

## **Women and the Law: Significant Developments in Malaysia**

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The author discusses the complex ways in which a multiplicity of conflicting laws relevant to marriage and divorce have affected Malaysian women, both Muslim and non-Muslim. Further, it examines efforts to standardize statute and practice in these areas from the 1970s to the present. It focuses in particular on multiple marriage statutes in effect until 1970 for Chinese and Hindu Malays and on the Law Reform Act 1976 that attempted to regulate customary marriage practices for non-Muslims. It also examines the codification of Islamic family law in the 1980s as a way of clarifying the legal rights of Muslim women, focusing on the Kelantan Island Family Law Enactment 1983. It also describes political action by women in Malaysia to raise public awareness about domestic violence, to amend the Penal Code on matters of violence against women, and to establish a training program for police in rape investigation.

**W**omen in Malaysia have been striving to improve their legal status and, in the past decade, have done much to bring about developments of considerable importance affecting their rights in family and financial matters. A major achievement was the amendments to the Penal Code, which, it is hoped, will provide better protection from violence. The process has been slow, but the results are encouraging.

### **Marriage and Divorce**

Until the 1970s a multiplicity of laws relating to marriage and divorce existed in Malaysia. Muslims were, and still are, subject to Islamic law, which is within the legislative authority of the states and is therefore regulated by the state and administered by state Shari'a courts. For non-Muslims there were then in force five statutes on marriage, an additional statute for the registration of marriage, and three for the dissolution of marriage, as well as the customary laws of the Chinese and Hindus and the natives of Sabah and Sarawak.

The need for reform was articulated as early as 1966 in the case of *Re: Ding Do Ca* (1966:223–24) by Thompson, L.P.:<sup>1</sup>

[T]he whole question of personal law in this country, particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature. As regards persons professing Islam the position is tolerably clear. But as regards persons of Chinese race the law the courts are administering is probably different from any law that exists or ever has existed in China. . . . The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955. The questions involved are questions which go to the very root of the law relating to the family, which, after all, is the basis of society at least in its present form, and the existence of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the modern *mores* of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.

The decision in the *Ding Do Ca* case created controversy and uncertainty among Chinese Christian women. The case involved a Chinese Christian who had solemnized his first marriage according to the Christian Marriage Ordinance and then contracted another marriage according to Chinese custom. On his death, the validity of the second marriage and consequently the legitimacy of the children of that marriage and their right to inherit had to be determined by the court. The federal court (as it was then) held that since the ordinance did not have a provision expressly stating that a marriage solemnized according to it was monogamous, since the personal law of the Chinese was the customary law of their race, and since Chinese custom permitted a plurality of wives, the deceased was entitled to marry polygamously and his second marriage was valid. This ruling meant that solemnizing a marriage in church was no guarantee that a woman would not have to share her husband with other wives. The Young Women's Christian Association began advising its members to solemnize their marriage according to the Civil Marriage Ordinance (which expressly provided for monogamous marriage) in addition to the church ceremony.

Divorce was another aspect of Chinese customary law that was unsatisfactory from a woman's point of view. While a man could unilaterally divorce his wife, a woman could obtain a divorce only if her husband consented to it. In *Mary Ng v. Ooi Gim Teong* (1972) a wife applied for maintenance for herself and her son. The husband alleged that he had divorced his wife and she was therefore not entitled to maintenance. Azmi, J., said:

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<sup>1</sup> "L.P." stands for Lord President (the head of the judicial system in Malaysia).

In dismissing this application, I have not overlooked the possible effect of my decision on the position and status of Chinese women in this country who have gone through marriage according to their personal law. As learned counsel for the applicants has forcefully put it, allowing a Chinese man in this modern age to divorce his wife for either talkativeness or disobedience would amount to giving thousands of Chinese husbands a gun in their hands. This may be so; and if the Chinese customary law on marriage and divorce is no longer popular and considered obsolete, it is for the legislature to make inroads into them, as has already been done in China. (P. 20)

In 1971 a Royal Commission was appointed to study the existing laws and to propose amendments to reform and unify the marriage and divorce laws applicable to non-Muslims throughout Malaysia. The commission drafted the Law Reform (Marriage and Divorce) Bill, which was presented to Parliament in 1972. It was not until 1976 that the bill became law and not until 1982 that the law came into force.

The Law Reform (Marriage and Divorce) Act 1976 (LRA) repealed all statutes on marriage and divorce.<sup>2</sup> The act does not prohibit customary marriages but attempts to regulate them by requiring compliance with its provisions. There are two provisions that have altered the characteristics of customary marriages significantly. The more important one abolishes polygamy (sec. 5). (Polygamous marriages solemnized after the act came into force are void [sec. 6] and constitute the offense of bigamy under the Penal Code [sec. 7].) The other imposes a minimum age of 18 for marriage, although a girl above the age of 16 can obtain permission to marry from the chief minister (sec. 10).

Marriages can be solemnized either in the registry in a civil ceremony (secs. 14–20 would have to be complied with) or in a temple or other place of worship (including a church) according to religious or customary rites (sec. 24). If the priest or other official conducting the religious ceremony has been appointed an assistant registrar of marriage, he will register the marriage at the end of the ceremony (sec. 25[1]). If the priest or official has not been so appointed, the parties have to undergo a civil marriage at the registry before the religious ceremony. This provision was considered necessary to ensure that all customary marriages are registered and that the parties thereto have the capacity to marry as prescribed by the act. Customs and traditions are thus maintained, and at the same time much-needed measures to improve the position of women are introduced.

When the act first came into force, there was some confusion about the application of its provisions, which could be attributed to the complexity of the act and the incomprehensibility of both

<sup>2</sup> The Registration of Marriage Ordinance was not repealed but ceases to have any effect or application in view of the provisions for registration in the LRA and the legislation relating to Muslim marriages.

its original text in English and its poor translation in Bahasa Malaysia to a large portion of the population living in the rubber estates and other rural areas, as well as the Hindu priests who were solemnizing the marriages. Campaigns were needed to inform the public of the effects of the new law. Legal literacy programs were carried out by women's associations, political parties, and social interest groups. The Association of Women Lawyers and the University Women's Association not only gave talks and organized seminars and workshops on the new law but also prepared in four languages (Malay, Chinese, Tamil, and English) simple pamphlets explaining what rights women have under the new law and how they can enforce those rights. The media played their part, though discussions were only in the women's pages of the newspapers, in women's magazines, and in the women's programs on radio and television. It was as if the law had no effect on men.

The LRA makes the registration of all marriages compulsory (sec. 27) whether the marriage is solemnized in Malaysia (sec. 25) or overseas at a Malaysian embassy, high commission, or consulate (sec. 26). All persons domiciled in Malaysia who are resident overseas are subject to the act (sec. 3[1]) and consequently must register their marriage under the act even if it is solemnized according to the law of their country of residence (sec. 31; sec. 35 renders nonregistration of foreign marriages an offense). Registration or the failure to register, however, does not affect the validity of the marriage (sec. 34).

A new feature of the act is the conciliation procedure, which is a mandatory precondition to the presentation of a petition for divorce. Conciliatory bodies had to be established before the act could be brought into force. The lack of specific rules to govern their establishment and functioning not only caused delay in the implementation of the act but also remains a major criticism of the conciliation procedure. The bodies set up by religious and other groups have members who are appointed on an ad hoc basis and who are not trained counselors, nor are they required to take an oath of confidentiality. Members of the community, therefore, are reluctant to refer their matrimonial difficulties to these bodies. Many are of the view that by nature Malaysians are not willing to discuss their personal problems with strangers, so requiring them to appear before a conciliatory body would not achieve reconciliation. Besides, it is argued, when the parties reach the stage of seeking a divorce, it is too late to reconcile them. The Bar Council has proposed that the conciliatory procedures be repealed.

The Islamic Family Law was also under review during the 1970s. Each state had its own Administration of Muslim Law Enactment that regulated all matters under Islamic law, from mosques and offenses against the precepts of the religion to fam-

ily law. A model Islamic Family Law Act was drafted to separate family law from other matters, to introduce measures to resolve existing problems, and to bring about uniformity in the state laws. The last objective proved to be impossible, for the rulers of the states would not agree to a uniform law. Eventually, each state passed an enactment based on the model but with modifications that were deemed necessary by each state's Religious Affairs Department. The first three state enactments were passed in 1983 (Kelantan Enactment No. 1 of 1983, Malacca Enactment No. 8 of 1983, and Negri Sembilan Enactment No. 7 of 1983). In 1984, Parliament passed Act 303, which applies only to Muslims in the Federal Territory.<sup>3</sup> Most of the state enactments have provisions that are similar or that differ in insignificant ways. Some enactments, in that they differ on the measures introduced to control polygamy, facilitate circumvention of the law, thereby reducing the impact of the controls introduced. Efforts are now being made to rectify this.

The new enactment codified the Shari'a, an exercise that succeeded in demystifying the law. The Family Law provisions in the Administration of Muslim Law Enactments had merely set out the court's jurisdiction and provided that *hukum syarak* (Islamic law) would apply in those matters. The *hukum syarak* had to be determined from the various sources of Islamic law.<sup>4</sup> Because this was generally within the exclusive knowledge of those trained in the Shari'a, most people, especially women, were ignorant of their legal rights. In the new enactments, the rights of all parties are spelled out, raising the general level of legal literacy and making it easier for lawyers trained in the common law to advise parties and to represent them in the Shari'a courts. Some of the *kadis*, or Shari'a judges, however, were contemptuous of lawyers who were not familiar with the primary sources of Islamic law. Initially, they insisted on applying the "pure" Shari'a, ignoring the statutory provisions that were introduced as solutions to existing problems—for example, the controls on polygamy. This situation has been improved somewhat by the introduction of two courses at the International Islamic University, one for *kadis* and the other for lawyers. The two groups now have greater mutual understanding and respect.

### **The Kelantan Islamic Family Law Enactment 1983**

In 1988 I received a Research and Development Grant from the Malaysian government to study the implementation of the enactment of the Islamic Family Law in Kelantan, which came

<sup>3</sup> The Federal Territory is made up of Kuala Lumpur in Peninsular Malaysia as well as Labuan in Sabah in East Malaysia.

<sup>4</sup> The primary sources are the Quran and the hadith. Where there is no clear rule, *Ijma* and *Qiyas* are resorted to.

into force on 1 January 1984, and, specifically, to determine (1) how far the new provisions had been implemented; (2) the effect of the new provisions on women; (3) the continuing problems and weaknesses in the system; and (4) possible solutions for recommendation to the proper authorities. The fieldwork in Kelantan covered the following: file searches in the Shari'a courts of eight of the nine districts in Kelantan for all family law matters for the period 1984 to 1988; interviews with Shari'a judges, kadis, and a woman welfare officer; observations of cases being tried in court, counseling and *hakam* (arbitration) sessions, and the solemnization of a marriage; and visits to villages to interview headmen, imams, and villagers—the last to determine their level of legal literacy and to ascertain the difficulties that they encountered in attempting to obtain relief in the courts.

I encountered difficulties in carrying out the study. The first was in relation to the file search. The kadis recorded evidence and set out their decisions in their own handwriting in the *jawi* (Arabic) script, which was not always legible. Deciphering the records was time consuming. The second difficulty was in understanding the Kelantanese dialect. An interpreter had to be used in some of the interviews, because some of the kampung residents did not speak “standard” Malay. Fortunately, two Kelantanese agreed to be research assistants in the project.

Four issues that have the greatest effect on the status of women—polygamy, *talaq* (divorce effected unilaterally by men), divorce initiated by women, and *harta sepencarian* (matrimonial property)—were covered in my report. Those parts of the report are summarized here. A fifth issue is access to lawyers.

### Control of Polygamy

Section 19 of the enactment requires a married man to obtain the court's permission in writing before he takes another wife. Upon receiving an application, the court sends for the prospective wife and her *wali* (a guardian for marriage) to find out whether they know that the groom-to-be has a wife or wives. If the woman and her *wali* both consent to the marriage and if the court is satisfied that the man is able to support another family, the marriage will be solemnized. Unfortunately, the court apparently concludes that any man who declares that his ability to support existing and future dependents is in fact able to do so. Applicants earning as little as 300 ringgit (about U.S. \$100) a month were granted permission to marry again. The purpose of section 19 is to ensure that men who marry polygamously are in a position to carry out their responsibilities. The men should, at the very least, prove that they are financially able to provide decent support for their existing wives and children. By not placing importance on the man's income and his ability to support a family,

the courts are not protecting the interests of the existing wives and children.

Another defect in the provision is its failure to require the courts to inform the wife or wives of the husband's intention to marry again.<sup>5</sup> The kadis were all of the opinion that the present procedure is satisfactory, for the Shari'a does not require the wife's permission and the enactment does not prescribe seeking her views as a precondition to granting permission. Furthermore, most men indicate on their application forms that their wives agree to the proposed marriage, and the kadis state that they are satisfied with this declaration, even though it is unsupported by any other evidence.

### Control of Talaq

Section 35 requires a man who wishes to divorce his wife by talaq to apply to the court for permission to do so. He must set out his reasons for desiring the divorce, as well as the amounts of the payments that he will make for *nafkah edah*, *mutaah*, and *mas-kahwin*,<sup>6</sup> as well as harta sepencarian [matrimonial property]. This procedure ensures that the wife obtains her entitlements should the conciliatory procedures fail and the divorce be granted. The procedure was introduced to reduce the high divorce rate. The requisite application to the court means, at the very least, that the talaq is not pronounced impulsively. It provides time for reconsideration. Furthermore, the average man's fear and suspicion of the court deters him from making the application unless he is determined to dissolve the marriage. When an application is made, the parties are counseled by the kadi, who attempts to reconcile them. Together, these procedures have succeeded in reducing the divorce rate.

### Divorce on Application by the Wife

Section 35 provides that a wife who wishes to obtain a divorce may apply to the court in the same manner as a husband who wishes to pronounce the talaq. If the husband agrees to the divorce, it is registered immediately. If he refuses, then conciliation must follow. If the husband persists in refusing even when the conciliation committee feels that a divorce should be granted, the case is referred to a hakam appointed by the court. The court

<sup>5</sup> In December 1992 the chief kadi of Kelantan issued a directive to all kadis and Shari'a judges to inform wives of their husbands' application for permission to take another wife. So the current practice is to inform wives.

<sup>6</sup> *Nafkah edah* is maintenance during the period of *edah*, which is for three menstrual cycles after the pronouncement of the talaq or for three months for those not menstruating; *mutaah* is a consolatory gift for a woman divorced without just cause; *mas-kahwin* is the dower payable to a woman at the time of the marriage. Payment may be deferred and if still owing at the time of the divorce, it must be settled.

can confer on the hakam the authority to pronounce the talaq. This procedure was introduced as the solution to cases in which the marriage has broken down but the husband refuses to divorce his wife, who is unable to prove grounds for either a *takliq* divorce or a *fasakh* divorce.<sup>7</sup> It had not been implemented at the time of the study, however. The kadis and the hakam appeared to be reluctant to pronounce the talaq on behalf of the husband. They usually succeeded in persuading the wife to accept a *kholo* divorce. For a *kholo* divorce, the husband pronounces the talaq but the wife has to compensate him for doing so. Although the sums required are seldom more than 500 ringgit, it is nevertheless a financial burden and perhaps even an impossibility for women who have no income. A woman who is unable to raise the required amount may never get a divorce unless this new provision is implemented.

### Harta Sepencarian

Harta sepencarian is property acquired jointly by spouses during a marriage and divided between them in the event of a divorce. The right to such property is believed to be rooted in adat, or Malay custom, but has been received into Islamic law and is now administered by the Shari'a courts. "[J]urisprudentially *harta sepencarian* rests upon legal recognition of the part played by a divorced spouse in the acquisition of the relevant property" (Ibrahim 1987:198). In most earlier cases, the women had either worked on the land or had contributed financially to its purchase. The decision in the case of *Boto v. Jaafar* (1985) extended women's rights to such properties by holding that by providing comfort and companionship to her husband, the wife had given him the peace of mind to carry on his fishing business, thereby contributing to the purchase of his assets, including his boats and nets and other business equipment. She was, therefore, entitled to share the property. Tun Salleh Abbas, who decided the case, expressed the view that Malays were moving from agriculture to business, so harta sepencarian had to change to include business assets. In *Tengku Anun Zaharah v. Dato Dr. Hussein* (1983), it was acknowledged that the wife had neither contributed financially nor helped with the business. The court held that the moral support she gave her husband and the title Dato, which he received by marrying into a royal family, amounted to contribution that entitled her to a share in his property.

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<sup>7</sup> A *takliq* divorce is available to a woman in the event of a breach of any of the conditions that the husband agreed to at the time of the marriage and set out in the surat *takliq*, which he must attest; a *fasakh* divorce is in the nature of a decree made by the Shari'a court upon the establishment (or proof) of one of the many grounds for divorce.



## Protecting Women's Rights Generally

As I comment in the report, women are not always able to present their case in court, particularly if it involves proving the husband's income, as in maintenance claims, or proving the right to property, as in harta sepencarian disputes. In these instances, the assistance of a lawyer is required. The majority of women, however, are unable to afford legal services and have to depend on the Legal Aid Bureau. The bureau is in Kota Bharu and is not easily accessible to residents of remote villages. Furthermore, there are only two lawyers attached to the bureau to serve the whole state. Delays in the disposition of cases are inevitable, although attempts are made to hear all cases handled by each officer on the same day.

## Income Tax

The Income Tax Act 1967 has undergone many changes in its application to women. According to the original provision, the income of married women had to be aggregated with that of their husband and could not be assessed separately. An amendment in 1975 (Act A273) enabled women to opt for separate assessment of income derived from employment only. Another amendment in 1978 (Act A429) allowed assessment in her name if her income was derived from the exercise of a profession. The right to separate assessment, however, was subject to the proviso that the wife was not employed in a business controlled by her husband. There was no separate assessment for women engaged in business or a nonregistrable profession. This provision was regarded as unfair and discriminatory, hence an amendment to cater to the increasing number of businesswomen. The group that lobbied for change was the Association of Women for Women, or WOW. The group prepared a memorandum setting out the changes sought, which the National Council of Women's Organisations presented to treasury officials during a prebudget dialogue. With persistent reminders from the WOW president, the treasury officials, one of whom was a woman herself, incorporated most of the suggested changes. Today there is separate assessment for all women for all income derived from whatever source. But this achievement does not signal the end of efforts in this area. On the contrary, it should encourage attempts to secure separate taxation for women, which would mean separate files, separate returns, and separate responsibilities.

## Violence against Women

In March 1985 five nongovernmental organizations (NGOs) formed a Joint Action Group (JAG) and organized a workshop and exhibition on domestic violence, rape, prostitution, sexual harassment, and the portrayal of women in the media.<sup>8</sup> A joint memorandum was submitted to the government seeking reform of the relevant laws. Forty-two associations met in June 1985 and resolved to (1) work toward amendments to the Penal Code and the Evidence Act; (2) set up rape crisis centers at the accident and emergency units of hospitals; (3) press for a training program in rape investigation for police personnel; and (4) pass a Domestic Violence Act. There was much activity in 1986 and early 1987 in terms of raising public awareness, lobbying police and government officials, and drafting laws.

In May 1987, Citizens against Rape (CAR) was formed after the brutal rape and murder of a nine-year-old schoolgirl. CAR held demonstrations, exhibitions, and sought signatures for a petition calling for better protection from violence. In 1988 the Consumers Association of Penang published a book entitled *Rape in Malaysia*, which dealt with victims, rapists, myths, and realities.

The deputy minister in the Prime Minister's Department who was responsible for the Women's Affairs Department led a delegation of women in a discussion with the attorney general on the proposed amendments to the Penal Code and the Evidence Act relating to rape and other sexual offenses. During the course of the discussion, it was suggested that section 312 of the Penal Code, which prohibits abortion except to save the life of the woman, be amended to allow abortion for a woman who has been raped. The attorney general gave the impression that the section would never be amended, so it came as a shock to most people when it was amended in Act A727, effective on 4 May 1989.

Section 312 still prohibits abortion but provides an exception for a medical practitioner registered under the Medical Act 1971, who may cause a miscarriage if believing that the risk to the life or mental or physical health of the woman is greater than the risk of the abortion. Antiabortion activists claim that this exception is tantamount to making abortion available on demand, for there is no requirement that a second medical opinion be obtained, nor is there a limitation on the period during which it can be performed. In response, the deputy minister for the Women's Affairs Department explained in Parliament that doctors are subject to and guided by the Medical Code of Conduct, which is a sufficient safeguard. Many doctors had, in fact, been conducting abortions even before the amendment and usually

<sup>8</sup> The NGOs in this case are the University Women's Association, the Women's Aid Organisation, the Selangor Consumers Association, the Association of Women Lawyers, and the Malaysia Trade Union Congress (Women's Committee).

for an exorbitant fee. Legalizing abortion has made it available at government hospitals and clinics, so lower-income women have access to clinically performed abortions instead of resorting to quacks and risking their lives.

The changes to the sections on rape include (1) increasing the age for statutory rape to 16 years but providing that the law would not apply where the parties were lawfully married (because Muslims can still marry below that age); (2) considering threats of death or injury to third parties duress that vitiates consent, where previously when victims consented for fear that their children might be injured, the act was not considered rape; (3) adding a mandatory minimum sentence of 5 years' imprisonment and a maximum of 20 years. The proposal that marital rape be made an offense was not accepted, but it was agreed that the act would be accounted rape if the spouses were living apart because of a decree of judicial separation or an injunction or if they were divorced but the divorce had not become absolute.

Although there was much jubilation when the amendments were finally passed, it is realized that the laws by themselves are not going to provide better protection. The police must improve their investigative techniques. The available data show a decline in the police success rate: In 1981 there were 368 reports of rape; 211 persons were detained in connection with 198 cases. In 1986 there were 586 reports; 146 persons were detained in 111 cases. Of the 12 victims who died, 10 were less than 12 years old.<sup>9</sup>

Another area in need of improvement is the handling of the victim both by the police when taking the report and by the doctors when examining her. Victims are treated so badly that there is a reluctance to report cases, and the figures presented to Parliament represent only the tip of the iceberg. With the setting up of rape crisis centers, the situation is improving, but more needs to be done.

One advance has been made: the Evidence Act 1950 was amended by Act A729 to delete section 155(d), which provided that on a charge of rape the accused can adduce evidence of the victim's immoral character or sexual history.

## Domestic Violence

In January 1989 a Campaign Kit on Violence against Women was prepared by the All Women's Action Society of Malaysia (AWAM). In May 1989 a workshop on confronting domestic violence, organized jointly by the Association of Women Lawyers and the Royal Malaysian Police, was held. Participants, including representative of the police force and women's organizations,

<sup>9</sup> From the speech in Parliament of Democratic Action Party opposition M.P., Dr. Tan Seng Giau (Malaysia 1989:vol. 3, no. 14, p. 52).

lawyers, and social workers, discussed a draft Domestic Violence Act. NGOs and government agencies formed a national committee to consider the draft. There is hope of success, because the government has for the first time included a separate chapter on women in development in the Sixth Malaysia Plan for 1991–95, where it is stated:

Women's NGOs will also be encouraged to provide counselling and other support services, particularly in cases of domestic violence and violence against women. The welfare of women will be further safeguarded through the establishment of crisis centres and shelters for battered women, the provision of subsidized legal aid as well as the establishment of other intervention centres for women in distress. This is crucial towards enabling women to regain their sense of self-worth and facilitating their re-entry into productive activities. (Malaysia 1991:426 ¶ 37)