

RAPE LAW IN MALAYSIA: AN ANALYTICAL AND
CORRECTIONAL STUDY FROM SHARĪ‘AH PERSPECTIVE

BY

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ABSTRACT

Rape is a violent and heinous crime against women. Those who commit it will be punished according to the Malaysia's civil criminal law, specifically through section 375, Malaysia Penal Code. It is an illegal sexual intercourse between a man and a woman without consent and against her will. Different types of rape such as statutory, non-statutory, incestuous and gang rape are prescribed with different punishments based on the seriousness of the crime. The government's effort to seriously curb the number of rape cases is clearly seen by strengthening and amending the law in 2013. However, based on statistics given by Royal Malaysian Police (PDRM), rape cases are still reported at an alarming rate, and the adequacy and sufficiency of the present rape law is being questioned. Accordingly, this study intends to analyse rape law from the Sharī'ah perspective with the purpose of suggesting its harmonisation with Sharī'ah as a correctional study. To attain this objective, a qualitative case study method has been adopted. The data have been collected by using two methods, namely document review and interview and the collected data were analysed thematically. The findings of the study indicated that there are three main aspects of Malaysian rape law which are in contradiction with Sharī'ah principles: first, the irrebuttable presumption of a boy as a rapist in the definition of rape; second, the issue of consent in terms of ambiguity and statutory rape; third, the punishment for incestuous and consensual statutory rape. Therefore, in order to ensure that the law and Sharī'ah are in tandem, a suggestion of harmonisation on these aspects has been proposed. It is hoped that this study will contribute to a better Malaysian rape law in safeguarding the welfare of society and protecting the honor and lineage (*hifz al-'ird wa al-nasl*) as outlined in the Sharī'ah objectives (*maqasid sharī'ah*).

ملخص البحث

إن الاغتصاب جريمة عنيفة وشنيعة بموجب القانون الجنائي المدني الماليزي، خاصةً في المادة ٣٧٥ من قانون العقوبات الماليزي. وهي عبارة عن ممارسة جنسية غير مشروعة بين رجل وامرأة دون موافقة وضد إرادة المرأة. فثمة أنواع مختلفة من الاغتصاب، مثل الاغتصاب القانوني وغير القانوني، واغتصاب سفاح المحارم، والاعتصاب الجماعي، تنص عليها بعقوبات مختلفة على أساس خطورة الجريمة. ومن الواضح أن الجهود التي تبذلها الحكومة للحد بجدية من عدد حالات الاغتصاب يُنظر إليها من خلال تعزيز القانون وتعديله في عام ٢٠١٣م. بيد أنه استناداً إلى الإحصاءات التي قدمتها الشرطة الملكية الماليزية، لا تزال تبين أن نسبة حالات الاغتصاب تثير الانزعاج، فبدأ يجري التحقيق في مدى كفاية قانون الاغتصاب الحالي. وبناءً على ذلك، تسعى هذه الدراسة إلى تحليل قانون الاغتصاب من منظور الشريعة، بهدف اقتراح مواءمته مع الشريعة كدراسة تصحيحية. ولتحقيق هذا الهدف، فقد اعتمدت هذه الدراسة على طريقة نوعية بحيث تم جمع البيانات باستخدام طريقتين، هما مراجعة الوثائق وإجراء المقابلات، وتحليل البيانات المجمعة على نحو التحليل الموضوعي. وتشير نتائج الدراسة إلى أن هناك ثلاثة جوانب رئيسية من قانون الاغتصاب الماليزي تتعارض مع مبادئ الشريعة، وهي أولاً: الافتراض القاطع للصبى كمغتصب في تعريف الاغتصاب، وثانياً: قضية الموافقة من حيث الغموض والاعتصاب القانوني، وثالثاً: معاقبة اغتصاب سفاح المحارم والاعتصاب القانوني بالتراضي. ولذلك، بغية تصحيح القانون لكي يتماشى مع الشريعة الإسلامية، فيُقتَرَح المواءمة في هذه الجوانب المذكورة. ولعل تُسهم هذه الدراسة في تحسين قانون الاغتصاب الماليزي في ضمان رفاهية المجتمع وحماية الشرف والنسب أي حفظ النسل على النحو المبين في مقاصد الشريعة الإسلامية.

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DECLARATION

I hereby declare that this thesis is the result of my investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Malaysia Penal Code

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Ibnor bin Idris v Public Prosecutor [2009] MLJU 738

Augustine Foong Boo Jang v Public Prosecutor [1990] 1 MLJ 225

Public Prosecutor v Mohd Ridzwan bin Md Borhan [2004] 5 MLJ 300

Nor Afizal bin Azizan v Public Prosecutor [2012] 6 MLJ 171

Rahmat bin Ghazali lwn Pendakwa Raya [2019] MLJU 819

LIST OF ABBREVIATION

Sing	Singular
Pl	Plural
PBUH	Peace be Upon Him
s.a.w	Sallahu alaihi wasalam
s.w.t	Subhanahu wa ta`ala

LIST OF TRANSLITERATION

Q q	ق	Z z	ز	A a	أ
K k	ك	S s	س	B b	ب
L l	ل	Sh sh	ش	T t	ت
M m	م	Ṣ ṣ	ص	Th th	ث
N n	ن	Ḍ ḍ	ض	J j	ج
W w	و	Ṭ ṭ	ط	Ḥ ḥ	ح
H h	ه	Ẓ ẓ	ظ	Kh kh	خ
’	ء	‘	ع	D d	د
Y y	ي	Gh gh	غ	Dh dh	ذ
Al- al-	ال	F f	ف	R r	ر

Aw aw	أَوْ-	Ī ī	يْ-	Ā ā	أَ-
Ay ay	أَيْ-	Ū ū	أُوْ-	Ā ā	أَيْ-

un	ُ-	in	ِ-	an	َ-
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Al-Maktabah al-Islāmiyyah	المكتبة الإسلامية	h in mawṣūf	ة
Maktabat al-Wahbah	مكتبة الوهبة	at in idāfat	

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Criminal law in Malaysia is framed by reference to the Indian Penal Code, which is in turn based on English Common Law, and this Western-style legislation was introduced gradually, starting during colonisation. The Federal Constitution, which consists of law concerning criminal matters, is the supreme law of Malaysia and it still applies the same principles as those found in English law, subject to amendments and conditions (Siti Zaharah Jamaluddin & Nor Aini Abdullah, 2010). Article 75 of the Federal Constitution indirectly indicates its comprehensive, authoritative jurisdiction and dominance, by declaring any law contradicting it as null and void. Matters of religion and Islamic law are under the state's administration, as stated in the Second List of the Ninth Schedule of the Federal Constitution (Tun Mohd. Salleh Abas, 2015). Therefore, the implementation of Islamic criminal law in Malaysia is restrictive, and the Sharī'ah court has limited jurisdiction under the Federal Constitution (Shamrahayu A Aziz, 2007).

Rape is a violent and heinous crime under Malaysia Civil criminal law, namely, Malaysia Penal Code. It is a humiliation, degradation, and violation of a woman's dignity. The victim would suffer emotionally, mentally, psychologically, and physically. Rape affects and leaves a terrible trauma on the victim throughout her life. While physically, it frequently leaves an injury on the woman's body due to her resistance, even sometimes leading to death. Sections 375 of the Penal Code defines rape as illegal sexual intercourse between a man and a woman without the consent and against her will (Law of Malaysia, 2015). There are four categories of rape; statutory, non-statutory, incestuous and gang rape. First, statutory rape is illegal intercourse with

underaged girls of 16 regardless of their consent. Second, the non-statutory rape involves the women over the age of 16 without consent. Third, the incestuous rape is non-consensual intercourse with women prohibited under the religion and custom by blood relationship. Fourth, gang-rape committed by one or more in a group of males. Different categories are prescribed with a different punishment, based on the extremity of the crime.

Moreover, rape-cum-murder crimes are becoming more frequent lately and are expected to continue in the future (Zaizul Ab Rahman et al., 2018). Although efforts and approaches from Islamic, legalistic and sociological studies propose preventive methods in curbing rape cases, they are individually inadequate to remedy the crime of rape (Azman Mohd Noor, 2011c, Zaleha Kamaruddin, Mahmood Sanusi, & Nik Rahim Nik Wajis, n.d., Azizah Jaafar & Chan Siew Lee, 2009; Noor Azlan Mohd. Nor & Bazlin Darina Ahmad Tajudin, 2014; Saedah A. Ghani, Sallah Abdullah, Sharifah Mariam Syed Akil, & Noratthiah Nordin, 2014). Hence, the gap in the present-day rape law studies requires an integration or harmonisation study which this study proposes to undertake.

In view of the statistical increase of rape cases, in 2013, amendments to section 375 and 376 Penal Code were made to make the law more deterrent. There were three significant amendments made to this effect. First, regarding gang rape, section 375B was inserted, with severe punishment of ten years of mandatory imprisonment, not exceeding 30 years. Second, the addition of four circumstances under subsection 376(2) which have also been deemed as aggravating factors to the crime of rape. These are; (i) the woman becomes insane as a result of rape, (ii) sexually transmitted diseases such HIV, AIDS or any virus and illness has been transferred through the intercourse, (iii) the woman commits suicide because of rape, (iv) the rape of vulnerable women who

suffer from a mental disability or emotional disorder, or physical handicap. Third, the enhancement of mandatory imprisonment term from five years to ten years under rape involving aggravating factors, 376(2).

Nevertheless, the sufficiency of this law is still disputable as rape crime statistics are increasing at an alarming level. It seems that the present rape law is not adequate to deter the criminal from committing the crime. Figures from the Royal Police of Malaysia (PDRM) are illustrated as follows:

Table 1.1 Rape Statistic by State (Not Including Incestuous Rape)

STATE	2011	2012	2013	2014	2015	2016	2017
PERLIS	50	41	43	34	30	27	29
KEDAH	299	258	220	216	198	138	97
PULAU PINANG	141	119	108	84	75	59	69
PERAK	191	166	141	108	79	88	73
SELANGOR	476	388	371	285	285	281	296
KUALA LUMPUR	127	128	133	145	108	91	125
NEGERI SEMBILAN	158	154	155	124	105	96	83
MELAKA	78	88	101	58	75	50	56
JOHOR	526	455	429	276	247	252	175
PAHANG	200	195	175	138	85	121	138
TERENGGANU	126	140	117	89	97	76	53
KELANTAN	262	224	206	183	181	139	96
SABAH	190	196	190	174	182	148	163
SARAWAK	135	144	129	131	126	132	129
TOTAL	2,959	2,696	2,518	2,045	1,873	1,698	1,582

Table 1.2 Rape by Age

AGE	2011	2012	2013	2014	2015	2016	2017
under 6 years old	16	20	18	7	14	8	7
6 - 9 y/o	27	33	22	22	22	27	15
10 - 12 y/o	82	89	71	58	53	61	72
13 - 15 y/o	1333	1230	1,152	965	850	743	808
16 - 18 y/o	699	694	640	531	470	511	355
TOTAL	2157	2066	1,903	1,583	1,409	1,350	1257

According to the statistics above (table 1.1), it reveals that rape cases have declined in numbers after 2013, the year of the law amendment. Nonetheless, it still at an alarming and dangerous level that disrupts the peace and security of women and girls. Specifically, statistics on statutory rape, involving girls under 16 years old, which only show the slightest decrease over time. Besides, based on table 1.2 above, statutory rape is a demonstrably significant category of the overall crime of rape.

The statistic should be a wake-up call for the legislative body, academics and researchers to analyse rape law in order to curb this heinous crime. Accordingly, this study is intended to analyse rape law in Malaysia, and examine its flaws from the perspective of Shari'ah, and for the purpose of its harmonisation with Shari'ah in safeguarding the public interest.

1.2 PROBLEM STATEMENT

The main reasons for which the study is conducted are the problematic issues of existing rape law, from three aspects. **First:** the alarming numbers of rape cases, and the shortcomings of present rape law. Owing to the high statistic given by Royal Police Malaysia as illustrated above, it seems that something is wrong in the present law in curbing such crime. In spite of making the law more severe by amending section 375 and 376 of Penal Code, the statistics still show at alarming level of crime. Hakimah Yaacob (2013) asserted that the worrying statistic of rape cases indicates the failure of present law in addressing the crime. It is undeniable that there are loopholes in rape law that need legislative reform. For instances, Fernandez & Nor (2019), Siti Zaharah Jamaluddin & Nor Aini Abdullah (2010), Anis Suhiaza Md Salleh (2010), Hakimah Yaacob (2013) and Mohamad Ismail Mohamad Yunus (2014) have argued the flaws of the rape law definition from an issue of gender. They are of the opinion that it should be gender free rather than confined to stating the specific gender of perpetrator or victim. Moreover, Anita Abdul Rahim (2012) and Nasimah Hussin (2007) criticized the law for stipulating the rapist's age to thirteen years old and above. It has been outdated because the present reality the opposite. (Astro Awani online, 18 January 2107) (The Star online, 27 July 2017) (Berita Harian online, 11 September 2017).

Second; consensual intercourse in statutory rape. In Malaysia, according to section 375 (g), the girl's age of consent to engage in sexual intercourse is sixteen years old and above. A girl under this age is deemed incapable of giving consent as she does not understand the nature, quality and consequences of sexual intercourse. It signifies that consent is immaterial for the girls under sixteen years old. Understandably, the statutory rape law intends to protect teenagers from being taken advantage of due to

their tender age. They are too young to give consent to sexual affairs. However, in reality, Che Thalbi Md Ismail & Aspalella A. Rahman (2017) contended that most of the statutory rape cases were consensual intercourse by genuine consent of the victim, based on the police reports gained from Sexual Crime and Children Investigation Division Bukit Aman, Royal Malaysian Police (PDRM). In fact, this consensual intercourse, which is regarded by Penal Code as statutory rape, is *zinā* (illegal intercourse) that is prohibited by Sharī'ah and is on the rise.

The consensual statutory rape causes many troubles and effects that have been discussed by scholars. For example, Noor Azlan Mohd. Nor et al. (2013), Nor Jana Saim et al. (2014) and Saedah A. Ghani et al. (2014) asserted the most significant consequence is unwanted teenage pregnancy that results in many other social issues such as abortion, baby-dumping and sexually transmitted diseases. The record from the Malaysian Registration Department (JPN) shows that a total of 159,725 babies were born as illegitimate children from the year 2013 to 2015 (Berita Harian Online, 13 September 2016). Therefore, the application of such a law from a Sharī'ah perspective raises numerous juridical questions, particularly concerning *zinā* (illegal intercourse) among teenagers in preserving the lineage (*hifz al-nasl*) that needs to be investigated.

Third; the issue of deterrent punishment for the rapist and potential sexual predators. Fernandez & Nor (2019), Hakimah Yaacob (2013), Roosniza Mohd Shariff (2005) and Jamaludin Mustaffa & Kamarudin Ngah (2015) argue more harsh punishments should be inflicted on rapists to give enough of a deterrent impact. It is due to the usual sentence, limited only to imprisonment and whipping, even for terrible rape cases causing the victim's death. The rapist is only punished with several years of imprisonment, then released, and might repeat the same crime. While the victims, even if still alive, are being affected and traumatized throughout their entire lives. That is