



# GENDER EQUALITY

## **GENDER EQUALITY: THE CONSTITUTION & THE LAWS**

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# INTRODUCTION

- Gender equality is part of the broader mosaic of human rights. Any strides towards this ideal must be supported and celebrated.
- It must be noted, however, that the existentialist reality is that in most societies, through much of history, discrimination against and exploitation of women have been a shameful reality.



- Kings and emperors kept harems. Infanticide (especially of girls) was known to many societies. Grown-up daughters were often given away to temples as devdasis. Widows were burnt on the pyres of their deceased husbands. Genital mutilation, child marriage, polygamy, unilateral divorce were and are persistent.
- Prostitution, sex slavery, trafficking in women and the abuse of the female form in the media, in advertising, and in sports are profitable aspects of the national economy.

- Though the tide of equality is lapping at our shores, there are many constitutional, legal, religious, cultural, and economic structures that act as dykes against this surging tide.
- The quest for gender equality must therefore be waged at many fronts. In some areas great strides have been made though more needs to be done. In others, Malaysian Muslims have regressed badly.
- All in all, we are all witnesses to a new movement in history and it is up to us to be bystanders or participants in this civilisational advance.

I hope to highlight for you:

1. The many strides that have been made in our quest for gender equality.
2. Some of the flaws that remain in our laws.
3. The structural and societal factors that impede progress, and
4. What needs to be done.

# INTERNATIONAL LAW

Malaysia has ratified important international instruments on gender equality.

**UDHR:** Article 7 of the Universal Declaration of Human Rights (UDHR) states that "All are equal before the law and are entitled without any discrimination to equal protection of the law."

**CEDAW:** Malaysia has acceded (though with some significant reservations) to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Note, however, that under Article 160(2), international law does not have the status of 'law' in Malaysia unless incorporated by legislation.



# MALAYSIA'S FEDERAL CONSTITUTION

- **Equality under Article 8(1):** Under Article 8(1) of the Federal Constitution all persons are equal before the law and entitled to the equal protection of the law. Regrettably, Article 8(1) remains one of the least utilised provisions of the Constitution though it was meant to be a catalyst for constitutional development.
- **Article 8(2) – Non-Discrimination:** In 2001, our Constitution was amended in Article 8(2) to outlaw discrimination on the ground of gender in some (though not all) fields.



- **Under Article 8(2)**, discrimination is banned on five grounds – religion, race, descent, place of birth or gender in the following enumerated areas:
  - In any law
  - In employment with a public authority. In *Noorfadilla Ahmed Saikin (2014)*, the court held that terminating a trainee teacher on the ground that she was pregnant was a violation of our Constitution.
  - In the administration of any law relating to property
  - In establishing of any trade, business, profession, vocation or employment.





- **Protection of women:** Schedule 9, List III, Item 1 empowers both the federal and state governments to enact laws on social welfare, social services, protection of women, children and young persons. This is an underutilized provision.



- **Other Articles:** Some other Articles on non-discrimination do not mention gender.
- For example, Article 12(1) bans discrimination on the grounds of religion, race descent or place of birth in respect of education.
- Article 136 bans discrimination in the public services on the ground of race.
- It is submitted that the Constitution must be read as a whole and all provisions must be interpreted in the light of Art 8(1) to require equal treatment.

# JUDICIAL GLOSS ON THE LAW

- **No irrational classification permitted:** The courts have helped the law to develop by declaring that (i) discrimination in the forbidden areas is illegal; (ii) discrimination in other areas is subject to judicial review on the ground that it is an “irrational or unreasonable classification”: *Datuk Haji Harun v PP (1976)*; *Malaysian Bar v Govt (1987)*; *Govt v Menon (1990)*.
- **Equal punishment:** *PP v Tengku Mahmood Iskandar (1973)*.
- **No arbitrary powers:** *Tan Tek Seng v Suruhanjaya Perkhidmatan (1996)*.
- **Procedural fairness:** *Hong Leong v Liew Fook Chuan (1996)*; *Alma Nudo Atenza (2019)*
- **Proportionality in punishment:** *Hong Leong v Liew Fook Chuan (1996)*



# SOME ADVANCES TOWARDS GENDER EQUALITY

- **Employment:** Women constitute 60% of our work force. The Chief Justice and the President of the Court of Appeal are women. In recent memory, the Anti-Corruption Chief, the Head of the National Bank and the DPM were women. We have had women Vice-Chancellors though their number is not rising.
- The Employment Act requires maternity leave in most sectors. Even fathers are eligible for a few days of paternity leave. There is prohibition of night work and underground work for women.
- **Family law:** Non-Muslim family law (but not Muslim family law) has evolved significantly towards equal treatment.



- **Penal laws:** The Penal Code has been amended repeatedly in the last few years to take note of feminist thinking on issues of rape and abortion. The plight of unwed mothers and victims of domestic violence has attracted state support. The Domestic Violence Act and the Penal Code provide protection against violence in the home.
- **Judicial precedents:** Some judges have heard the beckoning of justice in gender equality cases. In *Noorfadilla Ahmed Saikin (2014)*, the court held that terminating a trainee teacher on the ground that she was pregnant was a violation of our Constitution and our international commitments under CEDAW. Not all is well with judicial practice, however.



# POLICIES & PRACTICES

- At the policy level, the Government is officially committed to the Third Millennium Development Goal to empower women.
- A federal Cabinet post oversees women's affairs.
- The country invests heavily in education and back in 2010, adult female literacy rate was already 91%.
- In some parts of the country, train, bus and taxi services incorporate features to prevent sexual harassment.



# PERMISSIBLE DEPARTURES

- In many areas the Constitution provides or permits gender discrimination.
- **Islam - Articles 3 & Schedule 9 List II Para 1:** As Islam is the religion of the federation, Muslims are subject to Muslim personal law. Many aspects of Muslim personal law are less favourable to women (polygamy, arbitrary divorce by men, unequal shares in the law of inheritance). In this area the sacrosanct and cherished provisions of religion and custom come face to face with the contemporary demand for gender parity. No one knows how this intractable dilemma must be resolved.



**Article 8(5):** Art 8(5)(a) permits departures from equality in the matter of “personal laws”. This departure applies not only to Muslims but to all other communities e.g. to natives in Sabah and Sarawak.

However, discrimination must be confined to “personal laws” and is not permitted in other areas but is pervasive.

It is unconstitutional to discriminate against women in such matters as appointment to the post of Syariah judges or the discriminatory criminalization of beauty contests but not of body building contests. Likewise, discrimination against men (but not against women) for cross-dressing is constitutionally questionable.



- Also, 8(5) on permissible discrimination, must be read along with Art 11(5) which says that freedom of religion does not permit anything contrary to public order, public health or morality. There is tremendous potential in Art 11(5) to ban or regulate the practices of child marriage, genital mutilation, dowry-taking, polygamy, arbitrary and unilateral divorces.
- **Citizenship:** In citizenship for children, Articles 14, 15, 24, 26 and Part III of the Federal Constitution emphasise the father's citizenship or residence. The mother's status does not matter.



- **Permanent residence:** In laws relating to permanent residence for a spouse, there is discrimination against Malaysian females with foreign spouses.
- **Natives:** In Article 161(6) the status of a “native” of Sabah is dependent on descent from the father.
- **Illegitimate children:** When it comes to illegitimate children, their citizenship is dependent on the mother’s and not the father’s citizenship status.
- **Provocation as a defence in criminal law:** Laws on provocation and self-defence reflect male psychology. In criminal law, provocation is a defence if the provocation was immediate. This reflects male psychology. Women’s reaction to abuse tends to be delayed, by which time it is too late to seek recourse to the defence.



- **Enticement:** In the law of enticement (s 498) it is an offence to entice or take away a married woman but there is no provision to punish a woman who entices a married man. Section 498 (on enticement) is patronising towards women and discriminatory against men.
- **Rape:** The law of rape allows defence lawyers to raise evidence about the rapist's sexual history with the accused.
- **Statutory rape:** Under s 375 of the Penal Code, girls aged 16 and below are, rightly, incapable of consent for sex. However, there is no provision for statutory rape of boys.



- **Religious education of children:** In Article 12(4), the religion of a child for the purpose of education is determined by a parent or guardian. Regrettably, the courts have interpreted Article 12(4) to mean “any one parent or guardian” despite the interpretation clause 2(95) in Schedule 11 that “words in the singular include the plural”. The devastating effect is that some fathers have unilaterally converted their children to another religion without the consent of the aggrieved mother. Fortunately, the Indira Gandhi decision of 2018 rejected previous precedents on this point. Now, the consent of both parents must be obtained.



## **Gender discrimination in private sector workplace:**

In *Beatrice Fernandez v Sistem Penerbangan Malaysia (2005)*, the dismissal of an air hostess because she became pregnant was upheld as permissible under the collective agreement. Do the civilizing provisions of the Constitution apply to the private sector? Or does the shade of the Constitution extend only to citizen-government relationships?



- It is submitted that it is an error of jurisprudence to hold that the human rights guarantee of the Constitution applies only against public authorities. It is submitted that a private business or corporation does not constitute a sovereign republic unto itself whose only law is the whim of the CEO. If a country has a supreme Constitution, then its values cannot be shut out of the private sector. The private sector is as big if not a bigger violator of human rights as public authorities.



- **Domestic servants:** They are almost all females and are not protected adequately by the Employment Act or EPF law.
- **Cross-genders:** Many Syariah laws criminalise cross dressing. Males are singled out. Their treatment by the police and the Syariah authorities raises many issues of due process, right to privacy, equality and other constitutional rights.



# SOCIO-POLITICAL REALITIES THAT PERPETUATE INEQUALITY

- Women's rights are part of the broader mosaic of human rights. Any strides towards gender equality must be celebrated and supported. However, there must be awareness of the possible hurdles in the path.
- **Formal versus functional equality:** Besides the provisions of the law, there is the practical dimension. Formal equality does not always result in functional equality. Formal equality does not always produce substantive justice. Intent and outcomes do not always match.





# SOCIO-POLITICAL REALITIES THAT PERPETUATE INEQUALITY

- Despite the equal right to vote and to seek political office, of the 222 MPs, only 33 or 14.86% are women. In the federal Cabinet, state executive councils and the civil service, less than 20% of decision-making posts are filled by women. This is despite the fact that women constitute about 60% of the work force (though mostly at middle and lower rungs).



- In the corporate sector, GLCs and statutory bodies, a similar pattern of under-representation at the top is discerned even though female enrolment in tertiary education stands at about 60%. On the university rolls of honour girls do as well, if not better, than boys. Why are they then holding jobs mostly at the middle and lower rungs of our workforce? Are quotas the solution?

- **Equal pay:** It is alleged that female-dominated vocations are deliberately allocated low salaries. There is a call that “equal pay for equal work” should evolve towards “equal pay for equal work of equal value”.
- **Child marriages:** Child marriages are common.
- **Sexual harassment:** In the workplace sexual harassment is widespread.
- **Rape:** Rape remains a scourge.
- **Cultural and religious prejudices are rampant:** A common one is that women are emotional, men are rational!



- **Law as obstacle to change!** The law can be a shield as well as a sword. It can liberate or it can enslave. It can transform or obstruct change and preserve the unjust status quo.
- In sum, everywhere in the world, a wide gap exists between the law in the book and the social, cultural, religious and economic realities on the ground. Legal provisions are necessary but not enough. They do not significantly dent pervasive patterns of bias and oppression. The Constitution can confer legal and formal equality but functional equality in any outcome is more difficult.



# THE WAY FORWARD

- **International developments:** THE UN Women Annual Report has just been published. It puts forward a very perceptive and broad-based plan for gender equality and female empowerment. It reiterates the following:
  - the need for increasing women's leadership and participation
  - ending violence against females
  - enhancing women's economic empowerment
  - proposing engagement of women in all aspects of peace and security, and
  - making gender equality central to national development planning and budgeting.



- But many dilemmas remain.
- **Equal rights or separate rights?** In a male-dominated society, an equal treatment approach only benefits women who meet male norms. Feminists have to decide whether separate rights are better than equal rights. Some feminist literature is suspicious of the liberal notion of equality. “Equality as what?” it asks.



- For example, the clock-in system at the office appears to be gender-free. But given the existentialist reality that house-keeping and child-care are customarily the responsibility of mothers and wives, a flexi-working hour system may be fairer for female workers.
- So, there is a dilemma about whether women should have equal rights or separate rights. Differential treatment perpetuates negative perceptions but is nevertheless needed as an aspect of affirmative action to remedy injustices of the past.



- **Work of equal value:** It is not enough to give equal pay for equal work. Protection should extend to equal pay for work of equal value. Nursing, which is dominated by women, tends to pay lesser than the work of excavator operators who are mostly men. Paradigms have to be shifted radically to compare the social worth of different jobs. The economic implications are staggering.
- **Education is not enough. We need empowerment:** Education is one of the keys to self-respect, independence and empowerment. However, in Africa and Asia it is being argued that education is not enough. What is even more important is paid work and employment. Polytechnics and universities must, therefore, restructure their programmes to create self-employed entrepreneurs who will create jobs and not join the mass of unemployed graduates.





- **Dignity versus rights:** Freedom and autonomy are important nourishments for the soul. Yet, it is also true that the exercise of some rights can diminish our dignity, perpetuate prejudices and entrench sexist views. The hedonistic, sex-laced culture (run by men) that pervades modern civilisation denigrates women in scores of ways.



- The fashion, cosmetics, film, TV and advertisement industries sexualise women. Females are depicted as mere objects of sexual desire and as frivolous and gullible beings. “Beauty pageants”, sports events and cheerleading squads do the same. Even girls in their early teens are not spared. Sex sells well. Outside a women tailor shop in Megamall it says: “If you have it, flout it.”

- Prostitution thrives and its peddlers are now anointed with the status “sex workers”. As long as there is prostitution there will be trafficking in women.
- Pornography pervades society. The Internet has worsened things.
- The women’s rights movement that takes a principled stand against the pervasive exploitation of women by men should take a similar moral stand against the overly liberal use of personal autonomy by some of their kind.



- In countries like Bangladesh and Thailand, there are demands for the fundamental rights of sex workers.
- Women leaders need to be reminded that it is not always right to use our rights especially if that contributes to the denigration of the entire female race. It must be realised that liberal society's moral laxity is, and will remain, fatal to women's dignity.

# CONCLUSION

- **No magic wand:** Gender bias cannot be exterminated by recourse to the law alone. The Constitution can confer legal and formal equality. Social and functional equality i.e. equality in any outcome is more difficult. For example, the equal right to vote does not result in equal representation in Parliament, the Cabinet and the higher echelons of civil service or industries. Around the world, women are still trapped in stereotyped roles.
- **Culture:** Deep-seated cultural values, socio-economic imperatives, psychological and biological factors and traditions as old as history have to be modified. In this area there are no destinations, only uncertain journeys. The battle has to be waged on many fronts. We all have a role to play.



- We need to put our heads together to see how our patriarchal past can accommodate the contemporary demand for equality and dignity. The panorama of possibilities is vast if we listen to each other with open hearts.

- **Religion:** We all recognise the entrenched, unshakable role and importance of religion in our lives. Throughout history, no political, economic, philosophical or rational theory has succeeded in displacing religion.
- Religion does do much good though it is also abused for horrendous purposes. As in most other cultures, many patriarchal institutions exist in our society. Some religious and hereditary posts are reserved for males. Despite the political executive's bold willingness to open up the Syariah judiciary to females, old attitudes persist and female appointees have remained marginalised.



- However, there is hope. In every religion there are doctrines, principles and precepts that can serve either purpose. Every religion is a mansion with many rooms. The character of every religion is influenced by the character of those distilling its essence. Many societies have brought reform (partial though it may be) by relying on more progressive views. These views are minority views. They are often suppressed and their holders persecuted and even killed. The challenge is to bring these voices to the mainstream.





- I wish to end on an optimistic note.
- Sociologists have observed that some aspects of ancient Malay culture gave women a relatively high status in Southeast Asia. Family structures did not always follow patriarchal patterns. Preference for male children was not widespread. Women played active economic roles. They maintained their family name even after marriage.
- This means that the future of gender equality may depend as much on understanding our past as in drawing inspirational lessons from abroad.