

RAPE VICTIMS AND BATTERED WIVES IN MALAYSIA*

Áhilemah Joned

[The article deals with the legal remedies for victims of rape and domestic violence. It examines, firstly, the defects in the laws relating to rape and other sexual assaults as mainly provided by the three important legislations viz. The Penal Code, the Evidence Act and Criminal Procedure Code. Proposed reforms and revisions in these legislations are also included but the discussion will not be in depth. As the laws stand, battered wives are left almost without any legal protection. Therefore the second part of the article deals not only with the meagre provisions which relate to the relevant laws but also some recommendations for legal reforms by the womens' groups.

Rencana ini membincangkan pemulehan-pemulehan undang-undang bagi mangsa-mangsa rogol dan keganasan rumah-tangga. Ianya mengkaji, pertamanya, kecacatan undang-undang yang berkaitan dengan rogol dan serangan-serangan berseksual yang lain seperti mana yang diperuntukkan oleh tiga perundangan yang terpenting iaitu Kanun Keseksaan Akta Keterangan dan Kanun Acara Jenayah. Cadangan-cadangan bagi pembaruan dan penyemakan perundangan-perundangan tersebut dimasukkan juga tetapi perbincangan tidak akan dibuat secara mendalam. Menurut undang-undang yang ada, isteri-isteri yang dipukul bolehlah dikatakan tidak mempunyaiapa perlindungan-perindungan undang-undang. Oleh yang demikian bahagian kedua rencana ini membincangkan bukan sahaja peruntukan-peruntukan yang segelintir itu tetapi juga beberapa saranan-saranan bagi pembaharuan undang-undang oleh kumpulan-kumpulanwanita.]

Introduction

An analysis of the statistics on rape cases shows that there is an average of one rape per day.¹ But, these figures, as claimed by some sources, are only the tip of the iceberg.² As for wife battering there are no statistics available. The number of cases handled by the Women's Aid Centre (WAC)

*This is a revised version of paper presented at a Conference on 'Violence Against Women' Rabat, Morrocco 29 April to 6 May 1985.

¹In 1977, 303 rape cases were reported to the police, this was followed by 312 in 1978, 388 in 1979, 368 in 1980, 360 in 1981 442 in 1982 and 460 in 1983. Up to June last year number of rape cases reported were 223. See for details: Appendix A Statistics on Rape Cases 1977 - 1983 compiled by Looi Pek Hong, Victimization of Rape Victim - A Socio-Legal Study, unpublished Project Paper, Faculty of Law, University of Malaya 1984/85.

²See Editorial, *The New Straits Times*, 23rd February 1982 where one source put it as ten fold and another as threefold. It is a common knowledge that many rape victims are reluctant to report the incident because of shame or embarrassment, fear of newspaper publicity and fear of the courtroom experience.

since its formation two years ago will probably throw some light as to the seriousness of the problem. The Centre (which will be discussed later) had sheltered 130 battered women and 149 children and rendered telephone service to 369 women³.

The wave of awareness of the problems that swept across the world in the early seventies was only felt in Malaysia a decade later. The setting up of the WAC in 1982 by the Womens' Aid Organisation marked the emergence of anti-violence against women in Malaysia. This was followed by the formation of Joint Action Group Against Violence Against Women (JAG) representing five womens' organisation, viz.:

- (1) The University Women's Association;
- (2) The Women's Aid Organisation;
- (3) The Selangor Consumers Association;
- (4) The Malaysian Trades Union Congress (Women's Committee)
and
- (5) The Federation of Women Lawyers.

The JAG has, as its primary object, "to effect significant changes not only in certain areas of law and procedure relating to rape and sexual assault but to examine the whole concept of violence against women and to serve as an educative force in changing the community's attitudes towards sexual assault."⁴

The Workshop and Exhibition on Violence Against Women held on 23rd and 24th March 1985 was very well attended; at the very least it shows public awareness of the extent of the problems at hand.

This article is intended to state the case of rape victims and battered wives with the emphasis on the defects in the present laws. Proposed reforms and revisions in these laws will not be dealt with in great length in the text of the paper; but some footnotes in the paper will provide readers with the relevant detailed proposed amendments and revisions and also some provisions of the newly proposed Domestic Violence Act as suggested by Women's Organisations.

³*The New Straits Times*, 3rd April 1985.

⁴See the introduction of 'Reform Proposals' - A pamphlet published by JAG.

A. Treatment of Rape Victims

1. Defect in the laws relating to rape and sexual assault

There are three legislations which need to be discussed viz. the Penal Code (F.M.S.) Cap. 45, Evidence Act 1950 (Act 56) and Criminal Procedure Code (F.M.S.) Cap. 6. Each and every one of these needs to be amended in order to give more protection to victims of rape from further victimization under the legal process.

2. Penal Code¹ and definition of rape

Section 375 defines rape as a man having sexual intercourse with a women who is not his wife under any of the following circumstances:

- (a) he does it against her will;
- (b) She does not consent to it;
- (c) Her consent has been obtained by putting her in fear of death or hurt;
- (d) He knows that he is not her husband and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent; or
- (e) The woman is below 14 years of age whether with or without her consent.

The Malaysian Penal Code was based on the Indian Penal Code which was drafted in 1834. Therefore the principles underlying section 375 were based on the prevalent life style, values and beliefs at that time.

The defect of this definition section can be summarised as follows:

- (1) The meaning of "sexual intercourse" is only capable of a narrow interpretation. The definition needs to be widened so as to include other kinds of sexual acts such as sexual connection occasioned by the

¹F.M.S. Cap. 45 Chapter XVI.

penetration of the anus and other parts of the victim's body. The present definition only covers the mere concept of penetration of vagina by a penis; therefore if the accused inserts objects such as bottles or hands in the victim's vagina it will not be a rape. (Cases such as these are prosecuted separately as the offence of "outraging of modesty" under section 354).⁶

- (2) The definition excludes rape by a husband (unless the wife is 13 where it will amount to statutory rape).

The policy underlying this is probably this: once a woman agrees to marry a man (in the case of Muslim women, their consent to a marriage is not necessary if they are virgins: they can be married off by their marriage guardians) she is taken to consent to sexual intercourse as long as the marriage subsists.

In a typically traditional and conservative society such as ours the idea of abolition of this rule may well sound repulsive but the merits of its abolition must be made known to women so as to show them that they have control over their bodies.⁷

'JAG has suggested that "sexual intercourse" should be given a definition which will widen the concept of "penetration" under the present law. The new section has been proposed to be worded as follows:

'376(l) for the purpose of this section and section 375, 376 and 376A 'sexual intercourse' means:-

- (a) Sexual connection occasioned by the penetration of the vagina of any person or anus of any person by
 - i) any part of the body of another person; or
 - ii) an object manipulated by another person except where the penetration is carried out for proper medical purposes;
- (b) Sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;
- (c) Cunnilingus.

In its own commentary on the proposed section JAG said that the criminal law ought to emphasize the violence aspect as distinct from the sexual aspect of non-consensual sexual impositions. Like rape, anal intercourse, fellatio and cunnilingus and the insertion of objects are sexual assaults which now should be viewed as acts of violence and as not as acts of the result of excessive passion; thus the extended meaning of sexual intercourse is very important for this purpose.

'JAG's proposed new section 375A will only protect a wife who is under 16 and a wife who is separated from her husband under a decree of judicial separation.

- (3) There is no express provision included in the section in which the consent obtained by committing fraud as to the nature of the act would vitiate the consent given. The fourth clause merely specifies that in order to vitiate the consent given (consent to the intercourse) it must be fraud as to the identity of the person.⁸
- (4) Consent obtained by threat of death or hurt directed to the victim's loved ones will not vitiate the consent. Under the present law the threat must be directed to the victim herself.⁹

⁸Decided cases in England and commentaries on the Indian criminal provision on rape (*in part materia* with Section 375 of our Penal Code) have included fraud as to the nature of the act as one of the two kinds of fraud (the other being fraud as to the identity) as being sufficient to destroy the effect of a woman's consent as to convert a connection consented to in fact into rape. See for example *Queen v. Clarence* (1888) 22 QBD 23, 43, 44, 16 60x 511; *William's Case* (1923) 1 KB 340 and *Re Flattery* (1877) 2 QBD 410. The Indian cases further concluded that:

A mere act of helpless resignation in the face of inevitable compulsion acquiescence, non-resistance or passive giving in, when volitional faculty is either crowded by fear or vitiated by duress, cannot be deemed to be consent as understood in law. Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also having fully exercised the choice between resistance and consent. See *Rao Harmarain Singh* [1958] Cr. L.J. 563, *Joseph* [1962] 2 Cr. L.J. 668, *Anthony* [1960] Cr. L.J. 927.

JAG considers this as one of the serious defects of the section. Their proposed new Section 375 is not only meant to codify the courts' decisions (*supra*) on fraud as to the nature of the act but also to cover situation in which consent has been given because of deceit, threat or undue influence. As an illustration of a case where rape has been committed because of fraud as to the nature of the act, the proposed new section 375A provides a following example:

"Illustration; A goes to B, a bomoh for treatment, B, under the pretext of treating her has sexual intercourse with her. B here has committed rape".

⁹The new section 375A will remedy the defect by revising the relevant paragraph to include consent obtained by putting the victim in fear of death or hurt or of any injury to herself as well or to any other person or by criminal intimidation as defined by section 503 to vitiate the consent given.

- (5) Consent obtained by an economic threat is also not sufficient to vitiate the consent given. Therefore in the case of sexual harassment, the women involved is denied the protection of the law. She is forced to choose between her honour and her job (to most women the choice is not merely between her honour and her job but between her honour and her food). A man who is in a position of authority is able to abuse his authority in order to have sexual intercourse with a woman who would otherwise refuse. "There has been numerous complaints from factory girls and female workers in the plantation section regarding sexual favours demanded of them from male superiors upon pain of dismissal of other forms of victimization at work."¹⁰
- (6) Punishment for rape as provided by section 376 has been viewed by women's groups to be inadequate for the purpose of deterrence and retribution. The section provides that punishment for rape may extend to 20 years and the offender shall also be liable to fine or whipping. Studies carried out show that many rapists get away with only 2 to 3 years¹¹ or 3 to 4 years¹² when the law provides for a maximum sentence of 20 years imprisonment. Women's groups urge that a minimum jail sentence be prescribed so as to reflect the gravity of the offence. JAG proposed that section 376 be amended so as to provide for a minimum 5 years imprisonment for a convicted rapist.¹³

¹⁰JAG proposes a new section 376A be inserted to cover this situation. The new section proposed by JAG:

"376A whoever, being a public servant or person in authority takes advantage of his official position or office and compels or reduces to illicit intercourse with him any woman who is in his custody, supervision, control or under his authority shall be punished with imprisonment for a term which may extend to two years or with fine, or with both."

¹¹See JAG's pamphlet on "Reform Proposals".

¹²Looi Pek Hong, *op. cit.*, p 108.

¹³This minimum period of imprisonment and whipping are particularly supported for cases of gang-rape and rape of children. JAG's new section 376 read as follow:

"376 - Whoever commits rape shall be punished with imprisonment for a term which shall not be less than five years or for a term which may extend to twenty years and shall also be liable to whipping of not less than five strokes.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than five years."

2. Evidence Act and the Corroboration Rule

Relevancy of prior sexual history

Section 155(d) of the Evidence Act allows evidence of prior sexual history of the victim to be adduced in court by the defence counsel to show her immoral character.

The section provides:

"When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutor was generally of immoral character."

The creditworthiness of a victim who testifies as a witness in her own case will be affected especially if she was not a virgin but had never been married or if she has had a series of 'illicit' affairs.

In the light of section 54(l), section 155(d) is not only discriminatory against women witnesses (as rape victims); the two sections read together will protect the accused and put the victim on trial. This is because section 54(l) says that the bad character of an accused is irrelevant unless according to subsection (2) he attacked the character of the complainant. Thus the fact that the victim was not a virgin at the time of the rape incident would, in a rather conservative society such as ours, be relevant whereas the fact that the accused is a habitual rapist or a habitual criminal would not.¹⁴

As the law allows the victim's character to be assassinated, the law in fact shuts the door of justice to prostitutes – prostitute can never therefore succeed in a rape trial.

¹⁴Looi Pek Hong, *op. cit.*, p. 124, n.l. About non-virgin victims, a lawyer at an interview asked: "What are you robbing her of if she was not a virgin at the time of the act? Her virginity? Her modesty?" Ibid. p. 124.

JAG proposed the sections be amended so as to make the past sexual history of the victims inadmissible in evidence. The repeal of a section such as 155(d) will also encourage more victims to lodge reports on rape incidents.¹⁵

Corroboration Rule

Corroboration as defined in Basherrilles case is an independent testimony on a material particular implicating the accused.

In Malaysian law it has become a well established practice of the court that the evidence given by the rape victim must be corroborated. Corroboration of the testimony of the victim can be in the form of a medical report, prompt police report or physical injuries (so as to show resistance and lack of consent).

The requirements of corroboration is not stated anywhere in the Evidence Act; it is a rule for the administration of justice and was said to be based "... on accumulated human experience and common sense ...".¹⁶

This rule of practice has been claimed to serve as a warning or caution to the court of the danger of convicting on the sole testimony of the victim. However, if the court feels that it is safe to convict without corroboration it can so convict and the conviction is good in law.¹⁷

¹⁵JAG suggests: that section 155(d) be repealed, new section 53A and 111A be inserted and a new paragraph be added to section 146. The new sections and paragraph are as follows:

"53A - In a prosecution for rape or an attempt to ravish, evidence of the character or the previous sexual experience of the complainant with any person other than the accused shall not be relevant."

"111A - In a prosecution for rape or an attempt to ravish, where sexual intercourse is proved and the question is whether it was without the consent of the woman and the woman with whom rape is alleged to have been committed or attempted, states in her evidence that she did not consent, the court shall presume that she did not consent."

A new paragraph (d) to S. 146 read:

"146(d) - In a prosecution for rape or an attempt to ravish, no evidence shall be given, and no question shall be put to a witness relating to -

- (a) The sexual experience of the complainant any person other than the accused; or
- (b) The reputation of the complainant in sexual matters."

¹⁶L.P. Thompson in *Din v PP* (1964) 30 MLJ 400, 301

¹⁷*Chui Nang Hong v PP* [1955] 1 MLJ 40

In a conducted study,¹⁸ the Malaysian judiciary hardly convicts an accused if there has been no corroboration, no matter how credible the victim is as a witness. A victim of rape, therefore belongs to the same category of an accomplice (party to a crime) or a child. Lord President Thompson says¹⁹

“... the desirability of corroboration of the evidence of the prosecution case in a rape case springs not from the nature of the witness (accomplices or a child) but from the nature of the offence ... If she (the victim) complains of having been raped, then prudence and practice demand that her evidence should be corroborated ... the temptations of a woman to *exaggerate* an act of sexual connection are well-known and manifold.

It has been found that it was nearly impossible to obtain independent corroborative proof of each element of the crime of rape. This stringent rule makes it almost impossible to convict a rapist. In their reforms proposal JAG did not touch on the issue of corroboration.

As this is not a rule of law but rather of practice, it is up to the court to resolve the issue. It could well be that petitions to abandon the rules should be addressed to the judiciary before legislative is considered. A court can convict on the testimony of the victim alone so long as the prosecution has managed to convince the court of the guilt of the accused beyond reasonable doubt. But in the light of the two statement by members of the judiciary, it is doubtful if the corroboration rule will ever be dispensed with:

(1) “I believe that if a woman is really raped, there should be ample evidence to that effect.” A High Court Judge quoted in “World’s most unreported Crime” *The New Straits Times* 22nd August 1981.²⁰

(2) “It is not easy to rape a woman if she resists hard enough.”

A former lady Magistrate in an interview.²¹

¹⁸Looi Pek Hong, *op. cit.*, p. 58

¹⁹Per L.P. Thompson in *Din v PP*, *supra*.

²⁰Looi Pek Hong, *op. cit.*, p. 68, n. 88

²¹*Ibid.*

3. Criminal Procedure Code and Rape Trial

Under the present law rape trial is treated as ordinary criminal trial; thus the court is open to the public. Although public and open trials are meant to ensure justice and avoid abuse, JAG recommends the Criminal Procedure Code be amended to insert a new section which provides that the inquiry and trial of rape and other allied offences be conducted *in camera*. Hearings *in camera* will protect the victim from the trauma of public hearing.

It is common knowledge that trial of rape cases is well attended by the public who are there either to enjoy what they think are the "juicy" details of the case or to pass accusatory and moralistic comments.

Another defect of the Malaysian criminal justice system is the way in which the victim identifies the accused in an identification parade. The method of identification follows from the British system where the victim has to go up to the suspect and touch him on the shoulder. It has been said that the shock and fear of coming face to face with the rapist again can result in the victim not being able to identify him.²² Perhaps the American method which makes use of a one-way mirror whereby only the victim can see the accused but he cannot see her should be adopted instead.

Investigation stage and treatment by the police and hospital authorities

When and if a victim decides to report the rape incident, more often than not she is subjected to further victimization. In the first place, the present system requires her to narrate the incident herself because a statement made by someone else will amount to hearsay which is not admissible as evidence in court.²³ While adherence to this rule is important to safeguard the rights of the accused, a very tender-aged victim could not possibly fulfil this requirement, as she cannot be expected to make the statement herself. It is a very delicate issue but the court that tries the case can admit the complaint made by other people on behalf of the victim, not to show the truth of the contents thereof but to show the fact that such complaint was made.²⁴

²²*Ibid.*, p. 30.

²³Hearsay statement is a statement that is made by a person who is not himself giving oral evidence in court.

²⁴See *PP v Subramaniam* [1956] 22 MLJ 220

According to the present practice in the police stations, the report is made and the interview held in a public place, bustling with people. At this time the accused is subject to humiliating and irrelevant questions such as "Did he discharge and where"? or "did you feel any pleasurable sensation?". Although some questions asked are relevant but the way they are addressed, and the tone used serves, to embarrass and belittle the victim. Local law enforcement officers not only lack the knowledge of the psychodynamics of rape but are also insensitive to the trauma and the anxiety of the victim. The defects of the present method of interviewing the victim which looks like an interrogation has been criticized by a researcher because²⁵

- (1) The victim is not given opportunity to talk freely without any interruption.
- (2) Questions are asked without explanation as to why they are asked.
- (3) Techniques used are impersonal, insensitive and intimidating.
- (4) Irrelevant questions are asked.
- (5) Important questions are either not asked or not sufficiently or properly asked.

When the interview is over and police investigation is completed, the case will be brought to the attention of the Public Prosecutor. At this stage, the victim will be asked the same embarrassing and humiliating questions all over again. It has been suggested that there should be better coordination between the police, prosecuting officer and public prosecutor so as to minimize the frequency of the victim repeating herself.

Proposals for a special rape squad unit was received with scepticism by parties concerned because they view that compared to the number of crimes committed each year, the number of rape cases is only a drop in the ocean.

Treatment of the victim in the hospital is not better than in the police station. When a victim comes to the hospital for an examination for the purpose of getting a medical report, she is given a very low priority. As far as the hospital staff are concerned, the rape is over and so what is the hurry? She is there for a routine examination and she can wait for her turn.

²⁵Looi Pek Hong, *op. cit.*, p. 35

When the medical examination is carried out, no explanations are given; it is done mechanically without paying much attention to the psychological trauma of the victim. Just like at the police station, rape cases will also cause a sensation and uproar at the hospital.

The main purpose of medical examination is not to treat the victim physically or psychologically as much as to examine the victim routinely and laboratory examinations are not done satisfactorily so as to elicit strong corroborative evidence for a successful prosecution.²⁶

Hospitals do not think that it is their role to give the victim psychological treatment. A former head of department of psychology stated that for the last 14 years of his service not a single rape victim (except for a victim of incest) has been referred to the department.²⁷

To sum up we can conclude that the police and hospital staff have been very insensitive to the needs of the rape victim.

The Judiciary and Their Attitude Towards Rape Victims

At the outset it is important to note that the Malaysian judiciary is dominated by male members of society.²⁸ A researcher alleges that:²⁹

"The fact is that our judiciary is dominated by the male members of society and it cannot be denied that it is easier for them to identify themselves with the male accused than the female victim. There is a tendency no matter how slight for them to place themselves in the shoes of the accused and to look for contributory behaviour on the part of the victim to excuse the behaviour of the accused."

In the light of some of the judicial remarks quoted by the researcher herself one cannot say that the allegation has no basis.³⁰

²⁶*Ibid.*, pp. 83 - 88

²⁷*Ibid.*, p. 125

²⁸See Rosyati Ahmad, "Wanita Dalam Profesi Undang-Undang" (Women in the Legal Professional) Project Paper, unpublished, Fakulti Undang-Undang, University Malaya 1982/83.

²⁹See Looi Pek Hong, *op. cit.*, p. 109

³⁰See *Ibid.*, p. 113

Examples of those remarks are:

1) In Mohamed Kunju v PP

Federal Court says:

... As no evidence was used and as the accused had not suffered physical damage that impair her future chances of marriage the sentence would be reduced to one of 7 years imprisonment.

Note:

The victim in the case was 11 years old girl – later was inflicted with gonorrhoea by the offender as a result of the rape. Original sentence of 10 years passed by the High Court was reduced to 7 years.

2) In PP v S Ganesan (unreported)

President of Sessions Court remarked:

“... Since the victim *not injured* to whipping will be imposed ...”

Note:

In this case an ex-security guard broke in to the house of the victim and raped her. He was sentenced to 5 years imprisonment.

3) In PP v Mokhtar Ariff and Others (unreported)

President of Sessions Court said:

“... although the girl was brutally robbed of her dignity ... she was not beaten up and did not suffer any serious injuries.”

Note:

In that case, the victim was kidnapped and gang-raped by three men. The separate sentence for the kidnapping and rape were ordered to run concurrently from the date of arrest. The offenders were sentenced (for the rape) 6 years and 1 stroke of rotan, 7 years and 2 strokes of rotan and 6 years and 2 strokes of rotan respectively. The girl was raped twice, thrice and once respectively.

Rape cases are triable in the Sessions Courts. Unless the cases go on appeal to the High Court or Federal Court (now Supreme Court) the cases would not be reported in law reports. Very rarely do cases such as these go to the appeal courts; if one were to study files in the Session Courts one probably would be able to find remarks such as the above.

There are also allegations by women lawyers that male judicial members fail to understand the physical and mental pain of rape, and as a

consequence of that they tend to impose light sentences.³¹

When a High Court judge admitted that rape laws favour the rapist deciding on the appeal the case of **PP v. Mohammad Ariff and Other** (*supra*), it is encouraging to know that the prevalent attitudes are changing. (However, the learned Judge had passed the burden of seeking reforms in the law to women's organizations). That historic statement however has had a tremendous impact on the women's organisations. When these organisations declared that they would join forces to press for the amendments³² in laws relating to rape their scope of struggle is now to go beyond family law.

B. Remedies and Protection of Battered Wife Under the Law

As an individual, a battered wife is denied a number of legal protections that would be available if she were not a 'wife'. If her husband batters her, she can not bring a civil action against him for damages, and the police would be hesitant to press criminal charges against him. The inclusion of a provision enabling a battered wife to obtain an injunctive relief against her husband under the Law Reform (Marriage and Divorce) Act 1976 (which came into force in 1982), if at all, does very little to improve her situation.

As the laws stand, battered wives are left almost without any protection of the law. The discussion below will deal with the meagre provisions that relate to the laws that may be of any use of battered wives.

1. Civil Remedies Under the Law of Torts and Married Women Ordinance, 1957

Under the law of torts, a person who has been assaulted or battered by another can sue the other for compensation or damages. However, a victim is denied this if she or he is married to the assailant. Section 9(2) of the Married Women's Ordinance 1957 takes away this right from the victim. The sub section (2) provides:

"Except for the protection or security of his or her property, no husband or wife should be entitled to sue the other for tort."

³¹*Ibid.*, p. 116, n. 42

³²*The New Straits Times*, 11th September 1984

The origin of this rule could be traced back to middle ages and the then prevalent view of the common law that a husband and wife were regarded under the law as one person; a suit between them would mean a suit by one individual against himself/herself.

The proposed Domestic Violence Act does not deal with civil remedies. It only covers issues relating to injunctive relief and police protection in the context of domestic violence. The repeal of Section 9(2) of the Married Women's Ordinance will, by itself, resolve the problem it creates.³³

2. The Penal Code

A husband who physically abuses his wife (except in the case of rape – *supra*) is actually committing an offence under the Penal Code.³⁴ The wife is a competent witness against her own husband should criminal proceedings be brought against him.³⁵ There is no prohibition imposed on battered wives to take criminal action against her husband as in the case of civil suit of tortious liability.³⁶ The charges that can be brought against the husband are: (1) Hurt and Grievous Hurt; (2) Criminal Force; (3) Criminal Assault.

Victims, however, are reluctant to report wife-battering incidents to the police for fear of embarrassment. This, is further worsened by the policy of non-interference in domestic violence on the part of the police. Thus if and when a battered wife decides to pursue the matter and report the case she would encounter these possible problems namely (1) her report is not acted upon because of the non-interference policy; (2) her difficulties to get witnesses because witnesses, just like the police adopt the non-interference policy; (3) while waiting for the case to be heard, she has no protection against future assaults by her husband.

³³It is submitted that the entire section 9 of the Ordinance should be reviewed. Sub-section 1 for instance is superfluous because it merely confers a right which already constitutionally guaranteed to married women as individuals.

³⁴Penal Code, Exception to section 375.

³⁵Evidence Act 1950, section 120(2)

³⁶See *Re Ketuna Bibi* (1955) MLJ and *Nurruddin v Siti Aminah* (1929) S.S.L.R. 146 – However none of these cases involved criminal assault, hurt of grievous hurt.

A husband who has battered his wife can also be brought to court by way of private summons.³⁷ The advantage of private summons is that a battered wife can bring the case to court without resorting to the police to press charges. But by doing that she runs the risk of provoking her husband. JAG in their proposed Domestic Violence Act pay particular attention to these problems. The Act deals with the problems by inserting several provisions which as certain the duties of the police officers involved.³⁸

3. The Law Reform (Marriage and Divorce) Act 1976 (L.R.A.)

One of the major defects of this Act is that it is not applicable to Muslims and Natives of Sabah and Sarawak. So whatever the worth of the protection accorded, wives of Muslims and Natives are denied it.

Under section 103 LRA the court is given power, during the pendency of any matrimonial proceeding or after the grant of a decree of divorce, judicial separation or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestations.

³⁷Section 133(1)(ii) Criminal Procedure Code (F.M.S.) Cap. 6

³⁸For example section 13 of the proposed Domestic Violence Act provides:

"13. Duties of Police Officers

- (a) If a police officer has any reason to believe that a person is a victim of domestic violence, the officer shall use all reasonable means to prevent further violence and to ensure that victim's safety by -
- i) exercising arrest powers attached to the injunction.
 - ii) removing the offender from the household if there is probable cause to make an arrest.
 - iii) failing out and filing a domestic violence offence report using the form prescribed.
 - iv) providing or arranging transportation for the victim to a safe place or shelter if such transportation is desired.
 - v) providing or arranging transportation for the victim to the nearest hospital or medical facility for treatment of injuries if such care is needed.
 - vi) reading to the victim the oral notice of rights to protection and any other relevant written information.
 - vii) advising the victim of the importance of preserving evidence and of the types of evidence that should be preserved,
 - viii) taking photos of any visible injuries or property damage wherever necessary or appropriate.
 - ix) accompanying the victim to a previous residence to remove personal belongings and
 - x) supervising court-ordered removal of an abuser from a residence shared with a victim."

In their commentary on the section, JAG points out the defects of the provisions:³⁹

- (1) protection is only available during the pendency of any matrimonial proceeding. It is not available at any time;
- (2) protection is not available to a spouse who is living apart from the other spouse unless and until he/she has presented a petition for dissolution of the marriage under the Act;
- (3) protection is not available to victims who are awaiting the outcome of conciliatory proceedings or who does not contemplate divorce;
- (4) applications for injunctions can only be made to the High Courts; as the High Courts are located only in the big towns, many battered wives from rural areas do not have accessibility to relief.
- (5) an injunction is not an effective order to protect the victims from their husbands' attacks. It is not a remedy for past battery. It is nothing more than "a piece of paper".

The Women's Aid Centre - Refuge for Battered Wife

What battered wives need most, apart from more legal protection, is independence from the men who batter them. However this independence means more than mere access to a women's shelter. It means an economic independence and independence from the notion that they were to be blamed for their husbands' battering. Rosemarie Tong says:⁴⁰

"What battered women most need is independence from the men who batter them. At first this independence may mean nothing more than access to women's shelter. Ultimately, however, independence must mean more than this. As judge Lisa Richette of Philadelphia said at the United States Civil Rights Commission Hearings on Domestic Violence in January 1978, "All the shelters in the world would not provide support for women unless society is reorganised to end sexism." Until a woman has the skills and financial resources to make a life of her own, she can never be certain whether she would be better off without her batterer, and until a woman understands that she is not to be blamed for her batterer's behaviour, she will never be free of him."

A road for better life for a battered wife starts with a shelter or refuge. But this shelter cannot afford to protect her from attacks of her husband for ever; it is meant as a temporary refuge while at the same time giving her an opportunity to decide whether to be on her own or to go back and be part of the violent home.

³⁹See pamphlet by JAG titled 'The Present Legal Protection for Victims of Domestic Violence.'

⁴⁰Rosemarie Tong, *Women, Sex and the Law*. Rowman and Allanhead 1984, p. 149.

In Malaysia, a refuge for battered wives was set up for the first time in 1982. This refuge is called The Women's Aid Centre which is to date the only shelter for these unfortunate women. The centre is open to all women in crisis, with or without children, regardless of race or religion. It is run by paid as well as voluntary workers. It is an independent non-profit-making body. The centre had sheltered 130 women, 149 children and rendered telephone services to 369 women since its establishment two years ago. The setting up of the centre is a commendable effort; let us hope that it will not remain the sole centre for battered wives for long.

CONCLUSION

Be it in a developed, a developing or an under-developed country, rape, sexual harassment and women – battering has been perceived as a trivial or a largely imagined phenomenon and that what the women need is treatment and not remedies for violation of their rights. In Malaysia, the awareness of the necessity for treatment was only a recent development; and issue of legal reforms to the related laws, and only items on the agendas of women's groups. The general public are caught up in building a capitalist nation – blissfully ignorant of the problems at hand. The law-enforcement officers think that compared to other cases, violence against women are only a drop in the ocean. The Government would rather channel the nation's resources to more useful and politically attractive projects rather than to setting up a Rape Crisis Unit for example; after all "there is no such thing as sex discrimination in this country"⁴¹ or if there are defects in the laws pertaining to the matter, it is the responsibility of the women's groups to act to remedy the situation.⁴² In view of all these, it looks like the struggle for a better life for women in Malaysia is going to be a very long and painful one.

⁴¹Report on Parliamentary Proceeding on 16th March 1984 is most pertinent to this point. Tan Seng Giaw (D.A.P.): "Why is it that there is no Women's Charter in this country?"

Sharifah Dora (Deputy Minister in the Prime Minister's Department: "There is no sex discrimination in this country. So there is no necessary for a Women's Charter in this country."

⁴²See the comment made by Justice Mustapha Hussain in *PP v. Mokhtar Ariff & Others*, *supra*.

Puan Nafsiah Omar, Deputy Minister of Housing and Local Government at the opening of the workshop held recently said:

"No amount of legislation will eliminate the problem of violence against women unless society, and women themselves, change their attitude."

The New Straits Times, 3rd April 1985. Once again the emphasis is on women. It is always the women who should shoulder the bulk of the responsibility to ratify the wrongs of the society.