

## **Section 375 Exception, Explanations and Section 375A Malaysian Penal Code –Legitimising Rape within Marriage: A Call for Reform<sup>1</sup>**

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### **Abstract**

This paper's objective is to consider the constitutionality and defensibility of exception and explanations under s375 of the Malaysian Penal Code (Penal Code) which legitimises the offence of rape committed by a husband on his wife. Section 375A will also be considered to see if it provides a cure for the contravention. The current law legitimises rape committed within marriage. The rationale for the differentiation in treatment of rape within and outside marriage is explored and discussed. The justification for maintaining the provision in the current day setting considering the development of society, particularly with respect to women, who have gone from being treated as chattels or possessions to legal persona having rights and entitlements including the right to vote and rights under local laws, and international and regional conventions, is discussed. The relevance of the provision today and the need for reform of the Penal Code provisions to ensure compliance with the Malaysian Federal Constitution (Federal Constitution) in spirit and form and with current policies, regional and international conventions and the Islamic perspective are discussed. The relevance of local legislation such as the Malaysian Domestic Violence Act 1994 (Domestic Violence Act) and the effectiveness of the same in achieving the outcome of the policy and objective of the Act from the perspective of a rape offence are also discussed. The movement for reform to update outdated concepts currently reflected in present laws and to embody the current spirit and form of women's status and rights as humans within society is a call much repeated and yet still ignored. This paper strives to keep alive the call for reform reminding all concerned of the jarring discrepancies between the Penal Code and the Federal Constitution and Malaysian State responsibility under regional, international human rights instruments and Islamic principles. The recommendation is to delete the s375 Penal Code exception, explanations and s375A.

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<sup>1</sup> This paper was presented at the International Conference on Law, Order and Criminal Justice (ICLOCJ) 19 & 20 November 2014 organised by International Islamic University Malaysia with the objective to gain recognition for the need for a review of the law. This was considered opportune as the relevant authority concerned namely the Institute of Public Security of Malaysia (under Ministry of Home Affairs) signed a MOU with Ahmad Ibrahim Kulliyah of Laws for a law review in conjunction with the conference.

## I. INTRODUCTION

As recently as May 2014, the Malaysian Prime Minister in his Facebook page renewed the government's commitment to the principles and values of human rights as well as the country's subscription to the philosophy, concepts and norms of the Universal Declaration of Human Rights (UDHR).<sup>2</sup> It is of import to note that article 1 of the UDHR reads: *All human beings are born free and equal in dignity and rights*. The mirror principles of equality and non-discrimination are housed in the said Article for both male and female. To also quote from the speech of the Attorney General:

We never forget that the constitutional duty enshrined in article 145 of the Federal Constitution is owed to our fellow Malaysians. This is a duty that can never be shirked regardless how onerous the challenges may be. Robert Jordan aptly captured this sentiment when he stated that, 'Duty is heavy as a mountain, death, is light as a feather'. As Attorney General, I am proud to say that we will continue to strive to ensure that each task and assignment, be it small or large, will be carried out competently, independently and fearlessly, and most definitely without bias or favouritism.<sup>3</sup>

The Attorney-General also noted the ongoing work of the Working Committee to review laws on Violence against Women through consultation and meetings with relevant ministries and stakeholders like the Joint Action Group for Gender Equality (JAG).<sup>4</sup>

In 2006, the United Nations Committee on the Elimination of Discrimination Against Women<sup>5</sup> had requested that Malaysia enact legislation criminalising marital rape, defining such rape on the basis of lack of consent of the wife.<sup>6</sup> Malaysia's response to the same, as seen in the amendments to the Penal Code in 2006, was not to delete the exception. Instead s375A was introduced wherein a married man who has sexual intercourse with his wife by use of force or fear of death to her or another is guilty of an offence that carries

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<sup>2</sup> Suhakam Press statement, 17 May 2014: "Suhakam Welcomes the Government Commitment to the Principles and Values of Human Right", <http://www.suhakam.org.my/wp-content/uploads/2014/05/Press-Statement>. Site accessed on 10 July 2014.

<sup>3</sup> Tan Sri Abdul Ghani Patail "Opening of the Legal Year 2014", *Malayan Law Journal Articles*, 2014, Vol. 1, ciii.

<sup>4</sup> See also UN General Assembly A/HRC/WG.6/17/MYS/1 17<sup>th</sup> Session *Human Right Council Working Group on Universal Periodic Review Malaysia National Report* 6 August 2013 GE 13-161132. It is to be noted that the Suhakam and Anti Rape Task Force Committee's recommendation to criminalise marital rape was previously ignored despite the (then) Suhakam commissioner Prof Hamdan Adnan stating that *Rape is violent and cruel and indeed should not happen between a husband and wife*. See, Devaraj Prema, "Furore Over Marital Rape. It should be seen as a Criminal Offence", *Aliran Monthly*, 2004, Vol. 24, Issue 9.

<sup>5</sup> Malaysia is a signatory to the Convention on Elimination of Discrimination Against Women (CEDAW) and acceded to it in 1995.

<sup>6</sup> United Nations Committee on the Elimination of Discrimination against Women Thirty-Fifth Session, 15 May 2006 – 2 June 2006. Excerpted from: Supplement No. 38 (A/61/38), *Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia Combined Initial and Second Periodic Report*, para 39.

a maximum sentence of five years.<sup>7</sup> Malaysia's recent response to the United Nation Human Rights Council is that:<sup>8</sup>

The Domestic Violence Act 1994 [Act 521] was enacted to curb the use of violence by a person against his/her spouse as well as provides a platform for victims to seek protection and justice. Act 521 was amended in 2011 to widen the definition of "domestic violence" to cover emotional, mental and psychological abuses. The concept of marital rape is not recognised in Malaysia's legal system. That notwithstanding, s375A of the Penal Code was enacted to prevent husbands from causing hurt or the fear of death to his wife in order to have sexual intercourse with her.

The United Nations Universal Second Periodic Report recommendation that Malaysia criminalise marital rape so as to allow equal protection of the law was rejected by Malaysia on the grounds that the concept of marital rape is not recognised in Malaysian legal system.<sup>9</sup> The process of ensuring the transformation of the societal structure power imbalance in favour of male gender favoured policies and laws has to be viewed as a continual process whereby persistence is a necessary attribute to attain a paradigm shift in the way women are to be treated in line with human dignity and the gender equality agenda of the United Nations and to eliminate violence against women.<sup>10</sup>

Suffice to state here, the point to be expanded upon later more fully is that it is the government's responsibility to make changes to the legal framework that discriminates against women, to uphold human dignity and eliminate violence against women and advance gender equality.

Malaysia has to address violence against women of which the legitimising of rape within marriage is arguably a significant flag or indicator of the status or regard women have in Malaysia. The area of focus is the defensibility of maintaining the immunity granted to a husband for marital rape. An ancillary question is whether the domination over, the lack of equality or the violence committed against women in cases of marital rape is cured by the possible charge of an alternative lesser offence under s375A.

<sup>7</sup> Hansard Parliament Debate Penal Code (Amendment Bill), 23 October 2007, pp. 1-5. Ms. Ellen Lee (Sembawang MP) raised the pertinent point that section 375A does not address the crime of marital rape and the protection to be given for this crime as opposed to assault. She cites United States, Britain, Australian, Taiwan, Hong Kong, Sri Lanka and the Philippines as having adopted marital rape laws. Other countries include New Zealand, Japan and Indonesia. See also Devaraj Prema *supra* n 4.

<sup>8</sup> United Nations Human Rights Council Twenty – Fifth Session Agenda item 6 Universal Periodic Review Report of the Working Group on the Universal Periodic Review Malaysia A/HRC/25/10/Add.1 United Nations 4th March 2014.

<sup>9</sup> Suhakam Table of Classification of UPR recommendation and Table on Government Position on UPR recommendation (item 146.129) <http://www.suhakam.org.my/regional-international/upr/second-cycle-2013/HRC/25/10/Add.1/Malaysia>. Site assessed on 10 July 2014.

<sup>10</sup> United Nations Development Programme Report (2013) *Humanity divided: Confronting Inequality in Developing Countries* where it was opined that Civic engagement, in and of itself, can greatly contribute to shifting people's opinions, interpretative schemes and attitudes. Available online at [www.undp.org/poverty](http://www.undp.org/poverty). Site assessed on 12 August 2014.

### **A. *The Framework of the Paper***

To begin, reference is made to the Malaysia's Millennium Development Goals (MDG) report to highlight the high rate of violence including domestic violence and marital rape against women in Malaysia. This is a matter of national concern that requires the immediate attention and address of policy and lawmakers. It will then be considered from a social perspective why marital rape should be a crime. This will be seen both in terms of impact to the wife/victim and the need to prevent the use of the exception in an abusive domestic relationship that undermines any law that strives to protect women from violence, violation and inequality.

The basis and rationale for the relevant exception will be shown to have been discarded in its country of origin as being no longer valid in current times. The Federal Constitution, regional and international declarations and conventions including the Convention on Elimination of Discrimination Against Women (CEDAW), which Malaysia has ratified, will be considered in order to advance the argument that the provisions of the exception to s375 and s375A should be deleted.

Finally, it is suggested that Islamic law does not condone the rape of a wife by her husband and that in fact rape by a husband of a wife is not Islamic. Further, there is a need to differentiate cultural and religious aspects in reviewing the continued desire for the exceptions legitimising marital rape. There is a need to reflect whether in resisting the calls to make marital rape a crime, lawmakers are in fact upholding and perpetuating the structurally and culturally male dominated biasness in a law which we are obliged to reform. An insight into the alarming status report of violence against women in Malaysia is produced below.

### **B. *Alarming State of Violence Against Women in Malaysia***

The Malaysia Country Report on MDG<sup>11</sup> 2010 highlighted that there is a low prosecution rate for acts of rape against women. It was reported *that perpetrators of acts of violence against women can apparently commit their acts with virtual impunity, indirectly rendering them "acceptable"*. Alarming too is the comment that only 10 % of rape cases are reported. Research by the All Women Action Society (AWAM) shows that between 2000 and 2002, 52% of wives in relationships where there is domestic violence faced marital rape, often repeatedly.<sup>12</sup>

The findings in the report sum up the collective crimes of rape, incest and outrage of modesty cases at an incidence rate of 21.8 per 100,000 population. The report equates these crimes against women with the Malaysian rate for "assaults" leading to serious

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<sup>11</sup> United Nations Country Team Malaysia, Malaysia (2010) Millennium Development Goals United Nations Country Team, April 2011. Malaysia. See also UNESCO (2014) Priority Gender Equality Action Plan (2014-2021), 37 C/4-C/5 – Compl. 1 France. In fact, the statistics reveal that, at the country level, reported cases trebled from around 1,200 in 2000 to around 3,600 in 2009, out of which there were only 162 prosecutions for rape, rendering a basis for the comment above.

<sup>12</sup> AWAM *Memorandum on Amendment to Law Relating to Rape* (2003) AWAM's statistics show that in the years 2000 – 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse.

bodily injury and leading to death. If domestic violence is included, then women are at a greater risk of gender-based violence than the population is to mere “assaults”. Thus, this is said to demonstrate a rampant state of violence against women.

The World Report on Violence and Health by the World Health Organization in 2002 suggested that 40–70% of women murdered worldwide were killed by their current or former husband or boyfriend, frequently in the context of an ongoing abusive relationship.<sup>13</sup>

The current state of law serves only to empower the married man to dominate his wife by turning a blind eye to equal treatment (irrespective of marital status) by forfeiting the requirement for the free consent of both parties for the sexual act. Further, it promotes violence against and violation of a married woman by an abusive husband on both a physical and nonphysical dimension for which there is no redress, as the law stands, under the Domestic Violence Act or the Penal Code since rape within marriage is legal.

If Malaysia intends to protect women in the sphere of domestic relationships and recognise the right status of women, the place to start and accord legal recognition of this is by recognising that a woman does not lose the rights she has as a human being and woman in relation to the offence of rape just by the fact of her marriage. There is a need for her consent. This signifies not only her status as an equal human being (a rights holder as opposed to property) but also that her consent is required as to the use of her physical body for sex irrespective of her marital status. Sections 375 and 375A of the Penal Code are contended to be in conflict in this regard with articles 5 and 8 of the Federal Constitution as will be explored further later.

Further, to protect the sanctity of marriage and respect for women, there is a need to ensure violence and violation in whatever form is not tolerated in the most basic and fundamental foundation of our social framework i.e. the family unit, and to accord greater protection to recognising and affirming this in policy, law and enforcement.

## II. LIMITATIONS OF MALAYSIAN DOMESTIC VIOLENCE ACT 1994 AND SOCIAL PRESPECTIVES ON WHY MARITAL RAPE SHOULD BE A CRIME

On why men rape, we refer to the findings of Philip N.S. Rumney<sup>14</sup> where he scoffs at the idea that men rape stating that the argument that “*he lost control in his sexual excitement*” is simplistic and completely ignores our growing understanding of why men rape. The research cited suggests a rationale that is in line with power or dominance theory, which is expressed by researchers as male sexual expression of power, dominance and anger over women and the male’s own feeling of insecurity or inadequacy.

<sup>13</sup> WAO, 10 June 2013, Inadequate Protection for Women [http://www.wao.org.my/news\\_details.php?nid=296&ntitle=Inadequate+protection+for+women#sthash.WB7eTFyd.dpuf](http://www.wao.org.my/news_details.php?nid=296&ntitle=Inadequate+protection+for+women#sthash.WB7eTFyd.dpuf) Site accessed on 5 August 2014.

<sup>14</sup> Philip N.S. Rumney, “When Rape isn’t Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape”, *Oxford Journal of Legal Studies*, 1999, Vol. 19, p. 252. He notes that “The assault may be triggered by what the offender experiences to be a challenge by a female or a threat from a male, something which undermines his sense of competency and self-esteem and activates unresolved feelings of inadequacy, insecurity and vulnerability. He attempts to restore his sense of power, control and worth through his sexual offense.”

The law as it stands as regards marital rape favours this treatment of women as objects and the abuse of power and dominance by the male husband, and does not protect the weaker wife. One could argue that the reason domestic violence laws are proposed in the first instance is to curb the expression of male dominance over females in the family unit through the use of power (which is now translated into its physical and non-physical aspects).<sup>15</sup> To argue in favour of maintaining the immunity for a rape offence within marriage, which is the primary method by which men in abusive marital relationships demonstrate their dominance, power, subjection and violation of the female, is to aid and abet the male offender in the victimisation of the female. Hence, to argue that Malaysia has domestic violence laws and then turn a blind eye to the offence of rape within marriage is to make a mockery of any law purporting to curb domestic violence.<sup>16</sup>

The Domestic Violence Act does not create any new offence so there is no special protection afforded to women in a domestic context. The offences fall back on the Penal Code existing offences of hurt, criminal force and assault.<sup>17</sup> As marital rape is not an offence, no protection is afforded to married women. They remain vulnerable, unprotected and deprived of the equal protection of law accorded to unmarried women.

It is submitted that rape within marriage is arguably an incident reflective of domestic violence, to which the current state of law chooses to turn a blind eye. In 2012, the Domestic Violence Act was amended<sup>18</sup> to include recognition under the inclusion of item (f) in the definition of domestic violence to include:

psychological abuse which includes emotional injury to the victim in addition to the pre-existing definition of fear of physical injury, causing physical injury or compelling the victim to engage by threat or force in any act, sexual or otherwise the victim has a right to abstain.

The amendment to recognise the dimension of violence in accordance with established Declarations<sup>19</sup> is welcomed. It is to be noted, however, that in the same Declaration marital rape is exemplified as violence against women.

However, the gap is that our current law does not recognise marital rape. Hence the victim (wife) here has no right to abstain and cannot have recourse to the remedy for psychological abuse given under the law if it is caused by marital rape. Marital rape needs to be outlawed in order to give effect to the remedy sought to be given to wives

<sup>15</sup> See, Domestic Violence (Amendment Act) Act 2012. Progress in protecting women rights has been slow-paced.

<sup>16</sup> It is to be noted s375A does not penalise the offence of rape within marriage but focuses instead on the use of force or threat by a married man in order to have sexual intercourse with his wife. It is argued that this does not address the offence of violation caused by the act of rape within the context discussed in s375 Penal Code.

<sup>17</sup> Nor Aini Bte Abdullah, "Domestic Violence Act: An end to a Nightmare?", *Malayan Law Journal*, 1995, pp. xli-xlv.

<sup>18</sup> See, The Domestic Violence (Amendment Act) Act 2012. It is to be noted that it took almost 20 years for domestic violence to be categorised as a seizable offence in order to give it due and proper attention by law enforcement.

<sup>19</sup> United Nations Declaration on Elimination of Violence Against Women Proclaimed by the General Assembly of United Nations 20 December 1993 Resolution 48/104 Article 1 includes physical, sexual or psychological harm in private life and article 2 exemplifies marital rape as violence against women.

under this amendment. At the moment what we have is just contradiction and a lack of effective remedy for married women because of the gaps in the law.

It would be untoward in this day in 2015 to overlook the physically, emotionally and psychologically abused state of a married rape victim whose offender is the husband.<sup>20</sup> According to research by Diana Russell, the impact of marital rape is more severe than stranger rape.<sup>21</sup>

When you are raped by a stranger you have to live with a frightening memory.  
When you are raped by your husband, you have to live with your rapist.<sup>22</sup>

Another point made by Rumney is that marital rape may, by its very nature, have a unique and devastating impact upon victims, precisely because of, and not despite, the relationship between victim and assailant. It is suggested the relationship is one of trust and confidence, the breach of which warrants more serious consideration. In fact the argument is that because of the relationship of trust, the more aggravating is the offence of marital rape and, in this regard, the related area of domestic violence. Hence protection against marital rape could be argued as a furtherance of the sanctity of the family unit.

That the impact of marital rape on the wife victim has serious consequences is supported by reference to the Working Paper of the Law Commission where it is noted that:

it is by no means necessarily the case that non-consensual intercourse between spouses has less serious consequences for the woman, or is physically less damaging or disturbing for her, than in the case of non-consensual intercourse with a stranger.<sup>23</sup>

The Commission also suggested that marital rape may be '*equally or even more, "grave" or serious as when the conduct takes place between non-spouses*' because it is an act

<sup>20</sup> N. Naffine, "Windows on the Legal Mind: The Evocation of Rape in Legal Writing" *Melbourne U.L.Rev.*, 1992, p. 767. commented on traditional legal thinking about the nature of rape and how the law should best deal with it depends on outmoded and contested images of women and their relations with men' and '[w]hile academic lawyers continue to analyse legal doctrine in a matter which excludes the insights of other disciplines (particular the feminisms, criminology, and the social sciences) . . . they will be poorly placed to understand the true complexity of the crimes they wish to dissect and analyse and more particularly what those crimes mean to the women affected.

<sup>21</sup> Diana H. Russell, *Rape in Marriage* 2nd ed. Indiana University Press, Bloomington, 1990. Russell found that out of a sample of 69 women 59% stated that they were 'extremely upset' by their experience of marital rape. Of 115 women in an earlier sample who were raped by strangers 61% stated that they were 'extremely upset'. Russell found that there was a significant difference in trauma related to the long-term effects of the assault: 52% of women raped by their husbands and 39% raped by strangers stated that they suffered 'great' long-term effects. Russell concluded that her findings argue strongly against the notion that wife rape is less traumatic than other forms of rape.

<sup>22</sup> Finkelhor and Yllo (1985) *License to Rape-Sexual Abuse of Wives* New York, The Free Press. Also noted were the betrayal, anger, humiliation, and guilt suffered by the victim and many other responses: aversion to sex, fear of being raped again, inability to trust, feelings of defilement and lack of self-esteem, which were partly brought on by the verbal abuse which accompanied many of the rapes.

<sup>23</sup> HSMO (1990) The Law Commission Working Paper No 116 *Rape within Marriage*, para 4.21.

'that has been or should have been his means of expressing his love for his wife'. In its final report the Commission reaffirmed this view concluding: '[marital rape] ought to be viewed by the criminal law on the same basis as extra-marital rape'. In so doing the Commission noted:

A number of respondents agreed that one reason why marital rape was as serious as, if not more so than, rape by a stranger was that it was an abuse of an act used to express love and an abuse of trust'.<sup>24</sup>

The Law Commission Working Paper rationalises the reason for there being a separate crime for rape and for that crime to be regarded as a serious violation:

Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe; the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this later should be underestimated because abortion would be usually available. That is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value.<sup>25</sup>

Another point made in Rumney's paper that is worth noting is the fact of denial of the violence inherent in rape based on a previous consensual sexual relationship. Rumney highlighted the point that such approaches are inherently illogical:

'[a rape] victim's vulnerability to psychological harm cannot be assessed by reference to her experience of an act which is essentially of a different nature to the one which constitutes that criminal act of rape. To argue otherwise would lead to the absurd result that any woman with an active sex life, married or not, in a relationship or not . . . is necessarily less traumatised by rape.'<sup>26</sup>

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<sup>24</sup> *Ibid.* para 4.17. It is to be noted also under the Malaysian Penal Code the abuse of position of trust in the commission of rape would warrant heavier penalties under aggravated rape.

<sup>25</sup> HSMO (1990) The Law Commission Working Paper No 116 *Rape within Marriage* p 49-50. See also HSMO (1990) The Law Commission Working Paper N0 113 *Rape within Marriage* p 127 referring to Warren Young, *Rape Study, A Discussion of Law and Practice* (1983) p 121 stating seven victims of marital rape were interviewed at length in this study. Although all had been living in violent relationships for a long period of time, they nonetheless experienced real and severe mental anguish, including feelings of terror, helplessness, shame and degradation.

<sup>26</sup> *Supra* n 14.



This phenomenon is women specific and applies also in Malaysia.<sup>27</sup> The Rape Report (2002) makes the following points<sup>28</sup> - (1) That a woman does not give up her right to decide if she consents to sex upon marriage; (2) That rape within marriage causes great continuous suffering to the victim given the fact the party is known and should be classified as a crime; and (3) A study conducted on domestic violence in 1989/1992 found that in 50% of cases of domestic violence the husband had used physical force during sexual intercourse.

Women who experience rape in marriage suffer severe physical and psychological trauma from the abuse, which is often repeated many times. The evidence of the impact of rape within marriage is also illustrated by the fact that in marital rape, there is the added element of betrayal and a breach of intimacy, in addition to the violence used. Research indicates that marital rape survivors are more likely to suffer multiple long lasting psychological injuries compared with rape by a stranger or acquaintance.<sup>29</sup>

Criminalising marital rape is also extremely important symbolically, as it demonstrates the government's and society's evolving respect for women and the need to protect women from all forms of violence. Eliminating the marital rape exception sends a clear signal that any rape within or outside a marriage is inherently wrong. It also demonstrates the level of commitment that exists in the elimination of violence against women in the domestic setting and the recognition of human rights in the person of a woman. Much has been devoted here to bring to the fore the fact that rape within a marriage occurs usually in an abusive and dysfunctional marital relationship for which there is a need for redress for the victim.

### III. SECTIONS 375 AND 375A PENAL CODE, ACT 574

Section 375 which defines the offence reads:

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

- (a) Against her will
- (b) Without her consent . . . .

<sup>27</sup> Brown Victoria Msian Activist call for marital rape to be recognized as rape. Asia News Network The Star 13 August 2013 where activists voiced the reality that rape is an act of violence. It is all about power and control. It is a sexual assault on the victim. Marital rape is a form of domestic abuse and often occurs with other forms of abuse.

<sup>28</sup> Lai Suat Yan, Maria Chin Abdullah, Ong Ju Lin, Wong Peck Lin (2002) Alina Rastam Ed An Overview of Rape in Malaysia AWAM, Strategic Info Research Development (SIRD). Also in Memorandum on Amendment to Law Relating to Rape (2003). AWAM's statistics show that in the years 2000 – 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse. Similarly a WAO National Research on Domestic Violence (1989–1992), Malaysia, showed that of the 60 battered women who sought help from five agencies, 50% of the cases also reported their husbands had used physical force during sexual intercourse.

<sup>29</sup> AWAM, Anti Rape Task Force (2003) Memorandum on Amendment to Law Relating to Rape (September 2003) Proposal for Amendments Coordinator All Women Action Society (AWAM) p11 cited the Center for Research on Partner Violence, www.wellesley.edu America for reference.

- (f) with her consent, when that consent is obtained by using his position of authority over her or because of a professional relationship or other relationship of trust in relation to her;<sup>30</sup>
- (g) with or without her consent, when she is under 16 years of age.

The exception to s375 reads:

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.

This is followed by explanations wherein a woman who has a judicial separation order or a decree nisi not made absolute or has obtained an injunction restraining her husband from having intercourse with her or a Muslim woman living separately from her husband during the period of *iddah* is not deemed to be his wife under this section.<sup>31</sup>

Additionally s 375A, which was inserted in 2006 reads:

Any husband, who during the subsistence of a valid marriage, causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to 5 years.

#### ***A. Need to Reform the Law – The Rationale for the Law No Longer Exists***

The current exception to s375 under the Penal Code is an inherited provision from an era where the UDHR and the recognition of women as human beings to be accorded rights had yet to penetrate the fabric and structure of a male dominated legal world shaped by male dominated bias.

The immunity given to a husband for marital rape is based on the concept of property, that when a woman enters into a marriage contract she consents to sexual intercourse and is unable to retract that consent.<sup>32</sup> This position has undergone a change due to the changing societal roles and power balance within the hierarchical social structure and more importantly due to the recognition that humans, irrespective of gender, are entitled to equal human rights and human dignity. This is what underlies the UDHR among other

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<sup>30</sup> Although this exception inserted in 2006 is targeted at medicine men, *sinseh*, *bomoh* or maid employers who may be in a position of authority or trust over women, but for the exception, this could be read to also include the husband.

<sup>31</sup> Note that the onus is placed upon the woman to get a court order to safeguard her rights to protect herself from involuntary sexual intercourse with her husband. Section 375B of the Indian Penal Code does not require a woman to get such an order but merely to live separately from her husband. A move more favorable to women than what currently exists in Malaysia.

<sup>32</sup> The History of the Pleas of the Crown (1800) at p. 629. See also *R v Clarke* [1949] 2 All ER 448 and *R v Miller* [1954] 2 All ER 529.

rights documents. When the case of *R v R (1991)*<sup>33</sup> was heard in the Court of Appeal Lord Lane CJ stated that:

a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

Lord Keith in the House of Lords noted that:

Hale's proposition reflected the state of affairs at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways . . . marriage in modern times [is] regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband'.<sup>34</sup>

The immunity for marital rape stands no longer in the country of its origin in light of societal development and the recognition of the rights of women but we slavishly follow a law that is behind its time.

This is not in line with the principles that exist today in our Constitution, the international and regional commitment to which Malaysia has subscribed to or to Islamic law as the following parts of this paper will serve to propose.

#### **IV. MALAYSIAN STATE RESPONSIBILITY IN THE INTERNATIONAL AND REGIONAL ARENA**

The Malaysian government has committed itself to promoting the empowerment of women and the elimination of violence against women. The following are listed as indications of its commitment:

- ratification of and accession with reservations to the Convention on Elimination of Discrimination Against Women (CEDAW) in 1995;
- constitutional Amendment to article 8 (2) of the Federal Constitution to prohibit discrimination based on gender;<sup>35</sup>
- endorsement of the Declaration on Elimination of Violence against Women in the ASEAN Region. This Declaration, signed by the ASEAN Foreign Affairs Ministers in June 2004, stresses the importance of regional cooperation to eliminate violence against women;
- as the chairman of the Non-aligned Movement (NAM), Malaysia undertook an initiative to include the concerns of women as part of the agenda of the Movement.

<sup>33</sup> *R v R* [1991] 2 All ER 257. In interpreting s1(1) Sexual Offences Amendment Act (1976) which defines rape as having "unlawful" sexual intercourse with a woman without her consent, the word unlawful was treated as a mere surplusage not meaning outside marriage as was the prior common law position, thus revamping the law to recognize women as rights holders and not mere chattels. See also *R v J* [1991] 1 All ER 759.

<sup>34</sup> *R v R* [1991] 4 All ER 481, pp. 483-4.

<sup>35</sup> Note also that article 8(1) also provides that all persons are equal before the law and entitled to the equal protection of the law.

The meeting endorsed the Putrajaya Declaration and the Programme of Action for the Advancement of Women in Member Countries of NAM. Among the outcomes of this meeting was the establishment of the NAM Centre for Gender and Development in Kuala Lumpur;

- the establishment of the Ministry of Family, Women and Community and the National Policy on Women 1989; the Second National Policy on Women and the Women's Development Action Plan in August 2009;
- on 8 November 2012, Malaysia adopted the ASEAN Human Rights Declaration (AHRD), which reaffirms the importance of ASEAN's efforts in promoting human rights, including the Declaration of the Advancement of Women in the ASEAN Region and the Declaration on the Elimination of Violence against Women in the ASEAN Region; and
- the third goal of the MDG of the United Nations which aims to promote gender equality and empower women.

The question posed by this paper is focused on whether, by condoning marital rape, Malaysia is in compliance with the spirit and form of its international, regional, constitutional and even Islamic obligations and commitment to protect women from violence and accord them human rights.

The common thrust to international and regional conventions is the founding doctrine in the parent document, the Universal Declaration of Human Rights wherein under article 1 the twin concepts of equality and non-discrimination are embedded. *All human beings are born free and equal in dignity and rights.*

Women's right to live free from violence is upheld by international documents such as the CEDAW especially through General Recommendations 12 and 19, and the 1993 United Nations Declaration on the Elimination of Violence against Women. In addition and in relation to these are the ASEAN and Putrajaya Declarations that affirm state responsibility to take affirmative action to protect and reform laws that violate human rights and discriminate and propagate violence against women and girls. Malaysia, in accession to CEDAW, made the following reservation:

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 9 (2), 16 (1) (a), 16 (1) (c), 16 (1) (f) and 16 (1) (g) of the aforesaid Convention.<sup>36</sup>

Article 16 is reproduced below:

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<sup>36</sup> Article 16(1)(f) deals with the right to guardianship and adoption and article 16(1)(g) the right to choose family name, profession and occupation. Art 9(2) refers to the granting of equal rights to women with respect to the nationality of their children.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution.

With reference to article 16(1)(c), the argument here is that the rights and responsibilities during marriage would not translate to the right to commit violence during the course of a marriage. This is supported by recognition of the need for and enactment of domestic violence laws. It will be seen in the following parts that marital rape is arguably in conflict with and contradicts constitutional liberties and Islamic principles.

To rely on article 16(1)(c) to argue that it allows a husband (whether Muslim or non-Muslim) to rape his wife as a marital right would not only demean women by maintaining a stronghold on the property theory, it would also propagate a narrow construction of Islamic principles. It is to be reflected whether or not such an argument is, in fact, made by vested interests to preserve the imbalances in a cultural setting that strives to favour the male. In fact the phrase same rights and responsibilities during marriage may be argued to mean that mutual consent for sexual intercourse is required during the course of a marriage.

The reservation should not be manipulated to advance an argument that seeks a backdoor exit from upholding the obligation of eliminating violence. Malaysia should not seek to justify upholding discriminatory laws against women in this context by simply asserting that Malaysian laws do not recognise marital rape. This is especially so when the Declaration of Elimination of Violence Against Women plainly states the State obligation to outlaw marital rape<sup>37</sup> and recognises marital rape as an offence and an act of violence against women:

#### Article 1

For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

#### Article 2

Violence against women shall be understood to encompass, but not be limited to, the following (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related

<sup>37</sup> See also article 7 of the United Nations Declaration on the Elimination of Discrimination against Women proclaimed by the General Assembly Resolution 2263 (XXII) of 7 November 1967 . See also article 2 (g) of the CEDAW.

violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

CEDAW has also recognised that discrimination against women also occurs when there is discrimination or a distinction made between married women and unmarried women which serves to impair their human rights and fundamental freedoms in any field.<sup>38</sup> The Convention imposes on State Parties to the Convention the obligation to agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women.<sup>39</sup>

Malaysia initiated the Putrajaya Declaration<sup>40</sup> which itself states in:

para 38. We hereby commit ourselves to: a) Review and amend all laws in order to identify and eliminate negative traditional and customary practices that discriminate against women; b) Establish appropriate national monitoring mechanisms for monitoring and evaluating implementation of measures taken to eliminate violence against women and girls.

The use of cultural difference as a rationale to justify inequality and discriminative treatment cannot be condoned or accepted as it will render naught the many Conventions listed previously to which Malaysia has been a party. It should be recalled here that the World Conference on Human Rights affirmed that:

while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>41</sup>

<sup>38</sup> CEDAW article 1 provides that “discrimination against women” shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>39</sup> CEDAW article 8 section 3.1.

<sup>40</sup> Putrajaya Declaration and Programme of Action on the advancement of women in member countries of the Non-Aligned Movement (NAM) 7-10 May 2005, Putrajaya, Malaysia [http://www.choike.org/nuevo/Putrajaya Declaration and Programme of Action on the advancement of women in member countries of the Non-Aligned Movement \(NAM\)](http://www.choike.org/nuevo/Putrajaya%20Declaration%20and%20Programme%20of%20Action%20on%20the%20advancement%20of%20women%20in%20member%20countries%20of%20the%20Non-Aligned%20Movement%20(NAM).htm) Retrieved 10 July 2014. See also ASEAN Declaration of Elimination of Discrimination Against Women in ASEAN recognized that violence against women both violates and impairs their human rights and fundamental freedoms, limits their access to and control of resources and activities, and impedes the full development of their potential. It goes on to declare and resolve inter alia to enact and, where necessary, reinforce or amend domestic legislation to prevent violence against women, to enhance the protection, healing, recovery and reintegration of victims/survivors, including measures to investigate, prosecute, punish and where appropriate rehabilitate perpetrators.

<sup>41</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action adopted on 25 June 1993, I, No. 5. See also Agreed conclusions on the elimination and prevention of all forms of violence against women and girls E/2013/27 Agreed conclusions adopted by the Commission are transmitted to the Economic and Social Council, in accordance with the Council resolution 2008/29 of 24 July 2008, as an input to the annual ministerial review and the development cooperation forum E/CN.6/2013/11.

A common theme of the Declaration and Convention and other instruments that spring therefrom, some of which are singled out above, is the history of male dominance, power imbalance and embedment of policies and law that favour men and oppress or discriminate against women.

Given the importance of CEDAW which is ratified and acceded to by Malaysia we reproduce for emphasis and highlight Articles 1, 2 and 5 therein. The point to be established here is that marital rape is exemplified as violence against women. Hence the need for a paradigm shift in social and cultural patterns regarding the status of women and the obligation to revamp policy and law, especially s375 and s375A which are in question here. CEDAW does not allow women to be deprived of their fundamental freedom and rights (arguably also under articles 5 and 8 of the Federal Constitution) by making a distinction based on their marital status. The effect is to make s375 and s375A contradictory to CEDAW, which Malaysia has ratified and acceded to.

Article 1 provides that:

discrimination against women shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 5 goes on to impose on the state the obligation to:

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>42</sup>

This quite extensive review of international and regional documents ends with a reference to the Report of the Working Group on the issue of discrimination against women in law. At the 26th Session of the Human Rights Council (April 2014) under item 136, states were called on to *eliminate all laws which discriminate against women by prescribing*

<sup>42</sup> See also article 2 CEDAW which states: State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the **equality of men and women in their national constitutions or other appropriate legislation** if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, **prohibiting all discrimination against women**; (c) To establish legal protection of the rights of women on an **equal basis with men** and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, **to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women**; (g) To repeal all national penal provisions which constitute discrimination against women.

*invasion of women's physical integrity and autonomy*.<sup>43</sup> Reference is also made to the UN Commission on Women wherein the Commission reaffirms the UN instruments on elimination of violence against women and reiterates that it is an essential precondition for the attainment of the MDG.<sup>44</sup>

The objectives of the Malaysian Policy on Women 2009 include the provision:

of a conducive environment, policy and legislation that are women friendly to increase the stature and wellbeing of women in all aspects physically, economically, socially, politically, health wise, psychologically and spiritually, recognising gender equality at all levels of the community in all sectors and in the domestic front strengthen the institution of marriage by recognising equal and just position of male and female.<sup>45</sup>

One cannot avoid asking whether it is equal and just to require a married woman to be subjected to sexual intercourse without her consent. It is in a dysfunctional and abusive relationship that a husband would commit rape against his wife in the context discussed earlier. There is no question of equality and justice in such situations where forced sexual intercourse is founded on an expression of power, dominance and control of the male husband over his female wife. Malaysia has a Plan for Action for the Development of Women comprising 13 sectors, one of which is the elimination of violence against women.

If there is no redress for marital rape under the laws of Malaysia, it is submitted that the transformation in spirit and form of all the instruments set forth above and also in the Policy on Women 2009 has yet to occur for Malaysian women. The jarring existence of the marital rape exception is a reflection that the championed change is in form only and solely a matter of rhetoric. It is not a change that is transformative or one that is in recognition of women's rights and the need for redress against violence.

## V. FEDERAL CONSTITUTION

Malaysia practices constitutional supremacy as stipulated under Article 4 of the Federal Constitution. As Lord President Suffian said in *Ah Thian v Government of Malaysia*<sup>46</sup>:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

<sup>43</sup> Human Rights Council Twenty-sixth session Agenda item 3 Report of the Working Group on the issue of discrimination against women in law and in practice A/HRC/26/39 1 April 2014 wherein it is reiterated that the due diligence standard for violence against women (VAW) is laid out in the Declaration on the Elimination of Violence against Women (1993) in article 4(c), where States are urged to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

<sup>44</sup> United Nations Commission on the Status of Women Fifty-Eight Session 10-21 March 2014.E/CN.6/2014/L.7

<sup>45</sup> <http://www.kpwkm.gov.my/dasar1>, accessed on 29 August 2014.

<sup>46</sup> *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.



In his paper *Human Rights and the Malaysian Judicial System*,<sup>47</sup> Court of Appeal Judge Justice Dato Abdul Malik Ishak also said that:

If a law is unconstitutional, the court should strike it out. And if an executive act is unlawful, the court should not hesitate to quash it. In my view, the legislature, the executive and the judiciary should act in accordance with the law.

In this section, the question of whether the provisions of s375 exception and explanation and s375(A) are contrary to articles 5 and 8 of the Federal Constitution will be examined.

It is important that we examine the Federal Court position regarding the approach to the construction of a fundamental right and a constitutional provision. Towards this end, we have as the main guide the outline set out by the Federal Court in the decision of *Lee Kwan Woh v PP*.<sup>48</sup> Firstly, as the supreme law of the land it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes, and judicial precedent plays a lesser role. Secondly, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. It is a unique document to be interpreted liberally and generally and not literally. It is said to be the duty of future generations of judges to give life to the abstract statements of fundamental rights.<sup>49</sup> In the case of *Badan Peguam Malaysia v Kerajaan Malaysia*<sup>50</sup> the court aptly puts it:

The long and short of it is that our Constitution – especially those articles in it that confer on our citizens the most cherished of human rights – must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

Thirdly, that the court when interpreting the other provisions of our Constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly referred to as “*the humanising and all pervading provisions of art 8(1)*”.<sup>51</sup> Fourthly, whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively.<sup>52</sup>

<sup>47</sup> Abdul Malik Ishak, “Human Rights and the Malaysian Judicial System”, *Malayan Law Journal*, 2009, Vol. 3, p. viii.

<sup>48</sup> *Lee Kwah Woh v PP* [2009] 5 CLJ 631 where the more restrictive approach in the case of *Government of Malaysia v Loh Wai Kong* was disapproved. See also *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 and *Badan Peguam Malaysia* [2008] 1 CLJ 521.

<sup>49</sup> *Lee Kwah Woh v PP* [2009] 5 CLJ 631 at p 640 cited with approval Lord Hoffman’s comment in *Boyce v Queen* [2004] UKPC 32.

<sup>50</sup> *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521 in the judgment of Hashim Yusoff FCJ approved, inter alia, the cited passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19.

<sup>51</sup> Ibid the Federal Court in the majority judgment of Hashim Yusoff FCJ also accepted and applied the following statement of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* - “When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art 8(1). That article guarantees fairness of all forms of state action”

<sup>52</sup> See the approach of court as the custodian and guardian of rights as stated in the case of *Prince Pinder v The Queen* [2002] UKPC 46 quoted with approval in *Lee Wan Woh v PP* [2005] 5 CLJ 631 at p 642.

In addition to the above, the need to construe the rights so as to be compliant with the provision of CEDAW is demonstrated in the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors*. The court dealt with the issue of whether the refusal to employ a woman on the grounds of her pregnancy alone is a form of gender discrimination and thus unconstitutional under Article 8 of the Federal Constitution. The High Court Judge referred to CEDAW in clarifying the term “equality” and the concept of gender discrimination under article 8 of the Federal Constitution.<sup>53</sup>

It was held that CEDAW is not a mere declaration but that it has the force of law and is binding on member states. The Attorney General decided not to pursue the appeal against the above decision hence acknowledging the binding force of CEDAW. Hence in construing our Federal Constitution, the need for and importance of being compliant with CEDAW and the provisions therein is affirmed.

#### A. Article 8 Federal Constitution

The case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Awam*, characterised article 8(1) as “...all-pervading in effect...” that “...strike at arbitrariness in a state action and ensures fairness and equality of treatment...”<sup>54</sup> Article 8 (1) declares that *all persons are equal before the law and entitled to equal protection of the law*.<sup>55</sup>

Article 8 (2) provides:

that except as expressly authorised by the Constitution, there shall be no discrimination against citizens<sup>56</sup> on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.<sup>57</sup>

Equality is a dynamic concept with many aspects and dimensions and it may not be imprisoned within traditional and doctrinaire limits.<sup>58</sup> This we need to be reminded of in light of the recent developments in favour of women (and human) rights in order to move and shape the law accordingly.

Article 8 of the Federal Constitution, on the face of it, the terms equal before the law and equal protection of the law may seem similar but they do have different connotations. Whilst equality before the law is a more negative concept that implies that no special privileges are to be accorded and that there is equal subjection of all to ordinary law, equal protection is more positive in that it implies equality of treatment in equal circumstances.<sup>59</sup>

<sup>53</sup> *Noorfadilla Bt. Ahmad Saikin v Chayed bin Basirun & Ors* [2012]1 MLJ 832 See also United Nations Human Rights Council Working Group on the Universal Periodic Review Seventeenth session Geneva, 21 October–1 November 2013 Malaysia National Report A/HRC/WG.6/17/MYS/1 6 August 2013.

<sup>54</sup> *Tan Tek Seng v Suruhanjaya Perkhidmatan Awam* [1996] 1 MLJ 261.

<sup>55</sup> Protection given to all persons irrespective of citizenship.

<sup>56</sup> Protection under the clause as provided only available to citizens.

<sup>57</sup> Provision on gender inserted in the 2001 amendment to Federal Constitution.

<sup>58</sup> *Maneka Gandhi v Union of India* AIR 1951 SC 41.

<sup>59</sup> Durga Das Basu (1994) *Introduction to the Constitution of India* 16th ed., Prentice Hall of India New Delhi, p.87.

The equal circumstances here refers to the right of every woman whether married or not to consent to sexual intercourse.<sup>60</sup> This is because the rationale of married women as the property of her husband which underlies the marital rape exemption can no longer be argued to provide support to justify an unequal circumstances argument.

The fact that we have a law in the guise of the s375 exception and s375A of the Penal Code that discriminates between married and unmarried women's rights and that provides a married woman with a lower level of protection of the law may be argued to run counter to article 8(1) where the argument is that every woman is to be given equal protection of the law. This is particularly so as rape is considered a violent offence against women under the Penal Code.<sup>61</sup>

The contention to be advanced here is that the exception to ss375 and 375A is contrary to articles 5 and 8 of the Federal Constitution. Further, the argument is that it is in violation of articles 1 and 2(d) of the CEDAW, since it discriminates on what would constitute an offence based on the marital status of women. The end effect is to nullify by reason of marriage the existing protection against rape given to women. The Penal Code provisions are also not in line with articles 2(e) to (g) of the CEDAW. Our courts should construe the provision of our Constitution so that it is in tandem with and as far as possible complies with international conventions to which Malaysia is a party.<sup>62</sup>

As the point under consideration here is the crime of rape, which is a public and criminal offence, the listed exceptions to article 8 do not apply.<sup>63</sup> The Penal Code is a written public law that comes under the description of "any law" and thus is subject to the challenge that the provisions contested herein violate article 8 of the Federal Constitution.

Article 8 consists of aspects of equal treatment, equal protection and prohibition against discrimination. The argument is that the exception to s375 violates all three aspects in that rape offenders (who commit sexual intercourse without consent) are not treated equally, women are not protected equally and women and men are discriminated against based on whether they are married or not. A married woman is discriminated against unfavourably since her consent to have sex with her husband is lost by reason of marriage. This runs counter to article 2 of the CEDAW mentioned previously where women are not to be discriminated against based on marital status. At the same time married men are discriminated against favourably in relation to unmarried man when they

<sup>60</sup> CEDAW, Article 1 provides "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>61</sup> Section 376 of the Penal Code provides for a punishment of up to 20 years and whipping. Aggravated rape as defined under s376 (2) carries the punishment of a term not less than 5 years and not more than 30 years and whipping.

<sup>62</sup> *Supra* n 54.

<sup>63</sup> Shad Saleem Faruqi, *Document of Destiny The Constitution of the Federation of Malaysia*, Star Publications (Malaysia) Bhd, 2008, p. 267. The exceptions as listed under Article 8 (5) do not invalidate or prohibit the existence of separate personal laws for different communities, religious institutions and offices reserved for persons professing that religion, protective discrimination may be resorted to in favor of the aborigines of Malay Peninsula, residence in a State may be required for the election or appointment of an authority in that State. The Malay regiment can be restricted to Malays.

have sexual intercourse with their wives without their consent under s375. An unmarried man is also discriminated against unfavourably with a charge of aggravated rape under s376 whereas a married man is chargeable under a lesser offence under s375A if the victim is his wife.<sup>64</sup> There is sexual intercourse (without consent) under s375A but the emphasis is on the offence of hurt and fear of death and not rape.<sup>65</sup>

It may be argued that the offence of sexual intercourse committed under the threat of hurt or fear of death by a husband provided under s375A does not equally protect women against the offence of rape as the elements of offence for a rape and the elements for an offence under s375A differ. Hence there is no equal protection before the law for women irrespective of their marital status. It has also been argued that the section does not offer any additional remedy to the aggrieved party as the offence of hurt and criminal intimidation already exist under the Penal Code. As the law stands, there is discrimination and unequal treatment in favour of married man and unmarried women. The discrimination is based on marital status, which CEDAW and article 8 of the Federal Constitution prohibit, as highlighted previously.

Professor Glanville Williams in his article *Rape is Rape*, contrary to its title, suggests that husbands who rape should be treated differently from a stranger who rapes and a different offence be coined.<sup>66</sup> Citing the exception of provocation (where the offender is deprived of self-control by grave and sudden provocation to cause the death of the person who provoked) which reduces murder to culpable homicide, he also argues that there is a good reason for giving a first offence of rape within a marriage some other legal name than rape suggesting assault rather than rape. One can only speculate if this trend of thought influenced the thinking and policy behind the amendment introducing s375A of the Penal Code in 2006. With this assumption in mind, we devote some time and space to review the justifications offered by Professor Glanville Williams.

Rape (excluding marital rape) and murder and culpable homicide are offences under the Penal Code. The criteria for the offence are not the same. Rape as discussed in this paper focuses on the absence of consent of the victim. Murder focuses on the intent or the lack of it through loss of control (going to mens rea) to support a provocation defence to qualify for the reduction of a murder charge to manslaughter. Rape is not a fault attributed to the victim unlike the provocation defence.<sup>67</sup> It is a show of dominance and power by a husband and is usually an intentional exercise of this power to violate the physical integrity of the body of the wife without her consent knowing the wife is

<sup>64</sup> The punishment for rape is aggravated and attracts enhanced punishment when under s376 (a) at the time of or immediately before or after the commencement of the offence it causes hurt to her or to any person or (b) at the time of or immediately before or after the commencement of the offence it causes to put her in fear of death or hurt to herself or to another person. Another line of argument is whether it is defensible to have a law wherein the offence committed is not determined by the elements of the offence but by the relationship between the offender and the victim to the extent it mitigates the offence as opposed to enhancing or aggravating the offence. This is in effect the outcome of Section 375(A).

<sup>65</sup> Section 375A Penal Code does not require consent of the woman but require the woman to be hurt or put in fear of death to herself or another person and the penalty is a maximum 5 years.

<sup>66</sup> Glanville Williams, "Rape is Rape", *New Law Journal* 1992, Vol. 10.

<sup>67</sup> Note that even a provocation defence under Section 299 of the Penal Code is subject to three different provisos and consideration of whether the provocation in itself is sufficient to warrant a reduction of the offence.

powerless (since no remedies exist under the law) to complain. In an abusive relationship this may be a repeated event meant not only to derive power over the weaker party but to do so in all aspects, emotionally, physically and psychologically as discussed previously.

The need for consent for marital sex comes from the recognition that fundamental freedom and human rights are not nullified by marriage under CEDAW. Section 375A of the Penal Code does not recognise marital rape as an offence. It creates a different charge focusing on the conduct of the offender by requiring different elements of criminal intimidation as opposed to rape under s375. What is recognised as an offence against women is just of import as it demonstrates how the law serves to treat women and expects men to treat women.

Perhaps preferable to the alternative of s375A is the recognition of rape within marriage as a crime with provisions to cover a mitigation plea by the accused, an impact statement and the wishes of the victim wife. Equality of treatment as expounded by Jennings is that:

Equality before the law means that among equals the law should be equal and should be equally administered that like should be treated alike... The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence.<sup>68</sup>

The contention here is that all women are equal regardless of their marital status and have the same rights before and after marriage. Marriage does not extinguish the fundamental freedoms and rights of the woman. If a husband can be charged for assault and battery against his wife then why not rape? There is no equality before the law (among women) if just by reason of marriage a woman loses her right to cry rape. The equal circumstance here is the need for a wife to consent to sexual intercourse. It is in the interests of gender equality, among other reasons, that this consent requirement remains even after marriage.

The issue raised here does not only touch on discrimination, favourable treatment and unequal protection but also touches on the issue of the personal physical integrity and dignity of the individual woman which is protected under Article 5 of the Federal Constitution, to be covered shortly.

To satisfy the test of reasonableness of differentiation of persons, in the words of Mohamed Azmi SCJ in *Malaysian Bar v Government of Malaysia*,<sup>69</sup> the classification must (i) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (ii) the differentia selected must have a rational relation to the object sought to be achieved by the law in question.

In the case of *Sivarasiah v Badan Peguam Malaysia*, the Federal Court also included the justifiability of the infringement, which requires us to weigh the reasonableness of why

<sup>68</sup> Ivor Jennings, *The Law and the Constitution* 5th ed, University of London Press, London, 1959, p. 50. See also Durga Das Basu *Shorter Constitution of India* 13th ed., Wadhwa and Company Law Publishers, Agra Nagpur New Delhi India, 2002.

<sup>69</sup> [1987] 2 MLJ 165.

a right should be subjected to infringement and allow the court to review the objective rationale and proportionality of the state action. The court said:

In other words, all forms of state action, whether legislative or executive that infringe a fundamental right must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

The question is whether the doctrine can save s375 exception and explanations and s375A in these current times. There have been other reasons and rationales put forward to maintain the notion of marital rape including: marital rape is less serious than other types of rape; extending the law of rape to married couples would undermine the institution of marriage; it would encroach upon marital privacy and hinder reconciliation, it would give vindictive wives the opportunity to make false allegations of rape; and rape within marriage would be very difficult to prove. These have been negated. Hence it is also the argument that the rationales given here would be weak support for an argument advancing reasonable classification to save s375 and s375A of the Penal Code from being unconstitutional.<sup>70</sup>

The contention here is that there are no possible intelligible criteria that could be used to argue for allowing discrimination between married women and unmarried women and in effect relieve married women of their rights to claim rape after marriage. The chattel theory on which the exception was founded has since been discarded as being unsound. Marital rape is now a crime in the country of origin. The effect of the provision is that it manifests inequality among the offenders when it legitimises differential treatment of rape offenders based on their relationship to the victim. What rationale or objective could be of so great import that it may be used to argue successfully in justifying the denial of a married woman's right to consent to the use of her body which she had prior to marriage and the equal protection of the law accorded to unmarried women. This is particularly so when rights in terms of other forms of trespass to a person are maintained. Here the issue of a conjoined fundamental liberty under Article 5 and 8 is raised. It is submitted that the discarded chattel theory cannot be relied upon by Malaysia since it contradicts Malaysia's avowed quest for gender equality, the Federal Constitution and CEDAW provisions, as referred to previously.

If Malaysia maintains the exception and explanations in s375 and s375A then no matter what arguments are drummed up in their support, they would be seeking to justify it by treating married women as inferior and conceding to the notion that married women are chattels and the property of men. It is unfair and unreasonable to maintain a law that gives a married man a legal license to violate a married woman's physical being without her consent.<sup>71</sup> The question also to be addressed is whether gender equality under Article

<sup>70</sup> HSMO (1990) The Law Commission Working Paper No 116 *Rape within Marriage* Part 1V Para 4.26- 4.65. It considered the points raised but found them wanting. See also similar findings by Philip N.S. Rumney *supra* n 14.

8 also equates with the need for both parties to consent to sexual intercourse irrespective of marriage.

The doctrine of reasonableness is a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constitutes a denial of equality. Where the classification is not reasonable and is impugned then the action is unconstitutional. It is the argument here that the classification of legitimizing rape within marriage is not reasonable, rational nor proportionate as it serves as discussed above to violate the protections afforded under articles 5 and 8 of our Federal Constitution. It is proposed that the existence of s375 and s375A offends article 8 of the Federal Constitution.

In *Mithu v State of Punjab*,<sup>72</sup> the Supreme Court of India struck down the punishment for murder by a life convict under the Indian Penal Code (s303) as being unconstitutional on the grounds that the classification between persons who commit murder whilst under a sentence of imprisonment and those who commit murder while they are not under a sentence of life imprisonment sentence for the purpose of making the death sentence mandatory in the former case and optional in the latter case was not based on any rational principle.

In the case of *People v Liberta*,<sup>73</sup> the New York Court of Appeal held that the New York rape statute by protecting married men from rape while exposing unmarried and separated men to liability under the same act violated the equal protection clause of the 14<sup>th</sup> amendment to the United States Constitution. It was held that there was no rational basis for distinguishing marital rape and non-marital rape and the statute was held to be unconstitutional. The UDHR and the fundamental liberties embedded in our constitution are universal values applicable to all humans.

It is submitted that equality between the sexes is included in the equality “*in dignity and rights*” of all human beings declared by article I of the UDHR. Article 2 of the Declaration specifically states that all persons without distinction of sex are entitled to the human rights set forth therein. We need to look again to see if our current embodiment of the laws under s375 exception and explanations and s375A offends and violates the stand for women that our nation has undertaken to protect and uphold under the Federal Constitution, CEDAW, other international, regional instruments and Islamic principles or whether we are mired in a cultural mindset where our vision may be impaired.

## ***B. Article 5 of the Federal Constitution***

Article 5, Liberty of the person reads:

- (1) No person shall be deprived of his life or personal liberty save in accordance with law.

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<sup>71</sup> United Nations Declaration of Elimination of Violence Against Women on marital rape being a violent act against women and CEDAW where there is an obligation not to discriminate based on marital status.

<sup>72</sup> AIR 1981 SC 1829.

<sup>73</sup> 74 N.E. 2d 567 (N.Y.1984).

Any person here refers to both citizens and non-citizens and may include artificial legal personalities. As read the right is not an absolute right but a qualified right to be subject to deprivation under a just law. The qualification as argued here must also comply with the living spirit of article 8 on equality.

The concept of life here does not refer just to mere existence and the phrase deprived of life should be construed to refer to the case of death only. It has been argued to include “something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by an arm or leg”.<sup>74</sup>

It is argued here that it also extends to any violation of the physical integrity or the use of the body of a woman without her consent. According to Shad Saleem Faruqi, it covers the right to live with human dignity.<sup>75</sup> The idea of dignity becomes important if the complaint is about the living conditions of a violent or abusive home front. Does it offend human dignity if a woman does not have a say as to the use and control over her own body irrespective of her marital, employment or social status or standing in society?

The right to life in Malaysia has included right to livelihood, right to a reasonable healthy and pollution free environment and the right to reputation.<sup>76</sup> Does it arguably also include a married woman’s right to decide as to the use of her body in the act of sexual intercourse?

It is to be acknowledged that only the very severe cases of marital rape see the doors of the police station as most women are protective of their family life and only in severe abuse cases is this course of action even contemplated. To back this up, we refer to the report cited earlier that only 10 % of rape cases are even reported.

The question to be addressed here is whether the right to personal liberty includes the right of a married woman to consent to sexual intercourse with her husband. According to Shad Saleem Faruqi citing the case of *Government v Loh Wai Kong*<sup>77</sup> personal liberty means liberty relating to or concerning the body of the individual. Further it means more than a right not to be subjected to unlawful arrest, imprisonment or other physical coercion. According to Tan and Lin Ann, this right extends not only to the freedom of expression or religion but also to the right to equal opportunity, the right to privacy and even the right to procreate.<sup>78</sup> The further argument here is that a wife who is raped is deprived of her right to choose to procreate as her consent is irrelevant for sexual intercourse. It can be seen that personal liberty has evolved from one’s physical state to other dimensions<sup>79</sup> yet here the contention is not about expanding but merely reinforcing the liberty of choice of a married woman regarding the use of her physical body and the extended right to choose to procreate.

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<sup>74</sup> Durga Das Basu (1965) *Commentary on the Constitution of India*, 5<sup>th</sup> ed., Sarkar & Sons (Pvt) Ltd, Calcutta, p.79.

<sup>75</sup> Shad Saleem, *supra* n 63, p.206.

<sup>76</sup> *Ibid.* p. 207.

<sup>77</sup> *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33.

<sup>78</sup> Kevin YL Tan, et.al., *Constitutional Law in Malaysia and Singapore*, Butterworth, 1997, p.529.

<sup>79</sup> In *Re JG, JG v Pengarah Jabatan Pendaftaran* (2006) the right was fluidly extended to cover a person’s right to change the reference to her gender in the Mykad after undergoing a sex change operation.



It is the contention that a married woman's right to consent to sexual intercourse is within the realms of the right to life and personal liberty guarantee under Article 5. We are then posed with the question of whether or not married women have been deprived of this right in accordance with the law under s375 and s375A. The scope of law referred to here has been construed to include both substantive and procedural law and further that the law refers not just to *lex* (valid law no matter how unjust) but to *jus* and *recht* (i.e. a law that is just and right). It is the contention of this paper that ss375 and 375A are unjust and unfair laws. The tie-up of articles 5 and 8 is aptly demonstrated by the following passage from *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*<sup>80</sup>

It is clear from the authorities thus far discussed that "in accordance with law" in art 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be. The question whether an enacted law is arbitrary must be decided upon settled principles that govern the right in Parliament to pass discriminatory laws. So long as the law does not produce any unfair discrimination it must be upheld. This is the effect of the equality limb of art 8(1). And it is here that a discussion of that article becomes necessary. If s 46A passes the test of fairness as housed in the equality clause then it is a fair law and therefore is a valid law for the purposes of art 5(1).

Hence it is the contention here that there is no reason to pass or justify the existence of discriminatory laws that favour married men over unmarried men and favour unmarried women over married women and do not equally protect married women. It is not only unfair, unjust and arbitrary it is also in contravention of the Federal Constitution, CEDAW and the human rights instruments discussed herein and is hence unconstitutional.

It is suggested that the exception and explanations of s375 and s375A do not pass muster under articles 5 and 8 to be maintained as a valid law.

### ***C. Jurisdiction of the Federal Government to Legislate on Marital Rape***

This point needs to be addressed to put to rest the possible argument questioning the jurisdiction of the Federal Government to legislate on this issue. We note firstly that rape is an existing offence under the Penal Code. It is in the nature of a public law applicable to all citizens of Malaysia notwithstanding their religion. On the issue of jurisdiction to legislate on the offence, we turn to the Legislative List under the Ninth Schedule of the Federal Constitution and articles 74 and 77 of the Federal Constitution. In the Federal List the matters enumerated include defence, internal security and so on. Item 4 is reproduced:

4. Civil and criminal law and procedure and the administration of justice including-
  - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;

<sup>80</sup> [2010] 3 CLJ 507, although in this case the discrimination was held to be valid as it did not impede the livelihood of the member and the need for a nonpolitical Bar.

- (k) Ascertainment of Islamic law and other personal laws for the purposes of federal law.

The jurisdiction of the Federal Parliament to make laws on this matter is clear and explicit. In the Federal Court decision *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*<sup>81</sup> FCJ Abdul Hamid Mohammad FCJ puts it succinctly:

Criminal law is a federal matter – item 4. However the State Legislatures are given power to make law for the ‘creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List-item 1 of State List. The two qualifications at the end of the sentence (i.e. ‘against the precepts of that religion’ and ‘except in regard to matters included in the Federal List’) limit the offences that can be created by a State legislature. So where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception ‘except in regard to matters included on the Federal List’ i.e. criminal law? To me, the answer to that last –mentioned question is obviously in the affirmative.

Furthermore, article 75 provides:

If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

## VI. ISLAMIC PERSPECTIVES OF VIOLENCE AGAINST WOMEN AND RAPE WITHIN MARRIAGE

Many detractors of gender equality and those who oppose change and the recognition accorded to women as human beings with rights and fundamental freedoms have resorted to cultural or religious arguments to resist the changes that are necessary to manifest the rights to be accorded to women. This stance has been responded to under the Memorandum of Law Related to Rape as quoted below.

In the Quran and in the Sunnah, it is very clear that sexual relations has its place and are part of nature, decided by Allah for the continuation of the human species. The aspect of fun and pleasure is mentioned in the Sunnah. According to al-Ghazali, in his writings on the ethics of sexual relations, intimate physical relationship should not come suddenly, but that the way should be paved until the husband and wife are stimulated. It is very clear from this that sex is necessarily meant to be sex with mutual consent and mutual will; These elements are clearly absent in forced sex/marital rape where the husband does not seek the consent of his wife on the sexual act. Wives are often humiliated, abused and no ethics are observed. Islam does not allow wives to be treated this way and in fact abhors any form of violence towards women. Under Syariah law, it is a matrimonial offence for

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<sup>81</sup> [2007] 5 MLJ 101, p.113.

the husband to be cruel to his wife. Forced sex reasonably constitutes an act of cruelty. This is detailed in Sections 127 & 128 of the Islamic Family Law Act (Federal Territory) (1984). Can a Muslim husband force sex on his wife? We stress that rape is rape, even if it is by the husband. In the spirit of mutual consent and consultation, there cannot be forced sex. There are ethics in sexual relation in Islam and mutual wish and desire must be present. According to al-Ghazali, sexual relations is a contract, and therefore it should not happen except through mutual agreement. Therefore, the recognition of marital rape would not be in contradiction to the spirit of Islam in marital relations.<sup>82</sup>

Some may argue that a wife is more likely to consent to avoid being divorced by the husband or because she is in a relationship where she feels obliged to consent and hence the occurrence of rape (sexual intercourse without consent) would be negligible within an Islamic context.<sup>83</sup> Hence we are focusing here on those incidents where there is no free consent of the wife. This is when there are issues of abuse, dominance and oppression of the wife such that the husband forces himself on her in the conduct of sexual intercourse without her consent. Ali Jarishah substantiates the concepts of freedom, right to justice, family life as follows:<sup>84</sup>

The concept of freedom being sacred is reflected in the saying of Umar r.a. *Betapa kamu boleh memperhambakan manusia sedangkan ibu mereka melahirkan mereka dalam kebebasan*<sup>85</sup>.

The concept of equality is also seen in Prophet Muhammad [p. b. u. h] saying that—*“sekalian kamu keturunan Adam, Adam pula daripada tanah...”* All of you are of Adam’s descendant; Adam in turn is from the soil. The right to justice is available to all equally in the saying of Prophet Muhammad [p. b. u. h]:

*Seseorang itu mesti menolong saudaranya sama ada yang menzalimi atau dizalimi. Kalau zalim ia mencegahinya atau kalau kena zalim, ia menolongnya. Hadith riwayat al – Shaikhan dan Turmuzi*<sup>86</sup>

In the context of non-violent family life it is said that both partners in a marriage have the right to be respected and valued emotionally in a situation of love and affection.

*Diantara tanda- tandanya (Allah) ialah menjadikan pasangan suami isteri supaya kamu bertenang kepadanya. Dia menjadikan kasihsayang di kalangan kamu. (Surah Al Rum Ayat 21)*

<sup>82</sup> AWAM Anti Rape Task Force (2003) *Memorandum on Laws Related to Rape (September 2003) Proposal for Amendments*.

<sup>83</sup> Ahmad Fadhli, *Obedient Wives can’t See Rape in Marriage*, 12 July 2012, Movement for Change Sarawak (MoCS) <http://mocsarawak.wordpress.com>, accessed on 27 July 2014.

<sup>84</sup> Ali Jarishah, *Kehormatan Hak – Hak Manusia Menurut Islam (Satu Kajian Perbandingan)*, Dewan Bahasa dan Pustaka, 1992, p. 60.

<sup>85</sup> Translation: How can you enslave humans when their mothers birthed them in freedom.

<sup>86</sup> Translation: A person must assist his brethren whether the oppressor or the oppressed. If the oppressor to prevent or if oppressed to assist.

Amina Wadud argues that in the Qur'an, the male and the female are a contingent pair that function co-dependently on each other on a physical, social and moral level. Man is intended as a comfort to woman; woman is intended as a comfort to man.<sup>87</sup> She further quotes Sayyid Qutb:

The man and the woman are both from Allah's creation and Allah ... never intends to oppress anyone from His creation<sup>88</sup>

On the point of disruption of marital harmony Amina refers to:

Within marriage there should be harmony (4.128) mutually built with love and mercy (30.21). The marriage tie is considered a protection for both the male and the female: "They (feminine) are raiment for you (masculine plural) and you are raiment for them". (2.187)

However in cases of marital discord the answer does not lie in violence.

So good women are qanitat, guarding in secret that which Allah has guarded. As for those from whom your fear (nushuz) admonish them, banish them to beds apart, and scourge them. Then, if they obey you, seek not a way against them. (al Quran .Al – Nisa 4.34).

Amina argues that Sayyid Qutb explains nushuz not as disobedience of the husband but a state of disorder between a married couple.<sup>89</sup> The solution suggested is a verbal solution whether between husband and wife (Al Quran Al – Nisa 4.34) or between husband and wife with the helper of arbiters (as in 4:35, 128) failing which a separation and in extreme cases the scourging. Further the scourging cannot be such as to create conjugal violence or a struggle between the couple because that is "unislamic". She also refers to the fact that men who strike in cases of domestic violence (and rape) cannot seek assistance from this passage as the goal of these men is not harmony, to which the passage alludes, but harm and oppression.

The alternative argument that a woman can refuse to have sex with her husband is reflected in the fact that the man (and equally a woman) can seek a divorce from his wife on the grounds of *fasakh* - not having sexual intercourse without a reasonable excuse for a period of one year.<sup>90</sup>

<sup>87</sup> "... among his signs is this; that He created azwaj for you from your own anfas so that you may find rest in them (30:21) and "O mankind ! Be careful of your duty to your Lord Who created you from a single nafs and from it created it zawj and from that pair spread abroad [over the earth] a multitude of men and women" (4:1); see Amina Wadud, *Quran and Women* Kuala Lumpur, Fajar Bakti, 1992, at pp. 72-78.

<sup>88</sup> See, Sayyid Qutb, *Fi Zilal al Quran*, 6 Vol. (Cairo: Dar al – Shuruq, 1980), Vol 11 p.650.

<sup>89</sup> Qutb Vol. 11, p. 653.

<sup>90</sup> Ahmad Hidayat Buang, ed., *Undang – Undang Islam di Malaysia Prinsip dan Amalan*, Penerbitan Universiti Malaya, 2007.

The status of woman under Islamic law as seen in the case of *Chulas and Kachee v Kolson binte Seydoo Malim*<sup>91</sup> was more advanced even in the year of 1867. The issue in this case was whether a Muslim married women was under any disability to bind herself in contract. Sir P.B. Maxwell Recorder made the observation that the rule of English law that vests in the husband various rights in the property of his wife was not applicable to a Mohammedan marriage. He notes:

The Mohammedan woman's contract is wholly different ...her right of property and her powers of contract are unaffected by marriage ; under the Mohamedan law she remains in this respect like an English femme sole... The incapacity to contract which affects a married women at common law is founded on the fiction that she and her husband are one person.

Sexual intercourse between consenting spouses does not entail abuse, violence and force. Rape on the other hand occurs where consent is absent and often, coercion (both physical and mental) prevails. One must consider to what extent a spouse can claim conjugal rights. In terms of conjugal rights, while some may argue that sexual intercourse between husband and wife - *jima* - is a religious duty and that the wife must submit, others have argued that the husband should perform *jima* with *adab* (courtesy). All religions value human dignity and life. None of them condone the use of force or cruelty in a marriage, however narrow interpretations of religious texts have often been used to justify the oppression of women.<sup>92</sup>

It is difficult to imagine a context where any right-minded, faithful and religious Muslim (or member of any religion for that matter) can defend marital rape, from the context of violence and violation that we have examined in this paper, as being acceptable to the Islamic religion (or any religion). It is not *Islamic*.<sup>93</sup>

## VII. CONCLUSION AND RECOMMENDATION

There is a need to reform the bias in law caused by imbalances of power based on male dominance. The recognition of every person's human dignity in all international documents and Malaysia's Federal Constitution speak to the bodily integrity of an individual, human rights and the recognition of gender equality. There is a need to remove the legal shackles and discrimination that are based upon the cultural and societal stereotypes promoting male power dominance of a bygone era which regarded women as property. Given Malaysia's Policy on Women promotes gender equality in the private sphere, surely then it follows that the consent of married women to sexual intercourse in the marital context cannot be negated.

Even if Islamic law is interpreted in a very limited and narrow context to say women must submit to their husbands in the matter of sexual intercourse it is a situation where

<sup>91</sup> *Chulas and Kachee v Kolson binte Seydoo Malim* [1867] Leic 462.

<sup>92</sup> Excerpt from Devaraj Prema, *Supra* n 4.

<sup>93</sup> Yasmin Masidi, *Are Muslim Men Allowed to Beat their Wives*, Sisters in Islam, Selangor, Malaysia, 2009.

there is arguably consent, hence the application of s375 and 375A does not apply. In fact applying the argument that cruelty and violence is not permitted against a wife as seen earlier under Islamic law Enactments and in the Penal Code provisions that apply to all alike, there is no reason to maintain the current law that legitimises marital rape.

There is an outstanding commitment by and entrustment to member states under international instruments and the Federal Constitution regarding the need to not discriminate between women, married or unmarried, and to outlaw marital rape so as to protect women from violence in the home by upholding their human rights and dignity. To meet this commitment requires a change in the mindset of policy makers and empathy for the marginalised and unprotected married women under our laws especially in domestic violence context. It boils down to who is protected - the oppressor or the oppressed.

Oliver Wendell Homes' words best reflect the situation we are in now, where a law that is no longer a just law remains intact and becomes unjust and oppressive due to our inability to see the need to change an outdated legislation.

It is revolting . . . if the grounds upon which [a rule of law] was laid down have vanished . . . and the rule simply persists from the blind imitation of the past.

Reference is made to *Government of Malaysia v Lim Kit Siang*<sup>94</sup> on the public defender role of the Attorney General where Salleh Abas LP had this to say:

Our system requires the public to trust the impartiality and fair-mindedness of the Attorney-General.

Malaysia should review whether the time has come<sup>95</sup> to make the necessary change, and to quote our current Prime Minister:

Sometimes inadvertently over the years we have lived with gender-biased laws and we don't realise that they discriminate against women. We will make a thorough review of laws with elements of discrimination against women<sup>96</sup>

It is the contention that the s375, exception and explanations and s375A, as they stand, are in conflict with the Federal Constitution, Malaysia state responsibilities under international and regional human rights instruments, and Islamic principles. It is thus subject to the challenge of unconstitutionality and is liable to be struck out. Hence the recommendation is as follows: That the Penal Code be amended by deleting the exception and explanations to s375 and s375A.

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<sup>94</sup> *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

<sup>95</sup> *Supra* n 6, for countries that have outlawed marital rape.

<sup>96</sup> Salleh Buang, *In the Service of the Law Simplicity and Greatness Tun Suffian Legacy*, Tun Suffian Foundation Incorporated, 2007, p. 254.