

# **Reluctantly Embracing International Human Rights Law: The Malaysian Experience Navigating the Dual Quality of International Law<sup>1</sup>**

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## *Abstract*

International human rights law, along with the setting up of the United Nations at the end of the Second World War, promised in the dignity and worth of humans in both large and small nations. International human rights law was supposed to save the world population from the scourge of war, despots and other miseries. The international legal order after the end of the Second World War also promised equal sovereignty where all states would be equal under international law in spite of inequality of population size, resources, military might and others. International human rights law is thus applicable to all states, meaning to protect all populations. International human rights law has been used to liberate colonies and to protect people from oppression. The universal nature of international human rights law means that it is applicable to all nations both large and small. However, the very fact that it is universal can also be problematic when it comes to its application, the Eurocentric understanding of human rights are imposed on all. This paper looks both at the acceptance of Malaysia of international human rights law and her manoeuvres in resisting the suffocating aspect of universalism in the application of the law.

**Keywords:** human rights law, universalism, Malaysia, international law

## **Introduction**

International human rights law, as with the setting up of the United Nations at the end of the Second World War, promised in the dignity and worth of humans in both large and small nations. International human rights law was supposed to save the world population from the scourge of war, despots and other miseries. The international legal order after the end of the Second World War also promised equal sovereignty where all states would equal under international law in spite of inequality of population size, resources, military might and others. International human rights law is thus applicable to all states, meaning to protect all populations. The following discussion also looks at the experience of Malaysia accepting the universality of international human rights law but at the same time affirming that the distinct character of the nations with its indigenous culture and norms.

## **The Promise of the International Human Rights Law**

The suffering of the people after the Second World Wars convinces the world of the need for a shared code of conduct recognising inalienable human rights. To prevent another World War, there is also a need to have an international body like the United Nation to keep the world peace. Initially, the United States and the United Kingdom were reluctant to place human rights as the central theme of the United Nation in the in proposals suggested in the Dumbarton Oaks Conference 1944, fearing that their treatment of coloured people and of

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<sup>1</sup> A paper presented in the *International Symposium on "Reconsidering Human Rights"*, organised by The Human Rights and Equality Institution of Turkey, 6-7 December 2018, Istanbul.

their colonies respectively would be questioned.<sup>2</sup> Thus, human rights were put under the most innocuous section of the International Economic and Social Cooperation (IESC) with the aim to promote respect of human rights and fundamental freedom. Efforts to put in place emphasis on human rights during the San Francisco Conference 1945 were stalled among others by the United States fearing their Jim Crow,<sup>3</sup> internment of Japanese, genocide of the Native Americans and lacks of workers' rights would be questioned.<sup>4</sup> The clause of human rights was agreed to be inserted subject to the inclusion the domestic jurisdiction clause. The colonial trusteeship and caretaking as a paternalistic arrangement suggest inherent inferiority of the colonised people rather than recognising the oppression and exploitation of the capitalist empires.<sup>5</sup>

Nevertheless, in June 1945 Article 1 of the Charter of the United Nations Charter put one of the purposes of the United Nations is to achieve international cooperation "in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, gender, language, or religion".

Furthermore, on 10 December 1948, the Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly in Paris setting out the standards for human rights as inalienable rights of all members of the human family as the foundation of freedom, justice and peace.<sup>6</sup> The preamble of the UDHR also reminds all that the failure to respect human rights would cause "barbarous acts" with the atrocities in the Second World War still fresh in mind.<sup>7</sup> It is the hope that the acceptance of the international human rights law inhibits human rights violations.

### **Malaysian Accepting the Treaties**

Immediately after being accepted as a member of the United Nations after its independence in 1957, Malaysia has embraced in general the importance of human rights. This is reflected in some of the speeches of its first Ambassador to the United States and permanent representative to the United Nations, Dr. Ismail Abdul Rahman.<sup>8</sup> Although Malaysia has not extended a warm embrace to the whole idea of international human rights as shown by criticisms from its leader, including criticisms from Mahathir Mohamad – the longest reign Prime Minister and the first person who became the Prime Minister for a second time in 2018, Malaysia as a sovereign country has ratified several treaties including the Convention on the Rights of the Child (CRC) in 1995 resulted in the enactment of the Child Act 2001, and the Convention on the Rights of Persons with Disabilities (CRPD) on 6 July 2010.

Another convention ratified is the Convention on the Elimination of All Discrimination against Women (CEDAW). The Convention seeks to provide a universal standard for the rights of women. The Convention acknowledges the "extensive discrimination against women" that continues to exist which "violates the principles of equality of rights and respect for human dignity". It addresses discrimination in the areas of

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<sup>2</sup> Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights 1944-1955*, Cambridge: Cambridge University Press, 2003, at 37-38.

<sup>3</sup> The name of the racial caste system operated in the United States through the anti-black laws enacted between 1876-1965.

<sup>4</sup> Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights 1944-1955*, Cambridge: Cambridge University Press, 2003, at 48-50.

<sup>5</sup> A Dirk Moses (Ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, New York: Berghahn Books, 2008.

<sup>6</sup> General Assembly Resolution 217A.

<sup>7</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Philadelphia: University of Pennsylvania Press, 1999.

<sup>8</sup> Tawfik Ismail & Ooi Kee Beng, *Malaya's First Year at the United Nations: As Reflected in Dr. Ismail's Report*, Singapore: Institute of Southeast Asian Studies, 2009.

education, employment, family relations, healthcare, politics, commerce and law. At present, 189 countries are state parties to CEDAW.<sup>9</sup> Malaysia ratified CEDAW on 4 August 1995; 16 years after it had been available at the United Nations since it was adopted on 18 November 1979.<sup>10</sup>

Malaysia has shown its commitment to the treaty by taking appropriate measures to ensure the advancement of women. It took 6 years before the express prohibition of gender discrimination was inserted in the Federal Constitution in 2001.<sup>11</sup> Apart from that, in furtherance to CEDAW and the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women 1995, the Ministry for Women, Family and Community Development was established on 17 January 2001.<sup>12</sup> Several legislations and regulations were amended in line with the commitment in CEDAW.<sup>13</sup>

### **The Malaysian Government and Cultural Relativism**

As indicated above, Malaysia has always stated its reservation to the idea of international human rights, particularly to its idea of universalism. Although Malaysia subscribes to the idea of international human rights, its implementation should always consider the local culture and norms – in other words cultural relativism. Cultural relativism means that different cultural perspective should be taken into account in applying international human rights that should be interpreted differently according to cultural, ethnic and religious traditions.

Mahathir Mohamad – while he was the Prime Minister of Malaysia for the first time (1981-2003) – criticised the imposition of Western values – in particular the liberal notion of human rights over the Asian values. He argued that the application of human rights should take into account the Asian values which in the context of Malaysia emphasise the Malay-Islamic values.<sup>14</sup> Other Asian leaders from Singapore and Indonesia for instance also share the idea of cultural relativism and Asian values with a different emphasis from Mahathir Mohamad.<sup>15</sup> Although the concept of Asian values was criticised as being vague, some agreed application of international human rights in a country should acknowledge the distinct local values and norms which although would not deny outright the human rights, provide nuance in its application.<sup>16</sup> Nevertheless, the nuance application of human rights admittedly should never be used to justify injustice and suffering.

Such misgiving of Eurocentrism and Western dominance in value setting is reflected in Malaysia making reservation while ratifying CEDAW. Malaysia made reservations in ratifying CEDAW on Articles 2(f), 5(a), 7(b), 9 and 16.<sup>17</sup> In making the reservation, Malaysia

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<sup>9</sup> <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

<sup>10</sup> UN Resolution 34/180.

<sup>11</sup> Constitution (Amendment) Act 2001 (Act A1130), in force on 28<sup>th</sup> September 2001.

<sup>12</sup> The Platform for Action provides for "Establishment of a full-fledged ministry that demonstrates the government's commitment to raise the status of women in this country".

<sup>13</sup> See for instance the voluntary Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace introduced by the Human Resources Ministry in 1999; the Guidelines Pertaining to Sexual Harassment Issues in Public Service, issued in August 2005 by the Public Service Department; insertion of provisions on sexual harassment and mandatory complaint and inquiry procedure in the Employment Act 1955 in 2012 through Act A1419; a new tort of sexual harassment in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; amendment to the Penal Code.

<sup>14</sup> Mohd Azizuddin Mohd Sani, *Media, Liberty and Politics in Malaysia*, Sintok: UUM Press, 2015, at 60.

<sup>15</sup> Knut D Asplund, "Resistance to Human Rights in Indonesia: Asian Values and Beyond" (2009) 10:1 *Asia-Pacific Journal on Human Rights and the Law* 27.

<sup>16</sup> See for instance Randall Peerenboom, "Beyond Universalism and Relativism: The Evolving Debates about 'Values in Asia'" (2003-2004) 14 *International and Comparative Law Review* 1.

<sup>17</sup> Article 2(f) refers to modifying or abolishing existing laws, regulations, customs and practices that discriminate against women. Article 5(a) refers to modifying social and cultural patterns to eliminate prejudices,

declares the acceptance is made with the understanding that “the provisions of the Convention do not conflict with the provisions of the Islamic Shariah law and the Federal Constitution of Malaysia”.<sup>18</sup>

However, Malaysia did review its reservation and following the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women 1995, on 6 February 1998, Malaysia withdrew the reservation on Article 2(f), 9(1), and 16(b), (d), (e) and (h). On 19 July 2010, Malaysia further withdrew the reservation on Articles 5(a), 7(b) and 16(2). The remaining reservations are on Articles 9(2) and 16(1)(a), (c), (f) and (g).

Although few State parties to CEDAW objected to the original and continuing reservations made by Malaysia, Article 28 of CEDAW permits reservation of the convention.<sup>19</sup> A reservation is a unilateral statement made by a state in ratifying a treaty. The objective is to exclude some provisions of the treaty from being applied to the state. Why should acceptance of the treaty be allowed to be made conditional? It is to promote the universality of acceptance of treaties albeit sacrificing the depth of obligations. Nevertheless, such reservation should not be incompatible with the object and purpose of the Convention. Thus, the greater goal is the universality of the treaty rather than onerous restrictions on reservation that could thwart expansive ratification of the treaty.<sup>20</sup>

The remaining reservations, particularly under Article 16 relate to laws applicable to Muslims. For instance under Malaysian law, generally there is no total freedom to choose a spouse since Muslims could not marry non-Muslims.<sup>21</sup> Similarly, even though it could be argued that Muslim men and women have equal substantive rights in marriage and dissolution of marriage, the exact instrument available for the 2 sexes are not similar. The initial reservation and subsequent withdrawal of it shows the acceptance of Malaysia to the principle of non-discrimination. However, since the understanding of equality differs and sometimes not holistic, Malaysia has to maintain its reservation.<sup>22</sup>

Perhaps at this juncture the call for dialogue among civilisations to achieve universalism in international human rights law is pertinent. The United Nations recognition of the “diverse civilizational achievement of mankind, crystallizing cultural pluralism and creative human diversity” shows the reality of pluralism and consequently cultural

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customs and practices that are based on the idea of inferiority or superiority of either of the sexes or stereotyped roles. Article 7(b) refers to eliminate discrimination in the political and public life including to hold public office and perform public functions in government. Article 9(1) on the equal rights in granting nationality and clause 2 on equal rights in granting nationality for the children. Article 16(1) is on equal rights (a) to enter marriage, (b) to choose a spouse, (c) during marriage and dissolution, (d) rights as parent irrespective of marriage status, (e) to decide having children, (f) rights and responsibilities to guardianship, (g) to choose profession, and (h) ownership of properties. Article 16(2) states that betrothal and the marriage of a child shall have no legal effect.

<sup>18</sup> <<http://www.un.org/womenwatch/daw/cedaw/reservations-country>>. The full text of the reservation: “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 Shariah 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”.

<sup>19</sup> See also the Vienna Convention on the Laws of Treaties 1969.

<sup>20</sup> Advisory opinion of the International Court of Justice in *Reservations to Genocide Convention* (1951) 15 ICJ Reports 15. See also Alain Pellet, “The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur” (2013) 24:2 *The European Journal of International Law* 1061.

<sup>21</sup> See for instance the Law Reform (Marriage and Divorce) Act 1982 and the Islamic Family Law (Federal Territory) Act 1984.

<sup>22</sup> Nik Salida Suhaila Nik Saleh, “A Conceptual Analysis of ‘Rights’ in the International And Islamic Human Rights Instruments” (2012) 2:4 *American International Journal of Contemporary Research* 155.

relativism.<sup>23</sup> Distinction then has to be made between the universality of international human rights law which refers to the “universal quality or global acceptance of the human rights idea” with the universalism in human rights which requires “interpretation and application of the human right idea”.<sup>24</sup>

### **The Malaysian Courts and the Doctrine of Dualism**

Some reluctance to accept readily provisions in international human rights instruments could be seen in the domestic application of international treaties in the Malaysian legal system. In disputes before the courts, parties have attempted to argue that international instruments should be used in interpreting and applying domestic law. However, an obstacle to this argument is the doctrine of dualism where municipal law and international law are considered existing in separate legal systems.<sup>25</sup> Thus, international law could not apply directly in the municipal legal system without first being incorporated domestically through legislation. This is the case even for treaties that the country has ratified.

Decision of the Malaysian in this issue is mixed. In *Abd Malek bin Husin*, the judge in deciding the fate of a detainee under an executive detention incarcerated under the Internal Security Act 1960 refers to the Universal Declaration of Human Rights 1948 to inform the interpretation of the Malaysian Federal Constitution regarding fundamental liberties.<sup>26</sup> A support for this approach in the law that establishes the Human Rights Commission of Malaysia where it asserts that “regard shall be had to the Universal Declaration of Human Rights 1948” in the work of the Commission.<sup>27</sup>

Similarly, the court gives due regard to the Universal Declaration of Human Rights 1948 in *Suzana bt Md Aris* where the judge refers to the principle right to life and liberty under the UDHR as part of Malaysian jurisprudence.<sup>28</sup> In this case, the court awarded exemplary damages over the oppressive and arbitrary actions of the police in depriving medical attention to a detainee that led to his death. Nevertheless in this case the UDHR has not contributed anything new to the Malaysian jurisprudence since the right to life is guaranteed under the Malaysian constitution.

Some decisions also have considered ratified treaties that have not been transformed or wholly transformed into domestic law such as CEDAW. In *Noorfadilla bt Ahmad Saikin*, the plaintiff accepted an offer as a temporary teacher from the Education Department.<sup>29</sup> After she disclosed that she is pregnant, the office withdrew the offer. She demanded that she is reinstated. According to the court, the amendment made in the Malaysian constitution to prohibit gender discrimination is a consequent of the ratification of CEDAW. Thus, the court should consider the government’s commitment at the international level and to construe domestic law in accordance to the principle of the convention.

However, decisions from other cases show the reluctance of the courts to consider international instruments that have not been incorporated into the domestic legal system. The Federal Court in *Beatrice Fernandez* took the view that a treaty could only be enforced

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<sup>23</sup> See for instance *United Nations Year of Dialogue Among Civilizations* A/RES/53/22 of 16 November 1998; Syed Othman Alhabshi & Syed Omar Syed Agil (Eds.), *The Role and Influence of Religion in Society*, Kuala Lumpur: Institute of Islamic Understanding Malaysia, no date.

<sup>24</sup> *Mashood A Baderin*, “Dialogue among Civilisations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic Law” (2001) 2:2 *Asia-Pacific Journal on Human Rights and the Law* 1.

<sup>25</sup> See further Farid Sufian Shuaib, “The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse” (2008) 16 *IJUM Law Journal* 181.

<sup>26</sup> *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368, Mohd Hishamudin J.

<sup>27</sup> The Human Rights Commission of Malaysia Act 1999, section 4(4).

<sup>28</sup> *Suzana bt Md Aris v DSP Ishak bin Hussain* [2011] 1 MLJ 107.

<sup>29</sup> *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun* [2012] 1 MLJ 832.

through domestic legislation.<sup>30</sup> Thus, the court did not consider CEDAW in deciding whether a term of contract of employment that bars a flight attendant from being pregnant is unconstitutional.

Similar in *AirAsia Bhd v Rafizah Shima bt Mohamed Aris*, the Court of Appeal refused to consider CEDAW in determining the validity of a scholarship agreement that forbid the student from being pregnant during the duration of a four year aircraft maintenance engineering training programme.<sup>31</sup> The court observed that CEDAW does not have the force of law in Malaysia unless incorporated into domestic law by legislation.

The Malaysian apex court seems to be averse in directly applying provisions of international instruments without legislative incorporation. On the other hand, the lower superior court, namely the High Court, seems more predisposed to give force to UDHR and CEDAW in interpreting and applying domestic laws. Collectively this shows the ambivalent attitude of the courts towards international instruments, even after ratification by the executive.

## Conclusion

This paper seeks out to analyse the experience of Malaysia in taking hold of international human rights law in a conditional embrace. The UDHR as a part of the international bill of rights under the United Nations by the name itself proclaims to be universal and seeks out to be “a common standard of achievement for all peoples and all nations”. However, the abstention of 8 Member States (Byelorussia SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, USSR, Ukrainian SSR and Yugoslavia) shows not of failed universalisation but of divergent interpretation of the rights. Taking CEDAW as the main example of the Malaysian experience, one could see the commitment of the executive and the legislature to implement and incorporate its provisions. However, there were reservations with the belief that indigenous norms and cultures should matter in the application of human rights.

With the end of the rule of the *Barisan Nasional* as the coalition of political parties forming the government for a 61-year continuous rule since the independence, replaced by the *Pakatan Harapan* (a new coalition formed before the 14<sup>th</sup> general election) subsequent to the completion of the 14<sup>th</sup> general election in May 2018, questions were raised as to the approach that will be taken by the new government. The new government seems to be more eager to ratify the remaining six human rights treaties as declared by the Minister of Foreign Affairs.<sup>32</sup> This is reaffirmed by the Prime Minister Mahathir Mohamad in delivering Malaysia’s national statement at the 73<sup>rd</sup> United Nations General Assembly’s general debate where he pledged that the new government of Malaysia is to ratify the remaining core United Nations’ instruments on human rights. Nevertheless, he reminded the Assembly that it would not be easy “as Malaysia is multi-ethnic, multi-religious, multicultural and multilingual”.

Thus, it appears that although the new government is more predisposed to accept international human rights, the doubt about its universalism lingers. The new government still

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<sup>30</sup> *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* [2004] 4 MLJ 466.

<sup>31</sup> *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318.

<sup>32</sup> “Saifuddin pledges to push for ratification of six international human rights conventions”, *The Star*, July 2, 2018 at <www.thestar.com.my>. The six remaining conventions are International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; the International Convention for the Protection of all Persons from Enforced Disappearance; and the United Nations Convention Relating to the Status of Refugees 1951. Malaysia has ratified three treaties namely Convention on the Rights of the Child (CRC), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD).

reiterates the need to consider indigenous culture and norms so that small nations from the South would not be overwhelmed by values whose universality are accepted but whose application requires indigenous interpretation.

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