

# Status of Women Under Malaysian Laws

*Prepared by Zarizana Abdul Aziz and Anna Marrison, Women's Crisis Centre, Penang, July 2001*

This paper aims to provide a quick overview of Malaysian laws and their impact on women's equality highlighting areas of Malaysian law where gender discrimination remains.

## i) The Federal Constitution

- The Federal Constitution, unlike the Indian constitution upon which it was based, does not include sex under its enumerated grounds of discrimination, implying that it is permissible to discriminate on the ground of sex. Clause 1 of Article 8 states that ". . .all persons are equal before the law and entitled to the equal protection of the law", however, Clause 2 continues, "except as expressly authorized by this constitution, there shall be no discrimination against citizens on the ground only of religion, race, decent or place of birth in any law".
- The deliberate withholding of rights in the country's supreme law has left the door open for other laws to follow suit. Furthermore, it sends the message that gender equality is not on equal footing with racial and religious rights. (This has subsequently been amended - please see the latest amendment to the Federal Constitution)

## ii) Rape Laws

- In 1989, after much agitation by women's groups following the rape and murder of a 9 year old girl child on her way to buy breakfast, Ang Mei Hong in 1987 (see below), amendments were made to the rape provisions under the Penal Code, which redefined rape, and declared consent to be vitiated if obtained under mistake, deceit, threat, or from a girl under 16 years.
- The new minimum sentence for rape offenders is 5 years.
- In order to protect the complainant, rape trials are to be held in camera, and the introduction of the complainant's sexual past and character are to be limited to her history with the accused (see Evidence Act).
- The amendments duly addressed the evidence to be proffered in court. However in a high profile case involving a 15-year-old complainant, her past sexual history with other young men was introduced in the media by the then Attorney-General. Despite the minimum statutory sentence, the young men were not imprisoned but bound over. (See Appendix A.)
- The alternative avenue employed by prosecutors to overcome the minimum statutory sentence is by charging the accused under is section 16(1)(b) of the Women and Girl's Protection Act (WGPA), namely the offence of carnal knowledge of a person under 21 years old (see below).
- As recent as July 6, 2001, the Star reported that a man pleaded guilty to having sexual intercourse with his adopted daughter. His original charge of rape under the Penal Code was reduced to the above S16 of the WGPA despite the man's 16 previous convictions, which included rape, outraging modesty, sodomy, and possession of firearms. (See article at Appendix B)
- Another shortcoming of the amendments is in their definition of rape. Section 375 of the Penal Code remains focused on the sexual act of penetration, rather than the violence underlying all sexual assault. In focussing on rape as a sexual act, the law does little to alleviate the historical tendency to blame the victim. Women are

presumed to have "asked for" sexual attention, or in the least are held responsible for not dissuading it.

- By limiting rape to penile penetration of the vagina, other violent sexual acts, particularly the penetration of the vagina or anus by other objects, are not recognized. The exclusion of these acts of sexual assault from the rape provision implies that these crimes are less heinous and fails to recognize the impact they have on their victims. From the victim's perspective these other acts are no less if not more violent and traumatic than penile penetration. In Ang Mei Hong's case mentioned earlier, a 10 foot pole was thrust into her vagina. Shifting the focus from sex to violence will go some way towards recognising these acts as a form of violence which motivating factor is neither sex nor desire by the rapist for his victim.
- Aside from the rare exception of a court order (for an injunction against the husband, or recognizing a legal separation) or for a period of iddah, the rape section does not apply to men who rape their wives; consequently, many women remain the sexual property of their husbands.
- It is ironic that whilst a husband cannot use domestic violence against his wife, he is allowed to rape her. The basis of a marriage as a union which rests on mutual love and respect with both parties having rights and responsibilities cannot be maintained in the face of the permissibility of such violence.
- Finally, the Penal Code does not provide a separate offence of incest, thereby disregarding the complex issues arising from breach of trust and undue influence, and allowing no remedy in cases where the victim is over 16 and rape cannot be proven. Undue influence of a father or older male relative, particularly in the patriarchal set-up of many Asian families cannot be ignored.
- Last year, a 17 year old girl was charged for zina in the Kelantan Syariah High Court for having committed incest with her father. (See Appendix C). Whilst recognising the separation of jurisdiction between the Syariah and Civil law, one cannot but notice the absence of any provisions in the Penal Code under which the father could have been charged. After all, it is arguable that no girl under 16 had been charged for zina partly due to the statutory recognition that such acts constitute rape of the girl.

### iii) Domestic Violence

- The Domestic Violence Act was passed in 1994 and implemented in 1996.
- Under the Act, a "protection order" may be sought from a Magistrate's court (found in most towns) to restrain abusers; they are issued at the court's discretion if the court finds it necessary for the protection and personal safety of the complainant.
- Arrest warrants may be attached to the protection order to facilitate the straightforward arrest of one who breaches the order. However, police will only make an arrest where the act committed falls under the Penal Code. Until all offences described in the Act are either included in the Penal Code, or are independently sufficient to result in an arrest, the Act will fail to provide actual assistance to victims of domestic violence.
- There are other procedural weaknesses in the Act which must be addressed, including the need to file separate reports of domestic violence with the Police and Welfare departments, the need to obtain an Order to Investigate from the Deputy Public Prosecutor's Office, the non-recognition of persistent and repeated minor offences as constituting a seizable offence. Furthermore, IPOs can take between one week and four months; in order to ensure the safety of women and their children, the process must be simplified and expedited.

- There is also a need for expansion of police power under the Penal Code and Domestic Violence Act to ensure that police officers can be more proactive in assisting victims of domestic abuse.
- Please see the Memorandum on Domestic Violence Act 1994: Review and Proposals for Amendments attached at Appendix D.

#### iv) Women and Girls Protection Act

- The Women and Girls Protection Act (WGPA) remains a coercive tool to control young women. Under the Act, any woman under 21 years of age may be detained for up to three years if it is believed that she is being trained or used for the purposes of prostitution or any immoral purpose.
- In practice the WGPA has been used to round up and detain women in karaoke lounges and bars, while their male companions are untouched.
- The WGPA has also been used by Deputy Public Prosecutors (DPP) as a means around the amended rape laws. DPP have sometimes opted to charge men under Section 16(1)(1), which states that a person who has “carnal knowledge” of a female person under 16 years of age is punishable with imprisonment up to five years or a fine of RM10 000, or both. This avoidance of the serious penalty facing rape offenders serves to undermine the federal government’s efforts to combat rape.
- Note: The Child Act 2000 (yet to come into effect) will repeal the WGPA, as well as the Juvenile Court Act and the Child Protection Act, when it is implemented. The Child Act also remains problematic as it states that a child who has been exploited for prostitution shall be considered in need of “protection” and “rehabilitation”. By suggesting that the child needs to be rehabilitated, instead of simply cared for and protected, the Act compounds the notion that a rape victim’s behaviour contributed to the crime, or that they are “dirtied” as a result. (See Memorandum on the Child Bill 2000 attached at Appendix E.)

#### v) Immigration

- Under of the Federal Constitution, foreign men who marry Malaysian women cannot receive Permanent Residence (PR) status, unlike foreign women married to Malaysian men (Section 15(1)). As it is difficult to find employment without PR status, many Malaysian women who marry foreigners are forced to live abroad.
- Similarly, dependants’ spousal visas are only given to wives of Malaysian citizens as provided under the Immigration Act. This necessarily means that Malaysian women are forced to migrate should they choose to marry foreigners. Whatever contribution they could make to Malaysia will similarly be lost due to discriminatory laws.
- Although foreign women who marry Malaysian men are eligible for PR status, pending the granting of such PR status, they are dependent on their husbands’ annually applying for a social pass. If a husband does not renew his wife’s social pass, she will have to leave the country or face deportation. The immediate threat of or actual deportation upon non-renewal of the social pass means that a foreign wife is not even able to remain in Malaysia long enough to petition for divorce.

#### vi) Citizenship

- Under the Federal Constitution, children born outside of Malaysia must have a Malaysian father in order to obtain citizenship. Malaysian women married to foreign men must therefore deliver their children in Malaysia if they wish them to have Malaysian citizenship. This discrepancy on the ability of men and women to confer

right to citizenship to their children supports the stereotype that women (and their children) are, and ought to be, dependant on their husbands and that the value of a woman's citizenship is less than that of a man's.

- In 1959, Malaysia acceded to the United Nations Convention on the Nationality of Married Women, yet the government has not taken any steps to grant Malaysian women the right to confer citizenship on their children.

#### **vii) Guardianship**

- The Guardianship of Infants (Amendment) Act 1999 amended the 1961 Act to grant mothers equal guardianship rights as fathers.

#### **viii) Employment**

- The Employment Act 1955 sets out minimum standards for working conditions, but has no provision to prohibit sexual discrimination or sexual harassment in the workplace.
- Although the Act provides for maternity leave, it only requires 60 days, which falls below the 90 days of maternity leave required by the International Labour Organization (ILO). The Act also fails to meet ILO requirements for nursing allowance and care, facilities for nursing mothers, and the provision of day care centres at workplaces.
- The Act itself distinguishes between men and women in a discriminatory manner by applying some prohibitions, including working underground and at night, to women only.
- As the Act does not apply to domestic workers and foreign maids, they are left particularly vulnerable to exploitation.

#### **ix) Workers' Compensation**

- Under the Workman's Compensation Act 1952, lump sum compensation payable to women must be held by a Commissioner on her behalf. This policy suggests that women are incapable of handling their expenses.

#### **x) Sexual Harassment**

- The Code of Practice on Prevention and Eradication of Sexual Harassment, launched in 1998 maintains that sexual harassment (including verbal, visual and physical harassment) in the workplace is unacceptable. While the Code has been effective in broadening awareness of the issue, as a voluntary code, its implementation has not been widespread.
- The Code also fails to provide an appropriate grievance procedure for this misconduct. With no fixed mechanism to deal with sexual harassment, many victims either remain in untenable situations or resign from their employment. Invariably, women's work performance, and personal health and safety suffer as a consequence of sexual harassment.
- The Penal Code has not been an effective tool in addressing sexual harassment in the workplace for a variety of reasons including the difficult obstacle of proving intent. While a criminal case is pending, there is nothing to prevent the harassment from continuing or worsening.

- The Joint Action Group Against Sexual Harassment, comprising of five women's groups and one trade union, have called for a new Act on sexual harassment. Providing for sexual harassment under the Employment Act is unsatisfactory as the Employment Act itself is limited in scope (applying only to master-servant relationships whereas more and more women work outside these traditional relationships). Please find attached Memoranda regarding the proposed Sexual Harassment Bill at Appendices F and G.

#### xi) Marriage and Divorce

- The Law Reform (Marriage and Divorce) Act 1976 provides for the registration of non-Muslim marriages and its dissolution. Sections 9, 22 and 27 together states that all such marriages after 1/3/1982 must be solemnised by a Registrar and be registered.
- Section 48 on the other hand provides that the Court is only authorised to make a decree of divorce or judicial separation (a) where the marriage has been registered or deemed to be registered under the Act; or (b) where the marriage was solemnised under a law that contemplates or provides for monogamy; and (c) where the parties are domiciled in Malaysia.
- Due to this, a couple who has not registered their marriage would not be able to petition for divorce and may go on to contract another marriage upon separation.
- The finding of the Court in *Leong Wee Shing v Chai Siew Yin* [2000] 1 CLJ 439 (subject to appeal) that a marriage unregistered but solemnised in 1995 by way of custom is valid pursuant to section 34 of the Law Reform Act raises issues on the validity of a second registered marriage in the face of the first unregistered valid marriage. Please find attached the case of *Leong Wee Shing v Chai Siew Yin* [2000] 1 CLJ 439 at Appendix H.
- Would the party contracting the second marriage be committing bigamy, and would the first unregistered widow/widower or the second registered widow/widower be entitled to claim the estate of his/her deceased spouse? How does the first unregistered spouse dissolve the first unregistered marriage if the court is not authorised to make a decree of divorce and if there is a customary process for divorce, would it also apply for registered marriages?
- The second issue under the Law Reform Act is the issue of conversion of a spouse to Islam. This is provided for under Section 51.
- Conversion to Islam has raised many unsolved issues for the non-converting spouse and his/her children. The religious department also generally does not enquire about provisions made by the converting spouse for the welfare of his/her non-converting spouse (and children) prior to confirming the former's conversion. In view of the equal guardianship rights of both parents over their children, can one party convert his/her children to Islam without the consent of the other party?
- The creation of a family court where both the civil family court and the syariah family court can be housed under the same building and share common facilities would encourage concerted effort being utilised to solve such issues, amongst others

#### xii) International Standards

- Apart from the international instruments already mentioned above, one of the most important UN instruments on discrimination against women is the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to which Malaysia acceded in 1995. Unfortunately none of the articles of the Convention have been recognised as having any impact on lawmaking or arguments in courts. In fact, Malaysia has yet to submit its first report (which is overdue) as

provided under CEDAW.

#### **LIST OF APPENDICES**

Appendix A: "Student Bound Over For Rape of Minor" Star (24 June,1996).

Appendix B: "Man Jailed For Having Sex With Adopted Daughter" Star (6 July 2001).

Appendix C: "Girl Bound Over in Incest Case" Star (2 March 2000).

Appendix D: Memorandum on The Domestic Violence Act 1994: Review and Proposals for Amendments. WCC (March 1999)

Appendix E: Memorandum on Child Bill 2000. WCC (October 2000).

Appendix F: Memorandum on Stop Sexual Harassment. WCC (June 2000).

Appendix G: Memorandum on Proposed Sexual Harassment Bill. WCC (March 2001).

Appendix H: Leong Wee Shing v Chai Siew Yin [2000] 1 CLJ 439.