

MALAYSIA

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MALAYSIA

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Part 1: Overview of Malaysia

A. Country Background

Malaysia Facts	
Geographical size	329,758 sq km
Population	32 million ¹
Ethnic background ²	Main ethnic groups: Bumiputera (Malay and non-Malay indigenous peoples) – 68.8% Chinese – 23.2% Indian – 7% Other – 1%
Official language	Bahasa Melayu
Literacy rate (aged 15 and above)	94.6% ³
Life expectancy	74.8 ⁴
GDP	US\$296.54 billion ⁵ (per capita US\$9,944) ⁶
Government	Constitutional monarchy and parliamentary democracy. Modelled after the British Westminster parliamentary system, Malaysia's parliament consists of the House of Representatives and the Senate. Malaysia practices the doctrine of separation of powers to ensure that the legislative, executive, and judicial branches of government are kept distinct to prevent abuse of power. The powers assigned to these three bodies are spelled out in the Federal Constitution.
Political and social situation	Malaysia is a multi-racial country whose official religion is Islam. ⁷ The Federal Constitution also states that other religions may be practiced in peace and harmony. ⁸

¹ Data from 2017. 'Current population estimates, Malaysia, 2016-2017' Department of Statistics Malaysia, Official Portal, available at <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=a1d1UTFZazd5ajjiRWFHNDduOXFFQT09>, accessed on 2 April 2018.

² Data from 2017. Department of Statistics Malaysia (see note 1 above).

³ Data from 2016. 'Human Development Reports' United Nations Development Programmes, available at <http://hdr.undp.org/en/indicators/101406#>, accessed on 2 April 2018.

⁴ Data from 2017. 'Abridged life tables, Malaysia, 2015-2017' Department of Statistics Malaysia, Official Portal, available at <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=dkdvKzZ0K1NiemEwNlJteDBSUGorQT09>, accessed on 2 April 2018.

⁵ Data from 2016. 'Malaysia' The World Bank, available at <https://data.worldbank.org/country/malaysia>, accessed on 2 April 2018.

⁶ Data from 2017. 'GDP per capita (current US\$): Malaysia' The World Bank, available at <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=MY>, accessed on 1 September 2018.

⁷ Federal Constitution, Art 3(1).

⁸ Federal Constitution, Art 3(1).

System of governance

Malaysia is divided into two regions by the South China Sea: Peninsular Malaysia (also known as West Malaysia) and East Malaysia. There are eleven states in Peninsular Malaysia, two in West Malaysia, and three Federal Territories (two in Peninsular Malaysia and one in West Malaysia).⁹ As a constitutional monarchy with a parliamentary democracy, the King (known as Yang di-Pertuan Agong) is the supreme head of state¹⁰ and the Prime Minister is the head of government.¹¹

Modelled after the British Westminster parliamentary system, Malaysia's parliament consists of the House of Representatives (or Dewan Rakyat) and the Senate (or Dewan Negara). The House of Representatives consists of 222 elected members¹² and the Senate comprises 44 appointed and 26 indirectly elected senators.¹³

Elections in Malaysia are provided for under Part VIII of the Federal Constitution (Arts 113 to 120). Part VIII governs the conduct of elections (to the House of Representatives and State Legislative Assemblies, and the preparation and revision of electoral rolls for such elections), the constitution of the Election Commission (EC), assistance to the EC, federal constituencies, state constituencies, methods to challenge elections, methods to question election petitions of no return, qualifications of electors, and direct elections to the Senate.

It is noteworthy that Malaysia practices the doctrine of separation of powers in its governance. In affirming the application of this doctrine as a form of check and balance in Malaysia, Justice Abdul Hamid Mohamad noted that the doctrine of separation of powers is a political doctrine devised to ensure that the legislative, executive, and judicial branches of government are kept distinct in order to prevent abuse of power.¹⁴ The powers assigned to these three distinct bodies are spelled out under the Federal Constitution.¹⁵

Population, ethnic groups, and language

In 2017, Malaysia's population stood at 32 million (28.7 million of whom are citizens, leaving 3.3 million non-citizens),¹⁶ with males outnumbering females (107 males per

⁹ 'State governments' Office of the Prime Minister, 2017, available at <http://www.pmo.gov.my/home.php?menu=page&page=1671>, accessed on 3 April 2018.

¹⁰ Federal Constitution, Art 32.

¹¹ Federal Constitution, Art 43.

¹² Federal Constitution, Art 46.

¹³ Federal Constitution, Art 45.

¹⁴ Mahaletchumi Balakrishnan 'The judiciary and the lost doctrine of separation of powers' *The Malaysian Bar*, 2010, available at http://www.malaysianbar.org.my/constitutional_law_committee/the_judiciary_and_the_lost_doctrine_of_separation_of_powers.html, accessed on 13 June 2018.

¹⁵ Federal Constitution, Chapters 3, 4, 5.

¹⁶ Data from 2017. Department of Statistics Malaysia (see note 1 above).

100 females).¹⁷ In terms of age structure, 24% of the population was aged 0-14 years while 69.7% of the population was aged 15-64 years.¹⁸

In reference to Malaysia's major ethnic composition, Bumiputera (Malay and non-Malay indigenous peoples) made up 68.8% of the total population¹⁹ with ethnic Chinese lagging far behind at 23.2% and ethnic Indians at 7%.²⁰ The Malay language is the national language of Malaysia.²¹ Other languages spoken by diverse communities include English, Mandarin, Cantonese, Hakka, Hainan, Foochow, Tamil, Telugu, Malayalam, Punjabi, Iban, and Bidayuh.

Economic development

Malaysia's economic growth in 2017 stood at 5.8%, the country's highest annual growth rate since 2014,²² while its gross domestic product (GDP) grew rapidly in the first three quarters of 2017.²³ As of December 2017, the unemployment rate stands at 3.3%.²⁴ Malaysia's inflation rate in 2017 rose to 3.5% as compared to 1.7% in 2016.²⁵

Political and legal situation

Malaysia has been ruled by the same coalition of three race-based parties known as Barisan Nasional (BN) for 60 years since it gained independence in 1957. BN's six decade rule has resulted in endemic corruption and abuse of power. Repressive laws such as the Sedition Act 1948, the Official Secrets Act 1972, the Printing Presses and Publication Act 1984, and the Multimedia and Communications Act 1998 have been selectively used against dissidents, opposition members, and human rights defenders to silence criticism of the government. These repressive laws have had a chilling effect on the exercise of free speech, contributing to a shrinking space for civil society.

The government continues to act with impunity as state institutions that were established to act as checks and balances to avert government excess fail to act independently to uphold the rule of law. For example, the judiciary fails to check the arbitrary and disproportionate use of existing repressive laws violating Malaysia's constitutional guarantee of fundamental liberties. Judicial independence continues to deteriorate as a

¹⁷ Data from 2017. Department of Statistics Malaysia (see note 1 above).

¹⁸ Data from 2017. Department of Statistics Malaysia (see note 1 above).

¹⁹ Data from 2017. Department of Statistics Malaysia (see note 1 above).

²⁰ Data from 2017. Department of Statistics Malaysia (see note 1 above).

²¹ Federal Constitution, Art 152.

²² 'Malaysia's economic growth accelerates to 5.8 percent in 2017' The World Bank, 14 December 2017, available at <http://www.worldbank.org/en/news/press-release/2017/12/14/malaysia-economic-growth>, accessed on 18 June 2018.

²³ The World Bank (see note 22 above).

²⁴ 'Key statistics of labour force in Malaysia' Department of Statistics Malaysia, 9 February 2018, available at <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=b0E2TzErRllva0sxamhUMHFJdGh2QT09>, accessed on 18 June 2018.

²⁵ 'Inflation in Malaysia' Focus Economics, available at <https://www.focus-economics.com/country-indicator/malaysia/inflation-eop>, accessed on 21 June 2018.

result of political interference in the appointment of judges. Section 26 of the Judicial Appointments Commission Act 2009 (JAC) provides that the Judicial Appointment Commission shall submit recommendations for the appointment of judges to the Prime Minister. The Prime Minister, however, is not obliged under the JAC to accept the Commission's recommendations effectively creating a gap that allows the Prime Minister to meddle with the appointment of judges.

BN's power has further been fortified by elections that have been marred with gross irregularities, cheating, and corruption. The absence of free and fair elections has created an uneven playing field, thus giving the ruling party a huge advantage in elections. As a response to this alarming state of affairs, Bersih 2.0 (a coalition of civil society organizations for free and fair elections) was formed in 2006 to advocate for electoral and institutional reforms.²⁶ In its fight, Bersih 2.0 has been subjected to incessant harassment and intimidation. As such, the police used excessive force to disperse peaceful protesters participating in rallies organized by Bersih 2.0.²⁷ The Home Minister also declared Bersih 2.0 illegal under the Societies Act 1966.²⁸ Draconian laws such as the Sedition Act 1948 and the Printing Presses and Publication Act 1984 were used against Bersih 2.0 supporters who participated in its activities.²⁹ The intimidation and harassment continued to intensify culminating in a police raid on the organization's office during which staff were arrested and hauled up for investigation.³⁰

It is important to note that the People's Tribunal on Malaysia's 13th General Elections (People's Tribunal)—an initiative set up by Bersih 2.0 in 2013 to investigate claims of gross irregularities, cheating, and corruption in the conduct of the 13th General Elections (GE13)—concluded that GE13 violated standards of free and fair elections and that many of the issues surrounding Malaysia's electoral system were both systematic and systemic.³¹ Significantly, it also observed that some funds from 1Malaysia Development Berhad (1MDB)—the world's biggest financial scandal³²—were used to finance Prime Minister Najib Razak's campaign in GE13.³³ As a result, BN won GE13 and continued to occupy positions of power.

²⁶ 'Background' Bersih 2.0, available at <http://www.bersih.org/about/background/>, accessed on 20 June 2018.

²⁷ 'Creating a culture of fear: The criminalization of peaceful expression in Malaysia' Human Rights Watch, 26 October 2015, available at <https://www.hrw.org/report/2015/10/26/creating-culture-fear/criminalization-peaceful-expression-malaysia>, accessed on 20 June 2018.

²⁸ Human Rights Watch (see note 27 above).

²⁹ Human Rights Watch (see note 27 above).

³⁰ Human Rights Watch (see note 27 above).

³¹ 'Findings of the People's Tribunal on Malaysia's 13th General Elections' Bersih, 25 March 2014, available at <http://www.bersih.org/wp-content/uploads/2014/03/Peoples-Tribunal-on-GE13-Findings-Report.pdf>, accessed on 17 June 2018.

³² Ramesh, R, '1MDB: The inside story of the world's biggest financial scandal' *The Guardian*, 28 July 2016, available at <https://www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia>, accessed on 21 June 2018.

³³ 'WSJ: Najib used 1MDB's funds for GE13' *Malaysiakini*, 19 June 2015, available at <https://www.malaysiakini.com/news/302433>, accessed on 21 June 2018.

B. International Human Rights Commitments and Obligations

To date, Malaysia has only ratified three core human rights treaties (see Table 1 below), albeit with numerous reservations. If allowed to remain in place, such reservations would inevitably undermine the essence of those self-same treaties, ensuring their full realization will be nothing short of an impossibility.

Table 1: Ratification Status of International Instruments – Malaysia³⁴

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)		
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights (ICCPR)		
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance (CED)		
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)		5 Jul 1995 (a)
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)		
International Covenant on Economic, Social and Cultural Rights (ICESCR)		
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)		
Convention on the Rights of the Child (CRC)		17 Feb 1995 (a)
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict		12 Apr 2012 (a)
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography		12 Apr 2012 (a)
Convention on the Rights of Persons with Disabilities (CRPD)	8 Apr 2008	19 Jul 2010

³⁴ 'Ratification status for Malaysia' United Nations Human Rights Office of the High Commissioner, available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN, accessed on 4 June 2018.

Malaysia is party to three core human rights treaties namely CEDAW, CRC, and CRPD, albeit with a number of reservations deemed to contradict existing provisions of the Federal Constitution, Islamic, and national laws.

CRC: Malaysia ratified the CRC in 1995 with the following reservations:³⁵

- (1) Article 2 on non-discrimination;
- (2) Article 7 on name and nationality;
- (3) Article 14 on freedom of thought, conscience, and religion;
- (4) Article 28(1)(a) on free and compulsory education at the primary level;
- (5) Article 37 on torture and deprivation of liberty.

To fulfil its commitment to the CRC, the treaty provisions were translated into the Child Act 2001 which, e.g. provides for the care, protection, rehabilitation, and development of children in society.³⁶ Other protections accorded to children can also be found in the Penal Code which criminalizes incest, and the Domestic Violence Act 1994 which shields children from violence within the family.

CEDAW: As part of its efforts to fulfil its obligations under CEDAW, Malaysia proceeded to amend the Federal Constitution in July 2001 to include gender based anti-discrimination laws. Given the absence of a definition of gender-based discrimination in the Federal Constitution, while the amendment is commendable, concerns as to whether the essence of CEDAW have been fully realised remain. It is also important to note that despite 22 years having passed since Malaysia's ratification of CEDAW, it has failed to enact specific domestic law to incorporate its provisions. A full realization of CEDAW is also impeded by Malaysia's reservations:³⁷

- (1) Article 9(2) on equal rights with men pertaining to the nationality of their children;
- (2) Article 16(1)(a) on equal rights to marriage;
- (3) Article 16(1)(c) on equal rights and responsibilities during marriage and at its dissolution;
- (4) Article 16(1)(f) on equal rights and responsibilities with regard to guardianship, wardship, trusteeship, and adoption of children;
- (5) Article 16(1)(g) on equal personal rights as husband and wife.

³⁵ 'CRC reservations' UNICEF, available at https://www.unicef.org/malaysia/childrights_crc-reservations-malaysia.html, accessed on 20 June 2018.

³⁶ Preamble to the Child Act 2001.

³⁷ 'NGO CEDAW Shadow Report' for the Malaysian government's review by the CEDAW Committee at the 69th CEDAW session in February 2018, Women's Aid Organisation (WAO) and the Joint Action Group for Gender Equality (JAG), 29 January 2018, available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/INT_CEDAW_NGO_MYS_30011_E.pdf, accessed on 20 June 2018.

CRPD: The Persons with Disabilities Act was enacted in 2008. In 2010, Malaysia ratified the CRPD, albeit with reservations to Arts 15 and 18. Article 15 deals with freedom from torture or cruel, inhuman or degrading treatment or punishment while Art 18 deals with liberty of movement and nationality. In its observation on the realization of the rights of persons with disabilities, the Human Rights Commission of Malaysia noted that persons with disabilities continue to face inequalities as a result of omissions in the Act as regards sufficient comprehensive monitoring, penalties, or remedy mechanisms against violations of their rights.³⁸

C. National Laws Protecting Human Rights

The Federal Constitution

The Federal Constitution is the supreme law of Malaysia; thus, any law passed after Merdeka Day (31 August 1957) which is inconsistent with it shall be void.³⁹ Part II deals with the protection of fundamental liberties which are as follows:

- (1) The right to life or personal liberty (Art 5);
- (2) The right not to be subjected to slavery (Art 6);
- (3) The right not to be subjected to retrospective criminal laws and repeated trials (Art 7);
- (4) The right to equality and non-discrimination (Art 8);
- (5) The right to freedom of movement (Art 9);
- (6) The right to free speech, assembly, and association (Arts 10(a), (b) and (c) respectively);
- (7) The right to freedom of religion (Art 11);
- (8) The right to an education (Art 12); and
- (9) The right to property (Art 13).

As regards rights to free speech, assembly, and association, Clause 2 of Art 10 allows these rights to be limited by law. The grounds for limiting rights to free speech are:⁴⁰

- (1) In the interests of national security;
- (2) To safeguard friendly relations with other countries;
- (3) To maintain public order; or
- (4) To maintain morality.

Rights to freedom of assembly can be limited on the following grounds:⁴¹

- (1) In the interests of national security; or
- (2) To maintain public order.

³⁸ 'International Day of Persons with Disabilities' Human Rights Commission of Malaysia, 3 December 2017, available at <http://www.suhakam.org.my/press-statement-no-45-of-2017-international-day-of-persons-with-disabilities-pwd/>, accessed on 20 June 2018.

³⁹ Federal Constitution, Art 4(1).

⁴⁰ Federal Constitution, Art 10(2)(a).

⁴¹ Federal Constitution, Art 10(2)(b).

The grounds for limiting the right to freedom of association are:⁴²

- (1) In the interests of national security;
- (2) To maintain public order; or
- (3) To maintain morality.

Significantly, constitutional rights to freedom of speech, assembly, and association are only accorded to citizens unlike the rights to life or personal liberty, the right not to be subjected to slavery, the right not to be subjected to retrospective criminal laws and repeated trials, the right to equality and non-discrimination, the right to freedom of religion, and the right to property, all of which are guaranteed to every individual regardless of status.

The Human Rights Commission of Malaysia Act 1999

The Human Rights Commission of Malaysia Act 1999 was enacted to provide for the establishment of the Human Rights Commission of Malaysia (the Commission) and to set out its powers and functions in order to protect and promote human rights in Malaysia.⁴³ It is tasked with the following functions:⁴⁴

- (1) To promote human rights awareness and provide human rights education;
- (2) To advise and assist the government in formulating legislation and procedures concerning human rights;
- (3) To make recommendations to the government regarding accession to international human rights instruments; and
- (4) To inquire into complaints as regards violations of human rights.

However, the Commission merely acts as an advisory body and lacks enforcement and prosecution powers to compel the government to implement its recommendations or hold it accountable for human rights violations. This limitation poses an obstacle to the effective protection and promotion of human rights and is further aggravated by the fact parliamentarians have failed to debate the Commission's annual reports,⁴⁵ making the promotion and protection of human rights in Malaysia an uphill battle.

D. National Laws Threatening Human Rights

The Sedition Act 1948

The Sedition Act 1948 is a colonial-era law passed in 1948 to deal with the communist insurgency. Its use continued after Malaysia gained independence in 1957 to stifle dissenting views. The Sedition Act is deemed arbitrary given its wide and ambiguous definition of what constitutes "seditious," the lack of intent as an element that ought

⁴² Federal Constitution, Art 10(2)(b).

⁴³ Preamble to Human Rights Commission of Malaysia Act 1999.

⁴⁴ Human Rights Commission of Malaysia Act 1999, s.4(1).

⁴⁵ 'Suhakam: Parliament has to 'own' human rights in Malaysia' The Star, 4 April 2017, available at <https://www.thestar.com.my/news/nation/2017/04/04/suhakam-parliament-has-to-own-human-rights-in-malaysia/>, accessed on 12 June 2018.

to be proven, and its selective use against critics. The government justified its use to counter threats against peace, public order, and the security of Malaysia.⁴⁶ Significantly, the Sedition Act 1948 went through a series of amendments in April 2015 which, e.g. removed criticism against the government and the judiciary as seditious acts. A closer look at other amendments, however, granted the government more power to suppress the right to free speech. One of the amendments was even clearly aimed at social media users. This can be seen in amendments to the word “publish” which now also includes the words “cause to be published.”

The Sedition Act 1948 was also amended to give more power to the Sessions Court to issue prohibition orders for publications likely to lead to bodily injury or damage to property, appearing to promote feelings of ill will, hostility or hatred between races or classes of persons, or appearing to promote feelings of ill will, hostility or hatred between people on grounds of religion. Use of the words “likely” and “appears” means the threshold to determine whether publications should be thus prohibited is low. Other alarming amendments were the abolition of fines and the introduction of harsher punishments – a minimum of three years’ and a maximum of seven years’ imprisonment under s.4 of the Sedition Act 1948. The amendment also introduced a new offence, aggravated sedition, which carries a minimum of three years’ and a maximum of twenty years’ imprisonment upon conviction.

Amendments to the Sedition Act 1948 also empower courts to issue orders to prohibit persons charged with sedition from leaving the country. Upon an application filed by the public prosecutor, it is mandatory for the court to grant an order prohibiting the accused from leaving the country as the word “shall” is used in the amendment, essentially stripping the court of judicial discretion.

Not only do these amendments further restrict the right to free speech, they also undermine the independence of the judiciary as they remove the court’s discretionary power to decide certain matters including sentencing. In response, the United Nations High Commissioner for Human Rights warned that “the new provisions ... seriously undermine ... freedom of expression and opinion in the country, in breach of Malaysia’s Federal Constitution and its international human rights obligations.”⁴⁷ However, there was a significant decline in the use of the Sedition Act 1948 in 2017 as compared to 2015 – only nine cases were reported.⁴⁸

⁴⁶ ‘What you need to know about the amended Sedition Act’ The Malay Mail, 10 April 2015, available at <https://www.malaymail.com/s/875651/what-you-need-to-know-about-the-amended-sedition-act>, accessed on 6 June 2018.

⁴⁷ ‘Malaysia: Draft anti-terror and sedition laws seriously undermine freedom of expression and opinion – Zeid’ United Nations Human Rights Office of the High Commissioner, 9 April 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15810&LangID=E>, accessed on 6 June 2018.

⁴⁸ ‘Malaysia Human Rights Report 2017’ SUARAM, available at <https://www.suaram.net/wp-content/uploads/2018/02/HR-Overview-2017-Digital-Edition.pdf>, accessed on 6 June 2018.

The Communications and Multimedia Act 1998

The Communications and Multimedia Act 1998 (CMA) was enacted to regulate the converging communications and multimedia industries.⁴⁹ Used to specifically target critics, s.233 deals with the improper use of network facilities or network services to transmit communications deemed obscene, indecent, false, menacing, or offensive in character. Offences under s.233 carry heavy punishments – a fine not exceeding MYR50,000 (US\$12,145) or imprisonment for a term not exceeding one year. A person convicted under s.233 shall also be liable to a further fine of MYR1,000 (US\$243) for every day the offence continues after conviction. However, what amounts to “obscene, indecent, false, menacing, or offensive” under s.233 is not clearly defined, leaving it open to abuse, thus, further undermining the right to free speech.

The Printing Presses and Publications Act 1984

The Printing Presses and Publications Act 1984 (PPA) was enacted to regulate the use of printing presses and the printing, importation, production, reproduction, publication, and distribution of publications.⁵⁰ It has been used to limit the number of printed newspapers and suspend the publication of others. The PPA serves to restrict press freedom by requiring the annual renewal of newspaper licences. This leaves the door open for abuse as the Minister is given absolute power to grant, revoke, or suspend licences while his/her decision is invulnerable to judicial scrutiny. As such, it is unsurprising that in 2017, Malaysia’s press freedom was ranked 144 out of 180 countries in the ‘2017 World Press Freedom Index.’⁵¹

The Peaceful Assembly Act 2012

The Peaceful Assembly Act 2012 (PAA) was enacted to limit the right to peaceful assembly which is guaranteed under Art 10(b) of the Federal Constitution. One positive aspect of the PAA is the introduction of a requirement for notice to be given to the police. This stands in stark contrast to the onerous requirement to obtain a police permit under s.27 of the Police Act 1967 which was repealed in the same year the PAA was enacted. However, the requirement of 10 days’ notice before the proposed assembly and making the failure to do so a criminal offence imposes an unreasonable burden on those wishing to exercise the right to peaceful assembly. It also serves as an impediment to urgent and spontaneous assemblies.

Section 4(1) of the PAA further undermines the right to peaceful assembly as it forbids certain groups from exercising their rights, making the full realization of such rights illusory. As such, the PAA prohibits non-citizens, children (other than assemblies

⁴⁹ Preamble to the Communications and Multimedia Act 1998.

⁵⁰ Preamble to the Printing Presses and Publications Act 1984.

⁵¹ ‘2017 World Press Freedom Index’ Reporters Without Borders, available at <https://rsf.org/en/ranking/2017#>, accessed on 7 June 2018.

specified in the Second Schedule), and citizens below the age of 21 years (who may not organize assemblies) from exercising the right to peaceful assembly. This clearly violates the principle of non-discrimination which is not only recognized under international human rights law but also the Federal Constitution. Another problematic aspect of the PAA lies in its criminalization of street protests. The PAA also allows for the imposition of unreasonable conditions – date, time, duration, place, or manner of the proposed assembly. This long list of conditions further restricts the rights of those who intend to meaningfully participate in peaceful assemblies.

Security Offences (Special Measures) Act 2012

The Security Offences (Special Measures) Act 2012 (SOSMA) is an administrative detention law which was enacted to replace the Internal Security Act 1961 – an Act which allowed detention without trial and was used to silence criticism against the government. Further, SOSMA was also enacted to provide for special measures in connection with security offences threatening public order and the security of the country.⁵²

Application of SOSMA raises a number of concerns relating to the right to due process especially as the definition of such offences is overly vague and wide, leaving open the likelihood of abuse as virtually any act can be deemed prejudicial to public order or security. SOSMA also allows for detention of a person up to 28 days with no judicial oversight. Further, the person can be denied access to legal representation or family members up to 48 hours.

Although SOSMA allows for a trial to take place after the investigation is complete, it falls short of international standards as to what constitutes a fair trial. For example, SOSMA departs radically from the basic rules of evidence, and individuals accused of committing an offence under this Act are denied the right to cross-examine prosecution witnesses whose identities are kept secret. Another alarming aspect of trials under SOSMA is that the prosecution is permitted to use information against the accused without disclosing its sources.

The application of SOSMA clearly contravenes United Nations Security Council Resolution 2178 (2014) which was unanimously adopted on 24 September 2014. The Resolution provides that:

⁵² Preamble to Security Offences (Special Measures) Act 2012.

Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and noting that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity.⁵³

Prevention of Terrorism Act 2015

The Prevention of Terrorism Act 2015 (POTA) was enacted in 2015 to prevent, among other issues, the commission or support of acts of terrorism involving listed terrorist organizations in a foreign country, and to control those involved in such acts.⁵⁴ The POTA drew censure from human rights groups as it too allows detention without trial. Sections 13(1) and (2) empower the Prevention of Terrorism Board (the Board) to issue detention or restriction orders for a period not exceeding two years against individuals believed to have been or are involved in terrorist activities. Moreover, even if not detained, under s.13(3), restriction orders may be issued to control and supervise individuals for a period not exceeding 5 years. The Board also has the power to renew detention or restriction orders indefinitely. In addition, POTA shields the Board from accountability as its decisions are not subject to judicial review.

Some of the key provisions of POTA mirror the abolished Internal Security Act 1960 which was previously used to silence dissenting voices. In response to POTA's introduction, Human Rights Watch observed that:

POTA is like a legal zombie arising from the grave of the abusive Internal Security Act (ISA) and Emergency Ordinance (EO) that were revoked in 2012. The ISA and EO were established respectively to combat communist insurgency and to control racial and religious tension, but were repeatedly misused by successive Malaysian governments to arrest political opponents and hold them indefinitely, and intimidate and silence those raising concerns about government rights abuses or corruption. So there is a great deal of justifiable concern that bringing back detention without trial could preface renewed crackdowns on civil society.⁵⁵

⁵³ Resolution 2178 (2014), Security Council, 24 September 2014, S/RES/2178 (2014).

⁵⁴ Preamble to Prevention of Terrorism Act 2015.

⁵⁵ 'HRW slams Malaysia's new 'repressive' anti-terrorism law' Human Rights Watch, 7 April 2015, available at <https://www.hrw.org/news/2015/04/07/hrw-slams-malysias-new-repressive-anti-terrorism-law>, accessed on 21 June 2018.

Section 377A of the Penal Code

Section 377A of the Penal Code criminalizes homosexuality and sodomy with punishments up to 20 years in prison and whipping. This archaic provision further aggravates the discrimination suffered by the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community who are already living on the margins of Malaysian society.

E. Recent Court Cases Relating to Human Rights

Freedom of speech

The Star newspaper was investigated under the Sedition Act 1948 for publishing a controversial front page banner containing a photo of Muslims performing prayers coupled with the headline, “Malaysian Terrorist Leader.”⁵⁶ Two editors were suspended pending investigation over the controversial front page.⁵⁷

Deputy Communications and Multimedia Minister, Jailani Johari, revealed in Parliament that the CMA investigated 269 cases between January and September 2017.⁵⁸ Out of those, 146 were investigated under s.233 of the CMA criminalizing the use of network facilities or services to transmit communications deemed offensive, leading to 56 investigation papers being submitted to the Attorney General’s Chambers.⁵⁹ As a result, Premesh Chandran, Chief Executive Officer of news portal Malaysiakini was charged under s.244 of the CMA for airing a video entitled, ‘Khairuddin: Apandi Ali is not fit to be AG and he should quit immediately.’⁶⁰ Also, the book, *Breaking the Silence: Voices of Moderation – Islam in a Constitutional Democracy*, by civil society group, G25, was banned under the PPA for being prejudicial to public order.⁶¹ The ban was issued by the Deputy Prime Minister on 14 June 2017 but no reasons were given to justify it. Although G25 filed a judicial review application in court to challenge the legality of the decision, their attempt to seek an explanation for the ban failed.⁶²

⁵⁶ ‘Police probing The Star under Sedition Act: IGP’ New Straits Times, 30 May 2017, available at <https://www.nst.com.my/news/crime-courts/2017/05/244100/police-probing-star-under-sedition-act-igp>, accessed on 7 June 2018.

⁵⁷ ‘The Star suspends 2 top editors over controversial May 27 front page’ New Straits Times, 30 May 2017, available at <https://www.nst.com.my/news/nation/2017/05/244167/star-suspends-2-top-editors-over-controversial-may-27-front-page>, accessed on 7 June 2018.

⁵⁸ Parliament Hansard, 13th Parliament, 5th Session, 3rd Meeting, available at www.parlimen.gov.my/files/hindex/pdf/DR-06112017.pdf, accessed on 7 June 2018, at 25.

⁵⁹ Parliament Hansard (see note 58 above).

⁶⁰ ‘Mkini CEO charged over AG videos’ Malaysiakini, 15 May 2017, available at <https://www.malaysiakini.com/news/382234>, accessed on 7 June 2018.

⁶¹ ‘Govt bans book authored by G25, deems it prejudicial’ The Sun Daily, 27 July 2017, available at <http://www.thesundaily.my/news/2017/07/27/govt-bans-book-authored-g25-deems-it-prejudicial>, accessed on 8 June 2018.

⁶² ‘Malaysian moderate group G25 takes legal action to challenge Home Ministry’s book ban’ The Straits Times, 16 October 2017, available at <https://www.straitstimes.com/asia/se-asia/malaysian-moderate-group-g25-takes-legal-action-to-challenge-home-ministrys-book-ban>, accessed on 8 June 2018.

Right to peaceful assembly

Forty-four Rohingyas were arrested on 30 August 2017 for protesting in front of the Myanmar Embassy in Kuala Lumpur.⁶³ The protest was in response to the escalating violence committed against the Rohingyas in Rakhine state, Myanmar⁶⁴ and contravened s.4(2)(a) of the PAA criminalizing non-citizens participating in peaceful assemblies. Likewise, two activists from Bersih 2.0 and a member of parliament were charged on 4 October 2017 under s.4(2)(c) of the PAA⁶⁵ which criminalizes those organizing or participating in street protests.

Right to due process and fair trial

In May 2017, the Inspector General of Police (IGP) issued a statement that several Turkish nationals had been arrested under SOSMA for alleged involvement in activities threatening the security of Malaysia.⁶⁶ CCTV footage showed one Turkish national, Turgay Karaman, being surrounded by plainclothes men and taken away in an unmarked vehicle.⁶⁷ It was also reported that on the same night, another Turkish national, Ihsan Arslan, had also disappeared.⁶⁸ The Home Minister later announced that the two Turkish nationals were being investigated for involvement with the Islamic State.⁶⁹ The reason given by the Home Minister for the arrest and detention therefore stood in contradiction to the IGP's earlier statement. In expressing concern over the arrest and detention of the trio, the United Nations Office of the High Commissioner for Human Rights stated that "There are concerns that these men may have been targeted over their suspected links to the Gulen movement which is accused of being behind a coup attempt in Turkey in July 2016."⁷⁰ It is noteworthy that the third Turkish national, Izmet Ozcelik, was registered with the United Nations High Commissioner for Refugees as an asylum seeker.⁷¹ Further, while in detention, the trio had been denied the right to legal representation and access to their family members,⁷² raising serious

⁶³ 'The plight of Rohingyas in Malaysia' The Diplomat, 1 September 2017, available at <https://thediplomat.com/2017/09/the-plight-of-rohingyas-in-malaysia/>, accessed on 8 June 2018.

⁶⁴ The Diplomat (see note 63 above).

⁶⁵ 'Bersih duo, MP charged again with unlawful assembly' The Malaysian Insight, 4 October 2017, available at <https://www.themalaysianinsight.com/s/17122>, accessed on 8 June 2018.

⁶⁶ 'IGP: Detained Turkish men 'threat' to Malaysia' The Star, 4 May 2017, available at <https://www.thestar.com.my/news/nation/2017/05/04/igp-khalid-two-turkish-men-threat-to-malaysia/>, accessed on 8 June 2018.

⁶⁷ 'Amnesty International launches urgent action for 3 Turkish nationals arrested in Malaysia' Stockholm Center for Freedom, 8 May 2017, available at <https://stockholmcf.org/amnesty-international-launches-urgent-action-for-3-turkish-nationals-arrested-in-malaysia/>, accessed on 8 June 2018.

⁶⁸ Stockholm Center for Freedom (see note 67 above).

⁶⁹ 'Abducted' Turkish nationals arrested for alleged IS links' The Star, 4 May 2018, available at <https://www.thestar.com.my/news/nation/2017/05/04/turkish-nationals-arrested-over-alleged-is-links/>, accessed on 8 June 2018.

⁷⁰ 'UN Human Rights Office concerned by arrests of three Turkish nationals in Malaysia on security related charges' Office of the High Commissioner for Human Rights, 5 May 2017, available at <http://bangkok.ohchr.org/news/press/Malaysia%20Turkish%20Arrests.aspx>, accessed on 8 June 2018.

⁷¹ '2 Turkish men detained in Malaysia to seek judicial review: Lawyer' Channel News Asia, 9 May 2017, available at <https://www.channelnewsasia.com/news/asia/2-turkish-men-detained-in-malaysia-to-seek-judicial-review-8831194>, accessed on 8 June 2018.

⁷² Stockholm Center for Freedom (see note 67 above).

concerns over their safety. It was subsequently reported that the trio had been deported to Turkey.⁷³

Part 2: Outstanding Human Rights Issues

A. Continued Use of the Death Penalty

Malaysia continues to retain a mandatory death penalty for various crimes including drug trafficking, murder, and discharge of firearms with intent to kill or harm a person. Decisions to carry out executions are shrouded in secrecy, leaving those sentenced to death and their family members in a state of uncertainty. Human Rights Watch reported that as of 2017, nearly 1000 people are estimated to be on death row.⁷⁴ However, in November 2017, Parliament removed the mandatory death penalty for drug offences by amending the Dangerous Drugs Act 1952 (DDA)⁷⁵ to give judges discretionary power to sentence individuals convicted under the DDA.⁷⁶

B. Deaths in Custody

Deaths in custody (e.g. from torture, ill-treatment, or neglect) remain a major problem in Malaysia. A general lack of oversight mechanisms to ensure accountability has greatly contributed to emboldening the culture of impunity which allows such deaths to occur. While the Malaysian Bar has persistently called on the government to form an Independent Police Complaints and Misconduct Commission to investigate cases of police misconduct and abuse of power to end the culture of impunity,⁷⁷ this call continues to fall on deaf ears. As of October 31, 15 cases of custodial death were reported in 2017.⁷⁸

C. Violation of Indigenous People's Land Rights

Article 8(5)(c) of the Federal Constitution guarantees special rights governing the protection, well-being, and advancement of indigenous peoples in Malaysia. However, indigenous peoples continue to face marginalization and discrimination despite the constitutional guarantee. One of the struggles they face concerns the recognition of their customary land rights. In particular, logging activities, which continue to be carried

⁷³ 'Malaysia deports three Turks amid UN fears of widening Turkish crackdown' Reuters, 12 May 2017, available at <https://uk.reuters.com/article/uk-turkey-malaysia-idUKKBN1880PE>, accessed on 8 June 2018.

⁷⁴ 'Malaysia: Events of 2017' Human Rights Watch, 2017, available at <https://www.hrw.org/world-report/2018/country-chapters/malaysia>, accessed on 11 June 2018.

⁷⁵ 'Parliament removes mandatory death penalty for drug offences, judges to get discretion' The Malay Mail, 22 November 2017, available at <https://www.malaymail.com/s/1522297/parliament-removes-mandatory-death-penalty-for-drug-offences-judges-to-get>, accessed on 11 June 2018.

⁷⁶ Malay Mail (see note 75 above).

⁷⁷ 'Press release: Establishment of IPCMC is crucial in halting deaths in police custody' The Malaysian Bar, 22 February 2017, available at http://www.malaysianbar.org.my/press_statements/press_release_%7C_establishment_of_ipcmc_is_crucial_in_halting_deaths_in_police_custody.html, accessed on 11 June 2018.

⁷⁸ SUARAM (see note 48 above).

out on their land, threaten the full and effective enjoyment of a range of human rights especially the rights to self-determination, land and natural resources, and culture.

On 23 January 2017, 5 indigenous rights activists from the Temiar tribe were arbitrarily arrested by the Kelantan Department of Forestry for erecting a blockade to protect their customary land from logging activities.⁷⁹ On 24 January 2017, 16 more indigenous activists and 2 journalists were arbitrarily arrested for respectively defending the blockade and reporting the incident.⁸⁰ In this case, it can clearly be seen that the Department of Forestry abused their power as the law does not grant them the power of arrest.

D. Violation of Refugee Rights

Malaysia is not party to the 1951 Refugee Convention and its 1967 Protocol and it also lacks legislative or administrative provisions dealing with refugees and asylum seekers which leaves these groups at perpetual risk of serious human rights abuses. Thus, refugees and asylum seekers in Malaysia are deemed “illegal immigrants” as the Immigration Act 1959 makes no distinction between refugees, asylum seekers, and undocumented migrants. They are therefore subject to arrest, detention and prosecution for immigration offences and on conviction are liable to imprisonment, whipping, and sometimes deportation.

Furthermore, whipping was made mandatory for persons found guilty of being in the country illegally following an amendment to the Immigration Act 1959 in 2002.⁸¹ The Immigration Act 1959 also criminalizes employers who hire undocumented persons, who if found guilty, are liable to a fine of not less than MYR10,000 (US\$2,429) but no more than MYR50,000 (US\$12,145), or imprisonment not exceeding 12 months, or both for each employee. Employers hiring more than 5 undocumented employees at the same time are also liable to imprisonment of not less than 6 months but no more than 5 years, and are also liable to whipping of not more than 6 strokes.

The absence of legal status denies refugees and asylum seekers basic economic and social rights including the right to work, the right to adequate housing, the right to healthcare, and the right to education. While significant numbers of refugees and asylum seekers work illicitly to support themselves, the absence of legal status exposes them to exploitation and victimization by unscrupulous employers who are fully aware that such workers will be unable to seek legal recourse to assert their employment rights.

⁷⁹ ‘Ruckus again at Gua Musang. Authorities break Temiar blockades, held journalists released’ The Star, 25 January 2017, available at <https://www.thestar.com.my/news/nation/2017/01/25/ruckus-again-at-gua-musang-authorities-break-temiar-blockades-held-journalists-released/>, accessed on 12 June 2018.

⁸⁰ The Star (see note 79 above).

⁸¹ Immigration Act 1959, s.6(3).

However, it could be argued that criminalizing the act of hiring undocumented persons is unfair to refugees and asylum seekers who desperately need to find employment to support themselves. The absence of legal status also exposes refugees and asylum seekers to human trafficking.

E. Statelessness

Malaysia is not party to the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness. According to the United Nations High Commissioner for Refugees, there are 12,400 stateless persons in West Malaysia as of December 2017.⁸² As regards stateless populations in East Malaysia, particularly the state of Sabah, it is estimated there are nearly 30,000 stateless children.⁸³

As a result, stateless persons risk being denied basic human rights. Significantly, although the Federal Constitution provides a legal safeguard against statelessness (s.1(e) of Part II of the Second Schedule provides that a person born in Malaysia who is not born a citizen of any country is a citizen of Malaysia by operation of law), cases which have been litigated in court show that the burden imposed on stateless persons to prove their statelessness is extremely onerous, effectively impeding them from being accorded the right to a nationality.⁸⁴

F. Violation of the Right to Freedom of Movement

Article 9 of the Federal Constitution guarantees all citizens the right to freedom of movement. The full realization of this right, however, remains illusory given numerous cases where movements of rights activists' and opposition politicians have been arbitrarily curtailed. In May 2017, Maria Chin Abdullah, the chairperson of Bersih 2.0, filed an application for judicial review to challenge the legality of a travel ban imposed on her.⁸⁵ The High Court dismissed her application ruling that the right to travel overseas was a privilege and not a right, further stating that s.59A of the Immigration Act 1959 under which the travel ban had been imposed was not reviewable.⁸⁶ The government's move to restrict the right to movement also extends to foreign activists. In 2017, three prominent foreign activists were barred from entering Malaysia.⁸⁷

⁸² 'Ending statelessness in Malaysia' The United Nations High Commissioner for Refugees, available at <http://www.unhcr.org/en-my/ending-statelessness-in-malaysia.html>, accessed on 12 June 2018.

⁸³ '30,000 stateless kids in Sabah' 20 July 2017, The Borneo Post, available at <http://www.theborneopost.com/2017/07/20/30000-stateless-kids-in-sabah/>, accessed on 12 June 2018.

⁸⁴ Rodziana Mohamed Razali, 'Addressing statelessness in Malaysia: New hope and remaining challenges' Working Paper Series No 2017/9, 2017, available at http://www.institutesi.org/WP2017_09.pdf, at 9.

⁸⁵ 'Court dismisses Maria Chin's bid to challenge travel ban' The Star, 18 May 2017, available at <https://www.thestar.com.my/news/nation/2017/05/18/court-dismisses-maria-chin-bid-to-challenge-travel-ban/>, accessed on 13 June 2018.

⁸⁶ The Star (see note 85 above).

⁸⁷ SUARAM (see note 48 above).

Part 3: Conclusion

In his first speech as Prime Minister in 2009, Najib Razak committed to undertake a comprehensive review of the Internal Security Act 1960 (ISA) which allowed detention without trial.⁸⁸ He also announced that the suspensions imposed on Harakah and Suara Keadilan (newspapers belonging to opposition parties) would be lifted.⁸⁹ In reaffirming his reform agenda, the Prime Minister in his speech on Malaysia Day 2011, concluded that:

In closing, I wish to emphasize that, free of any suspicion and doubt, the Malaysia that we all dream of, and are in the process of creating, is a Malaysia that practices a functional and inclusive democracy where public peace and prosperity is preserved in accordance with the supremacy of the Constitution, the rule of law, and respect for basic human rights and individual rights.⁹⁰

Accordingly, in 2012, the government proceeded to abolish the ISA and s.27 of the Police Act 1967 (requiring permits for public assemblies). However, the government's reform agenda appeared to be little more than a sham when the abolished ISA and s.27 of the Police Act were respectively replaced with the repressive Security Offences (Special Measures) Act 2012 and the Peaceful Assembly Act 2012. Moreover, the government continued to tighten its grip on power by using repressive laws to silence dissent and instil fear. Use of such legislation has contributed greatly to a shrinking space for civil society, further undermining rights guaranteed by the Federal Constitution.

⁸⁸ 'Najib releases 13 ISA detainees' The Nut Graph, 4 April 2009, available at <http://www.thenutgraph.com/najib-releases-13-isa-detainees/>, accessed on 21 June 2018.

⁸⁹ The Nut Graph (see note 88 above).

⁹⁰ 'Prime Minister's message for Malaysia Day 2011' 15 September 2011, available at <https://www.najibrazak.com/en/official-addresses/perutusan-khas-hari-malaysia/>, accessed on 21 June 2018.

