

30/07/2001

Legality, equality, reality

WOMEN'S groups applaud the announcement made last Monday by Prime Minister Datuk Seri Dr Mahathir Mohamad and Datuk Shahrizat Jalil, Minister of Women and Family Development, that Article 8 (2) of the Federal Constitution be amended to include "sex" to ensure that women will not face discrimination on the basis of their gender from now on. The announcement made at the launch of Women Against Violence (WAVE) campaign is a significant milestone in women's fight for equality.

Life & Times talked to the following activists about the proposed amendment: Shanthi Dairiam, director of International Women's Rights Action Watch-Asia Pacific, Professor Wazir Jahan Karim, convenor, Women and Human Resource Studies Unit (Kanita), Universiti Sains Malaysia, Rasamani Kandiah, president of Association of Women Lawyers; chairperson, Law Commission; Mary Assunta, Consumers Association of Penang (CAP); Ramani Gurusamy, deputy president, National Council of Women's Organisations:

Question: Given that discrimination against women, blatant or implicit, has been part of our culture, can this be achieved? How can we ensure that the idea be wholeheartedly accepted and implemented, once the article is amended?

Shanthi: The first step is of course the constitutional amendment to prohibit discrimination on the basis of sex. But this is not enough. The constitutional amendment must also include a definition of discrimination as defined in Article 1 of the CEDAW Convention which states that any distinction, exclusion or restriction made on the basis of sex which has the intention or effect of nullifying or impairing the recognition, enjoyment and exercise by women, of all rights in the social, cultural, political and economic spheres is discrimination. Suhakam has also made this recommendation.

Most constitutions provide guarantees for prohibiting discrimination on the basis of sex. But this has not worked to women's advantage. This is because discrimination on the basis of sex can be very narrowly defined as differential treatment given to two sets of people who are similarly situated. So when we have two sets of people with different needs, (not similarly situated) and if one of them is disadvantaged by what may be a neutral rule that does not disadvantage the other, then it is not considered to be discrimination.

According to this reasoning, it can be argued that denying maternity benefits to women is not discrimination as men do not get maternity leave. Again neutral policies or laws will not be seen as discrimination even if these laws deny women the exercise of rights or access to opportunity because women's inability to access the opportunity is seen as a weakness of the person who is disadvantaged.

For example, if credit facilities are offered to women and men on the same conditions (neutral rule) such as that collateral needs to be provided, then women may not be able to access the credit, as the laws of inheritance or social practice may prevent them from owning property that they can offer as collateral.

The definition of discrimination given in the CEDAW Convention however implies that applying a neutral rule for women and men will constitute discrimination if the result is that women do not enjoy the intended benefit.

In other words, discrimination will occur when an apparently neutral condition or requirement is imposed that has a discriminatory effect on women, although discrimination was not intended.

Therefore under certain circumstances, (when the playing field is not even) there has to be a different rule for women to access credit. Non-discrimination should not mean same treatment but the enjoyment and exercise of equal rights. Secondly, the current constitutional provision for equality seems to address only the actions of the state via laws and policies. Much of the discrimination against women takes place through the actions of private actors. In the context of privatisation, we need to ensure that the private sector in the fields of education, employment, health, etc also are bound by the constitutional guarantee of equality. For example, the South African Constitution makes provisions for this. I have cited their provision below:

"No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection he grounds that prohibit discrimination.)

I also think that national legislation must be enacted to prevent or prohibit unfair discrimination. Eliminating discrimination against women is an obligation of the state under the CEDAW Convention which it acceded to in 1995. All sectors including the private sector need to be regulated so that there will be compliance with the requirements of the Convention.

There is also a need to look at all discriminatory provisions in the law and have them amended. Even in the constitution, Article 15 on citizenship discriminates against women.

Finally a great deal of awareness raising has to be done all round to impress on everyone the importance of the constitutional amendment.

Wazir: Cultural prejudices rooted in patriarchy may remain but a concerted effort on the part of the judiciary and community will sooner or later make these prejudices look archaic and obsolete in this millennium. Syariah judges, Hindu priests and fundamentalist religious leaders cannot articulate objections on religious or cultural grounds since they would be contravening constitutional law. These last defenders of male dominance will make way for others, younger leaders with greater gender sensitivity and knowledge of law. Equality before God will be enshrined as equality before man.

Rasamani: It can be achieved by education, the news media and by promoting public awareness. If there is evidence of violation of the Article, the courts should adjudicate speedily. The court should be specially set up to hear such cases.

Ramani: Short term: Government and corporate sectors must take a concerted effort to ensure that no laws or policies discriminate against women. All necessary amendments to existing discriminatory laws and regulations must be made in the first place. Women NGOs must draw up an effective education programme to raise awareness among both men and women that with this amendment women have the power to claim their right to equality (treatment/opportunity, etc). Women do not have to remain as passive beneficiaries.

For long-term benefits: Educate our children at home and in schools to respect and treat one another as equals including the sharing of home responsibilities. It will not be an easy task but women must make every effort to bring about this change and we must ensure that our men participate in this effort. Nothing is impossible to a willing mind.

Consumers Association of Penang (CAP): While the move to amend the constitution is a long awaited one, the real challenge lies in changing deeply held value systems and norms of our society. This won't be easy as it is often deeply rooted and perhaps not always tangible. There needs to

be massive effort made for public education, through the mass media, road shows and every available opportunity. Schools and higher learning institutions should also take an active part where teachers should actively participate in the implementation and the practice of the amendment. It must be done to the extent that it becomes part of public conversation. The rural folk and communities who still hold on to age-old traditional practices that discriminate must be educated and informed of the amendment to the constitution.

Question: Where do you think the obstacles will be? In our culture? In the substantive laws of our land? Among women who may not understand the significance of the amendment?

Shanthi: Women as compared to men, face many obstacles sanctioned by culture, religious practice, by entrenched male interests in key institutions such as political parties, trade unions, religious institutions, the courts, etc. There is a need to put in place enabling conditions or preferential rules to benefit women and thus facilitate their access to opportunities.

Variations of historic or past discrimination require the concept of corrective measures to overcome the effect of past discrimination that leaves women handicapped vis-a-vis the men. For example, if a development initiative is offered to women on the same footing as the men, according to the principle of equal rights or equal opportunity, it might still turn out that men benefit more than women, because men have more experience, confidence or simply because the environment is male dominated and is more conducive to male participation. This is the effect of past discrimination.

The constitutional amendment must also include provisions for positive action (through laws or other measures) in favour of women. This will pave the way for measures through which affirmative action and women-centred development policy and budgeting measures can be legitimised to ensure de facto equality for women. This has been done in other countries such as India. The private sector too should be regulated in this way.

Training is needed for key government sectors to fulfil their obligations under the Constitution. There is neither awareness nor skills to fulfil rights for women.

Furthermore legislative amendments alone are not enough. In spite of good laws, discrimination exists in practice. So the situation has to be monitored and a complaints mechanism set up and those who discriminate must face the consequences.

Wazir: Obstacles will continue to appear in socialisation and work practices, bringing up daughters to do more housework than sons, sending sons overseas and daughters to local colleges, enabling sons to inherit more property than daughters, seeing women to be good assistants and not directors, to be supplementary rather than joint income-earners, etc. Women themselves may be their own enemies, inventing womanhood as a passive, weaker representation of human partnerships, enabling and allowing man to take advantage of their advantage.

Rasamani: Our culture is the main obstacle. Even professional women take a back seat till today not only in official but also in performing domestic chores. The way enforcement of the laws is conducted must be revised. To educate and inform the women that we are equal and therefore we can do the work equally and not to acknowledge that the male counterpart is superior.

Ramani: The obstacles will be for women themselves who are not emancipated enough to accept this change. Obstacles also come from the whole community as inequality is socially constructed and perpetuated through the religious, cultural practices and customs in every community.

We also have to deal with the stereotyping of roles of men and women. As interim measure, we may need a quota system to correct the imbalance in areas and fields where women are absent especially at decision-making levels.

CAP: It will be harder to change the cultural mindset than to change the laws. First of all this extremely important move must not be seen as "women being more important than men" or worse as "challenging men" It is important to note that the change is to the word "sex". The public must understand that this change applies to both men and women - both enjoy equal standards and both should not be discriminated against.

The change in the constitution will not be meaningful if it is not followed through by making the necessary changes in all the relevant laws. This has to happen soon. Our immigration law, Immigration Ordinance 1959, for example, still discriminates against females which allows foreign wives of Malaysian men to stay on in the country but the same treatment is not accorded to the foreign husbands of Malaysian women.

Women themselves need to get a hold on this amendment and know how it applies to them in everyday life. If they do not know how it applies and ensure that it is applied, then it is useless. Also society as a whole needs to be diligent in identifying discrimination when it takes place and expose it. The ideal would be when society becomes intolerant of discrimination against both sexes.

Question: Give an example based on your experience where will this amendment be an advantage to women.

Wazir: The amendment will be an advantage to women in cases of sexual harassment at work, rejection of employment because of pregnancy, wage discrimination or discriminate job description to justify lower wages for women, quotas for men in universities to balance up the gender ratio in courses dominated for women and many other concrete situations which have worked in favour of men.

Rasamani: Judicial appointments. In the appointing of judges, the women do not get to be a Ketua Hakim Negara or Ketua Hakim Besar.

Ramani: Women must take advantage of this amendment to claim their right to equality. For example, just last month I was assisting an abused woman to get a transfer from one State to another. She couldn't cope alone and wished to return to her hometown to be with her family. She is seeking a divorce. However, the authorities dealing with her case wanted a letter of consent from her husband, giving her permission to seek a transfer. She doesn't even have a right to ask for transfer!

CAP: Employment opportunities where women are bypassed for promotions or given a smaller increment compared to their male counterparts. The amendment to the constitution will ensure that women are treated equally in the job sector.

Also they now can go to court if they feel they have been discriminated against. Non-discrimination is a big thing among the American public and that is because they are a litigious society. In Malaysia since we are not a litigious society discrimination is not taken seriously. The amendment will empower the discriminated person to exert the right due to them.

Question: Give an example where discrimination is so subtle it will be close to impossible for the amendment to be of any good to women.

Shanthi: I think my answer to question 1 and 2 will suffice. Almost everything will have the effect of discrimination unless there is an adequate definition of discrimination.

Wazir: A subtle form of discrimination may be in work scenarios when men gain promotions because they state that there are no suitable women around. This is always the case in terms of academic appointments, recognition of public service in the academe, appointments as deans and

directors. The truth is they are looking at certain qualities that women do not have - how to be part of a buddy system which excludes women, how to belong to an usrah group which excludes women, how to play politics without bringing up sex, etc. Women are constantly in a dilemma over this.

Rasamani: Look at the income tax laws, separate files are required. If a married man can claim deductions for his wife's income, then a married woman should also claim deductions for the husband's.

The husband will not give maintenance to the wife and the children suffer. If that happens, visiting rights should be rejected. Family courts should be set up speedily to ensure the rights of women.

Pension. The male should not receive the wife's pension if he remarries. If a female remarries, automatically the pension ceases.

CAP: The dowry system is still being practised among some in Malaysia. It is based on the concept that women have less value than men and hence are discriminated against when it comes to marriage. This form of discrimination is so subtle that it will be hard to eradicate and the constitution may just sweep over it unless the aggrieved party wants to take legal action.

Question: Is this not a significant achievement, given the status of women in the region and in Asian society as a whole?

Shanthi: It is definitely an achievement for the newly formed Ministry of Women and Family Development. It is indeed a very positive note on which they have started. My congratulations to the Minister Datuk Shahrizat.

Wazir: Malaysia is way behind other Asian countries but is trying to catch up as it were. Indonesia - the most populous Muslim nation in the world - has just sworn in a woman President. To me, this is a significant achievement. Our constitutional amendment is long overdue. It is actually late but better late than never or it's now or never.

Rasamani: Yes, it is a great achievement.

Ramani: This is and will become a really significant achievement provided that effective procedures, rules and regulations are put in place to ensure that women have equality. Relevant laws and legislations must be consistent with this amendment and should apply to both the public and private sectors.

CAP: It is indeed a significant achievement for Malaysia and Asian society as a whole. However we also must not forget that Malaysia ratified the CEDAW treaty (United Nations Convention on the Elimination of All forms of Discriminations Against Women) in 1995 and that it has taken us about six years to implement what we committed to doing. We should not have to wait too long to see the realisation of this significant amendment reflected in real terms in the following laws and meaningfully applied to everyday life.

There must also be visible changes taking place nationally that can testify to the fact that the amendment has indeed brought changes to society. For example, we need to see more women Ministers than the current number we have now. With girls outnumbering boys at tertiary education level and girls venturing into fields traditionally held by boys we need to see this also reflected in real terms in all spheres of life such as high-profile job opportunities such as vice-chancellors of universities and more ministerial positions.

Question: How do we go about teaching our young girls and boys of the importance of this new development?

Wazir: Young girls and boys have to teach us. We are obsolete, they are not. We underestimate their sophistication in understanding gender equality.

Rasamani: Gender equality should be introduced as a subject in school.

Ramani: A very effective and meaningful programme must be drawn up to cover all aspects of this new development which our young boys and girls must know. This awareness raising programme must be started as soon as possible as collaboration with the Ministry of Education. NCWO is in the process of forming a special task force on this issue. Discussions will be held and a plan of action drawn up as a follow-up to this proposed amendment.

CAP: This is where the real challenge lies in the way we bring up our children and teach them to understand the concept of equality of the sexes. Education has to start early in life. Parents have to stop making derogatory remarks about women and men. Parents need to ensure that they treat boys and girls equally. This means not favouring male children above females, making their children share the housework alike and not make the girls do the sweeping and the cleaning and spare the boys the housework.

Encouraging girls to do electrical work and carpentry. Boys need to be taught to respect girls and not treat them as objects. Further, the advertising industry need to respect women and stop portraying women as sex objects.

Question: How is this going to affect Syariah law?

Shanthi: Well, Article 8 of the constitution states that the equality provision will not invalidate any provision regulating personal law. So the Syariah law as it stands is above the constitutional amendment unless this provision is repealed. In my opinion, any discrimination that exists in the Syariah law has to be amended on the basis of justice and fairness that Islam accords to all human beings. For this a great deal of education is needed for people to internalise the value of equality and autonomy for women and to see the disadvantage of protectionism or paternalistic attitudes to women.

Furthermore Article 8 of the constitution also excludes the practice of restricting office or employment connected with the affairs of any religion etc. This would mean that the Christian or Hindu priesthood can be exclusively male. There is a long way to go still, I'm afraid.

Wazir: The Syariah jurors have to get together with constitutional lawyers. I repeat, Equality in the eyes of Man is equal to Equality in the eyes of God.

Rasamani: Syariah law does not prohibit equality. They will have to recognise that women will share the upbringing of the children equally with the male counterpart and therefore the male spouse cannot be bestowed the sole rights of guardianship.

CAP: The Syariah law won't be affected and will continue to exist alongside the constitution.