

**Constituting Women's Rights in Malaysia**  
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## **INTRODUCTION**

As modern state Malaysia strives to move forward in its economic growth and progress, civil liberty rights and cultural and religious rights are increasingly being negotiated, and at times intensely. Such contestations have demanded response from the government as well as civil society - as in the arrest and destruction of the Sky Kingdom cult in Trengganu in 2005, the well known Lina Joy's case related to freedom of religion, and in the fights to claim bodies to the extent of snatching the deceased bodies by religious authorities who allegedly claim that they had converted into Islam.

These constitutional issues have impact on citizens' as well as women's rights. Claiming women's rights is constantly a battlefield as it is being contested and marginalised as there are various legal frameworks in forwarding justice and democracy. In understanding women's discrimination, the constitution and laws shall be interrogated to reflect their impact on the daily lives of women in Malaysia. Law makers, such as Parliamentarians, State Assembly persons and local councilors, have to ensure that the creation and amendment of laws can lead to the protection and fulfillment of the rights of women. In the case of Lina Joy and many of such similar cases, can competing rights be addressed in the context of a multi-cultural multi-religious Malaysia?

This paper will review the inter-relatedness between constitution and laws with the notion of equality and women's rights. It argues that equality and justice is crucial in forwarding women's rights as present laws and practices do not reflect on the realities and experiences of today's society. Discrimination faced by women need to be interrogated in relation to the universal human rights principles, fundamental rights and constitutional guarantees. Today's laws and customs in Malaysia have not kept up with changing realities and some are outdated. This has created many injustices and discrimination against women. When a woman suffers injustice in the family, it affects

her dignity, personal security, mobility, property, citizenship, nationality, employment and ability to participate politically. Women's access to justice must be matched with equality, dignity and freedom from discrimination.

## **Concept of Equality**

An understanding of the discrimination faced by women has to premise on an understanding of the notion of equality and justice, which are underlying principles when constitution and laws are enacted. There are many interpretations on the theory of equality and below we will review them in relation to their impact on women's rights.

### **Formal Equality**

Formal equality means that women and men are viewed as being the same and therefore sets out to treat women the same as men. In so doing, both men and women enjoy the same opportunities, rules and standards and discrimination cannot happen as long as the law treats likes with likes and unlikes with unlikes.

This model of formal equality can also recognise difference. Since women and men are different then they can be treated differently even if it means that women and men may benefit differently. For example, air stewardess can have compulsory retirement age which is lower than men under the assumption that women lose their attractiveness after 40 years old. It is not viewed as discrimination, as only those who are alike need to be treated in the same way. Slaves did not need to receive the same privilege as their masters as they were not the same category or group of people.

The model is problematic in that it does not take into consideration the biological and gender differences between women and men. This places a great pressure on women who have to perform according to male standards. Women cannot have access to or benefit from opportunities in the same manner as men when there is so much difference between condition of women and men. Or if they do, it will be at great expense to themselves. The formal model of equality adopts what can be single standard rules as well as it accepts women's inequalities as they are not the same as men. When women

suffers rape, domestic violence, these occurrences are due to sex differences and not inequalities. This means that discrimination can only happen within the same group of people, in terms of rank, status or qualities, and if another group of people are not the same, then no discrimination occurs. This approach can also justify for racial segregation as the rationale is that it only happens to the same group of people. Others are not discriminated because they are not of the same group of people.

### **Protectionist Approach to Equality**

The **protectionist** approach recognises the biological differences that exists between men and women. Its approach to laws and policies would be that women need to be protected from harm and the way to do this is to exclude them certain aspects of society as it is for the best interest of women. For example, the protectionist approach would prohibit women from doing night work because the social environment is not safe at night. Women may be prone to sexual harassment and rape and in order to prevent this, women need to stay away from night work. This reproduces old myths: that women are less safe at night-time and that violence against women only happens at night. It also frees the state from carrying out its obligation to secure environments for women to allow them the freedom to carry out activities of their choice at any time.

Protectionist approaches see the differences between women and men but constitute these differences as weakness or inferiority in women. The barring of women from night work serves to curtail women's freedom to work, which is a right men enjoy and they are not denied on the assumption that men can take care of themselves and able to defend for themselves as compared to women.

Protectionist approaches are inherently limiting in that they do not challenge gender discrimination, but reproduce it in the need to protect women. In this sense the difference is considered to be naturally ordained and the approach serves to reinforce the subordinate status of women.

## **Substantive equality**

Substantive equality consolidates two central approaches to equality. First, it stresses the importance of *equality of opportunity* in terms of women's access on equal terms with men to the resources of a country. This has to be secured by a framework of laws and policies, and supported by institutions and mechanisms for their operation. This approach emphasises that the measure to secure the human rights of women and men needs to ensure *equality of results*. The indicators of progress lies not just in not just what has been done but in what has been achieved in terms of real change for women.

Substantive equality comes with equal treatment, equal access and equal benefits. Hence, it recognises that women and men may have to be treated differently in order for them to benefit equally. This may take the form of providing enabling conditions and or affirmative action. The underlying argument is the recognition that formal equality, often manifested in a gender-neutral framing of policy or law, may not be sufficient to ensure that women enjoy the same rights as men. That is to say, *framing* a policy for "people" implicitly including women and men, while not excluding women per se, may result in a de facto discrimination against women. This is because of the fact that women and men are not the same. Not only is there a significant biological difference between women and men (women bear children, not men), but gender differences (socially-created difference between men and women upheld by ideology and perpetuated by socialization processes) also result in norms and assumptions made about women and men's roles in society are, what their capabilities, needs and interests are, which influence both policy-making and its implementation. Differences between men and women whether based on biological (sex) difference or socially created (gender) differences results in women's asymmetrical experience of disparity and disadvantages.

Initiatives for the realisation of women's rights need to compensate for or cater to the difference, disparity or disadvantage. This means taking into account the ways in which women are different from men, and ensuring that these differences are acknowledged and responded to by legal interventions and implementations. However, how this is done, depends on what kind of analysis informs the legal contents. Presently, laws do

not take into account the differences between women and men and have not been immediately favourable to women - in fact, they have discriminatory effects, if not in intention. In order to be able to intervene effectively in favour of women's rights and equality, it is important to have a conceptually sound understanding of what or why differences exist between women and men.

The substantive model of equality explains discrimination by recognising that differences are premises on the fact that women are in unequal positions because they face current discrimination, or they come bearing the effects of past discrimination, or that the environment at the family and public levels, is hostile to women's autonomy. This approach assesses specific provisions or rules to see whether the rule in question contributes to women's subordination in the short or long term, whether it builds on existing subordination, thus reinforcing it, or whether it helps to overcome that subordination. If there are job opportunities that require night work, there would be public policies or laws that require employers to make some provision that would make it safe for women to work at night instead of placing a ban on night work. This could be the provision of transport for women workers etc.

Furthermore this approach requires that socially constructed differences such as the traditional roles ascribed to women and men as well as cultural practices that see women as inferior need to be changed. In particular, it recognises that the function of child bearing is borne exclusively by women and presents a case for viewing child bearing as a social function which cannot be used as a basis for discrimination against women.

The substantive approach recognises that in order to redistribute benefits equally between women and men, approaches to promoting women's rights must transform the unequal power relations between women and men in the process. For this to happen, policies, laws and programmes must aim to provide **enabling conditions**, in the form of the basic social, economic and cultural contexts within women may be able to lead their lives with dignity. **Affirmative action in the form of temporary special measures** need

to be in place where women's needs are specially recognised and catered for in the context of employment, education, financial services, politics and all other spheres of life in order to enable women to overcome barriers that are historical or those that arise from male domination in the system.

Such an understanding of equality broadens the approach to equality. An example of this approach can be seen in the Canadian Charter of Rights and Freedoms (1982), Section 15 (i) of the charter reads:

“Every individual is equal before and under the law and has the right to be equal protection and equal benefit of law without discrimination and in particular, without discrimination based on race national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

This broad legal approach to equality is essential as it would help spell out the different aspect of equality rights to include when seeking legal protection for women: equality in the substance of the legal texts, equal treatment under the law, access to the law and its institutions and finally the de facto enjoyment of equal rights. Taken together, equality rights recognise the different discrimination suffered by different categories of people and individuals. In so doing, their entitlements and access to rights and equality can be integrated and taken into consideration by legal provisions that will facilitate the fulfillment of the different level of equality rights.

The contexts in which women facing discrimination and the how that had created inequalities will require re-examining past events, historical disadvantages, female subordination, male dominance and privileges and current patriarchal institutional arrangements. It demands that the actual conditions experienced by individual women and groups of women be examined and that structural barriers be removed. Additional programmatic efforts, special measures and differential treatment of women are some steps taken in order to gain the results in the achievement of equality.

## The Malaysian Federal Constitution

In order to understand the relationship between the equality theory and the Malaysian constitution, this section gives an overview of the Federal Constitution which guides and protect citizens' rights.

Malaysia subscribes to the doctrine of the Separation of Powers and the Federal Constitution (FC) is the supreme law<sup>1</sup>. This means that government is divided into three branches: the Executive (the Cabinet), Legislative (the Parliament) and Judiciary (the Judges). The three branches are meant to be a check-and-balance so that one branch of government does not dominate. Acts of Parliament are laws legislated by the Parliament. They affect the country as a whole. Matters under which the Parliament has jurisdiction are listed in List 1<sup>2</sup> of the Ninth Schedule in the FC. It covers external affairs; defense of the Federation; internal security; civil and criminal law and procedure; the administration of justice and more. Another body that enacts laws is the State Assemblies. These state enactments affect the particular State that passes the laws,<sup>3</sup> not the Federation as a whole. Under List II<sup>4</sup> of the Ninth Schedule, the State List enables State Assemblies to legislate on Islamic law; local government including local administration and local government elections; services of a local character like burial and cremation grounds. It also sets out specific areas in which the State Assemblies may pass enactments despite the general areas being under the purview of the Federal List (List I).<sup>5</sup> State Assemblies may enact laws affecting "social welfare; social services subject to Lists I and II; protection of women, children and young persons [...] public health, [...], culture and sports."<sup>6</sup>

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<sup>1</sup> Article 4, FC.

<sup>2</sup> Article 74(1), FC.

<sup>3</sup> Article 73 of the FC: "In exercising the legislative powers conferred on it by this Constitution -  
(a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation;  
(b) the Legislature of a State may make laws for the whole or any part of that State."

<sup>4</sup> Article 74(2), FC.

<sup>5</sup> *Ibid.*

<sup>6</sup> Ninth Schedule, List III - Concurrent List, FC.

Under Syariah laws, when *fatwas* are issued, then passed by the State Assemblies and gazetted, they also become law.<sup>7</sup> However, these laws affect Muslims only. Muslims who breach *fatwas* would be liable for committing an offence.<sup>8</sup>

Apart from these formal structures, judges make laws when they pass judgments on cases. This is known as 'common law'. Malaysia follows the common law system which subscribes to the doctrine of *stare decisis*.<sup>9</sup> This means subordinate courts are generally bound to follow the decisions of the higher courts.<sup>10</sup>

Having an independent judiciary is precisely because of this 'law making' power of the judges. Besides, the law may be used as one of the tools to realise women's human rights: to promote women's equality and to eliminate discrimination against them. It has great potential as it set standards of acceptable behaviour. It is a mechanism through which those who are wronged can seek redress. The law can be used to punish wrongdoers so that there is no impunity.

### **Constitutionally Invisible**

The formal equality promoted in the Federal Constitution has unintentionally excludes women as stated in Part II Fundamental Liberties, section 5: Liberty of the person, "(1) No person shall be deprived of **his** life or personal liberty save in accordance with law".<sup>11</sup> By using "he/his" in the Federal Constitution, women are intentionally or unintentionally subsumed under men's identities, homogenised and made invisible. This has serious

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<sup>7</sup> See for example, Section 34(3), Administration of Islamic Law (Federal Territories) Act 1993: "Upon publication in the Gazette, a fatwa shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion it shall be his religious duty to abide by and uphold the fatwa..."

<sup>8</sup> See for example, Section 4(1), Syariah Criminal Offences (Federal Territories) Act 1997: "Any person who teaches or expounds in any place... any doctrine or performs any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to any... fatwa for the time being in force in the Federal Territories, be guilty of an offence and shall upon conviction be liable to a fine not exceeding five thousand ringgit or to whipping not exceeding six strokes or to any combination thereof."

<sup>9</sup> *stare decisis et quieta non movere* means to stand by decisions made previously, and to not disturb what is settled. It is commonly called the doctrine of precedent.

<sup>10</sup> *stare decisis et non quieta movere* – to stand by and adhere to decisions, and not disturb what is settled.

<sup>11</sup> Federal Constitution, p:22.



repercussions on the legal treatment of women when it comes to interpretation and delivery of justice. Some of the key issues are as follows:

## 1. Competing Jurisdiction

Increasingly the bold pronouncement of constitutional supremacy is not working well in a number of areas.

- The federal-state division of power is being ignored in many areas. EPF, SOCSO, insurance, pension and trusts are federal matters. State laws have taken over control in the distribution of these assets in accordance with Islamic personal law. The wishes of the account owner are ignored.
- The power of the States to create and punish offences against the precepts of Islam is often used in disregard of the guarantees of fundamental rights in Articles 5 - 13 e.g. compulsory rehabilitation orders against *murtads* raise important constitutional issues.

Under Article 3 (1) of the Federal Constitution declares that “Islam is the religion of the Federation”... and that “all other religions may be practiced in peace and harmony”. Article 11 provides that every person has the right to profess and practice his own religion. This means every person has the right to propagate his religion, but state law and, in respect of the Federal Territory, federal law may control or restrict the propagation of any religion, doctrine or belief among persons professing the Muslim religion. The Constitution provides for a federal-state separation of legal systems between a federal civil law system and a state Islamic law system.

In 1988, under the administration of the then Prime Minister, Tun Dr. Mahathir Mohamad, a controversial constitutional amendment was made to Article 121 (1 a). It states that the civil courts at federal levels shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts<sup>12</sup>. In essence what this amendment

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<sup>12</sup> The Syariah Courts are state-level Islamic courts that have jurisdiction over Muslims in personal law matters. The Syariah laws differ from state to state and attempts are being made to standardise these laws.

means is that the civil courts do not have the power to hear any application on matters related to Syariah laws as that is a matter for the state Syariah court. Article 121 (1a) has created a dual legal system of civil law and multiple versions of Syariah law, which results in continuing discrimination against women, particularly in the field of marriage and family relations. This has adversely affects the rights of Muslim women.

It has resulted in legal lacunas in a string of cases in which litigants appear to have no recourse under the law. Although the provision states that the High Court (secular court) has no jurisdiction in any matter within the jurisdiction of the Shariah Court, it does not address the predicament of citizens who have changed their religion and no longer consider themselves Muslim themselves no longer Muslim or non-Muslim married couples who later find that one of the partners is converting to Islam. There appears to be a legal grey area in such cases and there are no judicial guidelines in either of the two parallel jurisdictions to provide a remedy.

The insertion of Article 121 (1a) has serious implications on women's rights. The cases below aim to show how women's rights, through unjust laws, are eroded due to blinkered following of the theory of formal equality.

What is worrying is that there is a narrow ideological approach which is being supported by a new interpretative trend urging the Courts to read Article 3(1) of the Federal Constitution, which states that Islam is the religion of the Federation, to mean that all laws must conform to syariah principles.

Even though Article 3(4) states that nothing in Article 3(1) derogates from any other provision of the Constitution, arguments are now being made in court to give Article 3(1) an expanded meaning without considering other Constitutional provisions that limit syariah jurisdiction, and in particular Article 4(1) which recognises the Constitution as the supreme law of the land.

Such actions to justify legal arguments, under the pretext of religion, have ramifications on citizens' civil liberties. If one speaks up as a muslim, you will be brushed off as not having the knowledge as "only those religious leaders" knows or if you are a non-muslim speaking out, you will be labeled as "kafir" and against Islam. When you do "defy" such accusations, conservative Islamists break up meetings violently, demonstrators shout down any attempts to bring people together for healthy exchange of ideas. Either way, the silent majority are cowed into believing that they have no right to speak, not even if they are the ones facing discrimination.

When there is no space to debate these issues, contradictory argument and "bad" laws will continue be enacted. Below are some of the cases to illustrate how the competing jurisdiction has brought about much heartaches and pain to the women who happen to be at the receiving end of the unjust legal judgements.

### ***The Susie Teoh dilemma (1989)***

In an Aliran monthly (2004), Salbiah Ahmad interrogated Susie Teoh's case which involved an infant's conversions to Islam in the civil courts. Susie Teoh was 17 years and 8 months when she became Muslim. Her father Teoh Eng Huat, a Buddhist, took the Jabatan Agama in Kelantan to court for the conversion<sup>13</sup>. He applied for a declaration that, as father and guardian to the infant, he had a right to decide her religion, education and upbringing and that her conversion to Islam was invalid.

The High Court ruled that the father's right to decide the religion and upbringing of the infant (under 18) is allowed provided that it did not conflict with the infant's choice of religion as guaranteed under the Federal Constitution. However, the Supreme Court overruled the decision of the High Court and held that "in all the circumstances and in the wider interests of the nation no infant shall have the automatic right to receive instruction relating to any other religion other than (her) own without the permission of the parent or guardian". The Supreme Court, however, did not proceed with the

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<sup>13</sup> The case was covered by the Guardianship of Infants Act, 1961, a federal law of general application, Art. 11 (1) (freedom of religion), and Art. 12 (3), (4) (right to education) of the Federal Constitution.

declarations sought by Teoh Eng Huat as these were “only of academic interest” as Susie Teoh had reached the age of majority by the time the case was heard in the Supreme Court in 1990.

This resulted in a number of legislative amendments in the syariah laws:

1. several state passed provisions to lower the age of conversion to 15 years for boys and the age of the onset of menstruation of girls, which differed from civil laws where the age of majority is 18 years old. But these amendments eventually compromised with civil laws, where an infant is below the age of 18 years.
2. In 1989, the Selangor state lawmakers passed an additional amendment to the Administration of Islamic Law Enactment (a state Islamic law) to provide that if an adult converts to Islam, any infant children become converted at the same moment. This had subsequent impact on cases of conversion and to freedom of religion for women like Susie Teoh.

### **The Shamala case**<sup>14</sup>

Shamala’s husband converted into Islam without the knowledge of his wife and family and along with it he also converted two of their infant children to Islam. In 2002, Shamala Sathiyaseelan asked the civil court to declare that the conversion of her two infant children to Islam as null and void, as it was carried out without her knowledge. In April 2004, the High Court dismissed the case on the grounds that the civil courts did not have the jurisdiction to hear the matter and only the Syariah Court could decide on such matters. Further, the judge agreed that Shamala did not have the legal standing to appear in the Syariah Court.

In July 2004, the High Court, however, gave joint custody of the children to Shamala and her Muslim husband. Yet care and control of the children’s daily lives was given to Shamala - subject to a caveat. The condition was that if Shamala taught her children her

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<sup>14</sup> Anil Netto (2007), *Changing dynamics and new tensions in Malaysia’s multicultural society* in Working for Democracy: Footprints from Civil Society in Malaysia. Women’s Development Collective. Malaysia.

Hindu faith or made them eat pork, she would lose her right to actual custody<sup>15</sup>. Both Shamala and her husband are appealing to the Court of Appeal.

### ***Subashini Case***

In another case, R. Subashini, the Federal Court ruled that the dispute between her and her Muslim-convert husband T. Saravanan alias Muhammad Shafi Abdullah over the dissolution of their marriage and child custody, will continue to be under the jurisdiction of the civil court.

In the landmark 2-1 majority judgement, the Federal Court judge Justice Nik Hashim Nik Ab Rahman said, "by contracting the civil marriage, the husband and wife were bound by the 1976 Act (Law Reform (Marriage and Divorce) in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam."

### ***Lina Joy case***<sup>16</sup>

An ethnic Malay, Azlina Jailani changed her name to Lina Joy after she renounced Islam via deed poll and converted to Christianity in 1998. The National Registration Department (NRD) eventually granted her an identification card with her new name a year later - but refused to remove Islam as her stated religion because it felt that such a matter had to be brought before the Shariah court for a decision.

Joy took the matter to the civil courts but failed when the High Court on 18 April 2001 ruled that she could not renounce Islam without a decision by the Shariah Court. Upon appeal, the Court of Appeal in 2007 upheld the High Court's decision by a 2-1 majority, ruling that the NRD could reject her application to amend the religion stated on her identity card<sup>17</sup>. Under shariah law, as long as her identity card indicates that her religion is Islam, Lina Joy will not be able to marry a non-Muslim without her spouse embracing Islam.

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<sup>15</sup> Aliran Monthly (2005). Vol 24, Issues no 7-9. Malaysia.

<sup>16</sup> Star Online (2007). [Lina Joy Loses Appeal](#). 20 May 2007. Malaysia

<sup>17</sup> Sun (2007). Lina Joy loses appeal to drop 'Islam' from her NRIC. 7 June 2007. Malaysia.

The Court of Appeal ruling stated that "a person who wanted to renounce his/her religion must do so according to existing laws or practices of the particular religion. Only after the person has complied with the requirements and the authorities are satisfied that the person has apostatised, can she embrace Christianity. However, Justice Datuk Gopal Sri Ram, the dissenting judge, said in a minority decision that the NRD's decision was null and void and of no effect.

### ***Moorthy Maniam case***

Upon the death of Moorthy Maniam @ Mohammad Abdullah on 20 December 2005, Malaysians witness an ugly legal tussle between his widow and religious authorities over whether Moorthy's possible conversion to Islam. His non-converted wife, Kaliammal, disputed his conversion and sought to bury him according to Hindu rites, having cared for the former mountaineer since he was paralysed in 1998. The Federal Territory religious department officials, however, quickly claimed the body.

Kaliammal went to the civil court to plead her case but was denied a hearing as the High Court relied on the Syariah Court Order which was obtained *ex parte* (i.e. without hearing Kaliammal). She found herself with no court she could turn to for legal recourse. The High Court judge refused to allow Kaliammal a stay of execution pending appeal to the higher civil courts. Moorthy was buried on 28 December 2005 according to Islamic rites.

### ***The Nyonya Tahir case***<sup>18</sup>

Nyonya Tahir, born in 1981, was raised as a Chinese by her Malay grandmother who married a Chinese convert. She lived as a Chinese Buddhist and never practised the Islamic faith even though her Malay name and Muslim religion remained on her identity card. Documents from the Alor Gajah religious office in 1986 stated that she had made a written declaration, duly certified, that she wanted to live and be buried as a Buddhist<sup>19</sup>.

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<sup>18</sup> Op. cit. Anil Netto.

<sup>19</sup> Star (2006). Nyonya a non-Muslim. 24 January 2006. Malaysia.

In this particular case, the Syariah Court ruled on 23 January 2006 that she was a non-Muslim at the time of her death, paving the way for her to be buried as a Buddhist.

In another landmark case, the Perlis Syariah High Court allowed an application by Muslim convert Siti Fatimah Tan Abdullah, 39, to renounce Islam and officially revert to her original faith. She claimed that she converted to Islam in July 1998 for the sake of marrying an Iranian named Ferdoun Ashanian in 1999, and had not practised its teachings. This is the first case where a living Muslim convert was allowed to renounce Islam since the Syariah Court Civil Procedure (State of Penang) Enactment 2004 came into force on Jan 1, 2006<sup>20</sup>.

In the first three cases mentioned above, apart from the broader cultural, religious and legal issues, it appears that women's rights – as wife, mother, parent and potential wife – have been impinged upon. Civil society groups, particularly women's groups, have expressed concern over the negative and discriminatory impact of the dual court system on the non-Muslim spouse in cases such as Shamala's. While they support the Muslim partner's right to practise the faith of his choice, they argue that the rights of a father and his new religion should not take precedence over the rights of the mother/his non-Muslim spouse and her religion.

They maintain that a child's upbringing and development, inclusive of his or her religion, ought to be the joint responsibility of both parents. They urge the judiciary to therefore uphold Article 12(4)[1] of the Federal Constitution, which has been judicially interpreted to mean that both the father and mother shall jointly decide the religion of a child under 18 years of age.

Women's groups have pointed out that as a State Party to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Malaysia has an obligation to eliminate discrimination and ensure that all women and men in Malaysia have "the same right freely to choose a spouse" as provided under Article 16 (1)(b) of

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<sup>20</sup> Star (2008). Court allows Muslim convert to return to Buddhism. 8 May 2008. Malaysia.

CEDAW. Article 16 deals with equality in marriage and family relations and paragraph 1(b) refers to the “same right freely to choose a spouse” and enter into marriage with full consent.

Malaysia’s accession to CEDAW and the Convention on the Rights of the Child (CRC) should also have a bearing on judicial decisions involving child custody cases. These treaties make it clear that State parties, such as Malaysia, have to ensure the equality of both parents in raising their children. Indeed Article 16 (d) clearly points out that States should ensure “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”.

As such, women’s groups are arguing, among others, that the rights of a married non-Muslim woman should be the rights and obligations contained in a civil law marriage agreement even when her spouse converts to Islam; the right to have all issues pertaining to a civil law marriage resolved according to civil laws and adjudicated only in civil courts; the equal right, as a parent, to decide on matters relating to her children’s upbringing; and the right to be informed of her spouse’s conversion to Islam.

Competition between rights is inevitable in the very process of recognition of human rights. If one right or set of rights is interpreted absolutely, it may, knowingly or unknowingly, “diminish” other rights. However, it is important that, through regulation, law and policy-making, citizens continuously engage in an open and respectful process of ‘social engineering’ or a balancing of conflicting interests. Consequently the existence of the prospect of conflicting human rights should not be a reason for rejecting the human rights-based approach. Rather, efforts are needed to understand the potential for conflict, and a commitment to developing strategies for resolving them so as not to undermine the core agenda of equality, non-discrimination and justice. For instance, freedom of religion and the right to manifest religious belief in practice and observance, and cultural rights may foster particularities that challenge the universality of human rights, and purport to limit equality rights. Conflicts between women's human rights and



religious rights illustrate the philosophical, legal, and political difficulties of reconciling competing human rights values. The right to religious freedom, custom or religion may therefore have to be interpreted not absolutely, but so as to strike a balance, and achieve the norms of social justice. Hence, in order to exercise tolerance and non-discrimination by all actors in society, it is necessary for the full realization that citizens, government and religious bodies continue to undertake dialogue at all levels to promote greater tolerance, respect and understanding.

## ***2. Piecemeal Integration of Equality into the Federal Constitution***

The Federal Constitution of Malaysia does provides for life, liberty, the security of the person; freedom of expression and association; and respect for family life. As a move to support gender equality, the Government of Malaysia committed itself to work towards the advancement, integration and implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which it ratified in 1995. The ratification of CEDAW meant that Malaysia is committed to uphold human rights standards and move towards being more inclusive and democratic.

The key amendment made to the Federal Constitution was the equality provision in Article 8 and it is as follows:

- “(1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law [...]

With this amendment, discrimination based on gender is disallowed. Unfortunately, this amendment falls short as the mainstreaming of gender equality was piecemeal and overlooked other provisions in the FC. There are still CEDAW reservations which Malaysia had not removed as it states: “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 notified the Secretary-General of a partial withdrawal as follows: "The Government of Malaysia withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h).”

It is important for a wholistic approach to the integration of CEDAW into the FC. Not doing so means that CEDAW provisions on human rights standards are not enforceable in courts, tribunals and administrative authorities. Women who face discrimination will have difficulty in invoking their legal right, especially when the party practicing discriminatory policies is not a public authority.

This is illustrated in Beatrice’s case,<sup>21</sup> where she was dismissed as an air stewardess because she became pregnant, but did not resigned as stipulated in the collective agreement. The Federal Court held that the guarantee of no discrimination on the ground of *gender* in Article 8(2) only applied to persons within the same class. Since all air stewardesses were not permitted to have children, there was no discrimination. Note that the comparison class used was not ‘men’, but other women i.e., fellow air stewardesses. Air stewards did not have to resign when their wives became pregnant. The Federal Court also held that constitutional remedies could only be invoked when the discriminating party was a public authority. Since the first Defendant was a public listed company and not a government entity, Beatrice could not rely on her constitutional rights.

This case is also an illustration of how in substance, a law may apparently provide protection, but in choosing a more traditional approach to the interpretation of

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<sup>21</sup> Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 173

constitutional law and its implementation, Beatrice was not able to exercise her right to work concurrently with her right to found a family.

3. ***The Federal Constitution and other legislations do not contain a definition of discrimination against women***, in accordance to Article 1 of CEDAW or the principle of equality of men and women as in Article 2 (a). This has led to the existence of sections in the Constitution that still discriminate against women.

A more direct form of discrimination exists in the FC. This pertains to the differences between the ability of Malaysian women and men to confer citizenship on their children.<sup>22</sup> Malaysian men married to foreign women may confer citizenship on their children regardless of where their children are born. Malaysian women married to foreign men, on the other hand, may only confer citizenship if their children are born in Malaysia.

A foreign husband of a Malaysian woman cannot become a Malaysian citizen by registration under Article 15 (1) of the FC unlike a foreign wife of a Malaysian man who can obtain citizenship under that law if she fulfils certain residential and character qualifications.

This is the patrilineal practice of determining one's citizenship only through the fathers or husbands. It assumes that men are the heads of households, and that women will follow their husbands to their countries to live.<sup>23</sup>

In denying equal citizenship rights to women, they are not able to enjoy equality before the law. Their rights to found a family are compromised, and they face more restrictions in terms of being able to choose residence and national identity. It also restricts their freedom of movement.

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<sup>22</sup> See Part III of the FC, especially Articles 14-15A.

<sup>23</sup> This and the following paragraph of that section are extracted from Women's Right To National and Citizenship, IWRAW Asia Pacific Occasional Papers Series No. 9, (2006), International Women's Rights Action Watch Asia Pacific.

A common problem faced by foreign spouses in Malaysia, especially foreign wives, is the tremendous difficulty they face in trying to remain in Malaysia when their marriages break down. They are dependant on their husbands to apply for their annual spousal visa to remain in Malaysia. In cases where divorces occur, foreign wives are often separated from their Malaysian children as they are unable to remain in Malaysia. Foreign wives who face domestic violence often think twice before seeking protection or a divorce as their errant husbands often threaten to not renew their visas.

### **Women's Voices and Participation**

Table 1 and Table 2 shows the number of women in Parliament and State Assemblies and unfortunately women's political participation remains woefully low – far below the target set in the Ninth Malaysia Plan of having 30% of women in decision making processes.<sup>24</sup>

Nonetheless, there are definite issues which need to be acted upon. Women are confronted with crucial issues such as:<sup>25</sup>

#### *1) Inadequate number of women candidates*

To begin with, the number of female candidates in the 2004 elections still falls far short of the 30% figure globally recognised as the minimum necessary for women to be effective at the level of political decision-making. The above statistics also show that a good number of women candidates will not win because the odds are against them. It will not be surprising to find that there is no significant change in the percentage of women either at the State Assembly or Parliamentary levels in the 2004 election.

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<sup>24</sup> See the website of the Economic Planning Unit at <http://www.epu.jpm.my/RM9/english/Chapter13.pdf> last accessed on 1 September 2008.

<sup>25</sup> Maria Chin Abdullah (2005), Beijing +10 Monitoring Report, *Power Relations and Agency*, Malaysia.

**Table 1:<sup>26</sup> Members of Parliament**

Year	Total No. of Women MP Candidates Contesting	Total No. of Candidates for MPs (men & women)	%of Women MP Candidates	No. of Women who won as MPs	Total No. of MPs	% of Women MPs	% of Men MPs
1990				9	180	5.00	95.00
1995				13	192	6.80	93.20
2000				19	193	9.80	90.20
2004				23	219	10.50	89.50
2006 <sup>3</sup>				21	219	9.60	90.40
<b>2008</b>	<b>45</b>	<b>477<sub>1</sub></b>	<b>9.43</b>	<b>24</b>	<b>222</b>	<b>10.81</b>	<b>89.19</b>

**Table 2:<sup>27</sup> Members of State Assemblies (SAs)**

Year	Total No. of Women SA Candidates	Total No. of SA Candidates(men & women)	%of Women SA Candidates	No. of Women State Assembly (SAs)	Total No. of SAs	% of Women SAs	% of Men SAs
1990				15	443	3.40	96.60
1995				24	498	4.80	95.20
2000				15	250	6.00	94.00
2004							
2006				40	576	6.90	93.10
<b>2008</b>	<b>87</b>	<b>1105<sub>1</sub></b>	<b>7.87</b>	<b>40</b>	<b>505<sub>2</sub></b>	<b>7.92</b>	<b>92.08</b>

**Notes:**

1. 477 Parliamentary and 1105 State Assembly seats are extracted from The Star, 10 March 2008. Total contestants are 1582 contesting 727 Parliamentary and State Assembly seats (excludes State Assembly seats in Sarawak as their State Assembly elections will take place later).
2. The 505 State seats exclude Sarawak.

**2) Social and cultural obstacles**

While it is necessary to introduce temporary measures such as quotas to encourage women's increased political participation, this policy in itself does not guarantee that women will involve themselves in this traditionally male realm. Women face a different set of difficulties in relation to politics. They do not take up offers to get involved for reasons tied to social norms and cultural stereotypes, among them:

- They lack confidence as a result of years of social conditioning that defines their

<sup>26</sup> Table 1 is prepared by Persatuan Kesedaran Komuniti Selangor (Empower).

<sup>27</sup> Table 1 is prepared by Persatuan Kesedaran Komuniti Selangor (Empower).

rightful place first and foremost in the domestic sphere ---- as mothers, not as breadwinners and citizens. Politics has been painted as a man's world, one in which women will not last, let alone make an impact.

- They may desire to take up the challenge of political participation but lack the necessary support mechanisms allowing them to do so, such as married women double burden of work and family and men continue to play lesser household roles. Cultural stereotypes discourage even those brave enough to rise up to the challenge.
- Long and grueling hours are required to be an effective politician. This means that many women may not be able to perform their jobs effectively. The lack of childcare facilities has been a hindrance, along with the traditional division of household labor.
- Sexist attitudes of male politician, such as s are barriers towards women's participation. For instance, a protempore chief, Roselan Juhar of Kota Kinabalu UMNO (United Malay National Organisation—the present ruling majority party) was cited for these sexist remarks: “if you cannot fight rape, better lie down and enjoy it!”

### *3) Toeing party lines*

Women who are nominated and elected often fail to represent their female constituents because they too are not gender sensitive. Although having more women in politics is a good thing, it is essential that they truly represent their female constituents.

A much bigger obstacle for women in office is their lack of autonomy to raise women's concerns or without repercussion. Their inability to cross party lines and vote according to their conscience on gender, justice and democracy issues is a major problem, linked to a culture that does not encourage critical thinking.

It is important to have more women in Parliament and State Assemblies as women contribute different perspectives and experiences which will reflect the diversity of

Malaysians. In doing so, there is a better chance of the laws recognising that there is no essential 'Woman'. These laws would be better equipped to deal address the needs of women who face multiple discriminations, for example, on the grounds of gender, class, ethnicity, and level of education, among others. Having more women in the Legislature recognises women's agency in determining laws which affect them, enabling women to fulfill some of their potential in this site of power. This type of lawmaking is what Robert Cover refers to as 'jurisgenerative': it aims to transform social meaning as laws can give life to fundamental aspirations and visions of social movements.<sup>28</sup> It is to have laws which reflect women's realities, end discrimination and promote substantive equality.

### **Constituting Women's Rights and Equality**

The efforts taken by the Malaysian government to address the above challenges have been, as mentioned, piecemeal. In 1995 the Government of Malaysia ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to enhance its work towards the advancement, integration and implementation of gender equality. It was expected that by bringing in the CEDAW framework, it will move modern state Malaysia to be more inclusive and democratic. Other efforts were made, including an amendment to the Federal Constitution in July 2001 of the Article 8 (2) to disallow discrimination based on gender, which now reads:

“...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.’<sup>29</sup>

To support the gender equality amendment, it was necessary to create and strengthen the environment so that implementation of justice and equality can be met. The government's commitment to gender equality and women's participation are in several policy documents. The Ninth Malaysia Plan (9MP) (2006-2010) made specific plans to

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<sup>28</sup> “Nomos and Narrative”, (1983), Cover, R.M., 97 Harvard Law Review 4, at p. 15 in *Battered Women and Feminist Lawmaking*, (2000), Schneider, E., New Haven, London: Yale University Press, p. 34.

<sup>29</sup> Government Printers, Federal Constitution. International Law Book Services. Kuala Lumpur. p:24-25.

activate the Government Cabinet Committee on Gender Equality (set up in 2004) and made firm promise to “implement the quota of at least 30 per cent of decision-making positions in the public sector to be held by women [Chapter 13:9MP, Women and Development 13:21-22 p:288]. The Ministry of Women, Family and Community Development (MWFCD) led a one-year research on “Towards achieving at least 30% women at decision making levels in Malaysia” [2009) and held a consultation with government officials and CSOs in April 2009. The report has yet to be published. The Malaysia Development Action Plan for Women, 2009 was then revised to state that: “gender agenda is an important national priority which needs to consider gender perspective in planning, reforms, and policy implementation and development programmes”.

Despite of all these efforts, issues of freedom of religion, right to marriage of choice, registration of citizenship and protection of women’s rights still capture women’s rights, political and cultural discourses. Authorities, law makers, parliamentarians, including state assembly representatives need to comprehend and accept that human rights are universal, inalienable and indivisible. There should be no hierarchy of rights and it is not for the authorities to give human rights as a gesture of goodwill or at the pleasure of the state. Deeply entrenched attitudes that uphold male privileges at the expense of women's rights have to be transformed to give recognition and visibility of women and enable them to participate fully to advance equality and the elimination discrimination against women.

Given the public outcry and heart-wrenching distress caused to parents and children, what is urgently needed now is immediate law reform to restore the law to the status quo before these confusing and conflicting judgments were made.

There must be clarity in law and interpretation and that women’s rights are defended by substantive equality, non-Muslims should not be subjected to syariah jurisdiction, a child’s religion can only be changed with the consent of both parents, and that all



matters pertaining to a civil marriage must be resolved in the civil court under civil law, even if one party has converted to Islam.

In the long run, what is perhaps needed is the submission of a White Paper to Parliament that clearly addresses all the problems, complexities and competing interests on matters involving women's rights and how such rights have been curtailed by formal equality, and how the interaction with culture, religion and politics has in many instances resulted in inequalities instead of justice for women. The Government can then present its long-term solutions for debate on women's role in public life and to view their participation in decision making as a source of public law and policy, and the framework and principles to be used to address the areas of conflict.

The renowned Sudanese legal scholar, Abdullahi An-Na'im, advocates that the use of syariah rules and principles to make laws must pass the test of "civic reason" and be subject to safeguards within the framework of constitutionalism, human rights and citizenship. It is important that issues, especially when they intersect with each other, be given the public space for debate. The search for just solutions can only take place if we as citizens protect this space and consider the possibilities of equality and justice from multiple perspectives – religious, international human rights, constitutional and fundamental rights guarantees, and our lived realities. The use of substantive equality arguments for public law and policy must be grounded in the realities of modern day life in a democratic constitutional state, and a world linked by international law.

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