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# Big changes needed to end statutory rape



Nation

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Activists of the Women's Centre for Change Penang promote their stand for child rights.



THE recent astounding case of a 40-year-old father of four who allegedly raped a 12-year-old girl in Inaman, Sabah, has brought a huge tide of outrage against the apparent lack of legal protection to prevent children from becoming victims of sex offenders in Malaysia.

The accused in this case later declared in the midst of the trial that he had married the girl. Although the sessions court ruled in favour of the marriage, Attorney-General Tan Sri Abdul

Gani Patail has assured the public that the case has not been dropped.

The incident came on the heels of the highly publicised cases of a national bowler in Kuala Lumpur and an electrician in Penang – both adults – who escaped jail terms, after they had been convicted of statutory rape with a 13-year-old girl and 12-year-old girl, respectively.

Although the offence under Section 376(1) of the Penal Code carries a jail sentence of up to 20 years' jail and whipping, they were both bound over after being convicted.

The issue has become intensely heated as it opens the Pandora's box on how prevalent child rape is in the country. Incredibly, it has also brought to the fore the existence of child marriages, which to many should be an archaic and outdated cultural practice.

The matter was animatedly discussed at a forum on '*Protecting our Children: Evaluating Statutory Rape*' organised by the Penang Institute here on Sunday.

### **Legal loophole in meting out punishment**

Datuk Ambiga Sreenevasan, former Bar Council president and recipient of the US Secretary of State's International Women of Courage Award in 2009, explained that the law as far as statutory rape is concerned is pretty straight-forward.

Under Section 375 of the Penal Code, a person under 16 years of age who has sexual intercourse is presumed not to have consented.

There is however an issue in the clause for punishment under Section 376. "When it comes to the issue of the committing of the crime, the question of consent is irrelevant when the child is below 16. But when it comes to punishment, they distinguish, and consent does become a factor," she explained.

This law allows for consent to be taken into account in meting out punishment when the child is between 12 and 16 years of age.

"I have a problem with that. If it is irrelevant in the offence it should be irrelevant in the punishment as well," Ambiga said, stressing that the minimum term of five years must be imposed.

Under Section 376, whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

Another contention that has been raised in the past is Section 294 of the Criminal Procedure Code which allows the convicted person to be bound over for a first offence, ostensibly on condition that the offence is not repeated.

Ambiga stressed that this needs to be looked at so it does not become an "escape clause" for first-time offenders. "This is something that has to be corrected. It is my view that if it is statutory rape, it's statutory rape," she said.

### **Internet luring and cultural orthodoxy**

The Sabah case also raises concerns about the reality of internet luring in Malaysia, as the perpetrator got to know the girl through Facebook.

Ambiga pointed out that internet luring is an offence in Canada. "The Malaysian Communications and Multimedia Commission (MCMC) should be looking out for sexual predators," she said. "A lot of parents don't know what their children are doing on the internet."

Interestingly, attorney-general Abdul Gani said that in the Sabah case there was an issue of RM5,000 paid to the girl's father by the accused, which was referred to as a '*sogit*,' a form of compensation under the Sabah native laws. However, he said that there was no such order from the Native Court. A small task force had been formed to investigate the issue.

So cultural orthodoxy is also something that needs to be tackled in the country, however sensitive it may be to certain people. Ambiga pointed out, as an example, that in the Indian sub-continent, the practice of widow-burning or *suttee* was ultimately banned by law though practised for centuries.

"We need to find a way to annul child marriages," she said. "We need a provision that anyone who goes through a form of marriage with a victim, the marriage can be annulled."

Also, the fact that the family was poor, and was paid RM5,000, indicates how people can become vulnerable due to their poverty.

### **Crucial amendment still not done**

Ironically, in October last year, then Minister in the Prime Minister's Department Datuk Seri Mohamed Nazri Abdul Aziz had reportedly told Parliament that the government has given the green light to the Attorney General's Chambers to amend Section 376 of the Penal Code.

He said this was to ensure that those convicted of raping underage girls receive the mandatory jail term without liberty to resort to other legal provisions to mitigate the sentence.

He added that the amendment was proposed to maintain the mandatory imprisonment under Section 376 and judges could not invoke Section 294 of the Criminal Procedure Code (Act 593) to impose a sentence based on their discretion.

"This includes meting out a good behaviour bond order if the accused is a first offender or if there are extenuating circumstances to show that the law has not been adhered too," he was quoted as saying by *Bernama*.

"From 2007 to August 2012, a total of 5,976 rape cases were recorded involving girls aged below 16. In the same period, 5,119 people were charged for the offence," he said.

However, the amendment has still not seen the light of day.

### **Alarming child marriages in Malaysia**

Ratna Osman, the executive director of Sisters in Islam wants to dispel the notion that child marriage is within syariah law and no one should question it.

If an under-aged person is not allowed to buy cigarettes, drive or vote, why should any leeway is given to allow the child to get married?

She pointed to a 2010 progress report for HIV testing by the Health Ministry to the United

Nations, that showed significant findings in view of the fact that it is compulsory for any Muslim couple to go through HIV testing in Malaysia.

The report showed that there were 32 girls below 10 years who underwent HIV testing, 445 girls and two boys between 11 and 14 years, and 6,815 and 1,911 boys between 15 and 19 who took the test.

The highest were in the states of Penang, Malacca and Johor, where there are huge urban populations. "What does it say for our developing nation?" Ratna asked.

Ironically enough, the forum was officiated by Penang chief minister Lim Guan Eng, who more than a decade ago, was involved in bringing up the case of a statutory rape victim and her family in Malacca.

"Instead of detaining the rapists, the rape victim was detained," he remembered. "The rest, as they say, is history. I ended up in jail while the many perpetrators roam free till today. That is Malaysian justice."

### **Need to abide by international conventions**

Chong Eng, the Penang state executive councillor for youth and sports, women, family and community development, noted that under the Child Act 2001, children are defined as those under the age of 18. This is prescribed by the Convention on the Rights of the Child.

"It is internationally recognised and accepted that children under 18 require family and societal support and protection of their rights.

"Under that age they cannot be legally bound to any contracts, parents have the obligation to support and protect their well-being and the state has set up a safety net to care for their interests."

"The horrific case of Ilham Mahdi Al Assi, the 13-year-old girl from Yemen who suffered a rupture in her sex organs and haemorrhaging following her first sexual intercourse with her 23-year-old husband in 2010 comes to mind," she said.

There are major concerns also because if the girl child survives sexual intercourse and becomes pregnant, she suffers from a fresh set of threats to her survival and that of the child she carries. There is a markedly increased risk of maternal mortality for girls who become pregnant that young, including premature pregnancies and death in childbirth, as well as increased vulnerability to any risk of sexually transmitted diseases (STDs) including HIV/AIDS.

"In 2011 alone, Malaysian clinics reported 18,000 teenage pregnancies with all the risks as stated earlier," Chong Eng pointed out.

Measures to address these issues need to be taken at the international, national and state government levels. Article 16(2) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), ratified by Malaysia, takes a clear stand against child marriage by prescribing that "the betrothal and the marriage of a child still have no legal effect," and that requires state parties to take all necessary action to specify a minimum age of marriage, Chong Eng pointed out.

So action should include amending laws to raise the minimum age of marriage of girls to 18,

equal to that of men, she said.

"The worrying issues that arise from the recent Sabah case and those similar to it are these: Why are the adults who are tasked to protect the child and society not doing so?"

statutory rape

Penal Code

Criminal Procedure Code

CEDAW

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