1 (a) of the declaration is significant, as it states: All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

This has a valuable lesson on the rights and dignity of every human being and is relevant to ICERD in that there is no superiority of race or ethnicity. In fact the Cairo Declaration makes no mention or provision like ICERD on special measures to equalize opportunities for disadvantaged communities.

On the matter of lessons learnt from OIC Member States

None of the nations that have ratified ICERD are perfect societies. But they have made a global statement that they are against any form of racism and discrimination. They have agreed to come under an international standard for peer review and have agreed to address racism and discrimination in their societies.

We can note from the 55 OIC members and with specific reference to Saudi Arabia, Indonesia, Turkey, Egypt, the Islamic Republic of Iran and Palestine – all these countries did not see or view ICERD as anti-Islam and detrimental to the Muslim community. Moreover, in the case of Palestine, they are actively utilizing the ICERD mechanism at the UN level to hold another country accountable.

In Article 10 on religious freedom states: *“It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.”* This is significant as there can be no compulsion on the matter of religious freedom.

Article 11 (a) includes a reference to non-discriminatory practices: *“Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.”* There is also reference to evils of Colonialism which is the context of ICERD along with the global stand against the apartheid system.

Nevertheless, some Muslim voices in Malaysia sound very different on ICERD than the global Muslim community's position. Among the anti-ICERD group, the political rhetoric sees ICERD as anti-Islamic and negative to Muslims, yet on the global stage, Muslim nations via the OIC are positive towards ICERD. It is outstanding that both the OIC and the 55 Muslim countries have made a public stand against racism and discrimination via ICERD. It is now for Malaysia to review its position of non-ratification and stand alongside the 55 OIC countries on compliance to international standards.

ARE THERE COUNTRIES WITH SPECIAL MEASURES?

Among the 182 Member States of the UN that ratified ICERD, three country examples are cited here to illustrate special measures or affirmative action programmes being implemented by these countries in selected areas such as education, employment and business opportunities. The three countries are India, the United States of America and South Africa.

India and its special measures

India is a good example for this review, as it has specific Constitutional special measures and they have also ratified ICERD with one reservation. India is not under pressure by CERD to amend their Constitution or provisions although the Indian reservations are not time-bound.

India has ratified eight major human rights conventions. It signed ICERD on 2 March 1967 and ratified it on 3 December 1968. Its only reservation was on Article 22 with reference to the International Court of Justice if there was a dispute that the consent of all parties must be obtained. There were no concerns recorded at this point on its quotas and reservations. There are records of discussions between CERD and the Indian Government, whether caste fell under racial categories or under descent. Both categorizations are not accepted by the Indian Government.

In the Indian Government's report, it stated the following on affirmative action for socially and economically disadvantaged sectors. In paragraph 26: "The Government of India has also adopted a policy of affirmative action to create an effective environment for the exercise of human rights by certain vulnerable sectors of society who, as a result of socio-historical distortions, have been socially or economically disadvantaged.

"In institutional terms, the Constitution has prescribed specific affirmative measures, with the two-fold objective of safeguarding the fundamental human rights of such vulnerable sectors of society, including removal of social disabilities and promoting their educational and economic interests. These measures include reservation of seats in the public services, administration, Parliament (Lower House), state legislatures and setting up of advisory councils and separate departments for the welfare of such socially and economically vulnerable groups. These groups have been identified in the relevant schedules of the Constitution and are designated as Scheduled Castes/Tribes.

"The National Commission for Scheduled Castes and National Commission for Scheduled Tribes serve to ensure observance of these measures and to monitor violations of these rights while a range of specific beneficiary-oriented schemes and plans have been put in place to ensure promotion of education and employment opportunities. These include the establishment of a National Scheduled Castes and Scheduled Tribes Finance and Development Corporation, which takes up and finances viable schemes for economic development of these groups."

The United States of America and its special measures

The United States has a legacy of the slavery system. President Abraham Lincoln's Emancipation Proclamation of 1863 freed slaves, and real change towards a more equal society emerged with the passing of the Civil Rights Act of 1964. This legislation ended segregation in public places and banned employment discrimination on the basis of race, colour, religion, sex or national origin. No longer could Black Americans and other minorities be denied service simply based on the colour of their skin. CERD was concerned over the issues of segregation in public educational institutions and this matter had to be addressed.

Affirmative action programmes were introduced by President Johnson through Executive Order 10925, setting up the President's

South Africa and its special measures

South Africa has been rebuilding its nation of 52.9 million people from the legacy of the apartheid system, which segregated communities by colour favouring the minority whites who formed only 9.1% of the population, as opposed to the indigenous Black community who made up 79.6% of the nation.

With the founding of the new democratic South Africa in 1994, the new South African Constitution established the right to equality and equal protection under the law. At the same time, Section 9 states that discrimination on the basis of race is allowed if it is established that the discrimination is fair. Kanya Adam (1997) makes reference to terms such as corrective action, reverse discrimination, positive action, remedial strategies for the disenfranchised majority who are the beneficiaries. The South African example is different when compared to the Indian and United States examples as the focuses there are minorities. The South African example is similar to that of Malaysia, where there was a historical period of disadvantage as a result of the colonial period that favoured Chinese or Indian workers.

Constance De La Vega (2009) notes that in South Africa, this introduction of new policies in favour of the majority Black communities is in the context where there are major disparities

Committee on Equal Employment Opportunity. According to Louis Menand (2020), these programmes were expanded during the time of President Jimmy Carter, when "affirmative-action requirements were extended to virtually all firms, educational institutions, and state and local governments that received contracts or grants from the federal government."

The United States Government, in its report to CERD on 3 October 2013, provided an explanation of its special measures. It also recognises the place of special measures as a way "to address disparities in outcomes, across a host of indicators that disproportionately impact members of racial and ethnic minorities." There are no calls from CERD to remove these measures now that the United States has ratified ICERD.

in employment and educational opportunities. It is noted that the underlying issues are structural problems resulting in a lack of equality in educational opportunities especially with the low participation of Black students in higher education.

South Africa signed the ICERD treaty on 3 October 1994 and ratified it on 10 December 1998 without any reservation. The South African Government and CERD do not see the South African special measures for the majority of the Black community as discriminatory, and CERD is not pressuring South Africa to repeal these special measures. South Africa, in its 2014 report to CERD, indicated special measures such as the Broad-Based Black Economic Empowerment Program (BBBEE), which includes measures such as employment equity, skills development, ownership, management, socioeconomic development and preferential procurement. Other details on employment distribution are also provided in this report. A majority of the poor are Black, especially in rural areas.

The three country examples of special measures are informative to the Malaysian ICERD discussion. The South African experience will have great relevance for Malaysia as it reviews the need for ratification.

CONCLUSION AND WAY FORWARD

We have clearly established in Chapter 2, that the Federal Constitution contains important sections on fundamental liberties and has a strong commitment to the principles of human rights. Hence, it can be argued that human rights are at the heart of Malaysia's Federal Constitution and parliamentary democracy.

Valuable lessons centre around the nature of balances that the Federal Constitution draws on, especially on matters pertaining to religious freedom (Article 3 & 11); linguistic rights (Article 152) and the special position and legitimate interest (Article 153). These compromises were derived through bargaining and negotiation among the various communities in Malaysia.

In Chapter 3, we discussed the matter of the United Nations, human rights and Malaysian society. We established that the UN is committed to universal and inclusive human rights for all people with a very strong commitment to sustainable development goals, which is at the centre of its work. As a member of the UN since 1957, Malaysia has international obligations and has played an active role at the global level. Therefore, Malaysia is benchmarking its development agenda with many of the UN international standards including those on human rights.

In Chapter 4, we focused on the ICERD convention and mechanism. We noted the ratification track record of Islamic states that are members of the OIC. We recognised that out of the 57 countries that are members of the OIC, 55 have ratified ICERD, illustrating that ICERD is almost universally accepted by Islamic countries.

There are therefore three key questions we need to review in this conclusion after examining all the points before us in a step by step method.

First, on the question of ICERD and Article 153 of the Federal Constitution, is the ICERD provision of special measure (Articles 1:4 & 2:2) compatible with the Malaysian Federal Constitution of Article 153?

In our earlier discussion on the Malaysian Constitution and Article 153, we have clearly discussed questions raised on the special position and legitimate interests provisions. We recognise that these special provisions provided for in the Federal Constitution aims to address historical disadvantage by way of special intervention measures.

Most legal scholars, including the late Tun Mohamed Suffian who served the Federal Court as Lord President from 1974 to 1982 and constitutional law professor Shad Saleem Faruqi, view Article 153 as an affirmative action policy to address historical inequalities. Therefore, special measures are necessary for the Malays and indigenous people to catch up with other communities. This paper too takes the position that Article 153 is not in conflict with ICERD, and in this sense, the Convention is consistent with the Federal Constitution.

If Malaysia ratifies ICERD, it could provide an explanation to CERD on this matter, stating the historical context and the joint agreement by all the communities. It could include a statement that in exercising this provision, such as employment opportunities in civil service, educational opportunities, scholarships and business opportunities, other communities are not discriminated. The data clearly shows that poverty and inequality is highest among the Malays, natives of Sabah and Sarawak, the Orang Asli communities and other urban poor communities in the bottom 40%. Therefore, an inclusive development agenda of leaving no one behind and in targeting neglected communities is a necessary step for public sector intervention.

The Federal Constitutional provision of the special position for the Malays and natives of Sabah and Sarawak as per Article 153 affirms the special measures such as reservation of places in the public service, education and business. There are however some guidelines that these allocations must be 'deemed reasonable' and should not deprive other communities.

The Federal Constitution makes it the responsibility of the Yang di-Pertuan Agong (King) as the custodian of this provision to protect both the special position and legitimate interests of other communities. The Constitutional balance is noted as well in Article 153 (3) provides for the Yang di-Pertuan Agong to "give such general directions as may be required." Furthermore, we have already discussed on the Constitutional save guards that none of the provisions in Article 153 can be amended by Parliament without the consent of the Conference of Rulers.

There could be a problem with CERD if Article 153 special measures are viewed as a permanent set of special rights. This could be a reason for the objection by some sections who see the special measures as a special set of permanent rights and not as an affirmative action or positive action to offset a historical disadvantage. If Article 153 is seen as a permanent set of special rights, then it may be deemed as discriminatory under ICERD definitions.

The position taken in this paper is that the founding fathers of the nation recognised the historical disadvantage of the Malays and the indigenous people but at the same time wanted to ensure justice and fairness for other communities too. The New Economic Policy (NEP) was found in 1970 on similar principles and is not at odds with ICERD. Moreover, similar policies have been adopted by other ICERD-compliant nations without challenge. We underline also that commentators have held that the Federal Constitution does not legitimize racial superiority or dominance of one community over another. By not ratifying ICERD, Malaysia is in danger of violating the international standards of non-discriminatory practices.

Therefore, what impact would ICERD adoption have on the affirmative action plan of NEP? Here we can note that the NEP's twin objective of addressing poverty and restructuring society is really a focus on socioeconomic development policy for the Malays and natives of Sabah and Sarawak. This is provided for in Article 153 of the Federal Constitution. Much debate has taken place on the application of the NEP over the years. But nevertheless, the NEP is unambiguously a policy package to tackle discrimination. It is crafted as an affirmative action plan very much in line with approaches adopted by other countries that have adopted ICERD both with and without reservations.

Second, what are the implications of ICERD ratification by Malaysia? It is important to note that we must have an open discussion on these matters with regards to implications for ICERD ratification and accurately answer the questions raised. All questions may be asked and we must give people the space to raise and discuss them.

We have noted the two frequent comments raised by the critics of ICERD, which centre around ratification having a negative impact on Islam and second on Article 153 of the Federal Constitution which is regarded as being part of the agreed social contract among the communities both in 1957 with Independence and granting of citizenship to all and in 1963 with the formation of Malaysia. There are concerns that with ratification, Malaysia might be compelled to discontinue the special provisions of Article 153. In both cases we have noted that the political rhetoric has compounded these fears.

However, it is important to note that in the ratification process and when Malaysia submits its first report within a year of ratification, the historical context of Malaysia's founding, including the social contract agreement, the specific provisions of Article 153 (special position and legitimate interest) and the inclusive development agenda of the Government, could be clearly presented. Countries such as the United States of America, India and South Africa have

special measures for sections of their society who have suffered historical disadvantage. They have not been under CERD pressure to discontinue those policies.

There may be a need for the Malaysian Government to state what are the specific Article 153 special position measures and services currently being made available to Malays and natives of Sabah and Sarawak and which agencies are directly involved in this. There will be a need to disclose information on these groups, including who is really benefiting from these measures. Disaggregated data is also needed to show the beneficiaries. In terms of ICERD compliance, categorizing them within special measure (ICERD Article 1:4 & 2:2) is needed. We will also need to clearly state which other services and provisions are made available to all Malaysian citizens as per ICERD Article 5.

Third, there is a need in Malaysian society for fostering a shared history as a nation. While Malay presence in Peninsular Malaysia with its unique Malay history is a historic fact, the dimensions of Malay community encounter with the Chinese and Indian civilizations date back to periods well before the arrival of the colonial powers. The Merdeka struggles of 1957 and the Malaysia nation building of the 1960s along with the native communities in Sabah and Sarawak in the Borneo Island is an important dimension of our national narrative. The nation consists of different ethnic, religious, linguistic, cultural and historical affiliations, and all these narratives needs to be better captured for nation building. It must be remembered that Malaysia was formed by the Federation of Malay states, Sabah and Sarawak.

In so doing, we recognise a Malaysian identity that draws on all the constituent ethnicities and religions and will enable us to reap the richness and diversity of the communities. Moreover, we acknowledge a commitment to non-discrimination and equity that lies at the heart of the Federal Constitution and burnishes the peaceful and cooperative communal relations that Malaysia has established.

Malaysia will need to revisit the recommendations of the National Unity Consultative Council report (2015) on establishing the National Harmony Act to address hate speech, namely establish a non-judicial mechanism for community mediation, introduce public policies and programmes for inclusive development and ensuring no one is left behind and strengthen cultural and inter-religious dialogue among the various ethnic and faith communities.

We can end with thoughts on what is the implication of not ratifying ICERD in the global eyes, when nations around the world are benchmarking their standards and achievements using international indicators. We stand along with only 11 other countries of the world. Among these countries, a majority are small island states with the exception to Myanmar, the Democratic People's Republic of Korea, South Sudan, Brunei Darussalam and Malaysia. We may be perceived as not adhering to one of the most basic of human rights principles – racial non-discrimination. We may also lose the moral authority on international advocacy on human rights violations, for example against the Rohingya by Myanmar as like them we are not willing to place our records for international review.

There is therefore a necessity for the national political leadership to review the ICERD ratification, consult all parties concerned including the Conference of Rulers, explore all the evidences in an open and objective way so as to showcase the unique Malaysian interethnic story of economic process, social cohesion and community well-being among people of different ethnic, linguist, religious and cultural communities, Malaysia truly Asia.

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APPENDIX 1

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14

December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the

Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
 - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
 - (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;
 - (vi) The right to inherit;

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
5.
 - (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;
 - (b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:
 - (a) within one year after the entry into force of the Convention for the State concerned; and
 - (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.
2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.
5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;
- (b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.
5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.
6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.
8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.
2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.
3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. Any State Party which makes a declaration as provided for in paragraph I of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.
3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.
4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.
5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.
6.
 - (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;
 - (b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
7.
 - (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;
 - (b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.
8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.
9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph I of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.
2.
 - (a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;
 - (b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.
3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.
4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.
2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

- (a) Signatures, ratifications and accessions under articles 17 and 18;
- (b) The date of entry into force of this Convention under article 19;
- (c) Communications and declarations received under articles 14, 20 and 23;
- (d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

**UNITED
NATIONS**

ICERD



**International Convention on
the Elimination of all Forms of
Racial Discrimination**

Distr.
GENERAL

CERD/C/GC/32
24 September 2009

Original: ENGLISH

COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-fifth session
3 - 28 August 2009

The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination

I. INTRODUCTION

A. Background

1. At its seventy-first session, the Committee on the Elimination of Racial Discrimination (“the Committee”) decided to embark upon the task of drafting a new general recommendation on special measures, in light of the difficulties observed in the understanding of such notion. At its seventy-second session, the Committee decided to hold at its next session a thematic discussion on the subject of special measures within the meaning of articles 1, paragraph 4, and 2, paragraph 2 of the International Convention on the Elimination of Racial Discrimination (“the Convention”). The thematic discussion was held on 4 and 5 August 2008 with the participation of States parties to the Convention, representatives of the Committee on the Elimination of Discrimination against Women, the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and non-governmental organizations. Following the discussion, the Committee renewed its determination to work on a general recommendation on special measures, with the objective of providing overall interpretative guidance on the meaning of the above articles in light of the provisions of the Convention as a whole.

B. Principal sources

2. The general recommendation is based on the Committee’s extensive repertoire of practice referring to special measures under the Convention. Committee practice includes the concluding observations on the reports of States parties to the Convention, communications under article 14, and earlier general recommendations, in particular general recommendation No. 8 (1990) on article 1, paragraphs 1 and 4, of the Convention,¹ as well as general recommendation No. 27 (2000) on Discrimination against Roma and general recommendation No. 29 (2002) on article 1, paragraph 1, of the Convention (Descent), both of which make specific reference to special measures.²
3. In drafting the recommendation, the Committee has also taken account of work on special measures completed under the aegis of other United Nations human rights bodies, notably the report by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights³ and general recommendation No. 25 (2004) of the Committee on the Elimination of Discrimination against Women on temporary special measures.⁴

1 Official Records of the General Assembly, Forty-fifth Session, Supplement No. 18 (A/45/18), chap. VII.

2 Ibid., Fifty-fifth Session, Supplement No. 18 (A/55/18), annex V. sect. C.; and Fifty-seventh Session, Supplement No. 18 (A/57/18), chap. XI, sect. F.

3 “The Concept and Practice of Affirmative Action”, Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5 (E/CN.4/Sub.2/2002/21).

4 Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 38 (A/59/38), annex I.

II. EQUALITY AND NON-DISCRIMINATION AS THE BASIS OF SPECIAL MEASURES

A. Formal and de facto equality

6. The Convention is based on the principles of the dignity and equality of all human beings. The principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles.

B. Direct and indirect discrimination

7. The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The "grounds" of discrimination are extended in practice by the notion of "intersectionality" whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion - when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference", making it especially important that States parties distinguish "special measures" from unjustifiable preferences.
8. On the core notion of discrimination, in its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee observed that differential treatment will "constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".⁵ As a logical corollary of this principle, in its general recommendation No. 14 (1993) on article 1, paragraph 1, of the Convention, the Committee observes that "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate".⁶ The term "non-discrimination" does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.

⁵ Ibid., Supplement No. 18 (A/59/18), chap. VII, para. 4.

⁶ Ibid., Forty-eighth Session, Supplement No. 18 (A/48/18), chapter VIII, sect. B.

C. Scope of the principle of non-discrimination

9. The principle of non-discrimination, according to article 1, paragraph 1, of the Convention, protects the enjoyment on an equal footing of human rights and fundamental freedoms “in the political, economic, social, cultural or any other field of public life”. The list of human rights to which the principle applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party. The reference to public life does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in the light of the provisions in the Convention mandating measures by States parties to address racial discrimination “by any persons, group or organization”.⁷
10. The concepts of equality and non-discrimination in the Convention, and the obligation on States parties to achieve the objectives of the Convention, are further elaborated and developed through the provisions in articles 1, paragraph 4, and 2, paragraph 2, regarding special measures.

III. THE CONCEPT OF SPECIAL MEASURES

A. Objective of special measures: Advancing effective equality

11. The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions.

B. Autonomous meaning of special measures

12. The terms “special measures” and “special and concrete measures” employed in the Convention may be regarded as functionally equivalent and have an autonomous meaning to be interpreted in the light of the Convention as a whole, which may differ from usage in particular States parties. The term “special measures” includes also measures that in some countries may be described as “affirmative measures”, “affirmative action” or “positive action” in cases where they correspond to the provisions of articles 1, paragraph 4, and 2, paragraph 2, of the Convention, as explained in the following paragraphs. In line with the Convention, the present recommendation employs the terms “special measures” or “special and concrete measures” and encourages States parties to employ terminology that clearly demonstrates the relationship of their laws and practice to these concepts in the Convention. The term “positive discrimination” is, in the context of international human rights standards, a *contradictio in terminis* and should be avoided.

⁷ Article 2, paragraph 1 (d); see also article 2, paragraph 1 (b).

C. Special measures and other related notions

14. The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.
15. Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men.⁸ Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.⁹

D. Conditions for the adoption and implementation of special measures

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.
17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural¹⁰ status and conditions of the various groups in the population and their participation in the social and economic development of the country.
18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

⁸ See Committee on the Elimination of Discrimination against Women, general recommendation 25 (note 4 above), paragraph 16.

⁹ See for example paragraph 19 of general recommendation 25 of the Committee on the Elimination of Discrimination against Women (note 4 above), and paragraph 12 of the Recommendations of the Forum on Minority Issues on rights to education (A/HRC/10/11/Add.1).

¹⁰ Article 2, paragraph 2, includes the term "cultural" as well as "social" and "economic".

IV. CONVENTION PROVISIONS ON SPECIAL MEASURES

A. Article 1, paragraph 4

19. Article 1, paragraph 4, of the Convention stipulates that “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved”.
20. By employing the phrase “**shall not be deemed racial discrimination**”, article 1, paragraph 4, of the Convention makes it clear that special measures taken by States parties under the terms of the Convention do not constitute discrimination, a clarification reinforced by the *travaux préparatoires* of the Convention which record the drafting change from “should not be deemed racial discrimination” to “shall not be deemed racial discrimination”. Accordingly, special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.
21. In order to conform to the Convention, special measures do not amount to discrimination when taken for the “sole purpose” of ensuring equal enjoyment of human rights and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves, the arguments used by the authorities to justify the measures and the instruments designed to put the measures into effect. The reference to “sole purpose” limits the scope of acceptable motivations for special measures within the terms of the Convention.
22. The notion of “adequate advancement” in article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove “historic” discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from arising.

23. The term “protection” in the same paragraph signifies protection from violations of human rights emanating from any source, including discriminatory activities of private persons, in order to ensure the equal enjoyment of human rights and fundamental freedoms. The term “protection” also indicates that special measures may have preventive (of human rights violations) as well as corrective functions.
24. Although the Convention designates “racial or ethnic groups or individuals requiring ... protection” (article 1, paragraph 4), and “racial groups or individuals belonging to them” (article 2, paragraph 2), as the beneficiaries of special measures, the measures shall in principle be available to any group or person covered by article 1 of the Convention, as clearly indicated by the *travaux préparatoires* of the Convention, as well as by the practice of States parties and the relevant concluding observations of the Committee.¹¹
25. Article 1, paragraph 4, is expressed more broadly than article 2, paragraph 2, in that it refers to individuals “requiring ... protection” without reference to ethnic group membership. The span of potential beneficiaries or addressees of special measures should however be understood in the light of the overall objective of the Convention as dedicated to the elimination of all forms of racial discrimination, with special measures as an essential tool, where appropriate, for the achievement of this objective.
26. Article 1, paragraph 4, provides for limitations on the employment of special measures by States parties. The first limitation is that the measures “should not lead to the maintenance of separate rights for different racial groups”. This provision is narrowly drawn to refer to “racial groups” and calls to mind the practice of Apartheid referred to in article 3 of the Convention, which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention. The notion of inadmissible “separate rights” must be distinguished from rights accepted and recognized by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights.
27. The second limitation on special measures is that **“they shall not be continued after the objectives for which they have been taken have been achieved”**. This limitation on the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved.¹² The length of time permitted for the duration of the measures will vary in the light of their objectives, the means utilized to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned.

11 See also paragraph 7 above.

12 Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on Non-Discrimination in Economic, Social and Cultural Rights, paragraph 9.

B. Article 2, paragraph 2

28. Article 2, paragraph 2, of the Convention stipulates that “States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved”.
29. Article 1, paragraph 4, of the Convention is essentially a clarification of the meaning of discrimination when applied to special measures. Article 2, paragraph 2, carries forward the special measures concept into the realm of obligations of States parties, along with the text of article 2 as a whole. Nuances of difference in the use of terms in the two paragraphs do not disturb their essential unity of concept and purpose.
30. The use in the paragraph of the verb “shall” in relation to taking special measures clearly indicates the mandatory nature of the obligation to take such measures. The mandatory nature of the obligation is not weakened by the addition of the phrase “when the circumstances so warrant”, a phrase that should be read as providing context for the application of the measures. The phrase has, in principle, an objective meaning in relation to the disparate enjoyment of human rights by persons and groups in the State party and the ensuing need to correct such imbalances.
31. The internal structure of States parties, whether unitary, federal or decentralized, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralized States, the federal authorities shall be internationally responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary.
32. Whereas article 1, paragraph 4, of the Convention uses the term “special measures”, article 2, paragraph 2, refers to “special and concrete measures”. The *travaux préparatoires* of the Convention do not highlight any distinction between the terms and the Committee has generally employed both terms as synonymous.¹³ Bearing in mind the context of article 2 as a broad statement of obligations under the Convention, the terminology employed in article 2, paragraph 2, is appropriate to its context in focusing on the obligation of States parties to adopt measures tailored to fit the situations to be remedied and capable of achieving their objectives.

¹³ The United Nations Declaration on the Elimination of All Forms of Racial Discrimination referred, in article 2, paragraph 3, to ‘special and concrete measures’ (General Assembly resolution 1904 (XVIII)). See also paragraph 12 above.

33. The reference in article 2, paragraph 2, regarding the objective of special measures to ensure “adequate development and protection” of groups and individuals may be compared with the use of the term “advancement” in article 1, paragraph 4. The terms of the Convention signify that special measures should clearly benefit groups and individuals in their enjoyment of human rights. The naming of fields of action in the paragraph – “social, economic, cultural and other fields” – does not describe a closed list. In principle, special measures can reach into all fields of human rights deprivation, including deprivation of the enjoyment of any human rights expressly or impliedly protected by article 5 of the Convention. In all cases, it is clear that the reference to limitations of “development” relates only to the situation or condition in which groups or individuals find themselves and is not a reflection on any individual or group characteristic.
34. Beneficiaries of special measures under article 2, paragraph 2, may be groups or individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals. The identification of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary.
35. Provisions on the limitations of special measures in article 2, paragraph 2, are in essence the same, *mutatis mutandis*, as those expressed in article 1, paragraph 4. The requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing, system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal. States parties should also carefully determine whether negative human rights consequences would arise for beneficiary communities consequent upon an abrupt withdrawal of special measures, especially if such have been established for a lengthy period of time.

V. RECOMMENDATIONS FOR THE PREPARATION OF REPORTS BY STATES PARTIES

36. The present guidance on the content of reports confirms and amplifies the guidance provided to States parties in the Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents (HRI/MC/2006/3) and the Guidelines for the CERD-specific document to be submitted by States parties under article 9, paragraph 1, of the Convention (CERD/C/2007/1).

37. Reports of States parties should describe special measures in relation to any articles of the Convention to which the measures are related. The reports of States parties should also provide information, as appropriate, on:

- **The terminology applied to special measures as understood in the Convention**
- **The justifications for special measures, including relevant statistical and other data on the general situation of beneficiaries, a brief account of how the disparities to be remedied have arisen, and the results to be expected from the application of measures**
- **The intended beneficiaries of the measures**
- **The range of consultations undertaken towards the adoption of the measures including consultations with intended beneficiaries and with civil society generally**
- **The nature of the measures and how they promote the advancement, development and protection of groups and individuals concerned**
- **The fields of action or sectors where special measures have been adopted**
- **Where possible, the envisaged duration of the measures**
- **The institutions in the State responsible for implementing the measures**
- **The available mechanisms for monitoring and evaluation of the measures**
- **Participation by targeted groups and individuals in the implementing institutions and in monitoring and evaluation processes**
- **The results, provisional or otherwise, of the application of the measures**
- **Plans for the adoption of new measures and the justifications thereof**
- **Information on reasons why, in the light of situations that appear to justify the adoption of measures, such measures have not been taken.**

38. In cases where a reservation affecting Convention provisions on special measures is maintained, States parties are invited to provide information as to why such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time frame. In cases where States parties have adopted special measures despite the reservation, they are invited to provide information on such measures in line with the recommendations in paragraph 37 above.

APPENDIX 3

ARTICLE 153 OF THE FEDERAL CONSTITUTION

Reservation of quotas in respect of services, permits, etc. for Malays and natives of any of the states of Sabah and Sarawak

- (1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.
- (2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitutions and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or license for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licenses.
- (3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.
- (4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.
- (5) This Article does not derogate from the provisions of Article 136.
- (6) Where by existing federal law a permit or license is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonably; and the authority shall duly comply with the directions.

- (7) Nothing in this Article shall operate to deprive or authorize the deprivation of any person of any right, privilege, permit or license accrued to or enjoyed or held by him or to authorize a refusal to renew to any person any such permit or license or a refusal to grant to the heirs, successors or assigns of a person any permit or license when the renewal or grant might reasonably be expected in the ordinary course of events.
- (8) Notwithstanding anything in this Constitution, where by any federal law any permit or license is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak; but no such law shall for the purpose of ensuring such a reservation -
- (a) deprive or authorize the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or
 - (b) authorize a refusal to renew to any person any such permit or license or a refusal to grant to the heirs, successors or assigns of any person any permit or license when the renewal or grant might in accordance with the other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or
 - (c) where no permit or license was previously required for the operation of the trade or business, authorize a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been bona fide carrying on, or authorize a refusal subsequently to renew to any such person any permit or license, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or license when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.
- (8A) Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.
- (9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak.
- (9A) In this Article the expression “natives” in relation to the State of Sabah or Sarawak shall have the meaning assigned to it in Article 161A.
- (10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.



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ISBN 978-967-0741-63-5



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