

MEASURING UP TO CEDAW : HOW FAR SHORT ARE MALAYSIAN LAWS AND POLICIES ?¹

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Introduction

International law affects Malaysians through the Federal Constitution, the Civil Law Act 1956, Malaysia becoming a member of international organisations, the ratification of treaties and conventions and the later incorporation thereof through legislation into domestic law, Acts of Parliament, and Judicial Decisions.

In 1995, Malaysia ratified the United Nations' Convention On The Elimination Of All Forms Of Discrimination Against Women '**CEDAW**'. However, reservations were made to Articles 5(a), 7(b), 9(2), 16(1)(a), (c), (f), (g) and 16(2). A declaration was made on Article 11. CEDAW sets out a definition of discrimination against women, outlines the obligations of the State and the measures to be taken by the State to eliminate discrimination. To date, the Malaysian Government has not passed an Act through Parliament to make CEDAW wholly applicable to Malaysians². Instead, CEDAW is given effect in a piecemeal fashion, by incorporating its principles in some of the domestic legislation, and Article 8(2) of the Federal Constitution '**the Constitution**.'

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² The *doctrine of incorporation* (which states that international law automatically forms part of the domestic law) is not provided for in the Federal Constitution. The *doctrine of transformation* provides that international law only forms part of domestic law if enacted by subsequent domestic legislation or incorporated by judicial decisions- *A Dictionary of Law, 3rd Edition, Oxford University Press*. 'Treaties to which Malaysia is a party may either require subsequent legislation, in which case they become the law of the land as soon as the necessary laws are enacted or, they may not, in which case they remain within a category of Malaysia's international law, binding only herself *vis-à-vis* the other parties to the treaties, but having no effect as such on Malaysian subjects.' Tunku Sofian Jewa, *Public International Law – A Malaysian Perspective*, Pacifica Publications 1996, p.35

The scope of this paper is to provide an overview of the non-Syariah laws that discriminate against women. By failing to address these discriminatory laws and procedures, there is a failure to comply with the provisions of CEDAW. In Section 4, there is a brief outline of the policies on women with which the Government aims to bring about equality for women.

Oftentimes, whilst the laws may be adequate, the implementation thereof pose problems due to the cultural, religious and social practices of the Malaysian society. This is compounded by the lack of gender awareness and sensitivity of the agencies involved in the implementation of laws and policies.

1. The Federal Constitution

1.1 The Constitution was amended in 2001, heralding in formal equality for women in Malaysia. Article 8(2) of the Constitution now reads :

*‘Except as expressly authorised 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.’*

However, other Articles of the Constitution did not appear to have received similar attention from the Legislators. There still exists a few provisions that run counter to the spirit of Article 8(2).

1.2 Therefore, it will be noted that Article 12(1) of the Constitution pertaining to the rights of education was not amended to include the word ‘gender’. Whilst there may not be discrimination in getting access to primary and secondary education, there still exist cultural practices that favour the boy child in being given priority to be educated over the girl child. Certain educational courses are still deemed ‘for the boys’ e.g. engineering whilst teaching courses are ‘for the girls’.

1.3 Another United Nations Convention that Malaysia ratified is the Convention On The Nationality Of Married Women in 1959. However, there are still gender discriminatory provisions in Articles 15, 26, 24, the Second Schedule of the Constitution and in the related legislation, the Immigration Act 1959/63 and the Regulations made thereunder.

Citizenship may be conferred on foreign wives of Malaysian men if an application is made. However, there is no reciprocal provision for foreign husbands of Malaysian women.

A *Malaysian woman* married to a foreign man may only confer citizenship rights to her child if the child is born *in* Malaysia. If a Malaysian man is married to a foreign woman, the child is granted citizenship whether the child is born *in* Malaysia *or abroad*.

2. Civil Laws

2.1 Women In Employment

2.1.1 One of the biggest problems faced by women in employment is sexual harassment.

Currently, there only exists a Code Of Practice On The Prevention and Eradication Of Sexual Harassment In The Workplace '**the Code**'. The Code was launched in 1995 by the Ministry Of Human Resources. As the adoption and implementation of the Code is entirely voluntary, many employers have failed to adopt it.³ Some of those employers who have adopted it do not appear to have implemented it well or wholly.⁴ The launch of the Code brought the issue of sexual harassment to the forefront, but there are no provisions in the Code for a grievance procedure. Sanctions against the harasser are not set

³ As at March 2001, only about 1% of employers nationwide have implemented the Code- *News Straits Times*, 21 March 2001

⁴ Cecilia Ng and Zanariah Mohd Nor (2001), *Sexual Harassment and the Code of Practice in Malaysia (A Study of Pioneer Companies Implementing the Code)*, All Women's Action Society and Women's Development Collective.

out, and the employer cannot be held responsible for failing to provide a working environment safe from sexual harassment.

As no legislation exists to deal with sexual harassment, victims of sexual harassment have to resort to the Penal Code⁵, sue in tort for assault and battery or claim for unfair dismissal in the event they are dismissed. The Joint Action Group Against Violence Against Women ‘JAG’ has proposed a Sexual Harassment Bill ‘**the Bill**’ to comprehensively deal with the issue of sexual harassment.⁶

2.1.2 The Employment Act 1955 ‘**the EA**’ contains two provisions that are obviously discriminatory against women: s. 34 of the EA prohibits night work i.e. between the hours of 10 p.m. and 5 a.m. for women in any agricultural or industrial undertaking, unless an exemption from the Director General is obtained; and s. 35 of the EA prohibits underground work for women.

The provision in the EA for 60 days maternity leave also falls short of the 90 days leave requirement of the International Labour Organisation ‘**ILO**’. Other shortcomings relative to ILO requirements include issues of nursing allowance and care, facilities for nursing mothers, and provisions for crèches at workplaces. The Government has however, provided tax relief incentives to encourage the provision of childcare facilities at the workplaces, but such provisions are not mandatory. The EA also does not state that employers must pay men and women equally for the same amount of work done, though Malaysia has ratified the ILO Convention No. 100 on the Equality of Wages between men and women in 1997.

2.1.3 Domestic servants and foreign domestic servants, who are mostly women, are not defined as employees and therefore do not benefit from the Employees Provident Fund Act 1991, and the Employees’ Social Security Act 1969.

⁵ A most unsatisfactory manner of dealing with the problem as it is difficult to prove beyond a reasonable doubt. Sexual harassment is also often repetitive, which could make the charges lengthy as each act of harassment constitutes a separate charge. There is also no room to provide preventive measures, and employers cannot be held liable.

⁶ Visit www.wccpenang.org to view a copy of the Bill.

2.1.4 Under s.10(1) of the Workmen's Compensation Act 1952, lump sum compensation payable to women and minors must be deposited with the Commissioner. This provision discriminates against women, as there is no similar provision for men, and suggests that therefore than women are less capable than men in dealing with monetary issues.

2.1.5 Whilst female naval personnel may not serve on board ships currently, the Navy is planning that they may do so by 2008.⁷

2.2 Women and Family

Paras. 2.2.1 and 2.2.2 pertain to non-Muslim women only.

2.2.1 When marriages break down, the issue of maintenance becomes a big bone of contention. Generally, maintenance may be claimed only by wives and children.⁸ Husbands may only claim maintenance if they are incapacitated from earning a livelihood and the courts are satisfied that having regard to the wives' means, that it is reasonable to do so.⁹

The limitation period for the claiming of arrears of maintenance and the enforcement of maintenance orders is shorter than for other matters. Due to the lack of clarity of s.86(3), the Law Reform (Marriage and Divorce) Act 1976, it is arguable that *enforcement* of arrears of maintenance orders may only be for three years. The case of *Gangagharan v Sathiabhama*¹⁰ would appear to be authority for the proposition that the courts may only be able to *make orders* for payment of maintenance which have been in arrears for no more than one year. The reason cited is that the payment is a fund for maintenance and not property.

As maintenance is mostly claimed by women and children, these one

⁷ The Star, 8 March 2003.

⁸ See the *Married Women and Children Maintenance Act 1950*.

⁹ s. 77, *Law Reform (Marriage and Divorce) Act 1991*.

¹⁰ [1976] 1 MLJ 77

and three year periods have the effect of discriminating against women. This is clear when s. 6 of the Limitation Act 1953 provides that actions to enforce an award are only barred if brought after the expiration of six years, and actions founded in tort and contract have a similar limitation period of six years. The limitation period to recover land is twelve years.¹¹

2.2.2 When only one party in a non-Muslim marriage converts to Islam (especially if the converting party is the husband) the children may be converted to become Muslims as under the Syariah Laws, the *father* is the guardian of the children. The view of the (non-Muslim) wife/mother is oftentimes not consulted. As fathers and mothers have equal parental rights under the Guardianship of Infants Act 1951, such conversions of the children constitute a violation of the mother's rights.

2.2.3 The adversarial litigation process also discriminates against women. Women tend to be in less well off economically, and would be harder pressed to appoint a good family law practitioner to claim for that to which she and her children are legally entitled. Furthermore, heavy reliance on documentary evidence also weighs against women as the average woman may not be as aware as the average man of the value of keeping receipts, records and ensuring that her name appears in the titles to immovable properties purchased by her and her husband jointly.

The way forward is to set up a Family Court system whereby alternate dispute resolution methods are emphasised, counselling is provided to all parties, including to the children of the marriage (especially during and after the divorce proceedings) and an efficient enforcement of maintenance mechanism is put in place.

2.3 Domestic violence

2.3.1 Violence against women is a form of discrimination against women. The Domestic Violence Act 1994 '**the DVA**' attempts to deal comprehensively

¹¹ s. 9 of the *Limitation Act 1953*

with the problems of domestic violence. It applies to Muslims and non-Muslims alike.

2.3.2 Domestic violence is defined under s. 2 of the DVA¹², and is a crime. However, in order for charges to be brought against the abuser, the crime must be one that is found in the Penal Code *only*. If charges are to be filed against the abusers, *each* incident of domestic violence will form a separate charge. In view of the fact that domestic violence is often repetitive, this process is cumbersome. The definition of domestic violence does not include stalking, mental, emotional or psychological abuse. These also do not constitute crimes under the Penal Code and many women are left vulnerable as these are not uncommon forms of abuse.

As some of the crimes of domestic violence constitute non-seizable offences, orders to investigate must be obtained from the Deputy Public Prosecutor. When an Interim Protection Order ‘**IPO**’ is breached, often times the power of arrest is not included in the IPO itself, thereby further aggravating the vulnerable situation of the women.

An IPO may be sought *only* when the matter is pending investigations by the police. The filing of a police report of the incidents of domestic violence is therefore necessary. The police are often frustrated when women withdraw their reports in an effort to give their marriages another chance. This then feeds into the less than helpful attitude of some front desk officers when women come forward to lodge reports. Gender sensitising programmes are crucial in order to make the DVA work more efficaciously.¹³

¹² Domestic violence means the commission of any of the following acts ; (a) wilfully or knowingly placing or attempting to place, the victim in fear of physical injury (b) causing physical injury to the victim by such act which is known or ought to have been known would result in injury (c) compelling the victim by force or threat to engage in any conduct or act , sexual or otherwise, from which the victim has a right to abstain (d) confining or detaining the victim against her will or (e) causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim.

¹³ Visit www.wccpenang.org to view the *Memorandum on the Domestic Violence Act 1994 : Review and Proposals for Amendments*

2.4 Women in Politics

Currently there are 19 female members and 174 male members in the Parliament of Malaysia. Women make up only 6% of the members of the State Assemblies.¹⁴

Recently, Indonesia passed legislation to ensure that at least 30% of the candidates in future general elections must be women.¹⁵ Sadly, no such affirmative action exists here. In fact, the recent amendments to the Elections Act 1958 may result in a drop in women's nominations as candidates. The amendment raised the maximum amounts of deposits that may be levied for each candidate.

2.5 Child Act 2001 (CA)

This big piece of legislation is an amalgamation of the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973, and the Child Protection Act 1991. All three Acts now stand repealed.

However, certain anomalies still remain from the repealed Acts. There is still a differentiation between a child in need of *care* and protection (for abused children) and children who are in need of protection and *rehabilitation* (children exploited for prostitution). Most of the children who have been prostituted are female, but all children who have been abused, including those exploited for prostitution need care and protection. This differentiation perpetuates the myth that the behaviour of a victim of sexual abuse contributes towards the crime and that they are thereby 'sullied' by the crime, and constitutes *de facto* discrimination against women.¹⁶

¹⁴ As at 2000 : *Malaysian Information Clearing House On Women Development*

¹⁵ The Star, 20 February 2003

¹⁶ Visit www.wccpenang.org to view a copy of the *Memorandum on the Child Bill 2000*

2.6 The National Land Code 1965 ‘NLC’

Section 323 of the NLC provides that a person may file a caveat over a piece of property which is not registered in that person’s name in order to give notice that the said person has an interest in the property.

It is not uncommon that properties are registered in the sole names of husbands, though paid for by both the husbands and wives. The wives’ interests in such properties are not defined in the NLC as a caveatable interest, and the wives are vulnerable to losing the roofs over their heads as their husbands may sell the properties without their knowledge or consent.

3. Criminal Laws

3.1 Rape

3.1.1 Rape is a heinous crime and one of the worst forms of violence against women. However, the definition of rape under s. 375 of the Penal Code ‘**PC**’ is narrow :- it is a man having sexual intercourse (ie *only* the insertion of a penis into a woman’s vagina) with a woman against her will, without her consent or with her consent but the consent having been obtained under duress, misconception or under circumstances where she is unable to understand the nature and consequences of that to which she gives consent.

Insertion of any other parts of a man’s body or objects into any other orifices of a woman’s body does not constitute rape. These acts of sexual assault, which may sometimes lead to greater physical injury, implies that they are less ‘serious’.

The differentiation fails to take into account the impact these acts have on the survivors, and does not focus on the fact that rapes and other forms of sexual assault are acts of violence. Sexual intercourse and other sexual acts are merely the *form* in which the violence is perpetrated.

The myths that rapes occur due to the way women dress or act, and ‘asked for it’ are sadly, alive and well. As there are no jury trials in Malaysia,

it is crucial that judges, the police, the medical staff in hospitals and prosecuting officers are gender sensitised and have an understanding of the dynamics of rape and sexual assault in order to secure convictions.

3.1.2 Marital rape is not recognised in Malaysia. It is totally anomalous that whilst a husband may not use domestic violence against his wife, he may rape her.

3.1.3 The new incest provisions under s. 376A and s. 376B of the PC¹⁷ does not deal satisfactorily with a few issues, not the least of which concerns the issue of consent. As the overwhelming cases of incest involve females being the survivors, these provisions discriminate against women.

Due to the familial relationship between the rapist and the survivor, instances where consent may be deemed vitiated must be adequately provided. The new provisions have failed to do so. Such provisions are important to reflect the power imbalances that exist in incest cases, and the opprobrium with which society must view the breach of the trust that the rapist has committed against the survivor.¹⁸

3.1.4 The requirement of corroboration is often a stumbling block in the proving of rapes, and is discriminatory against women. In the leading case of *Din v Public Prosecutor*, Thomson LP states

‘... the desirability of corroboration ... springs ... from the nature of the offence... [and] as to the fact of the offence itself... The

¹⁷ s. 376A of the PC ‘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 law, religion, custom or usage applicable to him or her, to marry the other person.’

s. 376B (1) of the PC ‘Whoever commits incest shall be punished with imprisonment for a term not less than six years and not more than twenty years, and shall also be liable to whipping.’

s.376B (2) of the PC ‘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 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.’

¹⁸ Visit www.wccpenang.org to view the *Memorandum on Laws Against Incest 2002*

temptations of a woman to exaggerate an act of sexual connection are well known and manifold.’¹⁹

Corroboration is a big stumbling block to overcome when there are few signs of cuts and bruises; where the defence of consent is raised; when rapes happen in detention; when the survivor knows the rapist; or where there has been a long lapse of time between the incident and the making of the police report. Some countries eg. the United Kingdom and Australia no longer require that a corroboration warning be given to the juries. It is to be noted that in Malaysia, jury trials no longer exist. Clearly the gender sensitivity of the judge, along with his knowledge and understanding of the dynamics of rape is crucial in his decision to acquit or convict.

Augustine Paul, J opines :

*‘A false accusation concerning other offences can just as easily arise from sexual neurosis, jealousy or fantasy or spite. The danger is no less hidden in such cases. It may be that such motives to falsely implicate may have a particular bearing upon sexual cases, but, surely, **this should only mean that the evidence must be sifted with care**, which should, in any event be done in **all cases.**’²⁰ (emphasis added)*

3.2 The issue of women who are trafficked does not receive as much attention in Malaysia as do other issues relating to women. Little is done to deter the men who visit the brothels. Trafficked women, who are the victims, may instead be charged with an offence under the Immigration Act 1959/63 for illegal entry and not having a valid work permit.

4. Policies on Women²¹

In 1989 the National Policy On Women ‘**NPOW**’ was formulated by the

¹⁹ [1964] MLJ 300

²⁰ Augustine Paul, *Evidence, Practice and Procedure*, 2nd Edition, *Malayan Law Journal Sdn Bhd*

²¹ Aminah Ahmad, Country Briefing Paper, *Women In Malaysia*, December 1998

National Advisory Council On The Integration Of Women In Development **‘NACIWID’**. Its objectives, as stated in the Sixth Malaysia Plan, are to ensure equitable sharing in the acquisition of resources and information as well as access to opportunities and benefits of development, and to integrate women in all sectors of national development in line with their abilities and needs in order to improve the quality of life, eradicate poverty, abolish ignorance and illiteracy, and ensure a peaceful and prosperous nation.

A National Action Plan For The Advancement Of Women **‘NAP’** was then formulated to put the NPOW in operation. With the incorporation strategies and programmes contained in the Beijing Platform For Action, the NAP outlines 13 critical areas of concern to be addressed:

- i. strengthening the machinery for the advancement of women;
- ii. increasing public awareness and sensitivity of government bureaucracy to women’s issues;
- iii. activating non-governmental organisations **‘NGO’s’** to improve the efficiency and effectiveness of socio-economic programmes;
- iv. Women and Health;
- v. Women and Education and Training;
- vi. Women and Economy;
- vii. Women and Law;
- viii. Women and Power-Sharing;
- ix. Women and the Media;
- x. Women and Religion;
- xi. Women and Culture;
- xii. Women and Sports; and
- xiii. Women and Family

In the sixth, seventh and eighth Malaysia Plans, a chapter on Women and Development have been incorporated. It would appear that these policies have within their ambit, the plans to gain substantive equality for women. However, there does not appear to have been an assessment of the efficacy of these policies.

Conclusion

Many changes have been brought about in recent years to improve the status of women in Malaysia. Most recently, it was the amendment of Article 8(2) of the Constitution. The Guardianship Of Infants Act 1961 was amended to accord mothers and fathers equal guardianship rights over their children. The Domestic Violence Act 1994 was enacted to deal with domestic violence, the victims of which are mostly women and children. The Distribution Act 1958 was amended so that when a woman died intestate, her husband did not inherit the whole of her estate to the exclusion of the children of the marriage.

Whilst women's substantive equality is slowly becoming a reality, the pace at which change is being brought about must be increased. There is great resistance from the existing cultural and traditional practices, values and religions. Men must be persuaded that they are an important agent of change in bringing about the end of violence against women. Great political will is required to increase the rate at which substantive equality between the sexes is brought about. A greater share of the National Budget should be allocated in order to implement educational and training programmes, to raise awareness, and to bring about change in the value systems to ensure that women may enjoy in full their civil, economic, social and political rights.

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