

**Refugee Review Tribunal  
AUSTRALIA**

**RRT RESEARCH RESPONSE**

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**Questions**

- 1. Is there state protection for women who are victims of domestic violence in Malaysia?**
- 2. Is there state protection for child victims of domestic violence in Malaysia?**
- 3. Is there information on the police/authorities in Malaysia failing to enforce domestic violence legislation?**
- 4. If a Christian couple in Malaysia separated and the husband converted to Islam, would the husband be likely to be granted custody of the couple's children?**

**RESPONSE**

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While the government and NGOs have made a good deal of progress in providing protection for women and children who are victims of domestic violence, room remains for further improvement in Malaysia today.

In its 2005 report, Amnesty International states that:

**8.1 Women**

**Violence against women in the community:** For over two decades, women's groups in Malaysia have actively engaged in dialogue with the authorities about gender issues, including issues of rape and domestic violence, and police responses to such cases. Women's groups were concerned that, while criminal proceedings and protection injunctions were available under the Penal Code and other legislation, domestic violence tended to be regarded as a private matter, with the police and courts appearing unwilling to take action against those who may have assaulted their spouses or other relatives within the

home. For example, there were reports of police officers advising women seeking to lodge a report about being battered by their husbands, to return home and resolve the problem within the family.

In this context, women's groups lobbied for a Domestic Violence Act (DVA), passed in 1994 and implemented in 1996, which defined offences, protection measures and the duties of police officers in relation to domestic violence. Women's groups are also engaged in continuing debate over proposed amendments to the Penal Code and Criminal Procedure Code, in relation, among other things, to the criminalization of marital rape and more severe penalties for rape offences.

Efforts by women's groups, in collaboration with the Ministry of Women's Affairs and Family Development, to reinforce the content and implementation of the DVA and other laws and procedures continue, due in part to periodic reports that women, particularly women migrant workers, who seek to lodge complaints of domestic violence or other forms of sexual assault are at times discouraged or treated unsympathetically by police. There are also concerns about a general under-reporting of rape, with an estimated nine out of ten rapes not being reported. Studies have also shown that, even when alleged rapes are reported, only low percentages are heard in court, with few resulting in convictions.

Women's groups have conducted a series of dialogues with police and have welcomed RMP initiatives to strengthen procedures and gender-sensitive training of police officers regarding the receipt and investigation of reports of rape and other forms of violence against women, and the interviewing of women victims. Women police officers are assigned to receive reports of sexual assaults and accompany the victims to hospital for treatment, and in 2002 the RMP announced plans to set up "one stop" centres for rape victims whereby police reports could be lodged and medical treatment provided in single locations...

## **8.2 Juveniles**

Malaysia ratified the UN Convention on the Rights of the Child (CRC) in 1995 and incorporated many of its principles in the Child Act of 2001, which consolidated existing laws relating to the care, protection and rehabilitation of juveniles (Amnesty International 2005, 'Malaysia: Towards Human Rights-Based Policing', April, pp 43-44 – Attachment 1).

Commenting on the extent of domestic violence and difficulties faced by the victims, the (Malaysian) Women's Aid Organization notes that:

With 39% of Malaysian women estimated to have been abused by their partners, domestic violence is a significant, but often hidden social problem. The 'invisibility' of the problem is largely attributed to the sensitivity of the issues surrounding the problem, especially the traditional belief in the sanctity and privacy of the family and the intimacy of marital relationships. "Battered Women in Malaysia: Prevalence, Problems and Public Attitudes", 1995 (produced by the WAO office)... is based on a national research study ... conducted by WAO between 1990 and 1992... From this national survey, it was estimated that in 1989, 1.8 million or 39% of women over the age 15 were beaten by their husbands or boyfriends. Only 909 women actually reported violence to the police...

The [Domestic Violence] Act was passed by parliament in 1994, but two years later, was yet to be implemented. After eleven years of workshops, campaigning and negotiations, the Domestic Violence Act (DVA) was finally implemented on 1st June 1996...

Prior to the DVA, legal measures available to domestic violence survivors were hampered by a reluctance to enforce domestic violence as a criminal offense. Although criminal proceedings

and injunctions were available under the Penal Code and existing legislation, domestic violence was regarded as a private family matter, and police and the courts were generally unwilling to take action against batterers. Furthermore, the legal process was laborious and expensive. Protection injunctions often proved to be little more than pieces of paper which failed to protect women from their abusers. Finally, the implementation of a Domestic Violence Act sends out a strong message of the seriousness with which society regards domestic violence...

The original drafters of the DVA wanted to classify domestic violence as a crime in itself. But this proposal was rejected. Under the DVA, domestic violence is not defined as a specific crime punishable by new penalties, but it is attached to the Penal Code under definitions and procedures for hurt, criminal force and assault...

The Domestic Violence Act was originally intended to apply to both civil and criminal law, irrespective of religion or culture. Civil reforms were to include areas of maintenance, child custody and divorce, while criminal reforms were focused on improving protection order procedures, and empowering the police to make arrests and remove offenders from homes. Efforts to include civil reforms in the DVA met with objections, that for Muslims, there would be conflict between the DVA and Syariah Law. Islamic authorities maintained that Islamic Family Law provides adequate remedies and protection for survivors of domestic violence. But women's organisations campaigned that limitations to the Islamic Family Law did exist, and that furthermore, it would weaken the DVA making it vulnerable to loopholes, if certain laws were applicable to some groups and not to others. Although Syariah Law has jurisdiction over all family matters for Muslims, criminal matters fall under the Federal Government and criminal laws apply equally to Muslims and non-Muslims. Therefore, attaching domestic violence to the Criminal Procedure and Penal Code enabled domestic violence to be classified as 'criminal behaviour' and ensures its applicability to all Malaysians...

A patriarchal system continues to assign women to a lower position in the family, society, and before the law. The law does not perceive of women as autonomous individuals capable of making decisions appropriate to their own lives. Rather, women continue to be recognised only in terms of their relationships with others, as mothers, or wives. Cultural influences affect not only the content of the law, but also how the law is enforced. If members of society do not respect or understand the law - including those individuals responsible for the law's enforcement - the objectives set forth by the law will not be achieved...

Under the DVA, while police investigations are on going the court may issue an Interim Protection Order (IPO), which prohibits the person on whom the IPO is served from using domestic violence against the survivor(s). If the accused is charged with an offence under the DVA, a Protection Order (PO) can then be served, with greater powers to restrict the activities of the abuser.

Survivors of domestic violence are at high risk of further abuse and protection orders are vital. However, the length of time women wait for protection orders has ranged from only two days, to over four months. Even one month remains too long for women to wait for protection. The period of time between the registering of a complaint and the court hearing is often the most dangerous and frightening for women.

The procedures for obtaining protection orders must also be clarified and simplified. The application process for an IPO is not included in the DVA...

Women's organisations acknowledge that the DVA is not as far reaching as was originally intended because concessions and limitations were agreed upon in order that the DVA finally be implemented. The implementation of this Act is a monumental achievement...

In our culture, it takes a lot of courage to make a domestic problem public. In doing so the survivor experiences shame and the oppressor feels more angry because of *'jatuh air muka'* (saving face)... (Women's Aid Organization (undated) 'Domestic Violence – Malaysian Context', WAO website <http://www.wao.org.my/research/domesticviolence.htm> - Accessed 3 June 2009 – Attachment 2).

Another report by the organization comments that:

- For every rape case that is reported, nine go unreported...
- Section 376 of the Penal Code states that whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall be liable to whipping.
- Marital Rape is not legally recognised but the new Section 375A [of the Penal Code] states any husband causing fear of death or hurt to his wife in order to have sex shall be punished for term which may extend to five years... (Women's Aid Organization (undated) 'Rape – Malaysian Context', WAO website <http://www.wao.org.my/research/rape.htm> - Accessed 3 June 2009 – Attachment 3).

The most recent US Department of State country reports on Malaysia comments on the situation of women and children who are victims of domestic violence as follows:

#### Women

The penal code states that rape is punishable by a prison term of up to 30 years, caning, and a fine. The government enforced the law effectively. According to the police, 1,651 rapes were reported during the first half of the year. Spousal rape is not a crime, although a husband may be charged for causing harm to his wife while attempting to force sexual relations with her...

Violence against women remained a problem. Reports of rape and spousal abuse drew considerable government, NGO, and press attention. Under the Domestic Violence Act, anyone who willfully contravenes a protection order by using violence against a protected person may be punished by imprisonment of up to one year and a maximum fine of RM2,000 (approximately \$588). In extreme cases involving "grievous hurt" inflicted using a deadly weapon, the maximum imprisonment increases to 20 years. Women's groups criticized the act as inadequate and called for amendments to strengthen it. In their view the act fails to protect women in immediate danger because it requires that separate reports of abuse be filed with both the Social Welfare Department and the police, causing delay in the issuance of a restraining order. Cases also require visible evidence of physical injury, despite its interpretation to include sexual and psychological abuse.

Many government hospitals had crisis centers where victims of rape and domestic abuse could make reports without going to a police station. NGOs and political parties also cooperated to provide counseling for rape victims, but cultural attitudes and a perceived lack of sympathy from the largely male police force resulted in many victims not reporting rapes. According to the Ministry of Women, Family, and Community Development (MWFCD) and a leading women's NGO, only 10 percent of rape cases were reported to police. Women's groups noted that while some rapists received heavy punishments, including caning, other rapists received inadequate punishments.

Although the government, NGOs, and political parties maintained shelters and offered other assistance to battered spouses, activists asserted that support mechanisms for victims of domestic violence remained inadequate. There was a sexual investigations unit at each police headquarters to help victims of sexual crimes and abuse. Women's rights activists claimed that police needed additional training in handling domestic abuse and rape cases.

Some Shari'a experts urged Muslim women to become more aware of the provisions of Shari'a that prohibit spousal abuse and provide for divorce on grounds of physical cruelty. Provisions in state Shari'a laws, however, generally prohibit wives from disobeying the "lawful orders" of their husbands and presented an obstacle to women pursuing claims against their husbands in Shari'a courts. Muslim women were able to file complaints in civil courts...

Women's rights advocates asserted that women faced discriminatory treatment in Shari'a courts due to prejudicial interpretations of Islamic family law.

... There was a small but steadily increasing number of women obtaining divorces under the provisions of Shari'a that allow for divorce without the husband's consent...

### Children

The government demonstrated a commitment to children's rights and welfare; however, some government policies limited those rights and protections...

The government recognized that sexual exploitation of children and incest were problems. Incest in particular was a problem in rural areas. The law provides for six to 20 years' imprisonment and caning for individuals convicted of incest. The testimony of children is accepted only if there is corroborating evidence. This posed special problems for molestation cases in which the child victim was the only witness.

Statutory rape occurred and was prosecuted. According to the MWFC, most victims were below 15 years of age. However, Islamic law provisions that consider a Muslim girl an adult after her first menstruation sometimes complicated prosecution of statutory rape. Such a girl may be charged with khalwat, or close physical proximity, an offense under Shari'a law, even if she is under the age of 18 and her partner is an adult. Shari'a courts sometimes were more lenient with males charged with khalwat, although in many cases Muslim men were charged and punished for statutory rape under civil law (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Malaysia*, February, Section 5 – Attachment 4).

The 2008 *International Religious Freedom Report – Malaysia* notes that:

Shari'a courts do not give equal weight to the testimony of women. Several nongovernmental organizations (NGOs) dedicated to the advancement of women's rights complained that women did not receive fair treatment from Shari'a courts in matters of divorce and child custody. In December 2005 Parliament passed the Islamic Family Law Act (IFLA) in an effort to harmonize Shari'a laws throughout the country. Women's rights advocates protested that provisions of the IFLA weakened women's legal standing. In response, the Attorney General's office announced it would seek to amend the IFLA in unspecified ways; however, no amendments were introduced during the reporting period. (US Department of State 2008, *International Religious Freedom Report – Malaysia*, September, Section II – Attachment 5).

Malaysia ratified the UN Convention on the Elimination of Discrimination against Women and its initial report was submitted to the UN Committee responsible for the convention in 2006 (Women's Aid Organization (undated), 'WAO Research and Advocacy: Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)')

<http://www.wao.org.my/research/cedaw.htm#cedaw3> - Accessed 3 June 2009 – Attachment 6).

In a report to the UN Committee, the Malaysian government comments on the progress made in eliminating discrimination against women in the country as follows:

64. ... all existing laws are being reviewed to ensure gender equality. All new laws will also adhere to the principle of non-discrimination. Among the existing laws which are being reviewed are as follows:

- Domestic Violence Act, 1994;

to examine the difficulties in obtaining the Interim Protection Order, the power of Judges and the need for counseling for victims as well as the lack of understanding of the provisions under the Act.

- Legislation related to rape such as the Penal Code, Criminal Procedure Code and the Evidence Act;

- Law Reform (Marriage and Divorce) Act 1976 in particular the provision of Section 51 pertaining to maintenance, division of matrimonial assets, issue of custody and the jurisdiction of the competent court; and ...

#### *National Commitments to Eliminate Discrimination*

70. As noted previously, the Federal Constitution provides equal protection to all persons. In all spheres, the provisions in the Federal Constitution and in the law ...

71. In fact, some laws are specifically aimed at the recognition and protection of women. Penal legislations such as the Penal Code enumerate specific offences against women such as assault or use of criminal force on a person with intent to outrage modesty, offences in relation to prostitution, rape, and offences relating to marriage (such as cohabitation caused by a man deceitfully inducing a belief of lawful marriage or enticing, taking away or detaining with a criminal intent a married woman). Other legislation include the Child Act 2001 (Act 611) which protects girls against prostitution activities as well as provides for 'protection homes,' and the Domestic Violence Act 1994 (Act 521) (although the latter affords protection to male as well as female victims and thus is not specific to women, the Government and NGOs have recognised that the victims of domestic violence are mainly women).

72. In civil matters there are legislation such as the Married Women Act 1950 (Act 450), Married Women and Children (Maintenance) Act 1950 (Act 263) and other legislation ...

73. In addition, legislation have been enacted or amended by the Government on its own initiative or in response to calls by women's organisations in order to eliminate discrimination against women. These changes include:

... (iii) The enactment of the Domestic Violence Act in 1994 (Act 521) to provide protection for battered wives and other victims of domestic violence;

(iv) Amendments to the Distribution Act 1958 (Act 300) in 1997 to repeal the distinction between wives and husbands in terms of the distribution of the estate of an intestate to the surviving spouse. Previously, a wife who survives her husband is entitled to only one-third of her husband's estate but the surviving husband is entitled to his wife's whole estate;

(v) Amendments to the Guardianship of Infants Act 1961 (Act 351) in 1999 to give legal recognition to the parental rights of mothers. Previously, only the father of an infant was recognized as the guardian of his/her infant's person and property. The Act now provides that: "In relation to the custody or upbringing of an infant or the

administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.” This law is only applicable to non-Muslims in Malaysia; however, the Act specifies that it shall also apply to Muslims in states, which adopt the law. So far four states have adopted it. At the federal level, to address the issue of equal guardianship rights to Muslim mothers, a cabinet directive was issued in September 2000 to allow mothers to sign all documents related to their children. This ensures that all Malaysian women irrespective of race and religion are conferred the right of equal guardianship;

- (vi) An amendment to Article 8 (2) of the Federal Constitution in 2001 to expressly prohibit discrimination on the ground of gender; ...
- (viii) Under the Pensions Act 1980 (Act 227), widows lose their pensions if they remarry. The Government has rightly recognised the problems faced by widows who remarried ...

103. Another area of law reform is the enactment of the Domestic Violence Act 1994. While this act is meant to protect both women and men from spousal abuse, most reported cases indicate that it is women who are seeking the protection of this act. In the year 2000, out of a total of 2,462 reported cases of domestic violence, 98 per cent of the victims were women. The value of this act is that it contributes to the elimination of a culture that gives men authority to abuse their spouses ...

111. Cases of domestic violence reported to the Royal Police Department were on the rise at the beginning of the enforcement of the Domestic Violence Act. For instance, it increased to over 3,000 in 1999 and 2000. However, the statistics of the same case show some declination in the year of 2001 and 2002. This is contributed by the successful awareness campaigns as well as other programmes against violence, which was taken by the Government especially through the Ministry of Women and Family Development...

### **Relationships Out of Marriage**

449. There are no specific laws governing the rights of those who live together as husband and wife out of wedlock. Malaysian courts do apply the principle of common law to make awards on distribution of property upon the breakdown of a relationship out of marriage. However, application for such awards are few and far in between.

### **Protection from Violence**

450. In terms of protection against violence, women (and men) have recourse to two main legal instruments –

- i) the body of laws on various violent crimes such as assault and rape in the Penal Code; and
- ii) the Domestic Violence Act 1994. These laws are applicable to Muslims and non-Muslims.

### *Penal Law*

451. Under the Penal Code, the following are some of the offences subject to criminal action:

- a) Voluntarily causing hurt or grievous hurt;
- b) Voluntarily causing hurt or grievous hurt by dangerous weapons or means;
- c) Wrongful restraint or confinement;
- d) Assault or use of criminal force otherwise than on grave provocation;
- e) Assault or use of criminal force with intent to outrage modesty;

- f) Kidnapping or abducting any woman with intent that she may be compelled to marry against her will, or forced or seduced to illicit intercourse or to a life of prostitution; and
- g) Rape.

452. The legal definition of rape goes beyond having sexual intercourse with a woman against her will or without her consent and extends to situations where consent was obtained as a result of deception or under fear of hurt or death; or, where a woman is unable to understand the nature and consequences of giving her consent at the time she does so (e.g. if she is mentally disabled or under the influence of drugs.) Having sexual intercourse with a girl under 16 years of age, even with her consent, is also legally defined as rape (normally referred to as 'statutory rape').

453. The law also stipulates that sexual intercourse by a man with his own wife is not rape and Malaysia does not have a provision on marital rape. However, there are three instances in which a man who has sex with his wife can be charged for rape:

- (i) Where the wife is living separately from her husband under a decree of judicial separation or a *decree nisi* not made absolute;
- (ii) Where the wife has obtained an injunction restraining her husband from having sexual intercourse with her; and
- (iii) In the case of a Muslim woman living separately from her husband during the period of '*iddah*' which is approximately a period of three months.

454. In 1986, the Malaysian Police set up a Sexual Offences Unit to deal with rape and other sexual offences. In 1989, the legal penalties for rape were enhanced such that any person convicted for this offence faces an imprisonment term of not less than five years and not more than 20 years and is also liable to whipping.

#### *The Domestic Violence Act 1994*

455. The Domestic Violence Act 1994 (DVA), aims to provide protection for victims of violence in homes pending investigation or other criminal proceedings in court. It was passed on 24 June 1994 and was gazetted on 7 July 1994. The DVA had been long awaited, especially by battered wives and women's non-governmental organisations which had campaigned for a law to protect abused and battered women for years.

456. Although many of those who benefit from the DVA are women, the Act does not only protect women/wives. It extends its protection to either spouse, a former spouse, children, incapacitated adults or any other member of the family who is subject to violence in a domestic situation. The law provides extensive provisions relating to protective orders (POs) which can be issued by the courts. These include provisions on:

- a) Issuance of interim POs pending investigation of any alleged domestic violence offence prohibiting the person against whom the order is made from using domestic violence against the spouse, a child, an incapacitated adult or any other member of the family;
- b) Issuance of POs prohibiting the person against whom the order is made from using domestic violence against the spouse, a child, an incapacitated adult or any other member of the family during the course of any proceedings before the court involving a complaint of domestic violence; and
- c) Attaching of additional orders to the protection order which includes:
  - i) granting of the right of exclusive occupation to any protected person of the shared residence by excluding the person against whom the order is made;

ii) prohibiting or restraining the person against whom the order is made from entering any protected person's place of residence, school or other institution;  
iii) requiring the person against whom the order is made to allow the protected person to enter his place accompanied by an enforcement officer for the purpose of collecting the protected person's belongings; and  
iv) not to make written or telephone communications with the protected person;  
and allowing the protected person to have continued use of a vehicle which has previously been ordinarily used by him or her.

457. Besides issuing POs, the court may also order the parties concerned to be referred to bodies providing counseling, rehabilitation therapy, psychotherapy and reconciliatory counseling. The law also provides that a protection order may be sought during any criminal proceedings where the accused is charged for a domestic violence offence under the Penal Code as a condition for the accused to be released on bail or upon the compounding of such offence.

458. Muslim wives who are in abusive marriages can also apply for divorce. Alternatively, a wife can apply to the *Syariah* Court for a restraining order against her own husband. Section 107(1) of the IFLA empowers the court to order any person to refrain from acts of molestation pending any matrimonial proceedings or on or after the grant of an order of divorce or annulment. Usually, to obtain such an order, the applicant must prove that there has been molestation in the past or that the wife is in a dangerous situation and that an order is necessary for her protection...

459. It is also an offence under the Islamic Family Law for a husband who ill-treated his own wife either mentally, emotionally or physically. The IFLA provides that any person who ill-treats his wife commits an offence and is liable to be punished with a fine not exceeding RM1000 or with imprisonment not exceeding six months or both (United Nations Committee on the Elimination of Discrimination against Women 2004, 'Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Combined initial and second periodic reports of States parties – Malaysia', United Nations Division for the Advancement of Women website, CEDAW/C/MYS/1-2, 12 April, pp. 14, 17-19, 27, 32, 115-117 <http://www.un.org/womenwatch/daw/cedaw/35sess.htm> – Accessed 16 May 2008 – Attachment 7).

Information on the types of services and shelters available for women and children, victims of domestic violence is found in a few reports by the Immigration and Refugee Board of Canada (Immigration and Refugee Board of Canada 2002, *MYS38449.E – Malaysia: Recourse available to women who are victims of physical or sexual* 12 February – Attachment 8); Immigration and Refugee Board of Canada 2000, *MYS35707.E – Malaysia: Assistance and protection available for Sikh women who are victims of domestic violence (update to MYS22272.E of 4 December 1995-* Attachment 9; Immigration and Refugee Board of Canada 2005, *MYS100433.E – Malaysia: Recourse available to women who are victims of sexual or physical abuse (January 2003 – August 2005)* , 22 August – Attachment 10).

An RRT research response dated 21 October 2005 comments on the community attitudes to domestic violence in Malaysia and protection available to women who suffer domestic violence (RRT Country Research 2005, *Research Response MYS23726* , 21 October, Questions 7 & 8 – Attachment 11).

The UNICEF has made efforts “to strengthen the professional framework to prevent child abuse and neglect” in cooperation with the government and non-government agencies in Malaysia. A UNICEF website notes that:

#### Child Act 2001

UNICEF supports the implementation of the Child Act 2001, especially through development of operational procedures for child care professionals...

In 2006, under the leadership of the Ministry of Women, Family and Community Development, UNICEF formed strategic partnerships with the Malaysian Association for the Protection of Children, and the Royal Malaysian Police to strengthen the professional framework to prevent child abuse and neglect in Malaysia. Activities are also designed to increase the capacity of social workers in delivering protection services in the court process.

#### Engaging with Religious Leaders

UNICEF is also working with religious leaders and faith-based organisations to promote zero tolerance on violence against children. Malaysia's Department of Islamic Development (JAKIM) will collaborate with UNICEF to review existing pre-marriage and parenting training modules to include information and education to prevent violence, exploitation and abuse of children (UNICEF (undated), ‘Malaysia: Child Protection – UNICEF in Action – Abuse and Neglect’, UNICEF website [http://www.unicef.org/malaysia/protection\\_4207.html](http://www.unicef.org/malaysia/protection_4207.html) - Accessed 27 May 2009 – Attachment 12).

Despite the legal devices and government efforts, Malaysia finds it difficult to provide effective protection for victims of domestic violence for the reasons of corruption, conflicts between the dual legal system, the prevailing attitudes towards women and others. In particular, corruption permeating throughout the law enforcement agencies has interfered with the adequate provision of protection for women and children.

Referring to corruption, government attitudes and the weakness of the country’s judicial system, the US Department of State comments that:

Several NGOs conducted local surveys on government corruption and identified the police as among the country's most corrupt government organizations. Additional data indicated 73 percent of those surveyed perceived the government's anticorruption efforts as "ineffective or very ineffective." Reported police offenses included accepting bribes, theft, and rape...

The government continued to focus police reform efforts on improving salaries, quarters, and general living conditions of police officers. However, the status of other reforms, including the formation of an independent police complaints and misconduct commission, remained pending at year's end. NGOs complained that the government's reform efforts lacked transparency...

#### e. Denial of Fair Public Trial

Three constitutional articles provide the basis for an independent judiciary; however, other constitutional provisions, legislation restricting judicial review, and additional factors limited judicial independence and strengthened executive influence over the judiciary.

The constitution does not directly vest judicial powers in the courts but rather provides that Parliament confers judicial powers. The constitution also confers certain judicial powers on the attorney general, including the authority to instruct the courts on which cases to hear, the power to choose venues, and the right to discontinue cases. The attorney general controlled

and directed all criminal prosecutions and assumed responsibility for judicial assignments and transfers. Session and magistrate court judges report to the Attorney General's Office. The prime minister's recommendation determined senior judge appointments, subject to concurrence by the Council of Rulers, the traditional Malay rulers of nine states.

Members of the bar, NGO representatives, and other observers expressed serious concern about significant limitations on judicial independence, citing a number of high-profile instances of arbitrary verdicts, selective prosecution, and preferential treatment of some litigants and lawyers.

On May 9, the royal commission, which had been formed to investigate the 2002 videotape of a purported conversation in which a senior lawyer and senior judge discussed arrangements for assigning cases to "friendly" judges, released its findings and determined that former Prime Minister Mahathir, UMNO Secretary General Tengku Adnan, and former Chief Justice Eusoff Chin among others were involved in manipulating judicial appointments and improperly influenced the promotion of judges. On May 22, the attorney general announced his office would investigate the allegations, but there was no progress in the investigations at year's end. (Section 1) ...

#### Government Corruption and Transparency

The law provides criminal penalties for official corruption; however, the government did not implement the law effectively, and officials often engaged in corrupt practices with impunity. The media reported numerous cases of alleged official corruption. There was a broadly held perception of widespread corruption and cronyism within the governing coalition and in government institutions. The Anti-Corruption Agency (ACA), the primary government agency for combating corruption, employed approximately 1,800 staff members nationwide. In December the government passed legislation replacing the ACA with the Malaysian Anti-Corruption Commission (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Malaysia*, February, Sections 1 & 2 – Attachment 4).

A few recent RRT research responses commenting on the issue are also attached:

- RRT Research & Information 2008, *Research Response MYS33943*, 31 October (Q.1 government and police corruption; Q.2 government or official involvement in goods smuggling; Q.3 action taken by authorities against illegal goods smuggling) – Attachment 13).
- RRT Research & Information 2008, *Research Response MYS33296*, 21 May (Q7 police corruption – general corruption – Attachment 14).
- RRT Country Research 2007, *Research Response MYS31873*, 8 June (Q1 government & police corruption, organised crime – Attachment 15).

#### **4. If a Christian couple in Malaysia separated and the husband converted to Islam, would the husband be likely to be granted custody of the couple's children?**

A 2009 DIAC report gives an insight into the difficulties arising out of the dual legal system – civil and Sharia law - operating in Malaysia in relation to family law matters. Relying on several sources, it comments on the issue of custody of children of a converted Muslim father as follows:

A Canadian Immigration and Refugee (IRB) Research Response from 2002 also highlights ...

the children of a converted Muslim father would generally be considered Muslims themselves, requiring a Muslim education, and would therefore fall under Muslim jurisdiction ...

A 2004 article by the National Evangelical Christian Fellowship further reiterates the issue of which system, Shari'a or Civil, should be used when one spouse converts to Islam and the consequences for child custody. This article mentions that non-Muslim women have reported a loss of custody rights when the father converts to Islam ...

The International Freedom of Religion Report draws attention to the fact that family law matters are being directed to 'Shari'a courts, particularly in areas of family law involving disputes between Muslims and non-Muslims.'

A number of cases highlight how the courts have ruled regarding custody rights when a child's father has converted to Islam and which court, Civil or Shari'a, is determined to have jurisdiction over the case.

In 2003 Shamala Sathiyaseelan, a Hindu woman, contested the conversion of her children after her husband converted to Islam. Her case was referred to the Shari'a courts after being told that the civil court could not deal with the matter. In Shamala's case, contradictory orders were given by the High Court and the Shari'a court. Shamala was given custody of her children by the High Court, but the Shari'a court issued a separate custody order to her husband...

In another case, Subashini and Saravanan – a couple married in a Hindu ceremony went to court over the custody of their child after Saravanan (the husband/father) converted to Islam...

The final Federal Court finding was the Muslim-convert husband had the right to convert their minor children without the mother's permission...

According to the U.S Department of State's 'International Parental Child Abduction' flyer, 'Since compliance with the local court rulings is essentially voluntary, Malaysian police or local law enforcement are reluctant to get involved in custody disputes and could not be counted on to enforce custody decrees issued by the Malaysian courts.'

Karamah, an organisation of Muslim Women Lawyers for Human Rights, summarises Sections 81 to 87 of the Islamic Family Law (Federal Territories) Act 1984 governing custody of children in Malaysia.

'A child below the age of *mumaiyyiz* (discernment – 9-11 years for a daughter and 7-9 years for a son) will stay with the mother, while a child above that age has the right to choose between the two parents. There are several circumstances where the mother loses the right to custody, such as if she remarries and the marriage is not seen as appropriate for the child or in the child's best welfare. Judges consistently consider the welfare of the child as the first priority in child custody cases. Mothers who have converted to Islam are sometimes discriminated against, as there is a perception that they could not raise their children according to an Islamic way of life.

In terms of legal guardianship, the father is considered the primary guardian under the Islamic Family Law Act. This is consistent with an earlier provision in the Guardianship of Infants Act for non-Muslims. This provision was changed in the Guardianship of Infants Act in 1999 to provide equal guardianship rights for men and women, but this Act is not applicable to Muslims. Although the Islamic Family Law Act has not yet been amended, the government, at the urging of women's groups, issued a directive that all mothers, including Muslim mothers, are authorised to sign

any document a child requires for official purposes, such as school registration, identity card registration and passport application.

The father is required to pay for the maintenance of his children, based on the financial means of the father. Both determination of amount of maintenance and implementation are complicated, because it is difficult to get proof of a father's income and because there are not enough enforcement officers to find the fathers who default on their obligation to pay.'

Reunite International, a UK charity specialising in international parental child abduction summarises Article 88 of the Law Reform (Marriage and Divorce) Act 1976 finds that in the civil court system:

'either parent may be awarded custody of their children under 18, in accordance with the best interests of the children, the wishes of the parents and the wishes of the child if he or she is of an age to express an independent opinion. Therefore, in civil court cases non-Muslim mothers can be awarded custody, particularly of very young children, if this is proved to be in the best interests of the child (DIAC 2009, *Country Information Research Response MYS9665*, 23 March – Attachment 16).

The paper further outlines the process of how custody rights are decided and the children's wishes are considered.

Commenting on the Sharia courts' biases and the Federal Court's lack of clarity in the matter of child custody, the 2008 US Department of State *International Religious Freedom Report* states that:

Shari'a courts do not give equal weight to the testimony of women. Several nongovernmental organizations (NGOs) dedicated to the advancement of women's rights complained that women did not receive fair treatment from Shari'a courts in matters of divorce and child custody. In December 2005 Parliament passed the Islamic Family Law Act (IFLA) in an effort to harmonize Shari'a laws throughout the country. Women's rights advocates protested that provisions of the IFLA weakened women's legal standing. In response, the Attorney General's office announced it would seek to amend the IFLA in unspecified ways; however, no amendments were introduced during the reporting period...

In December 2007 the Federal Court ruled civil courts have exclusive jurisdiction in any case involving the dissolution of a civil marriage. Subashini Rajasingam, a Hindu, filed for divorce after her husband converted to Islam. She sought to prevent her husband from unilaterally converting their second son, age two, after her husband converted their eldest son, age four. However, the Federal Court did not clarify the issue concerning the custody of the two children, as it ruled that both the husband and wife could initiate custody proceedings in their respective jurisdictions. The Federal Court also held that Subashini's husband did not abuse the law by converting his eldest son to Islam without the knowledge of the mother. The Court ruled that according to Article 12(4) of the Federal Constitution, the consent of only one parent is sufficient for the religious conversion of a child (US Department of State 2008, *International Religious Freedom Report – Malaysia*, September, Section II – Attachment 5).

Similarly, the 2009 US Department of State *Country Reports on Human Rights Practices* states that:

Shari'a courts do not give equal weight to the testimony of women. Many NGOs complained that women did not receive fair treatment from Shari'a courts, especially in matters of divorce and child custody (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Malaysia*, February, Section 1 – Attachment 4).

A few recent RRT research responses discussing the issue of custody of children of divorced couples are attached:

- RRT Research & Information 2008, *Research Response MYS33057*, 27 March (Q6 Removal of children from apostates – Attachment 17).
- RRT Research & Information 2007, *Research Response MYS32441*, 17 October (Q2 Custody issues under Sharia law where mother seeks to relocate outside Malaysia – Attachment 18).
- RRT Country Research 2005, *Research Response MYS17446*, 30 July (Q1 Custody of children after divorce under Sharia law; Q2 Access rights of non custodial parent – Attachment 19).

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UK Home Office <http://www.homeoffice.gov.uk/>

US Department of State <http://www.state.gov/>

CIA *Factbook* <http://www.cia.gov/>

#### **United Nations (UN)**

UNHCR <http://www.unhcr.ch/cgi-bin/texis/vtx/home>

#### **Non-Government Organisations**

Amnesty International <http://www.amnesty.org/>

Human Rights Watch <http://www.hrw.org/>

#### **International News & Politics**

*BBC News* <http://news.bbc.co.uk>

*CBC News* <http://www.cbc.ca>

#### **Search Engines**

Google <http://www.google.com.au/>

Copernic <http://www.copernic.com/>

#### Databases:

Public *FACTIVA*

DIAC *BACIS*

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MRT-RRT *ISYS*

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Country Information

DIAC Research Responses

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IRBDC Research Responses (Canada)

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RRT Country Research database, including

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**List of Attachments**

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14. RRT Research & Information 2008, *Research Response MYS33296*, 21 May.
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