

Abstract

This paper takes a close look at the interpretation, application and adjudication of gender equality in Malaysia today. It begins by defining what we mean by gender equality, based on internationally accepted norms and standards. It then analyzes recent current events, such as the Beatrice Fernandez case and the Malaysian government's reporting before the CEDAW Committee, in terms of how they measure up against these international norms and standards. And outlines and examines the effectiveness of the Malaysian gender policies and mechanisms, as they exist today. Finding that the current system fails to provide full gender equality, the paper cites the need for gender equality legislation to achieve this goal. And it concludes by describing the current steps which are being taken to adopt this legislation, and by outlining in detail the latest draft of the Malaysian Gender Equality Act.

Introduction

Malaysia has yet to introduce legislation on gender equality.

It is not that gender equality was not considered important. Rather it was the fact that the Federal Constitution, while providing for equality under the law as well as prohibiting discrimination on the basis of race, religion, descent and place of birth, was until recently deafeningly silent on any prohibition of discrimination on the basis of sex or gender.

The omission of prohibition of discrimination of the grounds of sex or gender was certainly not unintentional since the Malaysian Constitution was modelled on the Indian Constitution which itself prohibited discrimination on the grounds of sex¹. Thus it was generally accepted that to campaign for comprehensive gender anti-discrimination laws prior to a Constitutional amendment to prohibit gender discrimination, would have been doomed from the start.

In 1985, the women's groups undertook an audit of the laws and submitted a memorandum on review and reform of gender discriminatory laws to the government². From this list, the women's groups, decided to concentrate their limited resources on those urgent reforms required in relation to violence against women (VAW) from a needs and later, rights perspective.

The VAW campaign emphasised providing immediate and effective redress for survivors of sexual and domestic violence. This resulted in a long campaign for legal reforms on rape, domestic violence and sexual harassment which spanned the better part of the 1980s to 1990s. Amendments to the rape laws were introduced in 1989 and the Domestic

Violence Act was passed in 1994 (enforced only in 1997). Although the government has promised amendments to the employment laws to address sexual harassment and many discussions had been held by the women's groups with governmental agencies as well as stakeholders, to date no legal provision on sexual harassment has been proposed in Parliament.

Apart from the VAW campaign, there were also intermittent successes which resulted in amendments made to several legislations to remove provisions that discriminate against women. These included amendments made to legislations pertaining to pensions, inheritance (for non-Muslims) and guardianship (for non-Muslims).

Then, in a seemingly politically opportune law passed in 2001, the Federal Constitution was amended to prohibit gender discrimination.³

The amendment to the Constitution brought hope that discrimination in other legislation would similarly be removed from the statute books. However, since the amendment to the Constitution in 2001, no attempt had been made by the government to audit the laws in Malaysia to ensure that they are non-discriminatory towards women despite promises from politicians to undertake this task.

Finally it was the occurrence of 2 separate events that dramatically showcased the urgent need for gender equality legislation.

The first was the *Beatrice Fernandez* case. The case traversed the Malaysian courts, ending in the apex Federal Court of Malaysia in 2005, 11 years after its commencement.

The second was Malaysia's submission of

its initial and second report to the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination against Women in May 2005⁴ which triggered efforts by the women's groups to produce a comprehensive shadow report.

This paper documents the Malaysian court's interpretation of equality under the law and the effect of constitutional guarantees on equality and fundamental liberties.

Part I lays out the different approaches to equality, namely formal and substantive equality.

Part II takes a detailed look at both the *Beatrice Fernandez* case as well as Malaysia's ratification of CEDAW.

Part III describes the prevailing social and political sentiments influencing gender equality in Malaysia. It also outlines the proposals that require special attention in any gender equality legislation in the Malaysian context, concluding with the framework of the proposed Gender Equality Act presently being prepared by the women's groups.

I. Equality and discrimination under the law: the case for substantive equality

Formal Equality

Equality is premised on the fact that women, like men, are persons to be accorded their full inalienable indivisible and inherent human rights. Human rights demand that women and men, who are alike, be treated equally.

Initially this was thought to mean that women and men should be treated alike. That is

like must be treated alike and the similarly situated must be treated the same. In other words, persons who are the same deserve the same treatment. This is known as formal equality.

However this notion of 'like treated alike' has inherent problems where there exist dissimilarities. As men and women are biologically different and socially differently situated, it is almost always possible to justify gender discrimination by emphasising these differences. In those instances, 'like treated alike' has sometimes proven to be an unwieldy tool.

For example, in a segregated labour market the struggle for equal pay for women had proved (and still continues to be), elusive. In this market, women are accepted as a distinct class of workers justifying differentiation of task and remuneration.⁵

Therefore, like treated alike is inadequate as a premise for equality because we can always find dissimilarities to justify discriminatory treatment.

This is not to say, however, that treating people the same will necessarily not result in equality. Sometimes treating people the same is discriminatory and sometimes treating them differently is discriminatory. For example, treating the disabled person and able bodied person the same may result in discrimination against the disabled. At other times treating them differently results in discrimination against the disabled.

Likewise, sometimes to treat women and men the same is discriminatory and sometimes to treat them differently is discriminatory.

Substantive Equality

The Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against women as

“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

In addressing the issue of equality, the Convention firstly addresses formal legal equality by requiring equal treatment of men and women. However, if equal treatment yields disparate results, then the law should look at ensuring equality of opportunity and removing barriers to women's advancement.

This is called substantive equality. Substantive equality is generally referred to as equality of access, equality of opportunity as well as equality of results.⁶

The unequal status of women also has many complex causes rooted in custom tradition and prejudice. Achieving gender equality requires change in institutional structures and systemic prejudices to facilitate the expression of women's capabilities which will result in the full participation of women in society.

II. Events Precipitating the Urgency for Gender Equality Legislation

1. Beatrice Fernandez v Sistem Penerbangan Malaysia⁷

Briefly, the facts of the case are as follows. Beatrice was employed as a flight stewardess by Malaysian Airlines. According to a collective agreement between the airlines and its union in 1988 which applied to Beatrice's employment, Beatrice was required to resign if she became pregnant; failing which she could be dismissed. When Beatrice became pregnant, Malaysian Airlines asked her to resign. Beatrice refused. In 1991, the airline terminated Beatrice's services.

Beatrice applied to the court to have her dismissal declared wrongful and to have the collective agreement provisions requiring her to resign on becoming pregnant, failing which the company could terminate her services, declared invalid.

By the time Beatrice's case was argued before the Courts, the constitutional amendments prohibiting discrimination on the grounds of gender had been passed.

Two articles in the Malaysian Federal Constitution are relevant. Article 8(1) states,

"All persons are equal before the law and entitled to the equal protection of the law"

whilst article 8(2), as amended, reads,

"Except as expressly authorised by this Constitution⁸, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or

in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment".

Beatrice argued her case on 2 levels. The first level was that the collective agreement discriminated against her as a woman. The second level was that the discriminatory provisions in the collective agreement were unconstitutional.

(a) Was Beatrice discriminated against?

The Court of Appeal answered this in the negative. Said the Court,

*"...we do not think that it can be argued that art. 2(3) of the First Schedule of the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men."*⁹

The Federal Court upheld this finding,

"... [T]he job requirements of flight stewardesses,"

said the court,

"are quite different from that of women in other occupations ... We take judicial notice that the nature of the job requires flight stewardesses to work long hours and often flying across different time zones. They have to do much walking on board flying aircrafts. It is certainly not a conducive place for pregnant women to be in".

"The applicant cannot compare herself with the ground staff or with the senior chief stewardesses or chief stewardesses as they were not employed in the same category of work."

The Court also said,

“...our hands are tied. The equal protection guarantees in clause (1) of art. 8, therefore extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret art. 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention.”

(b) The comparator

It is curious that the comparison argued before the court and ultimately adopted by the court in the *Beatrice Fernandez* case to determine whether discrimination had occurred was not between a man and woman but between a stewardess and a chief stewardess.

This choice may well find its reasoning in the difficulty of framing a male comparator in a pregnancy situation. In pregnancy, the search for a male comparator had always proved difficult, if not impossible. Pregnancy is a social function which can only be discharged by women. There is no male comparator. There is no similarly situated male equivalent.

It was perhaps this difficulty which prompted the lawyers as well as judges to compare Beatrice not to a male flight steward, but to a female chief stewardess. The absence of a comparator may have also compelled the Court to conclude that female flight stewardesses are a separate class of workers which require separate treatment.

With due respect, courts in other jurisdictions have argued discrimination on the grounds of pregnancy differently. Compare the Malaysian

dicta to that in *Brooks v Canada Safeway Ltd*¹⁰, where the Supreme Court in finding that unequal treatment due to pregnancy offends the principle of equality, said,

“I venture to think that the response to that question by a non-legal person would be immediate and affirmative. In retrospect, one can only ask -- how could pregnancy discrimination be anything other than sex discrimination? ... It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.... Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights.... The denial of benefits was the result of her pregnancy. Since pregnancy is a condition to which only women are vulnerable, the denial should have been characterized as sexual discrimination. ...discrimination against some women should not be treated any differently than discrimination against all women.... It may be unduly restrictive and somewhat artificial to argue that a distinction based on a characteristic such as pregnancy, which is shared only by some members of a group, is not discrimination against the whole group. ...for discrimination which is aimed at or has its effect upon some people in a particular group as opposed to the whole of that group is not any the less discriminatory. This

point was made by a board of inquiry under the former Human Rights Code, R.S.B.C. 1979, c. 186, in the case of Zarankin v Johnstone (1984), 5 C.H.R.R. D/2274, at p. D/2276, . . . wherein the board stated: . . . an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only one group adversely."

Adopting the reasoning in *Brooks*, it can be argued that whilst both men and women can become parents, the manner in which each becomes a parent is different. In this instance we have a contractual term that looks at the differences between people and penalises one group of people because of that difference. Thus under the test laid out in *Brooks*, the airlines' conduct does constitute gender discrimination.

In dismissing another employer's argument that the dismissal of a pregnant employee was not due to her pregnancy but due to her inability to work, the European Court of Justice said,

*"In circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged."*¹¹

As the theory of equality requires that nobody be discriminated against because of his/her difference, it similarly recognises that unless provisions are made for pregnancy like childbirth benefits, women would suffer loss of income and also incur extra expenditure.

The fact that maternity benefits are not made available to men is not discriminatory as equality ensures that nobody should be prejudiced because of his/her differences.

(c) Vertical Effect of the Constitution

What is the effect of a constitutional guarantee of equality under the law and prohibition of discrimination on the basis of gender? Quoting with approval from an Indian text book on constitutional law, the Court of Appeal in *Beatrice Fernandez* held that

*"The very concept of a 'fundamental right' involves State action. It is a right guaranteed by the State for the protection of an individual against arbitrary invasion of such right by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but the constitutional remedy would not be available."*¹²

This was confirmed by the Federal Court, the apex court in Malaysia.

*"We found that it is simply not possible to expand the scope of art.8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art.8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual."*¹³

The interpretation accorded by the Malaysian courts on the constitutional effect is called the “vertical effect” which essentially stipulates that constitutional law, as a branch of public law only addresses the contravention of an individual’s rights by a public authority. Where the rights of a private individual are infringed by another private individual, constitutional law (substantive or procedural) will take no cognisance of it. The very concept of ‘fundamental rights’ involves State action. These are rights guaranteed by the State for the protection of an individual against the arbitrary invasion of such rights by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but constitutional remedies will not be available.¹⁴ The opposite view on constitutional effect was adopted in the celebrated Indian case of *Vishaka & Ors v State of Rajasthan & Ors*¹⁵. This case was initiated after an alleged brutal gang rape of a social worker in a village of Rajasthan.

Vishaka was a class action by social activists and NGOs which sought to focus attention on gender equality. The alleged rape exposed the urgency in curtailing the hazards to which a working woman was subjected. The aim of the legal action was to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

There the Indian Supreme Court gave a broad meaning to constitutional guarantees,

“Each incident of sexual harassment of woman at workplace results in violation of the fundamental rights ... Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognised

basic human right. The common minimum requirement of this right has received global acceptance. The international conventions and norms are therefore, of great significance in the formulation of the guidelines to achieve this purpose. ... The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.”
[Emphasis mine]

The case of *Beatrice Fernandez* raised concerns regarding the narrow application of a Constitutional prohibition against gender discrimination. *Beatrice Fernandez* set a precedent which, not only entrenched the vertical effect of constitutional guarantees in Malaysian law, but also a narrow and literal understanding of discrimination.

(d) The Common Law Tradition

The jurisprudence from many common law countries, a tradition shared by Malaysia, shows that countries are developing their jurisprudence towards a strong respect for human rights and international human rights norms, using the common law itself, rather than the Constitution, as its source.

A common law country is defined by the ability of judges not only to interpret legislations but to make law. In India, Australia, the United Kingdom and Hong Kong, judges had drawn upon this tradition to proclaim human rights principles.¹⁶

In some of these countries, the courts have developed and proclaimed fundamental human rights to be inherent in the common law, without reference to parliamentary

instruments.

“[S]ome rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.”¹⁷

Not only was *Beatrice Fernandez* a lost opportunity for the Malaysian courts to adopt a more contemporary understanding of gender equality and constitutional effect, it was also a lost opportunity for the courts to explore the extent common law could have been used as the source of fundamental rights.

2. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

In conjunction with the 4th World Conference on Women, Malaysia ratified CEDAW with reservations¹⁸ in 1995.

The original reservations read as follows:

“The Government of Malaysia declares that Malaysia’s accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia’ law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2 (f), 5 (a), 7 (b), 9 and 16 of the aforesaid Convention. In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.”

On 6 February 1998, the Government of Malaysia withdrew its reservation in respect of article 2(f), 9(1), 16(1)(b), 16(1)(d), 16(1)

(e) and 16(1)(h). Malaysia also made a commitment to review the other reservations. Yet to date the remaining reservations have not been withdrawn.

CEDAW, although ratified by the government in 1997, has also yet to be made enforceable in domestic courts. Legislation to adopt CEDAW is crucial as Malaysia practices a dualist legal system in that any international treaty entered into by Malaysia, is not self-executing. This requires that a law has to be passed at the national law to give effect to the international commitments entered into.

(a) Dualist Legal System

A treaty is not part of domestic Malaysian law unless and until it is passed as legislation by parliament. Although small windows have opened where Malaysian courts have referred to international human rights treaty obligations¹⁹, this is still a far cry from the courts actually enforcing treaty obligations.

The adoption of a dualist legal system is shared by many common law countries. While the principle is admirable, in that it protects the people and the parliament from executive action, in matters of human rights, the non-incorporation of international human rights norms into domestic law means that human rights treaties cannot operate as an independent source of individual rights and liberties. For this reason, there have been efforts in other jurisdictions to tamper the effects of the dualist legal system theory particularly where human rights are concerned.

Reference to this can be found again the case of *Vishaka & Ors v State of Rajashtan & Ors*²⁰. Said the Indian Supreme Court,

“Independence of the judiciary forms a part of our constitutional scheme. The

international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v Teoh²¹ has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose.”

Taking *Vishaka*'s case and the Australian case of *Teoh* cited by the Court²², as persuasive precedents, it is possible to argue that upon Malaysia's ratification of CEDAW, a legitimate expectation was created that the government would observe and enforce the basic human right of gender equality, with or without domestic legislation. The courts can then declare the rights articulated in CEDAW as applicable in the domestic Malaysian context.

(b) The Law of Treaties

In any event, it is a well established principle of international law that once a State ratifies an international treaty, the State is bound to implement the treaty provisions in good faith²³. Whether the treaty has been incorporated into domestic law does not alter the State's obligation internationally.²⁴

III. The Malaysian Gender Equality Legislation

Legal precedents in Malaysia conclusively point to the fact that gender equality legislation is imperative. Malaysian courts have yet to take cognizance of legal judicial developments in other States such as horizontal effect of the Constitution, substantive equality, and legitimate expectation of accessibility by citizens to human rights guarantees under ratified international treaties as well as the centrality of human rights including equality and non-discrimination in national jurisprudence.

Further, in considering the Malaysian Government's report at the thirty-fifth session of the CEDAW Committee in 2006, the Committee stressed that Malaysia needed new laws directed specifically at eliminating sex and gender discrimination and recommended that a nation-wide mechanism to guarantee fully the rights of Malaysian women be created.

But before embarking on a new legislation, it is worthwhile to take into account the political climate as well as mechanisms already existing in Malaysia.

Political Will and Religion

Gender has not featured prominently in the political scene of Malaysia. Instead racial or ethnic politics has been the mainstay of post independence politics. Fifty years after independence, political parties are still divided along racial/ethnic lines and there has hardly been any perceptible shift from racial/ethnic politics.²⁵

Gender discourse has also been complicated by conservative religious interpretations which form the next layer of identity politics,

often colouring the arguments against gender equality. Coinciding with the rise of religious revivalism globally, Malay-Muslim²⁶ politics has resulted in a rise in ideological political and legal challenges to the legitimacy of women's claims for equality in the context of Muslim culture and religion.

Although such conservative interpretation has been subject to challenges from voices within and outside the religion, it nevertheless has substantial influence amongst many State religious officials.

Still, few Muslims will deny that Islam upholds justice as well as promotes and protects rights of women.

Retired Chief Judge of Malaya, the Honourable Tan Sri Siti Norma Yaakob, in her opening address underlined the relationship between Islam, justice and equality,

*"It is my belief that Islam accords women equal rights with men. ... Like many Muslims, I do not believe that Islam, which abhors injustices, treats women any less than it treats men. Women, like men are vice-regents on earth; equal in the eyes of Allah and it is our collective responsibility to ensure that principles of justice and equality are reflected in our laws."*²⁷

In October 2003, when Dato' Seri Abdullah Badawi became Prime Minister, he espoused an approach to Islam focusing on 10 fundamental principles, one of which is the protection of the rights of minority groups and women²⁸

"which is authentic and rooted within the tradition, yet human, just and compassionate" and "where women will not feel that statements describing Islam as a religion of justice and

*mercy in reality only speak to women with exceptions – inadvertently or otherwise".*²⁹

Explained Abdullah,

*"Women receive a specific mention because I believe that despite the fact that women in many parts of the world have become more emancipated, women in many Muslim countries continue to be marginalised and discriminated against. I find it most lamentable ... that [women have not] gained the status that they are entitled to, in terms of rights, equality and justice".*³⁰

While Abdullah appears to advocate a progressive interpretation of Islam, even questioning the applicability of Muslim legal principles purportedly final and complete fourteen hundred years ago in solving the problems that contemporary Muslim societies are confronted with today, there has been little change in the implementation of Muslim laws to the daily lives of Muslims, demonstrating once again the disconnection between political rhetoric and parliamentary and bureaucratic implementation.

Existing Policies and Mechanisms

Any gender equality legislation, to be effective, must provide for a framework or mechanism to promote gender equality.

Throughout the years, the government had established advisory councils³¹, secretariats, government affiliated NGOs and most recently a Cabinet Committee on Gender Equality to take forward women's issues.

In 1989, the government formulated the National Policy on Women as a guide for women's participation in the development process and thereby overcoming challenges

through poverty eradication and education. In the 6th of the national five year plans (1991 – 1995)], a chapter on women in development was introduced for the first time. However in its tone and language, the national plan, while constituting women as vital economic resource, clearly still perceived women's crucial role to be in family development.³²

In January 2001, the Government established a Women's Affairs Ministry which was subsequently (after a very short time period) changed to the Ministry of Women, Family and Community Development.

Upon her appointment, the Minister declared a policy of co-operation with women's NGOs to promote women's issues. This raised hopes that women's issues would receive the focused attention it needed to fuel a more holistic and integrated approach to expedite equal opportunity for women's full participation in the social and economic development of the country.

In line with this, several taskforces followed by national steering committees and thereafter, technical working groups were established by the Ministry (whose members included women's NGOs representatives) to look into key areas of concern including legal reform. The mechanisms initially functioned but gradually ceased operating, culminating in a withdrawal of women's NGOs from these mechanisms.

A Cabinet Committee on Gender Equality was also set up by the Cabinet of Ministers to advise the cabinet on policies and monitor activities pertaining to women and family development.

In 2004, a Parliamentary Caucus on Gender Equality was formed. However as the furore

over sexist remarks by parliamentarians in May of 2005 illustrated, political affiliations trumped gender concerns.³³

A Human Rights Commission was also established under the *Human Rights Commission Act 1999*. The Commission's functions are to promote human rights, advice, assist and make recommendations to the government as well as inquire into complaints. In relation to its powers of inquiries, the Commission is given power to inquire but not the power to compel attendance of witness or production of documents at its inquiries. Nor is the Commission empowered to enforce its findings. An annual report is to be submitted to Parliament each year but Parliament is not bound to table or debate the report, as a result of which none of the Commission's reports and recommendations had been debated by Parliament.

In August 2004, the government adopted a policy of 30% women in decision-making levels in the public sector. However, to date, the policy remains unimplemented. Neither the ruling political parties nor the opposition parties fielded even 15% women in their list of electoral candidates. The Ministry for Women Family and Community Development has presently commissioned national research to analyse and recommend the best practices and the way forward with regards to this policy.

On the international stage, the Government of Malaysia set up the Non Aligned Movement (NAM) Institute of Women's Empowerment (NIEW) in Kuala Lumpur which has different functions including conducting training on women's empowerment and gender equality to participants from NAM nations. The establishment of NIEW coincided with Malaysia's hosting the meeting of the Non-Aligned Movement (NAM) in 2006.

In launching the Institute, Abdullah Badawi, the Prime Minister of Malaysia gave an inspiring and forward looking speech, calling on all NAM nations to take firm and unequivocal steps to achieve humanity's vision for equality, peace and development and reminding them that

“it takes a great deal of moral courage and fortitude to be able to challenge long-held and deeply ingrained societal beliefs about the role of women in society, particularly if religion is cited as the main reason for their subjugation.”

Indeed Malaysia's desire to leave a legacy of its chairmanship of NAM had propelled Malaysia to take a normative stance on gender equality, even if at the national level, there is opposition against and challenges to gender equality.

The Proposed Gender Equality Legislation

While it is important to refer to the Constitution as a source of protection of individual rights and freedom, as shown in the *Beatrice Fernandez* case, the Constitution in itself does not afford sufficient protection of women against discrimination. Neither the Courts nor the government of Malaysia has committed itself legally to guarantee women protection from or redress for discrimination on the basis of gender.

Under such circumstances it is imperative the gender equality legislation be promulgated. Equality in both the public and private sphere should be implemented through comprehensive laws with effective remedies if violated. The proposed gender equality legislation must unequivocally make it clear that the objective of gender equality shall be applicable in all circumstances.

In its promulgation, the legislation must pay special attention to address the legal issues raised in *Beatrice Fernandez* as well as pre-empt any attempt to refer to extraneous sources to whittle away the effect and purpose of the legislation.

Chief amongst the concerns to be addressed is the definition and understanding of gender equality, both formal and substantive (equality of opportunity, access and results). Special attention must also be given to the definition of discrimination, both direct and indirect. Discrimination itself must be defined in broad terms and must exclude special provisions on pregnancy childbirth and breastfeeding from the definition of unlawful discrimination.³⁴

The legislation must categorically make unlawful discrimination on the basis of gender, irrespective of whether gender forms the sole ground for discrimination or otherwise, and irrespective of whether the discrimination is direct or indirect. This protection must apply regardless of who the perpetrator of such discrimination may be.

The legislation must adopt CEDAW and grant it the force of law in Malaysia, and for that purpose the legislation must be construed in accordance with the provisions of CEDAW. The gender equality legislation cannot merely refer to CEDAW³⁵ but it must actually categorically state that the purpose of the legislation is to adopt and implement the provisions articulated in CEDAW.

The implementation of the gender equality law cannot be restricted by societal beliefs, even if religion is cited as the reason for such beliefs. The rejection of religion as a ground for denying gender equality is supported by many traditional and contemporary religious intellectuals and scholars. In

deciding between conflicting opinions, it is important to keep in mind that most religious philosophies uphold justice, equality and equity. Furthermore, many countries of different religious persuasions have found ways to reconcile custom and religion with gender equality.

The legislation must also provide for temporary special measures to facilitate the objective of gender equality where systemic biases exist.

Past or existing mechanisms have proven unable to deliver gender equality. A dynamic, independent and effective national mechanism like a Gender Commission must be set up guarantee women's rights. The mechanism to be set up must be transparent, independent and free from political influences. The mechanism must be vested with sufficient authority and power to enforce the provisions of the legislation and be accountable to Parliament with its reports and recommendations tabled, considered and debated by Parliament³⁶.

The gender equality legislation must also provide that the legislation shall prevail in the event of conflict with any other law. This will avoid the necessity of auditing and amending all laws and regulations. However, as legislation cannot prevail where it conflicts with the Federal Constitution, which is the supreme law of the federation, simultaneously with the tabling of the gender equality legislation, amendments to the Federal Constitution must similarly be tabled to remove all discriminatory provisions in the Constitution.

Draft Gender Equality Act

In fact, the women's groups in Malaysia have prepared an initial draft of the proposed

Gender Equality Act and are in the process of finalising the proposed Act.

Briefly, the proposed Act is divided IX parts.

Part I contains the preliminaries which incorporates the policy of the government on gender equality and gender discrimination, the basic objectives of the Act, the applicability of international human rights treaties, in particular CEDAW and the relationship between the proposed Act and other laws in the event of conflict in that the provisions of the Act shall prevail.

A broad definition of equality and discrimination is also included, taking into account the legal theories and jurisprudence in this area.

Part II establishes the Gender Equality Commission with emphasis on the independence of the Commission. The objective of the Commission is to promote gender equality and eliminate gender discrimination. The Gender Equality Commission shall consist of independent members and the Commission itself shall have access to statutory funds. The Commission has advisory, monitoring, and investigative functions. The Commission may also intervene in cases involving gender discrimination. The Commission is answerable to Parliament and shall submit a report listing its activities and recommendations to Parliament annually for debate. The report shall be made available to the public.

Part III regulates the executive staff of the Commission.

Part IV sets out the meaning of discrimination and equality to include formal and substantive equality. Direct and indirect discrimination

is prohibited. Motive and knowledge is irrelevant.

This part also discusses sexual harassment and provides for exemptions and exceptions whereby protection of women because of pregnancy, childbirth or breastfeeding and special temporary measures do not constitute unlawful discrimination.

Part V prohibits victimisation of complainants and witnesses. It also prohibits authorisation of discrimination and establishes the vicarious liability of employers and principals for discrimination committed by their employees and agents unless reasonable precautions have been taken by the employers and principals.

Part VI sets out the inquiry procedure and **Part VII** provides for conciliation for those who favour such procedure provided that such conciliation must be undertaken freely and without coercion by any party.

Part VIII sets up the Gender Equality Tribunal. Recognising that the court process is formal, cumbersome and unfriendly; and following from the successful industrial court process as well as other newly formed adjudicative boards; the Act sets up a tribunal as an alternative mechanism to expedite adjudication of discrimination cases in a less formal and less technical setting. A specialised tribunal will also help develop the jurisprudence on gender discrimination.

Part IX contains general provisions such as power to make regulations and prevention of anomalies.

Conclusion

The proposed legislation has yet to be discussed with the government and also

disseminated to other political parties for discussion. Initial attempts to propose gender equality legislation has been rejected by the Prime Minister.

Still, the power of persistence and a good argument cannot be underestimated. Equality and equal opportunity are central in a democracy. Gender equality legislation is but a small step towards strengthening our democracy and engendering respect for human rights that is universal inalienable and indivisible.

In concluding, I would like to refer to the decision by Hartmann J in the Hong Kong case of *Equal Opportunities Commission v Director of Education*³⁷ as a reminder of the importance and pivotal status of protection of human rights in a legal system,

"In my judgment, if there is a central pillar around which the edifice of Hong Kong's legal system is built, it is respect for the rights and freedoms of the individual. That is manifest in our instruments of constitution, in our adherence to various international conventions and in our domestic law... These guarantees of equality – the antithesis of discrimination – call for a generous and purposive interpretation by our courts... It is not disputed that the right to equal treatment free of sex discrimination is in our society a fundamental right; as Lord Lester expressed it, a right of high constitutional importance."

In principle, Malaysia has proclaimed its adherence and commitment to the ideal of gender equality to both the international community as well as to its citizens. It is now time to realise and implement that ideal through legislative and policy means.

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Addendum

This paper was revised and updated for the purposes of publication and refers to events occurring and cases decided after the *Conference on Mechanisms and Legislation to Promote Gender Equality* held in Kuala Lumpur in August 2005.

Endnotes

- 1 Article 15(1) of the Indian Constitution reads, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."
- 2 See 1985 Memorandum submitted by the National Council of Women's Organization on Discriminatory Laws against Women
- 3 Article 8(2) of the Malaysian Constitution now reads, "Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law ..."
- 4 In June 2005, less than 2 weeks after Malaysia having submitted its report to the CEDAW Committee, the author presented a paper entitled *Gender Equality – the Need for Legislation* at a conference jointly organised by the Swedish Embassy and the Ministry for Women, Family and Community Development. The Minister promised to undertake a study and appoint a committee to look into this. The result of this study, or even whether a study was conducted, was not made public.
- 5 Development in this area was accelerated during the First World War when women workers engaged to do jobs of male workers drafted into the army, were employed on equal pay. However after the war, many women were removed from the workforce and equal pay was again ignored. Webb and Webb, *Industrial Democracy* (Longmans, 1897) as quoted in Fredman, *Women and the Law* (Oxford University Press, 1997)
- 6 See Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New definition of Equal Rights* in Borefin, Coomans, Goldschmidt, Holtmaat & Wellenswinkel (eds), *Temporary Special Measures – Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia 2003)
- 7 [2004] 4 CLJ 403 (Court of Appeal) and [2005] 2 CLJ 173 at 719 (Federal Court)
- 8 The Constitution itself authorises a diverse array of gender discrimination. Discrimination is allowed under the Constitution in any "practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion", in education, in the right of parents to decide on the religion of a minor as well as in the right of a woman to confer citizenship on their children or in the right of foreign husbands to receive permanent residence status

- in Malaysia. Discrimination is also specifically authorised in the regulation of personal law, effectively leaving Muslim personal law unaffected by the amendment.
- 9 [2004] 4 CLJ 403 at 408
 - 10 (1989) 1 SCR 1219
 - 11 *Carole Louise Webb v EMO Air Cargo (UK); Ltd. (Social policy)* [1994] EUECJ C-32/93 (14 July 1994) <http://www.bailii.org/au/cases/EUECJ/1994/C3293.html> (accessed 15 Nov 2005)
 - 12 [2004] 4 CLJ 403
 - 13 *Beatrice AT Fernandez v Sistem Penerbangan Malaysia* [2005] 2 CLJ 173 at 179
 - 14 *Ibid.* The opposite, which is that the constitution affects private dealings between individuals, known as the horizontal effect has been adopted to varying degrees, in other common law and civil law jurisdictions. See also Gardbaum, *The "horizontal effect" of constitutional rights*, Michigan Law Review, Dec 2003 v102 i3 p387(73)
 - 15 (1997) 6 SCC 241
 - 16 At the same time, common law judges are mindful not to 'usurp' the lawmaking functions of parliament, creating for themselves areas in which judge law making is acceptable.
 - 17 *R v Secretary of State for the Home Department, ex parte Daly* [2001] per Lord Cooke
 - 18 Reservations are declarations made by State parties to a treaty that they do not accept certain provisions as binding on them. Reservations are allowed so long as they are not incompatible with the object and purpose of the treaty. Incompatible reservations may be challenged by other State parties.
 - 19 See *Abdul Malek Hussin v Borhan Hj Daud* [2007] 1 LNS 460 where the Judge held, "I am mindful of the fact that I am presently dealing with the fundamental liberty of the citizens. The preservation of the personal liberty of the individual is a sacred universal value of all civilized nations and is enshrined in the Universal Declaration of Human Rights and Fundamental Freedoms of 1948". See also *Jakob Renner v Scott King, Chairman of Board of Directors of Kuala Lumpur International School* [2000] 3 CLJ 569
 - 20 id 15
 - 21 128 ALR 353
 - 22 See also *R v Secretary of State for Home Department ex parte Mohamed Hussain Ahmad* <http://www.bailii.org/ew/cases/EWCA/Civ/1998/1345.html> on the 'legitimate expectation' principle in *Teoh* (accessed on 24 Jan 2008) and Gopal Sri Ram, *Human Rights: Incorporating International Law into the Present System* at <http://www.mj.com.my/free/articles/gopalsriram.htm>
 - 23 Article 26 of the Vienna Convention on the Law of Treaties 1969 states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
 - 24 Article 27 of the Vienna Convention on the Law of Treaties 1969 states inter alia, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
 - 25 Ethnically Malaysians comprise 65% Malays and 'original inhabitants', 25% Chinese and 10% Indians. The formation of Malaysia post colonial rule is by 'social contract' between the 3 major ethnic groups with the Malays being guaranteed special rights under the Federal Constitution. Some would argue that the results of the recent General Election on 8 Mac 2008 is the first significant indication of the nation overcoming ethnic politics when Malaysians voted across ethnic divide.
 - 26 A Malay is defined under the Federal Constitution as also a Muslim, creating a unity of identity of a Malay with Islam.
 - 27 Opening speech at the International Conference on "Legislations and Mechanisms to Promote Gender Equality", Kuala Lumpur, 28 August 2006
 - 28 The 10 principles are :- faith and piety in Allah, just and trustworthy government, independent citizenry, mastery of knowledge, economic development, quality of life, protection of the rights of minority and women, cultural moral integrity, restoration of the environmental, strength in defense
 - 29 Inaugural lecture by the Prime Minister at the annual Abdullah Ahmad Badawi Women's Institute of Management annual lecture series, 15 January 2005, Kuala Lumpur
 - 30 Speech given at the Non-Aligned Movement ministerial meeting on the advancement of women at Putrajaya 9th May 2005.
 - 31 A National Advisory Council for the Integration of Women in Development (NACIWID) was established in 1976 to coincide with the International Decade for Women and the call by the United Nations for women to be integrated in development. As an advisory council however, NACIWID lacks implementation powers and was unable to move the women's agenda forward. see Ng, Mohamad & tan beng hui, *Feminisms and the Women's Movement in Malaysia*, 2006 Routledge
 - 32 Ng, Mohamad & tan beng hui, *Feminisms and the Women's Movement in Malaysia*, 2006 Routledge pp68-69
 - 33 In May 2005, in a debate over water leakages in the Parliament building, 2 male parliamentarians from the ruling party made sexist remarks against an opposition woman parliamentarian, saying she too 'leaked every month'. Members of the gender caucus from the ruling party defended or excused their remarks as inconsequential.
 - 34 *Ibid* 9
 - 35 *Mohd Ezam v Inspector General of Police* [2002] 4 CLJ 309. The Court held that the provision under the *Human Rights Commission Act* which provided that 'regard shall be had to the Universal Declaration of Human Rights' was merely an invitation to consider and be persuaded by the Declaration, if need be.
 - 36 Compare this to the Human Rights Commission. The commission's reports have yet to be debated by Parliament as there is no provision for the reports to be debated in Parliament.
 - 37 Hon Hartmann J in the Hong Kong case of *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 (HCAL15555/2000) at par. 80, 97 and 98