

FROM RIGHTS TO WOMEN'S RIGHTS: MALAYSIAN EXPERIENCE

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Abstract

This paper explores the philosophical idea of human rights to consider the meaning of the term '*rights*'. There are huge amounts of work being done in defining the term '*rights*'. '*Rights*' is defined by most human rights scholars in a four-separate perspective, as a claim, immunity, a freedom and a power. These concrete meaning of '*rights*' might be revealed from Hohfeld's idea of '*rights*' that may be used in a rigid sense of the right-holder's claim to something with a correlative duty. The emergence of a new consciousness of the patterns of discrimination against women and a rise in the number of organizations committed to combating the effect of such discrimination in 1960s, called the Government of Malaysia to show its support not only by setting up organisations, but also by allocating funds. However, there are critiques that justice for women is impossible to be upheld in Malaysia because the Government reserves few articles of the United Nations Convention on the Elimination of All Forms of Discrimination against Women due to its inconsistencies with *Shariah*. Therefore, it is critical to comprehend the Islamic ideals of human rights concept and principles and value the progress of women's rights in Malaysia.

Keywords: *Rights, Human Rights, Women, Discrimination, Law*

Introduction

There is an increasing discourse and debate on human rights both in political and international academic spheres. Rosenbaum (1980) draws attention to the understanding that human rights have received global awareness that may be based on expressed and implied promise as a non-bias and monolithic framework for overcoming challenge between multi traditions people. However, there have been disagreements over the specific interpretations of issues in both philosophical and political contexts.

To understand the philosophical idea of human rights, it is important to consider the meaning of the term '*rights*'. There has been a huge amount of work being done in defining the term '*rights*', including studies on collective and individual rights. '*Rights*' is defined by most human rights scholars in a four-separate perspective: as a claim, an immunity, a freedom and a power. A focus on '*rights*' according to their definition ensures that the position of individuals under the law is not considered as collective interest. These concrete meaning of '*rights*' might be revealed from Hohfeld's idea of '*rights*' that may be understood in a rigid sense of the right-holder's claim to something with a correlative duty. The term may also be used to indicate immunity from having a legal status changed. From this understanding, sometimes '*rights*' may indicate a privilege to do something and finally, may refer to a power to create a

legal relationship. Departing from social perspective of understanding '*rights*', Shestack (1984) used to describe it as a variety of legal relationships.

The Meaning of 'Rights'

The philosophical debate on the meaning of '*rights*' has been ongoing for at least five decades. Perelman (1952, 1963 and 1980), Buber (1955), Sharma (1980) and Rosenbaum (1980) addressed the philosophical historical background on the foundation of Western and non-Western human rights. In the early 1980s, while there was a growing concern over writings and publications on theological contexts of human rights. Kaplan (1980) explained the concept of human rights as fundamental to the moral philosophy of Judaism and Woo (1980), developed a metaphysical approach to human rights from a Chinese point of view. Henle (1980), on the other hand, put forward a Catholic view of human rights. Meanwhile, Hayden (2001) offered an exhaustive collection of readings examining both traditional Western perspectives of human rights as well as other views.

In the context of foundation of human rights in Islam, Rosenthal (1960) draws an attention to the Muslim concept of freedom prior to the 19th century. Nasr (1976), in the meantime highlighted the issue of Islam and the plight of modern man and later in 1980, he approached the concept of human rights from an Islamic perspective. He concluded that the foundation of human rights is essentially theological and is rooted in the obligations owed by human beings to God. However, the extent and applications of an Islamic perspective of the rights of human poses a number of problems. Some writers question the impossibility of defining '*rights*' in the Islamic tradition when it is clear that the phrase is itself of '*Western*' origin and they argue that the exercise of defining '*rights*' would be meaningless since there is only

the term '*duty*' in the Islamic tradition. However, within the Islamic tradition, the term '*haqq*' has always existed and translated into the English term '*rights*' (Ali, 2000).

Mohammad Tahir (2003) who analyses the term '*rights*' and '*duties*' in common law and *Shariah* has proven that the concept of '*rights*' is clearly identified by Quranic verses and Prophet's traditions. Furthermore, '*rights*' is the established meaning of the term in Arabic in the sense of a right holder's claim to something with a correlative duty. Indeed, the various foregoing terms identified as the concept of '*rights*' invokes different protections and produces diverse results in protecting humankind. Therefore, in attempting to develop a rigorous conceptual framework of human rights in international and Malaysian law, Hohfeld's vocabulary and analysis of '*rights*' might be employed usefully in identifying comparative categories of rights in both legal background as he creates more than one formulation of '*right*' and warns against treating all rights as belonging to a single category or class.

Women's Rights Movement in Malaysia

In Malaysia, laws on human rights of its citizen are known as fundamental liberties and stated in Part II of the Federal Constitution. There is no specific statute pertaining to human rights so far, yet citizens are protected under various laws, Government policies and international instruments of human rights ratified by Malaysia since its independence in 1957. Even though there is a large number of books and theses written on the human rights issues in Malaysia, there is no such effort to discuss philosophical and historical background of Malaysian fundamental liberties as legally codified in the Federal Constitution.

The situation of women in Malaysia has improved over time due to women's increase access to education and awareness of their constitutional rights. Legal amendments in order to eliminate any discrimination against women have been made continuously but still there is no clear definition of such discrimination. Customary and traditional practices continue to make a distinction between the sexes; each ethnic group in Malaysia is influenced by Asian values which determine the role of women in the domestic or private sphere while men dominate the public sphere (CEDAW/C/MYS/1-2).

The emergence of a new consciousness of the patterns of discrimination against women and a rise in the number of organizations committed to combating the effect of such discrimination in 1960s, called the Government of Malaysia to show its support not only by setting up organisations as mentioned earlier, but also by allocating funds. In response to the UN's 1975 resolution to integrate women into the development process (General Assembly Resolution 3519, 1975), the Government of Malaysia formed the National Advisory Council on Integrating Women in Development (NACIWID) which serve as an advisory and consultative body for the Government on matters relating to women in development planning and implementation. It was the national coordinating, consultative and advisory body on women's affairs.

The Department of Women's Development (JPW) serves as the secretariat for NACIWID. It was established in June 1976 as a multisectoral body comprising representative from the government and non-government sectors and provides the platform for greater intensification of efforts towards the integration of women in development. Amongst the functions of the Council are to provide advisory services and guidance to women's organizations on

their participation in national development and to advise on the formulation of legislation and programmes affecting women. It serves as a nucleus to which issues pertaining to women are referred and in addition, initiates research, studies and the dissemination of information. It liaises with appropriate authorities and related international organizations to promote friendly international relations and peace. However, the role and composition of NACIWID should have been reviewed to establish a secretariat independent of the Government's Women Ministry and limited its members to all experts on gender to strengthen its role as a coordinating, consultative and advisory body and operating effectively (NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia).

Subsequently in 1982-83, the Women's Affairs Secretariat (HAWA) was set up in the Prime Minister's Office of Malaysia to administer matters related to women. It was established to take over the tasks of the NACIWID Secretariat. Malaysia acceded to Women's Convention in 5 July 1995 with reservations to some of the Articles revolved around the practice of *Shariah* as practiced in the country and inconsistencies with the Federal Constitution. From 1997, HAWA functioned as a department under the former Ministry of National Unity and Social Development. In 2001, the Department was placed under the then newly established KPWKM and restructured as the Department for Women's Development (DWD). By 2002, the DWD had set up branch offices in every state in Malaysia.

The Government made allocations of funds to the Third Malaysia Plan (3MP) for the development of women, primarily in their roles and functions as housewives, mothers, and supplementary income earners. These funds were channelled through organizations such as the National Family Planning and Development Board or the

ministry dealing with social welfare. A National Policy on Women was formulated in 1989, incorporates its contents in the Sixth Malaysia Plan (6MP) period. The formulation of a National Action Plan in 1992 to support the implementation of the National Policy on Women was an integral component of the planning process. Under the Plan various strategies and programs were drawn up to be implemented by the government agencies, private sector, and non-governmental organizations (NGO). Therefore, the Sixth Malaysia Plan emphasized the formulation of the National Action Plan, which was to integrate women in the institutional process for planning, implementation, and monitoring followed by an Action Plan for Women in Development in 1997. It is stated that the government recognizes that specific strategies must necessarily be formulated to effectively incorporate women in the process of development. Towards this end, concerted efforts are made to progressively reduce existing constraints and facilitate the assimilation of women into the mainstream of social and economic activities.

Later, the Human Rights Commission of Malaysia (hereinafter referred to as SUHAKAM) was established as an independent statutory body operating under the Human Rights Commission of Malaysia Act 1999 to promote and protect human rights in Malaysia. The SUHAKAM's report to the Women's Convention Committee highlights the observation by the Government of Malaysia's responses and implementations on comments and recommendations on the Women's Convention made by the Committee (CEDAW/C/MYS/CO/2) and in the Universal Periodic Review (UPR) in October 2013. In developing the report, various consultations were held together with the Malaysian Government and Civil Society Organisations (CSO) to share ideas, recommendations and information on the Women's Convention. SUHAKAM also

monitored laws and policies which have impacted women's rights in Malaysia.

In January 2001, the Government announced the formation of a Women's Affairs Ministry developed from the HAWA as recognition of the contribution and role of Malaysian women. The Ministry, today known as the Ministry of Women, Family and Community Development, headed by a female minister is seen as a further acknowledgement of the importance of women's role in national development and as evidence of the Government's aim to promote gender equality. To empower women in Malaysia, the Government made allocations of funds to the Third Malaysia Plan (3MP) for the development of women, primarily in their roles and functions as housewives, mothers, and supplementary income earners. These funds were channelled through organizations such as the National Family Planning and Development Board or the ministry dealing with social welfare.

Moreover, in August 2001, Article 8 (2) of the Malaysian Federal Constitution was amended to prohibit discrimination on the basis of gender. Although this constitutional recognition could be a powerful instrument, it will remain in danger of being a mere token unless it is accompanied by a comprehensive review of law, policy, practice and implementation to ensure that women will benefit equally. It is important to say that the amendment must not limit itself to the word '*gender*' alone, but to include a definition of discrimination as provided for in the Women's Convention.

Like other State Parties, Malaysia is legally bound to put the Women's Convention's provisions into practice, committed to submit national reports, at least every four years, on measures it has taken to comply with its treaty obligations. Malaysia agrees to take all appropriate measures, including legislation, against all forms of traffic in

women and exploitation of women, so that women can enjoy all their human rights and fundamental freedoms. Malaysia also undertakes a series of instrument to establish tribunals and other public institutions to ensure the effective protection of women against discrimination and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

National Policy on Women and National Women in Development (WID) Machinery Report acknowledges that while it appears that women have made significant advances in all aspects of private and public life, as reflected by the overall status of women in the country, detailed analysis of the participation of women in all spheres of development, reveals the continuous existence of obstacles and constraints to the fullest utilization of women's potential. Women's position, the Report acknowledges, relative to men, remains less than satisfactory. Women still lag behind, particularly in assuming political power, leadership roles, legal standing and employment. The Government's acceptance of the Plan demonstrates its commitment towards a fundamental shift in development policies that would adequately address the realities of women's lives, and actively assist women in gaining equal access to resources, wages, employment, health care, education, personal autonomy, and decision making.

The different religions and cultures have consequences of complex implementation of legislation pertaining to human rights in Malaysia. Instead of having many positive aspects in women's lives due to multi-religious and cultures, however, it is also the case that women are discriminated against by their religions and cultures which perpetuate stereotype gender roles and protectionist and patriarchal attitudes towards women (Status Report on Women's Equality in Malaysia 2001). Stereotyped gender roles enshrined in

religion and culture permeate through society, and are reflected in the nation's schools, in places of work, in media, government, laws and in the home. School curricula, religious teaching material and media images continue to stereotype women as homemakers when many women in Malaysia work and pursue careers.

However, SUHAKAM commends the Malaysian Government's commitment to the Sustainable Development Goals 2030 (SDG) and its effort in incorporating those goals into the Eleventh Malaysia Plan (11MP) (Malaymail Online. 25 September 2016). The 2030 Agenda comprises of 17 transformative goals which consists of, among others, gender equality and empowerment of women and children. Goal 5 in particular focuses on the elimination of all forms of violence against women and girls in public and private spheres including human trafficking and sexual exploitation. This is the first time a global gendered framework for development has been adopted that is inclusive and builds upon human rights instruments (Special Rapporteur on Violence against Women, Its Causes and Consequences. A/HRC/32/42: para 38). The implementation of the 2030 Agenda will give a fresh opportunity to accelerate progress in achieving gender equality and empowering women and girls and eliminating violence against women (para 39).

Women's Rights Exploration in Malaysia

In Malaysia, feminists' writings are relevant and applicable (Ahmad and Baljit, 1989) even though there has been a widespread avoidance of the term '*feminism*' (Mohamad and Koon, 1994). Feminist movements have their own location (Yuan, 2003), which carries the same objectives and claims with '*feminism*'. This avoidance is to eschew '*Western feminism*' which is seen as the

universalist agendas of feminist global politics. Stivens (2003) found several reasons for this distancing which varied from avoidance of 'Western' agenda (Mohanty et al 1991) to libertarianism (Yuan, 1999). It is understood that the strategy of pursuing women's rights through a process of cultural dialogue stands in clear contrast to the secular approach of arguing for rights on the basis of universal claims to human rights (Othman, 1999). Women activism in Malaysia and other non-Western countries should be based on a communitarian feminism that engages in local cultural dialogue (Ong, 1996). Even defining Malaysian Muslim women's rights and freedom is a task that occurs on a complex cultural and political battleground in the midst of acute polemical contests over Islamization, modernisation and cultural relativism (Othman, 1998: 176). Malaysian women activists have felt increasingly willing and able to deploy local versions of frankly modern ideas of rights and gender equality within campaigns to advance feminist or womanist identities including those within Islamic practices (Stivens, 2003). As feminist jurisprudence is a house of many places to stay, it reflects the different movement in their legal thought, yet they unite with a belief that society and legal order is patriarchal (Freeman, 1994: 1027).

Malaysian women scholar activists have made a number of highly reflexive explorations of the relationships between feminist theory and practice. With only one publication on feminism and women's rights in pre-1970, it increased up to three from 1970 to 1980 and eight from 1981 to 1989. Interestingly, with higher awareness on women's rights in post 1990s, writings on this subject increase substantially to 81 from 1990-2004, which is equivalent to 2.2 percent of the total publication productivity in pre-1970 to 2004 (Ngah, 2007: 388). Even though studies on equality and non-discrimination started only post 1990,

women's rights and feminism has been the subject of research since 1970 (Ngah, 2008: 7).

Other than the study on history of the development of women's organisation in Malaysia in *Kajian Malaysia* edited by Mohamad and Koon (1994), Ng and Leng (1996), Ariffin (1999), Yuan (1999), Ng (1999) and Martinez (2003) there are significant numbers of literature. Women and politics in Malaysia are also carefully explored instead of women and employments which have been researched as early as 1983. In family matters, there are also significant numbers of research been done. Other than that, studies on women and education been explored since 1978. Economic status of women is significantly studied in early 1990s. Women and media also attracted readers from various literatures whereas violence against women is greatly debated after 1990s.

Not only urban women, rural women issue also tackled various attentions from researchers. Women's rights and conflicts with religion and culture been studied since 1987. Issues on public and private dichotomy of women's life in Malaysia are not yet thoroughly studied, except a debate on women's conflict and coping behaviour about the integration of home and non-home roles whereas representation of masculinity in a Malay society is only been studied in 1995. These plenty of literatures on women's studies in Malaysia denote that women's situation in Malaysia could recall an active and positive attentions from scholars and women's movements, to study their rights and protection. However, there is lack of information and knowledge about women and their legal protection in Malaysia except few studies on family laws, criminal laws and employment laws. There are 76 publications on legal status of women in family, four publications on criminal laws and 10 publications on employment laws between 1970 and 2004 in Malaysia. Only post 1990s, interest in the

study of equality and the Women's Convention has increased the number of publications. However, until 2020, there is still lack of coherent study of the Malaysian women's legal protection internationally as compared to the *Shariah* from Malaysian legal perspectives.

Harmonizing International Convention and the Shariah on Women's Rights

At another front, seeing that justice for women is regarded as impossible to be upheld in Malaysia because the Government reserves few articles of the Women's Convention due to their inconsistency with the *Shariah* and the Federal Constitution, it is critical to comprehend the Islamic ideals of human rights concept and principles. Malaysia supports the effort of the 19th Foreign Ministers' Summit of the Organisations of Islamic Cooperation (OIC) which was held in Cairo, Egypt on 31 July to 4 August 1990 towards creating universally accepted Islamic human rights standard such as the Cairo Declaration of Human Rights (Cairo Declaration) which consists of a Preamble and 25 Articles and is similar in tone and substance to the Universal Islamic Declaration of Human Rights (UIDHR) which was adopted on 19 September 1981 by the Islamic Council in Paris. The objective of which is to provide guidelines for Islamic countries concerning the protection of human rights in respective countries.

Both non-Muslim and Muslim human rights activists have charged that the application of *Shariah* in some countries has breached international human rights law as codified in numerous conventions and treaties. They have argued that in some places, the application of *Shariah* does not offer equal protection for men and women in which critics say it favours men. Back in 2008, United Kingdom's House of Lords drew stark attention to the conflict between *Shariah* and UK law, calling the Islamic

legal code '*wholly incompatible*' with human rights legislation (Hirsch, Afua. 2008).

However, Baderin (2001), while formulating a synthesis between international and Islamic human rights laws argues that although there are some differences of scope and application, it does not create a general state of dissonance between them especially if the concept of human rights were positively established from within the themes of Islamic law rather than imposing it as a concept alien to Islamic law. I certainly agree with Tehrani (1998), in his examination of the origin of the religion and Islamic sources in his thesis. He doubts the validity of the Western view and Muslim parties' reservations, based solely on their interpretation of the *Shariah*. Contrary to the common perception, the principles of *Shariah* have an in-built dynamism that is sensitive and flexible so that Islamic law can remain up-to-date and respond to the questions and demands of people at different times and places (Zafrullah Khan, 1967: 14).

Mayer (2006), who has compared perspective from different Muslim countries based on political make up in terms of national interpretations as to how women rights are translated by government policies, seems to support Tehrani's argument that principles of *Shariah* are flexible. She expresses various reservations and the process of interpreting the Islamic sources made when the Muslim countries entered into the Women's Convention. She has also cited how political change can affect the treatment of women's human rights by Islam. For instance, in 1993, Morocco had entered a reservation to the Women's Convention, indicating that it was bound by *Shariah* and maintaining equality for women was incompatible with the principles of *Shariah*. King Muhammad VI who ascended the throne in 1999 rejected such a notion and proposed a law

reform to tackle discriminatory treatment of women. The King's law reform in 2004 proved that Islamic sources could be reinterpreted to accommodate major advances in women's rights and there is a widespread opinion that Moroccan laws now meet the standards of international human rights law. Mayer argued that where there are debates to define the contours of women's rights and roles in contemporary Muslim societies, Islam is the main basis for arguments because the implication of Islam for women's rights are interpreted so differently by various groups of Muslims, however, some recent trends point in the direction of a reassertion of Muslims' support for women human rights, treating the values of international human rights and Islamic values as essentially harmonious.

At the same time, Ali (1998), while engaging in a conceptual analysis of human rights in Islam and international laws and the application of this analytical discourse to explore the nature of women's human rights in the Islamic tradition, argued that women's human rights in Islam are not entirely irreconcilable with current formulations of international human rights instruments emanating from the UN. The basic premise of the argument stems from a recognition that the Islamic legal tradition is not a monolithic entity. A further factor she raised in her study is the disparity between the theoretical perspectives on women's human rights, and their application to Muslim jurisdictions, a disparity which is determined by elements of cultural practices, socio-economic realities and governments' political expediencies. She uses the example of Pakistan to demonstrate the divergence between theory and practice of *Shariah* in these jurisdictions.

Furthermore, Brown (2005) examines the processes by which certain sets of ideas about Muslim women's rights become dominant in particular localities and questions the specificity accorded to

Muslim women in both global human rights talk and transnational Islamic narratives. He concludes that the strategies, negotiations and women's rights claims made in Muslim communities can be explained by religion, social, economic and ideological relations. His analysis reveals that attempts at understanding the conceptualisation of women's rights in Muslim communities must therefore be a holistic analysis which resists essentialising and imposing predetermined interests on actors.

The protection of human rights of women is a contentious issue in the realm of international human rights law by the fact that there is no standard agreement adopted by the international community. Although there are various international instruments guaranteeing protection there is no consensus as to what extent the provisions are incorporated within national laws and government policies as member states to the said instruments enter reservations on various articles upon ratification of the treaties. Of the six major human rights treaties, the Women's Convention has the largest number of reservations. Clapham (1993) suggests that the application of international human rights law to the private sphere has implications for the worlds of labour relations, race relations, discrimination and violence against women, and for victims of indignities everywhere. An argument that the concept of human rights is purely Western and foreign to non-Western cultures (Donnelly, 1989), supports the earlier notion that those human rights are not universal.

Benzeer (2000) compares selected provisions in UDHR and ICCPR with the principles set forth in three contemporary Islamic charters of human rights; namely: the UIDHR, the Great Green Charter of Human Rights in Jamahiriya Era of 1988, and the Cairo Declaration. However, it covers only the right to freedom and to gender equality. This is a study of the

general principles of *Shariah* concerning human rights. The views of some Muslim jurists and thinkers and their interpretation of the Quranic verses and the meaning of the Prophet's *Hadith* are analysed. It is admitted that in many Muslim countries, the violation of women's rights is evident. By this declaration by Muslim countries themselves, governments can be forced to provide better standard of protection because the concept of women's rights are existent in both civil and *Shariah* concepts, though with some technical differences as to the nature of those rights' vis a vis human position in this world.

Conclusion

Attempt at harmonizing the different concepts to achieve is still demanding rather than the complexity and diversity of human society or a common universal understanding that ensures the full guarantee of human rights to every human being everywhere (Baderin, 2003: 2). Thus, if the Malaysian laws could be harmonized with the Women's Convention by harmonising the principles of 'rights', it should bring about positive practical effects on women's rights notwithstanding its jurisdictional enforcement. Malaysian government could progress further in defending women's cause in the country by focusing on gender mainstreaming and including the gender equality dimension in all its policies. Government is making noble improvement towards a non-violent and more equal environment for women and girls following the proposed new or amended legislation such as the anti-stalking law, Gender Equality Act, Sexual Harassment Act and ending child marriage. Indeed, the establishment of a Select Committee on Rights and Gender Equality in Parliament was also a good step forward for equality.

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