

Malaysia: Women's rights: Progress or regress?

Saturday 25 June 2022, by [FARUQI Shad Saleem](#) (Date first published: 10 March 2022).

The international community celebrates March 8 as International Women's Day. This year, note was taken in many countries of the significant steps taken towards women's equality and dignity and the many hurdles blocking the way.

What about Malaysia? Let it be conceded that the Federal Constitution has many gender-biased provisions. Our Constitution, like all Constitutions, was born at a time in history, hence it reflects the patriarchal values and vulnerabilities of its age. This is, of course, no excuse for resisting change or turning a blind eye to the felt necessities of the times.

We need to search for and develop those aspects of our Constitution and laws that are aspirational.

Equality provisions: Article 8(1) proclaims that all persons are equal before the law and entitled to the equal protection of the law.

Article 8(1) is a generic provision and was meant to be a catalyst for constitutional development.

Regrettably, its potential has not been fully explored.

In Article 8(2), gender discrimination is banned on four enumerated areas. First, in any law; second, in any employment with a public authority; third, in the administration of any law relating to property; and fourth, in the establishing of any trade, business, profession, vocation or employment.

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

In the 11th Schedule, the interpretation clause 2(94) states that "words importing the masculine gender include females".

This means that rights granted to males apply equally to females. For this reason, scores of biased administrative practices have been modified over the decades to recognise the equal rights and dignity of women, for example equal medical benefits for a female public servant's spouse.

Women constitute 60% of our work force. The Chief Justice and the President of the Court of Appeal are women. In recent memory, the Malaysian Anti-Corruption Commission chief, the governor of Bank Negara Malaysia, and the deputy prime minister were women. We have women vice-chancellors although their number is not rising.

The Employment Act requires maternity leave in most sectors. Even fathers are eligible for paternity leave. There is prohibition of night work and underground work for women.

Non-Muslim family law (but not Muslim family law) has evolved significantly towards equal treatment. The Penal Code has been amended repeatedly in the last few years to take note of feminist thinking on issues of rape, incest and abortion. The plight of unwed mothers and victims of domestic violence has attracted state support.

The Domestic Violence Act and Penal Code provide protection against violence in the home.

Some judges have heard the beckoning of justice in gender equality cases. In Noorfadilla Ahmed Saikin (2014), the court held that terminating a trainee teacher on the ground that she was pregnant was a violation of our Constitution and our international commitments under Cedaw (Convention on the Elimination of all Forms of Discrimination Against Women).

But it was held in *Beatrice Fernandez v Sistem Penerbangan Malaysia* (2005) that the dismissal of an air hostess because she became pregnant was not banned by Article 8(2) as it related to the private sector.

In *Indira Gandhi Mutho* (a unilateral conversion case) and the recent case of *Loh Siew Hong*, the Judiciary courageously enforced the mothers' rights over their children.

Not all is well, however, with the law on gender issues. Despite some incremental progress, much more needs to be done. Gender equality is a journey, not a destination. Several crippling dimensions must be noted here:

First, constitutionally permissible discriminations: In citizenship for children, Articles 14, 15, 24, 26 and Part III of the Federal Constitution emphasise the father's citizenship or residence.

The mother's status does not matter. This is where the superior courts can play a role to interpret the Constitution and laws holistically and prismatically to read into all laws the wholesome provision of Article 8 clauses (1) and (2).

For example, one recent decision on citizenship gave an equal right to a Malaysian mother who gave birth to her child abroad while married to a foreigner.

The law, if literally interpreted, says that in the case of a child born abroad, the citizenship will follow the father. Justice Datuk Akhtar Tahir read the humanising provision of Article 8(2) into the citizenship chapter. This should be encouraged. The waters of our Constitution should be allowed to be refreshed by fresh flows from time to time.

In laws relating to permanent residence for a spouse, there is discrimination against Malaysian females with foreign spouses.

In Article 161(6), the status of a "native" of Sabah is dependent on descent from the father.

Under Article 8(5) and Schedule 9 List II Para 1, the requirement of equality does not apply to personal laws. Since the '80s, Muslim personal law has reversed some protections earlier afforded to women. It must be noted, however, that Article 8(5)(a) permits differentiation only in the matter of "personal laws".

Discrimination against women in such matters as admissibility of evidence or appointment as Syariah judges or holders of other public posts is not covered by Article 8(5)(a).

Also, Article 8(5) must be read along with Article 11(5), which says that freedom of religion does not permit anything contrary to public order, public health or morality.

There is tremendous potential in Article 11(5) to regulate the practices of child marriage, genital mutilation, dowry-taking, polygamy, domestic violence and unilateral divorces.

Second, structural injustices: Some discriminations are structural and institutional, and are not always visible. They are grounded in cultural, religious, psychological and historical assumptions that are patriarchal. Besides changing the law, we need to change minds.

For example, in criminal law, provocation is a defence if the provocation was immediate.

However, it is arguable that this rule reflects male psychology and may have no relevance to women who suffer in silence years of domestic abuse and at some point in time cannot tolerate it anymore and take the law into their own hands. Regrettably, they are not eligible for the right of private defence in most countries.

The law of rape allows defence lawyers to raise evidence about the rapist's sexual history with the accused.

Third, formal versus functional justice: In some areas, we need to look at things functionally. The law may look good on paper, but its results are unjust. Justice is not in form but functioning, not in content but in consequence, not what the law says but what it does.

In sum, gender bias cannot be exterminated by recourse to the law alone. The Constitution can confer legal and formal equality. Social and functional equality, i.e. equality in outcomes, is more difficult. Around the world, women are still trapped in stereotyped roles.

We need to put our heads and hearts together to see how our patriarchal past can accommodate the contemporary demand for equality and dignity.

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