

PROPOSED AMENDMENTS TO THE LAW OF RAPE IN MALAYSIA

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Abstract

The offence of rape is provided for in section 375 of the Penal Code. This paper seeks to first identify what are the elements that make up the offence of rape. After identifying the elements and looking at the relevant case law, this paper will discuss if the law is satisfactory or not. Specifically, this paper will discuss if there is a need for the law to be gender specific, if rape should only be limited to vaginal sexual intercourse, are the 7 circumstances provided in section 375 necessary, should the age of consent be amended, should the exception remain and should there be a specific reference to the mental element of the perpetrator. In examining these issues, reference will also be made to the law on rape in neighbouring countries like Singapore and Thailand, as well as the law in India (as the Penal Code is based on the Indian Penal Code) and in the United Kingdom.

Keywords: criminal law, sexual offences, rape

1. Introduction

This paper seeks to propose reforms to the law of rape in Malaysia. First, the offence of rape is explained looking at the relevant statutes and case law. Thereafter, the elements will be examined in detailed to see if the law is satisfactory or not. If there is something lacking in the law or if it needs to be reformed, proposals shall be made on how the law can be improved.

Comparisons will be made with the law on rape in the United Kingdom, India, Singapore, Thailand and the United States of America. The legislations that will be referred to are as follows:-

- (a) United Kingdom's Sexual Offences Act 2003;
- (b) India's Penal Code;
- (c) Singapore's Penal Code;
- (d) Thailand's Criminal Code; and
- (e) Texas Penal Code.

2. The Offence of Rape

The offence of rape in Malaysia is defined and explained in section 375 of the Penal Code.¹⁸⁵ Section 375 provides as follows: -

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (d) with her consent, when the man 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;
- (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- (f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her;
- (g) with or without her consent, when she is under sixteen years of age.

Explanation--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception--Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in the Federation as valid, is not rape.

Explanation 1--A woman--

- (a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or
- (b) who has obtained an injunction restraining her husband from having sexual intercourse with her,

¹⁸⁵ Act 574

shall be deemed not to be his wife for the purposes of this section.

Explanation 2--A Muslim woman living separately from her husband during the period of 'iddah, which shall be calculated in accordance with Hukum Syara', shall be deemed not to be his wife for the purposes of this section.

The first part of section 375 provides the elements that needs to be proved by the prosecution to establish the offence of rape. Basically, rape is when a man has sexual intercourse with a woman under the circumstances described in section 375 subsections (a) – (g). There is also a statutory exception provided for.

The prosecution will have to prove the following elements in order to successfully prosecute a person accused of committing rape:-

(a) The accused is a man and the victim is a woman

Section 10 of the Penal Code defines 'man' as a '...male human being of any age...'. The same section goes on to define 'woman' as a female human being of any age'.

(b) The accused must have sexual intercourse with the victim

(i) As stated above, section 375 contains an explanation which provides that penetration is sufficient to show that there was sexual intercourse.

(ii) Case law has further developed this. In *Nasrul Annuar bin Abd Samad*,¹⁸⁶ it was held that the penetration must be by the penis of the male accused. Based on the facts of this case, as the victim was not sure if the penetration was by the penis, the charge under section 375 failed to be proved.

(iii) In *Sidek bin Ludan v Public Prosecutor*,¹⁸⁷ it was held that penetration was proven as there was a tear in the hymen. It was held in obiter that even if there was no tear, any slightest penetration would suffice to show that sexual intercourse took place.

(iv) Further, and on line with this decision, case law has provided that there is also no need to show that ejaculation must have taken place¹⁸⁸ although the presence of semen can be evidence that penetration by the penis – and hence sexual intercourse – had taken place.¹⁸⁹

¹⁸⁶ [2005] 1 MLJ 619

¹⁸⁷ [1995] 3 MLJ 178

¹⁸⁸ *Cheong You Hoi* [1999] MLJU 518

¹⁸⁹ *Ahmad Najib bin Aris* [2007] 2 MLJ 505

- (c) The sexual intercourse must have taken place under one of the circumstances listed under subsections (a) – (g) of section 375 which has been reproduced above. These circumstances are where the sexual intercourse took place:-
- (i) against the will of the victim,¹⁹⁰ or
 - (ii) without the consent of the victim,¹⁹¹ or
 - (iii) with the consent of the victim but it was given under certain specific circumstances;¹⁹² or
 - (iv) where the victim was under sixteen years of age. In this case, it does not matter if it was consented or not.¹⁹³
- (d) As mentioned earlier, there is an exception provided in section 375 where it will not be considered to be rape if the sexual intercourse was by a man with his own wife.
- (i) It is provided that the marriage must however be ‘...valid under any written law for the time being in force, or is recognized in the Federation as valid’.¹⁹⁴
 - (ii) Two explanations are also provided under the exception to explain further when a woman is deemed not to be a ‘wife’ for the purposes of this exception. Basically it lists down 3 situations. The first is where a woman is living apart from her husband under a decree of judicial separation or a decree nisi not made absolute.¹⁹⁵ The second is where a woman has obtained an injunction which restrains her husband from having sexual intercourse with her.¹⁹⁶ The third is where a Muslim woman is living separately from her husband during the period of ‘iddah’.¹⁹⁷
 - (iii) It must be noted that section 375A makes it an offence for a man to have sexual intercourse with his wife during the subsistence of a

¹⁹⁰ Penal Code, s 375(a). See the case of *Public Prosecutor v Nasar bin Ahmad & Ors* [1986] 2 MLJ 71 where the court found that the accused had sexual intercourse with the victim against her will and without her consent showing that there is can be overlap between 375(a) and (b).

¹⁹¹ Penal Code, s 375(b). In the case of *Teo Eng Chan* [1988] 1 MLJ 156, it was held that there was no consent as consent was given out of fear. This is in line with section 90 Penal Code.

¹⁹² Penal Code, s 375(c) – (f). For example, in the cases of *Aling bin Ayun* [1970] 2 MLJ 160 and *Chiu Nang Hong* [1963] 1 MLJ 119, consent of the victim was obtained out of fear of the victim from suffering physical harm.

¹⁹³ Penal Code, s 375(g)

¹⁹⁴ Penal Code, Exception to s 375

¹⁹⁵ Penal Code, Explanation 1 to the Exception to s 375

¹⁹⁶ *ibid*

¹⁹⁷ Penal Code, Explanation 2 to the Exception to s 375

valid marriage if he causes hurt or fear of death or hurt to his wife or any other person in order to do so.

(e) The punishment for rape is provided for under section 376 of the Penal Code.¹⁹⁸

3. Is the law satisfactory?

In this section, the elements of the offence of rape will be looked into and analysis will be made if the law is satisfactory or not.

3.1. Gender specific offence

The first thing one can note is that the offence of rape is very gender specific where the perpetrator must be a male and the victim a female – this has been established earlier above.¹⁹⁹

This has come under some criticism as the law does not protect a man for example from sexual intercourse against his will or without his consent – or the consent was obtained in a manner that does not arise from choice or freedom.

It is submitted that there is no justifiable reasons why a man should not be protected in the same manner as a woman is protected. The shame and humiliation that a man has to go through being made to engage in sexual intercourse against his will or without his consent should be the same or even worse when compared with a woman who is made to do the same. Obviously each case will stand on its own facts but it cannot be denied that the psychological as well as possible physical harm is real whether or not the victim is a male or female.

It is further submitted that this is a form of gender discrimination and the law needs to be amended to rectify the position.

Another problem that arises is where a man has undergone gender re-assignment surgery. In Malaysia, the practice is that such a person is required to go to the courts to seek for a declaration under the Specific Relief Act 1950 that his/her gender has been changed from what was the gender at birth.²⁰⁰ This is usually accompanied by an application to compel the Registration Department to make the necessary amendment to the Identity Card (MyKad) to reflect the change of gender.

¹⁹⁸ This paper will not be looking into detail into the punishment for rape.

¹⁹⁹ See also section 375 of the Penal Code read with section 10

²⁰⁰ See *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90, *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755, *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* [2016] 12 MLJ 370

This means that a person who is born male will continue to be seen as one until the court has made a declaration that he is a female. He may have successfully gone through the gender re-assignment surgery and have the female genitals but if he has non-consensual (vaginal) sexual intercourse with another man (or it was against his will), it will not be rape unless there was a declaration from the court that 'he' is a 'she' before the sexual act.

The problem here is that a person may be for all intents and purposes a female in all perspectives – mental and physical (with reference to her genitalia and body structure) – after a gender re-assignment surgery but she can never be a victim of rape until and unless she has successfully applied to the courts for a declaration as such. The law is failing to protect people like these.

The position in Singapore and India is similar where their respective Penal Codes also define rape as having to be perpetrated by a man against a woman.²⁰¹

It is interesting to note that some jurisdictions have moved away from being gender specific when it comes to the offence of rape. In Thailand, the offence of rape has been amended to use the words 'any person'²⁰² so that the perpetrator as well as the victim could be male or female.

This is also the position in the United Kingdom where the law on rape was amended in the Sexual Offences Act 2003. It removes the mention of gender when defining the act of rape under section 1 and replaces it as such:-

- (1) A person (A) commits an offence if—
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.²⁰³

This way, the court does not need to be drawn into determining if the victim is legally a male or female – as long as there was a penetration of the victim's vagina, anus or mouth with the perpetrator's penis.

Further, there is also a problem on the flipside where the prosecution is required to show that the perpetrator is a male. Just like how there can be some confusion when it comes to a victim who was born a male but subsequently went through a gender reassignment surgery, the same problem can arise. The perpetrator could be born a female but subsequently went through a gender reassignment surgery and obtained a physiologically and anatomically correct and functioning penis. This

²⁰¹ Singapore Penal Code, s 375; Indian Penal Code, s 375

²⁰² Thai Criminal Code, s 276

²⁰³ UK Sexual Offences Act 2003, s 1

person may then forcibly penetrate 'her' penis into a woman for sexual purposes and even if it was against the victim's will and/or without her consent, no offence will be committed as the perpetrator is not declared a 'male'.

If however we look at the law in the UK,²⁰⁴ there is no need to show that the perpetrator is a male as long as he/she has a penis.

For the reasons stated above, it is submitted that the law should be amended to remove the gender specification of the perpetrators and victims for the sake of ensuring the all possible victims are protected and all perpetrators will not escape punishment due to technicalities as to what their gender is. As long as there is a reasonable doubt, the accused in Malaysia will walk free.

3.2. Vaginal Intercourse

The second thing one can observe from section 375 of the Penal Code together with case law is that the offence of rape is only committed if there was vaginal sexual intercourse.

Although not expressly stated in section 375, it is clear enough that it does not include any other kinds of sexual intercourse – anal nor oral. The word used is 'sexual intercourse' and the explanation to section 375 provides that 'penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

As discussed above,²⁰⁵ all cases make reference to vaginal intercourse – there must be penetration of the vagina of the victim and the penetration must be with the perpetrator's penis.²⁰⁶

It cannot refer to anal nor oral sex as these have been specifically covered under section 377A of the Penal Code. Section 377A provides as follows:-

Any person who has sexual connection with another person by the *introduction of the penis into the anus or mouth of the other person* is said to commit carnal intercourse against the order of nature. (emphasis added)

It also cannot refer to penetration by anything else including other body parts. This is reflected in the recently amended²⁰⁷ section 377CA which provides as follows:-

377CA. Sexual connection by object, etc.

²⁰⁴ Ibid

²⁰⁵ See notes 125-128 above.

²⁰⁶ See *Nasrul Annuar bin Abd Samad* (n 2 above) where the charge failed as there was a doubt if the penis was used to penetrate the vagina of the victim.

²⁰⁷ Amended by the Penal Code (Amendment) Act 2017 after the Court of Appeal acquitted the accused in *Bunya ak Jalong v PP* [2015] 5 MLJ 72 and called for the law to be amended.

Any person who has sexual connection with another person by the introduction of any object or any part of the body, except the penis into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term of not less than five years and not more than thirty years and shall also be liable to whipping.

The question that begs to be asked is whether rape is only limited to vaginal sexual intercourse. The law in Singapore is the same – although the words are much clearer and unambiguous. The Singaporean Penal Code provides that the act of rape is when any ‘man penetrates the vagina of a woman with his penis’.²⁰⁸

However, many other jurisdictions have moved away from this. The most telling one is India – where the Malaysian and Singaporean Penal Code is based on.

In India, rape is still only committed by a man but he can commit it by doing one of the following:-²⁰⁹

- (a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or with any other person; or
- (b) inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body such woman or makes her to do so with him or any other person, or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

So the law in India has been extended to cover anal and oral sexual intercourse as possibly rape. The penetration also is not limited to penetration by the penis.

This is similar in the UK where section 1 of the Sexual Offences Act 2003 defines rape as the penetration of the vagina, anus or mouth of the victim with the penis of the perpetrator. While the law still limits penetration only with the penis, it is extended to cover anal and oral sexual intercourse. This can be seen in the case of *R v Ismail*²¹⁰ where the accused was convicted of rape by inserting his penis into the mouth of the victim.

²⁰⁸ Singapore Penal Code, s 375

²⁰⁹ According to section 375 of the Indian Penal Code, it must be done in one of seven descriptions listed therein.

²¹⁰ [2005]EWCA Crim 397. See also *R v Tilambala* [2005] EWCA Crim 2444 and *R v H* [2006] EWCA Crim 853 for examples of oral rape. For anal rape, see *R v B* [2007] EWCA Crim 2086 where the accused was convicted for committing anal rape on his sister.

In Thailand, the definition of rape is even wider. Section 276 provides as follows:-

- (1) Anyone who forcibly performs sexual intercourse with another by threatening the latter in whatever manner, by exercising forcible violence, by taking advantage of the latter being in a state of irresistibility, or by causing the latter to mistake him for a different person, shall be liable to imprisonment from four years to twenty years and a fine from eight thousand baht to forty thousand baht.
- (2) To perform sexual intercourse, in paragraph 1, means to satisfy the desire of the performer by using the genital organ of the performer to do something against the genital organ, anus, or oral cavity of another person, or using any other thing to do something against the genital organ or anus of another person.

Therefore, according to the law in Thailand, the act of sexual intercourse which is criminalized involves vagina, anal and oral sexual intercourse and it can be committed using objects and body parts.

It seems to imply that the law in these jurisdictions view non-consensual vagina sexual intercourse just as serious as non-consensual anal/oral sexual intercourse. It is a sexual act that was done without the consent of the victim and as such, has been categorized together as the offence of rape.

Coming back to Malaysia, should the law then be changed to not only limit the offence of rape to vaginal sexual intercourse? If this is to be done, then the amendments will not just affect the provision of rape in section 375 but also other provisions that deal with other kinds of sexual intercourse – eg. anal and oral sexual intercourse that is covered in sections 377A, 377B and 377C.

On the one hand, there is an argument that may be made that such an amendment is not urgent as anal and oral sexual intercourse – as well as penetration with objects and body parts – are already criminalised and as such, potential victims are afforded some sort of protection from the law and would be perpetrators may be deterred and if they are not, they will have to answer for their crimes.

On the other hand, the law needs to reflect the severity of the offences – and by separating the offences into different category such as ‘rape’ and ‘carnal intercourse against the order of nature’ (sections 377A, 377B and 377C), it may appear that the law views a particular crime less seriously as compared with the other.

It is therefore submitted that if the law on rape is to be amended, it should be a thorough one and will have to include amending all sexual offences found in the Penal Code.

3.3. Circumstances making sexual intercourse rape

In order for the sexual intercourse to amount to rape, it must be done under one of the 7 circumstances described under section 375 of the Penal Code. They are as follows:-

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (d) with her consent, when the man 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;
- (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- (f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her;
- (g) with or without her consent, when she is under sixteen years of age.

As seen above earlier,²¹¹ the Indian Penal Code also provides for 7 descriptions.²¹² But in Singapore, section 375(1) of the Penal Code is very simple – the penetration

²¹¹ n. 23

²¹² The seven are slightly different from Malaysian law. There are:-

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age.

of the vagina must be without her consent.²¹³ If the victim is under 14 years of age, then it does not matter if there was consent or not.²¹⁴

In the United Kingdom, the Sexual Offences Act 2003 provides that for it to be rape, there must not be any consent to the penetration.²¹⁵

The question that arises is if there is such a need to describe the circumstances as such. It is submitted that there is no need to list down and describe the circumstances so specifically. It will not be helpful and it can cause more confusion.

Subsection (b) makes it very clear that if the sexual intercourse is without the consent of the woman, then it can be considered to be rape.

In the next subsection, it is provided that if there was consent but it was obtained under two different circumstances, it can still be considered to be rape. The first circumstance under subsection (c) is where the consent was obtained by putting the woman in fear of death or hurt. The second circumstance is where the consent was obtained under a misconception of fact and the man knows or has reason to believe that the consent was given as such.

It is submitted that these two circumstances are already covered under section 90 of the Penal Code which provides that if consent was obtained ‘...by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception...’, such consent is not a consent as intended by any section in the Penal Code. Simply put, there is no consent if the circumstances in subsection (c) takes place and the situation will fall back then to subsection (b) where there was no consent to the sexual intercourse.

Similarly, in subsection (d), the circumstance described therein is where the consent was given mistakenly – because the woman believed that the man she is consenting sexual intercourse with is a man who she is married to or to whom she would consent. This also falls squarely under section 90 of the Penal Code where the consent was obtained under a misconception of fact and therefore it cannot be considered as a valid consent.

As for subsection (e), the circumstance here is where consent was given but the woman was unable to understand the nature and consequences of her consent. This too is covered under section 90 of the Penal Code where subsection (b) provides that the consent is not valid if it was given by a person who was unable to ‘...understand the nature and consequence of that to which he gives his

²¹³ Singapore Penal Code, s 375(1)(a). See *Public Prosecutor v Victor Rajoo* [1995] 3 SLR(R) 189 where it was held that just because there was no injuries suffered by the victim, it does not mean that the sexual act was consensual.

²¹⁴ Singapore Penal Code, s 375(1)(b)

²¹⁵ Sexual Offences Act 2003, s 1(1)(b)

consent'. However, section 90 is a bit more specific in that it provides that the reason why the person is unable to understand is because of unsoundness of mind or intoxication.

As for subsection (f), this seems to be something that is not covered under section 90. It is when the consent was obtained by using a person's position of authority over the woman or because of professional relationship or other relationship of trust.

It is suggested that perhaps one of the ways to simplify the law is to have a proper definition of 'consent' in the Penal Code. In the United Kingdom, the Sexual Offences Act 2003 provides that a person consents if he agrees by choice, and has the freedom and capacity to make that choice.²¹⁶ So in the circumstances that fall under section 375(c) – (f), there can be no consent as whether the agreement given was not by choice and/or the woman did not have the freedom and capacity to make that choice.

It is submitted that section 90 can be amended to include a definition or explanation as to what can amount to a valid consent. It can be expanded to also include situations which fall under section 375(f) where consent obtained by an abuse of position of authority or trust cannot be considered as a valid consent in the Penal Code.²¹⁷

This way, the Penal Code need not have to list down all the possible scenarios and circumstances but instead to just provide the legal principle that can be applied in all circumstances.

One last thing to consider is subsection (a) to section 375. This is where the sexual intercourse took place against the will of the victim. Is there still a need to retain this? Section 375(a) provides that if the sexual intercourse is done against the will of the woman, it can amount to rape.

Can a woman consent to sexual intercourse when she is not willing to engage in it? It is submitted that if the sexual intercourse is not something that she is willing to engage in, the law should view that she is not consenting to the same.

Therefore, it is submitted that with a proper definition of consent in the Penal Code, subsections (a), (c) – (f) to section 375 can be removed.

²¹⁶ Sexual Offences Act 2003, s 74

²¹⁷ A good example is found in the UK Sexual Offences Act 2003 where section 74 provides that a person consents to something '...if he agrees by choice, and has the freedom and capacity to make that choice'.

3.4. Statutory rape

One of the circumstances that make sexual intercourse rape is where the woman is under 16 years of age.²¹⁸ This is referred to as 'statutory rape' – where it does not matter if there was consent or not. The law views that a woman under 16 years of age is not able to validly consent to sexual intercourse.

In every other jurisdiction, there is a law on this. But what is not common is the age. For example, in India, the age of consent is 18 years old.²¹⁹ That is high when compared with Singapore where the age of consent is 14 years old.²²⁰ In Thailand, the age of consent is 15 years old.²²¹

The question that is begging to be asked is what is the right age for the law to adopt? Even in Malaysia, the law is not very consistent. Although a person is no longer a child when he/she turns 18,²²² that person still is not allowed to vote in a general elections until he/she turns 21. But such a person's consent is not relevant in the context of sexual intercourse if she is a woman below 16 years old. Further, according to section 90(c) of the Penal Code, the general rule is that a person under 12 years old is unable to consent to anything (unless the contrary appears from the context).

With all these different ages, it is hard to understand why it is so. For example, a 17 year old girl can consent to sexual intercourse with a man as she is above 16 years old but the same girl cannot consent to sexual assault under section 14 of the Sexual Offences Against Children Act 2017 because she is under 18 years old.

Section 14 of the Sexual Offences against Children Act 2017 provides as follows:-

Any person who, for sexual purposes –

- (a) touches any part of the body of a child;
- (b) makes a child touch any part of the body of such person or of any other person;
- (c) makes a child touch any part of the child's own body; or
- (d) does any other acts that involve physical contact with a child without sexual intercourse

commits an offence...

²¹⁸ Penal Code, s 375(g)

²¹⁹ As amended by section 9 of the Criminal Law Amendment Act 2013.

²²⁰ Singapore Penal Code, s 375(b). It is interesting to note that for the offence of sexual penetration, it will be an offence if the victim is under 16 (section 376A).

²²¹ Thai Criminal Code, s 277

²²² See also section 2 of the Sexual Offences Against Children Act 20917 where a child is said to be one under 18 years old.

It is strange that the law allows the man to have sexual intercourse with a 17 year old girl but does not allow him to 'touch any part of her body'. The law on the age of consent in Malaysia clearly needs to be standardised and clarified. On the one hand, just because a female is a child (under 18 years of age), it does not necessarily mean that she is unable to understand the nature of what she is consenting to when she agrees to have sexual intercourse. On the other hand, the paternalistic nature of the law seeks to protect young girls from being taken advantage of.

Another related issue is whether the Romeo and Juliet law has a place here in Malaysia. Romeo and Juliet laws are common in the United States and it is regarding situations where teenagers (or where the man is not much older than the girl) indulge in consensual sexual intercourse. It is not a situation where an older man takes advantage of the naivety of a young girl – but instead, it is a situation where young lovers consent to sexual intercourse which can lead to dire consequences for the young boy. Such law seeks not to criminalise such acts, or at the very least, ensure that the punishment is not unduly harsh.

For example, in the state of Texas, if a man has consensual sexual intercourse with a girl under the age of 17, but at least 14 years old, it may still be statutory rape but the man need not register as sex offender if there is no more than a three-year age difference between the two.²²³

There may be an argument against having such laws here in Malaysia as there is no sex offender register. Further, the judge can take into account the so called consent and the lack of coercion and violence to accordingly mete out a less harsh sentence. The reply to such argument is that eventually we will need to have a sex offender register. Furthermore, it may be important not to categorise young men 'in love' together with sex perverts and predators who take advantage of young girls.

Therefore, it is submitted that the age of consent needs to be re-looked into and changes need to be made to make the law more consistent. There is also a need to include provisions which deal with consensual underage sex where the perpetrator is not much older than the victim.

3.5. Marital rape

The exception to section 375 provides that if the woman is the wife of the perpetrator, it shall not be rape.

²²³ Texas Penal Code, s 22.011(e)(2)

In Singapore, a similar exception is found in section 375(4) of the Singapore Penal Code.²²⁴ In India, this is provided for under Exception 2 to section 375 of the Indian Penal Code.

There is no such exception under Thai law but the law provides that the court may impose a more lenient punishment if the man and wife still wish to live together.²²⁵

In the UK, the House of Lords in the case of *R v R*²²⁶ made it clear that there is no such exception under English law. Lord Keith of Kinkel in delivering the main judgment held as follows – ‘in modern times the supposed marital exemption in rape forms no part of the law of England’.²²⁷

It is submitted that the law in Malaysia should be the same too. At the end of the day, the law on rape is straightforward – it is a sexual act that is carried out without the consent of the victim. It should matter who the victim is or how the victim is related to the perpetrator. The main question that needs to be asked is if the sexual intercourse was consented to. Just because the victim may have agreed to be lawfully married to the perpetrator, it does not mean that she had consented to sexual intercourse at any time.

In fact, it is submitted that it is ridiculous to impose upon the woman the obligation to take out an injunction restraining her husband from having sexual intercourse to protect herself from being raped by him. This is an unnecessary burden placed upon the victim when it should be the perpetrator who needs to take the responsibility and initiative to establish if there was consent in the first place.

As proposed earlier,²²⁸ if there was a proper definition of consent in the Penal Code, it would make it easier for the court to decide if the sexual intercourse was rape or not – by applying the law to the facts to establish if there was in fact consent present. Consent cannot be implied based on something that took place some time ago. Just because a woman consented to be married to a man, it surely cannot mean she is consenting to sexual intercourse all the time and at any time.

3.6. The mental element

All Criminal Law lawyers will be familiar with the Latin maxim, *Actus non facit reum nisi mens sit rea*. Basically, what it means is that an act itself is not criminal unless it is accompanied with a guilty mind. From this maxim, one can see that for each crime, there must first be the external elements (or some may call it *actus reus*)

²²⁴ See *PP v N* [1999] 3 SLR(R) 499 where the accused had sexual intercourse with his wife after tying her up. The accused was not charged for rape but for wrongful confinement, causing hurt and criminal intimidation.

²²⁵ Thai Criminal Code, s 276(4)

²²⁶ [1992] 1 AC 599

²²⁷ *Ibid*, at page 623

²²⁸ See para 2.3 as well as section 74 of the Sexual Offences Act 2003.

and there must also be the guilty mind/mental element (or some may call it the *mens rea*).

In section 375, the external elements are clear – there must be sexual intercourse between a man and woman and it must be done in one of the circumstances listed under subsections (a) – (g).

What is not clear is the elements required to show the mental state of mind of the perpetrator. While subsections (c) and (d) make some reference to the state of mind of the accused,²²⁹ section 375 generally does not make any reference to the state of mind of the accused. Although it is obvious that the sexual intercourse must be done intentionally, there is nothing to require the man to know or have reason to believe in the circumstances listed under subsections (a) – (g).

The law is similar in India and Singapore where no explicit reference is made to the state of mind of the perpetrator.

Under UK law however, the Sexual Offences Act 2003 expressly provides for the state of mind of the accused. The accused must not have reasonably believed that there was consent.

In the High Court case of *Rozi bin Ramli*,²³⁰ the fact that the accused knew the victim was below 16 years old was something that the court needed to take into consideration to see if the accused was guilty or not of committing rape under section 375(g).

Therefore, although not explicit in section 375, Courts appear to require the perpetrator to have the mental element – at the very least, the necessary knowledge of the circumstances that make the sexual intercourse a criminal act.

It is submitted that it is imperative that the necessary guilty mind of the accused must be proven before he is found guilty of rape. It will not be fair to find him guilty of rape under section 375(b) (sexual intercourse without the woman's consent) if he honestly but mistakenly believed that the woman was consenting and it was reasonable for him to believe so.

In the case of *Teo Eng Chan & Ors*,²³¹ the Court considered the possibility that there was a mistake on the part of the accused in thinking there was consent and if that was the case, whether the accused can rely on section 79 of the Penal Code and be found to be not guilty. Section 79 provides as follows:-

²²⁹ Subsection (c) requires the man to know or has reason to believe that consent by the woman was given under a misconception while subsection (d) requires the man to know that he is not the husband of the woman.

²³⁰ [1997] MLJU 177

²³¹ [1988] 1 MLJ 156

Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

This case appears to say that an accused may rely on this exception of mistake of fact to be acquitted of the rape charge. Therefore, even if section 375 is silent as to the state of mind of the accused, it does not prevent the accused from relying on section 79.

However, it is submitted that there is still a need to expressly provide for the state of mind of the accused in section 375. Section 79 is an exception and the burden of proving an exception lies on the accused.²³² This would mean that the accused will have to prove his innocence. If the mental element is provided for in section 375, the burden of proving it will lie on the prosecution.

It is submitted therefore that section 375 should be amended to explicitly provide for the mental element of the accused. The most suitable mental element would be what is provided in the English Sexual Offences Act 2003 where the accused must not have reasonable belief that the victim consented to the sexual act.²³³ This means that if the accused believed that there was consent, it will be sufficient to acquit him even if there was in fact no consent but it was reasonable for him to believe as such.

The problem that may arise is if the accused honestly believed there was consent but no other reasonable person would have held such belief. This means that there could be a possibility that a person who does not have a guilty mind (he honestly believed there was consent) can still be found guilty of rape. Perhaps the reasoning behind this is that if a reasonable person would not have held such belief, it is highly probable that the accused could not have held such a belief.

4. Conclusion

The law on rape as provided for under section 375 of the Penal Code is in need to be updated and amended. Based on what had been discussed above, here is a summary of things that need to be amended:-

- (a) The removal of references to gender in the definition of rape;
- (b) The inclusion of oral and anal sexual intercourse in the definition of rape;
- (c) The removal of circumstances (a), (c), (d), (e) and (f) in section 375 and the inclusion of a definition of 'consent';

²³² Evidence Act 1950, s 105

²³³ This is in line with the proposal earlier that that section 375 be amended to just provide that rape is sexual intercourse without the consent of the victim.

- (d) The age of consent to sexual intercourse will have to be consistent with other provisions regarding children in other statutes eg Sexual Offences Against Children Act 2017;
- (e) Consensual sexual intercourse between children (or where the adult is not much older than the child) should be dealt with differently;
- (f) The exception to section 375 should be removed;
- (g) There should be expressly included the mental element of the perpetrator in the definition of rape under section 375.

These proposals are far-reaching and the amendments needed will affect more than just section 375 of the Penal Code. In fact, it may not be limited to the provisions of the Penal Code. But it is something that needs to be done to ensure that potential victims are protected and possible perpetrators be deterred and those who commit the wrong will be brought to justice and not escape due to technicalities.