

GENDER DISCRIMINATORY LAWS IN MALAYSIA
by Women's Centre for Change (WCC) Penang
November 2008

1. THE FEDERAL CONSTITUTION

Article 8 Equality

- (1) All person 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 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.

Comment:

Article 8(2): Despite the fact that Article 8(2) has been amended to prohibit non-discrimination on the basis of gender, there is still a few provisions of the constitution that run counter to the spirit of Article 8(2).

Article 12 Rights in respect of education.

- (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of **religion, race, descent or place of birth** –

Comment:

Article 12(1): Provision on education has not been amended to include non-discrimination on the basis of “gender”.

Article 12(4)

- (4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his **parent or guardian**.

Comment:

Article 12(4): Provision on child's religion has not been amended by substituting “parent or guardian” with “parents and guardians”.

Article 14 Citizenship by operation of law.

1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in **Part II of the Second Schedule**.

Second Schedule (Part II) Citizenship by operation of law of persons born on or after Malaysia day.

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(b) every person born outside the Federation whose **father** is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and

(c) every person born outside the Federation whose **father** is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di- Pertuan Agong, registered with the Federal Government; and

Comment:

Article 14(1)(b) Federal Constitution and Part II of Second Schedule s 1(c): Women cannot confer citizenship onto their children born outside Malaysia in certain circumstances.

Article 15 Citizenship by registration (wives and children of citizens).

(1) Subject to Article 18, any married woman whose **husband** is a citizen is entitled, upon making application to the Federal Government, to be registered as a citizen if the marriage was subsisting and the **husband** a citizen at the beginning of October 1962, or if she satisfies the Federal Government –

Comment:

Article 15(1): No provision for foreign husbands of Malaysian women to receive citizenship.

Article 24 Deprivation of citizenship on acquisition or exercise of foreign citizenship, etc.

(4) If the Federal Government is satisfied that any **woman** who is a citizen by registration under Clause (1) of Article 15 has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen, the Federal Government may by order deprive her of her citizenship.

Article 26 Other provisions for deprivation of citizenship by registration or naturalisation.

(2) The Federal Government may by order deprive of her citizenship any **woman** who is a citizen by registration under Clause (1) of Article 15 if satisfied that the marriage by virtue of which she was registered has been dissolved, otherwise than by death, within the period of two years beginning with the date of the marriage.

Comment:
Article 24(4) & Article 26(2): Provisions as to deprivation of Malaysian citizenship status to women.

2. EMPLOYMENT ACT 1955

S 37 Length of eligible period and entitlement to maternity allowance.

(1) (a) Every female employee shall be entitled to maternity leave for a period of not less than **sixty consecutive days** (also referred to in this Part as the eligible period) in respect of each confinement and, subject to this Part, she shall be entitled to receive from her employer a maternity allowance to be calculated or prescribed as provided in subsection (2) in respect of the eligible period.

Comment:
S 37: Maternity leave is a minimum of 60 days as opposed to the standard of 90 days required by the ILO.

S 34 Prohibition of night work.

(1) Except in accordance with regulations made under this Act or any exemption granted under the proviso to this subsection no employer shall require any **female** employee to work in any industrial or agricultural undertaking between the hours of ten o'clock in the evening and five o'clock in the morning nor commence work for the day without having had a period of eleven consecutive hours free from such work.

Comment:

S 34: Prohibits women from working at night.

S 35 Prohibition of underground work.

No **female** employee shall be employed in any underground working

Part XIIB: Foreign workers are not covered by the Act.

Omissions

- There are no express provision of equal pay for equal work
- Domestic servants – local and foreign – not included within definition of “employees”

Comment:

S 35: Prohibits women from doing underground work.

3. SEXUAL HARASSMENT

Comment:

This is a major area of discrimination because there is at present not much recourse for women who have been harassed unless there has been an offence under the Penal Code, an action in tort or a case of unfair dismissal.

The Code of Practice on Sexual Harassment is not enforceable and implementation is optional by individual companies thereby rendering it effectively inoperative.

4. WORKMEN’S COMPENSATION ACT 1952

S 10 Distribution of compensation.

(1) No payment of compensation in respect of a workman whose injury has resulted in death, and **no payment of a lump sum as compensation to a woman or to a minor, shall be made otherwise than by deposit with the Commissioner**, and any such payment made directly to any dependant of a deceased workman or to any woman or minor shall be deemed not to be a payment of compensation for the purposes of this Act.

Comment:

S 10(1): Lump sum compensation payable to women and children is to be held by a commissioner on her behalf while there are no such provisions for men receiving such compensations.

5. DOMESTIC VIOLENCE ACT 1994

S 3 This Act to be read together with Penal Code.

The provisions of this Act shall be read together with the provisions of the Penal Code.

Comment:

S 3: This Act has to be read together with the Penal Code. Charges can only be brought against the abuser for crimes which are defined in the Penal Code, but not all instances of domestic violence so defined.

S 7 Powers of arrest.

(1)Where the court is satisfied that the person against whom a protection order or interim protection order is made is likely to cause **actual physical injury** to the protected person or persons, the court may attach a power of arrest to such protection order or interim protection order, as the case may be.

Comment:

S 7: The person who seeks the protection order must be facing the threat of actual physical injury before such an order can be obtained.

General Comment:

There are also procedural weaknesses like the filing of reports at different departments as well as the time it takes to obtain an IPO that hinder the effectiveness of the DVA. Also refer to www.wccpenang.org on Memorandum on Amendment to Domestic Violence.

6. PENAL CODE (Rape & Incest)

S 375 Rape.

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Comment:

S 375: The definition of rape excludes all sexual assault on a person that do not involve penile penetration. For instance, it does not include penetration of the anus or vagina with other parts of the body or with objects, in September 2007 the Penal Code had been amended to include S 377CA Sexual connection by object, but other forms of sexual assault is still not included.

Exception Rule in S 375

Sexual intercourse by a man with his own **wife** by a marriage which is valid under any written law for the time being in force, or is recognised in the federation as valid, is not rape.

Explanation- A woman

- (a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or
- (b) who has obtained an injunction restraining her husband from having sexual intercourse with her,

shall be deemed not to be his wife for the purposes of this section.

Comment:

S 375: The explanation for the exception in S 375 suggests that a wife who is not legally separated or has a restraining order against the husband is still his wife and therefore rape is not recognized if the parties are married. The amendment of the Penal Code in 2007, included S 375A –Husband causing hurt in order to have sexual intercourse, where in the offence carries a sentence of imprisonment of up to 5 years or more. This section still does not recognize marital rape.

S 376A. Incest.

A person is said to commit incest if **he or she has sexual intercourse with another person** whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

S 376B. Punishment for incest.

(1) Whoever commits incest shall be punished with imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping.

(2) It shall be a defence to a charge against a person under this section if it is proved-

(a) that he or she did not know that the person with whom he or she had sexual intercourse was a person whose relationship to him or her was such that he or she was not permitted under the law, religion, custom or usage applicable to him or her to marry that person; or

(b) that the act of sexual intercourse was done without his or her consent

Explanation - A person who is under **sixteen years of age, if female, or under thirteen years of age, if male shall be deemed to be incapable of giving consent."**

Comment:

S 376A & 376B: suggests that incest is a victimless crime, confined only to acts of sexual intercourse.

The explanation given above is inconsistent with the Child Act 2001 in the determination of 'consent'.

Does not take into consideration the age at which the incest commenced i.e. within or below statutory limit.

S 426 Order for payment of costs of prosecution and compensation

(1) The Court before which a person is convicted of any crime or offence may, in its discretion, make either or both of the following orders against him, namely:-

- (a) an **order for the payment** by him of the costs of his prosecution or such part of it as the Court directs;
- (b) an order for the payment by him of a sum to be fixed by the Court by way of compensation to any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed.

Comment:

S 426 Criminal Procedure Code: Compensation to victims of rape under S 426 to be made mandatory. Such compensation shall be paid by the convicted offender.

7. IMMIGRATION ACT 1959

12. Endorsement of name of wife and children on Permits, Passes and Certificates.

Subject to such conditions as may be prescribed it shall be lawful for the Director General, on application made in that behalf in the prescribed form by the holder of, or by an applicant for, a Permit, Pass or Certificate, to endorse upon the Permit, Pass or Certificate issued to the person the name or names of the **wife or child** of that person.

Comment:

S 12: a female holder of a work Pass/ Permit is not entitled to have her husband's name endorsed on the permit unlike the male holder who has the right to endorse his wife's name on the Pass / Permit..

8. IMMIGRATION REGULATIONS 1963

S 10 Dependant's Pass.

(1) A Dependant's Pass may be issued by the Controller to any person other than a prohibited immigrant being the **wife or dependent** child of the holder of a valid Employment Pass to enable such **wife or child** to accompany or join such holder and remain with him in the Federation.

(2) Subject to the conditions stated in the Pass and to these Regulations a Dependant's Pass shall authorise the holder thereof to enter the Federation on or before such date as may be stated in such Pass and to remain therein for such period as may be so stated but not exceeding the period for which any Employment Pass has been issued to the **husband or father** of the holder of such Dependant's Pass:

(3) Every Dependant's Pass issued under the provisions of paragraph (1) of this Regulation shall be subject to the condition that the **wife or child** in respect of whom it is issued shall not engage in any form of paid employment in the Federation without the consent in writing of the Controller.

(7) Every application for a Dependant's Pass shall be:

- (a) in the Form 10 set out in the Second Schedule hereto;
- (b) accompanied by two recent photographs of the applicant or applicants; and
- (c) supported by a declaration in the form set out in Part II of the said Form 10 **made by the husband or father of the applicant**, as the case may be.

Comment:

S 10: Foreign husbands are not entitled to Dependant's passes unlike foreign wives who are entitled to such passes.

9. LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

S 77. Power for court to order maintenance of spouse.

(1) The court may order a man to pay maintenance to his wife or former wife -

(a) during the course of any matrimonial proceedings;

(b) when granting or subsequent to the grant of a decree of divorce or judicial separation;

(c) if, after a decree declaring her presumed to be dead, she is found to be alive.

(2) The court shall have the corresponding power **to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.**

Comment:

S 77: It is more difficult for a husband to claim maintenance from his wife compared to a wife claiming maintenance from her husband.

S 86. Recovery of arrears of maintenance.

(3) No amount owing as **maintenance** shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

Comment:

S 86(3): The limitation period for recovery of maintenance debt is fixed at 3 years before the institution of the suit whereas the limitation period for claims in contract and tort generally under the Limitation Act 1953 is 6 years.

10. CHILD ACT 2001

S 17. Meaning of child in need of care and protection.

S 38. Meaning of child in need of protection and rehabilitation.

Comment:

S 17 & S 38: The existing distinction between children in need of care and protection (abused children) and children in need of protection and rehabilitation (exploited for prostitution, mainly female) reinforces the myth that the child victim contributes to the crime, which amounts to de facto discrimination.

11. NATIONAL LAND CODE 1965

S 323. Applications for entry of private caveats.

(1) The persons and bodies at whose instance a **private caveat** may be entered are-

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

Comment:

S 323: Does not expressly provide that a wife's interest in property is a caveatable interest.

12. REPRESENTATION OF WOMEN IN PARLIAMENT

Omissions:

- No provision for minimal representation of women in Parliament.
- The number of women in Parliament is considerably less than their male counterparts.