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CRIMINAL LAW CODIFICATION AND REFORM IN MALAYSIA: AN OVERVIEW

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This comment describes several of the most significant amendments to the Malaysian Penal Code in the past two decades. Sexual offences have featured prominently with changes made to the definition of rape and its penalty in order to afford greater protection to girls and women against sexual violence; a widening of the scope of unnatural offences; the creation of a version of the offence of marital rape; and new offences against the exploitation of persons for the purpose of prostitution. The offence of incest was also introduced into the Penal Code with resulting jurisdictional conflicts between the civil and Shariah courts, which the author contends should be resolved by the Penal Code taking precedent. Other amendments discussed in this comment are a reverse onus presumption provision for the offences of criminal misappropriation and criminal breach of trust; anti-terrorism legislation in the aftermath of 9/11; and an increased maximum penalty structure for serious offences.

I. INTRODUCTION

The introduction of the Penal Code[1] in Malaysia[2] went through several stages during British colonization as the British influence swept throughout Malaysia.[3] The first Penal Code, the Straits Settlement Penal Code,[4] was introduced in 1871 into Penang and Malacca, the two states comprising the Straits Settlement. Before the Penal Code, the law which applied in most states was Islamic law. The position was best described by Suffian L.P. in the case of *Che Omar bin Che Soh v. Public Prosecutor.*[5] According to His Lordship,[6]

> Before the British came to Malaya … the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and

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1 *Penal Code* (Act 574, 1997 Rev. Ed. M'sia.) [*Penal Code*].

2 Malaysia is a Federation of 13 states and 3 federal territories.

3 For further reading of the introduction of the Penal Code, see Ahmad Ibrahim, *Towards A History of Law in Malaysia and Singapore* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992), and Andrew Phang Boon Leong, "Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore" (1989) 31 Mal. Law Rev 46.

4 No. 4 of 1871 (S.S.).

5 [1988] 2 M.L.J. 55.

6 *Ibid.* at 56.

> the law applicable in the states was Muslim law. Under such law, the sultan was regarded as God's viceregent (representative) on earth. …When the British came … through a series of treaties with the sultans … and through so-called British advice, the religion of Islam became separate into two aspects, *viz*. the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's viceregent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, *i.e*., to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat.

In other words, the British made treaties with the Malay rulers, and introduced a dichotomy of laws into each State, *i.e*. by confining Islamic Law to operate as a personal law of inheritance and family matters for Muslims, and all other matters to be governed by civil law[7]—in particular, the Penal Code for criminal law. Subsequently, the 1936 Penal Code[8] was introduced to the Federated Malay States, namely the states of Negeri Sembilan, Pahang, Perak and Selangor in 1936. In 1948, the Federation of Malaya was formed which amalgamated the states of Penang, Malacca, the Federated Malay States and the Unfederated Malay States, which consist of the states of Johor, Kedah, Perlis and Kelantan. The 1936 Penal Code was then extended to the Federation of Malaya by the 1948 Penal Code Amendment Ordinance.[9] The Federation of Malaya gained its independence in 1957 and, simultaneously, the Federal Constitution[10] was proclaimed. Under Art 3 of the Federal Constitution, Islam is the official religion of the Federation. Art 4 of the Federal Constitution provides that the Constitution is the supreme law of the land.

In line with the position of Islam in the Federation, Malaysia operates a parallel judicial system. The federal legal system is based on a modern 'secular' state and at the same time, Malaysia also implements some aspects of Islamic law for those professing Islam (*i.e*. Muslims). The civil court has jurisdiction in all matters of the law except matters within the jurisdiction of Islamic Law. In cases of Islamic law, the Shariah[11] court has jurisdiction. Art 74 of the Federal Constitution states that Islamic Law is a matter which falls within the State List,[12] which means that it is a matter for the state legislature.[13] The State List covers Islamic Law and the personal law of Muslims. The Federal Constitution provides that the state legislature may make laws "for the creation and punishment of offences by persons professing

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7 Wu Min Aun, *The Malaysian Legal System* (Petaling Jaya: Longman, 1997) at 36.

8 *Penal Code* (Cap. 45, 1936) (F.M.S.) [*1936 Penal Code*].

9 *Penal Code (Amendment and Extended Application) Ordinance* (No. 32, 1948) [*1948 Penal Code Amendment Ordinance*].

10 *Constitution of the Federation of Malaysia* (1997, 12th Reprint) [*Federal Constitution*].

11 *Shariah* is an Arabic word which means 'Path to be followed'. For further reading, see Abdul Rahman I. Doi, *Shariah; The Islamic Law* (London: Ta-Ha Publishers, 1984).

12 Federal Constitution, *supra* note 10, Ninth Schedule, List II [*State List*].

13 See also the Federal Constitution, *supra* note 10, Ninth Schedule. Each state is governed by their own State Enactment in regards to Islamic Law matters.

the religion of Islam against the precepts of the religion, except in regard to matters included in the Federal List".[14] This means that the state legislature has jurisdiction over the constitution, organization, and procedure of the Shariah court which has jurisdiction only over persons professing the religion of Islam and in respect only of the matters included in the said paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law.[15] Limb 4 of the Federal List[16] in the Ninth Schedule reads that the Federal List consists of civil law, criminal law, procedure and the administration of justice. Following this, in so far as criminal law is concerned, the Penal Code applies to all individual within the Federation. This is clearly spelt out in s. 2 of the Penal Code which reads,

> Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within the Federation of Malaya.

Although the states of Sabah,[17] Sarawak[18] (East Malaysia) and Singapore[19] joined Malaysia in 1963,[20] it was only on 22 January 1976, that the 1936 Penal Code was extended throughout Malaysia through the 1976 Penal Code Amendment Act.[21] The 1936 Penal Code was revised in 1997, and became the present Penal Code.[22] The only change made in the revision was to the long title. Previously it read, "an Enactment to consolidate the law relating to criminal offences", which was appropriate when it was first introduced based on the background of the country as discussed above; it later became "an Act relating to criminal offences".

This comment will examine the development of the Penal Code through its amendments over the years, which changes may affect some original underlying principles in Macaulay's Code, of which one of its main features is clarity, *i.e.*, where each individual offence is distinguished where a different mental requirement is expressly spelt out, and in turn allows a fixed degree of punishment. This comment will also examine the influence of Islam in the development the Penal Code in Malaysia.

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14 State List, *supra* note 12 at Limb 2.

15 In Islam, crime is provided by the Quran (divinely revealed provision). Punishment of a crime is provided in the Quran by way of *hudud* (fixed by God) or *taazir* (discretionary). Offences in Islam are the same as provided by the Penal Code on offences against the person and property. But offences in Islam also include adultery, drinking of liquor and apostasy. The jurisdiction given to the States is to enact the law following the Quran, but provisions of punishment is controlled by the jurisdiction given to Shariah Courts under the *Shariah Court (Criminal Jurisdiction) Act* (Act 355, 1984). By this Act, the *hudud* punishment is not enforced. See Raiz-ul-Hassa Gilani, *The Construction of Legal Thought In Islam* (Idara Tarjuman Al-Quran, 1983) at 3371-3374. See also Sharifah Suhanah, *Malaysian Legal System* (Dayton: LexisNexis, 2007) at 158.

16 Federal Constitution, *supra* note 10, Ninth Schedule, List I [*Federal List*].

17 Sabah had its own *Penal Code* (Ordinance No. 3, 1959).

18 Sarawak had its own *Penal Code* (Cap. 57, 1934).

19 Singapore became independent on 9 August 1965.

20 The Federation of Malaya was renamed Malaysia on 16 September 1963. See *Malaysia Act 1963* (Act 26, 1963) (F.M.).

21 See *Penal Code (Amendment and Extension) Act 1976* (Act A327, 1976) [*1976 Penal Code Amendment Act*], ss. 4 and 6.

22 *Supra* note 1.

II. Development of the Penal Code

The Penal Code is the first statute which provided for general criminal offences in Malaysia. According to Koh and Myint Soe, there are two reasons why the Penal Code may be said to be exhaustive.[23] The first is based on its long title, which reads, "an Act to consolidate the law relating to criminal offences".[24] And secondly, s. 2 provides, "every person shall be liable to punishment under this code and not otherwise for every act or omission contrary to the provision thereof, of which he shall be guilty within Malaysia".

In 1976,[25] the Penal Code was amended, consolidating all three existing Penal Codes in Malaysia to one Penal Code which was to apply throughout Malaysia.[26]

The legislature in 1976 took the opportunity to review and amend the provisions on punishments for certain offences due to the change of circumstances. These provisions were made 40–50 years before and it was time for them to be reviewed and made more meaningful and appropriate.[27] The word "penal servitude" was removed in all the provisions of the code in line with the abolition of such punishment by the Criminal Justice Act.[28] Fines were also increased by four times following the change in currency values.

The amendment changed the phrase "penal servitude for life" to "life imprisonment for 20 years". The amendment substituted "life imprisonment" for "penal servitude for life", with the exception of offences related to national security under Chapter VI for which it literally meant imprisonment until death, to mean imprisonment for 20 years.[29] The Chapter VI exception was appropriate at this juncture as the security of the country was being threatened by a communist-inspired armed insurrection. The amendment also brought the Penal Code in line with the Essential (Security Cases) Regulation 1975 (ESCAR), which came into operation in December 1975.[30]

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[23] Koh Kheng Lian and Myint Soe, *The Penal Codes of Singapore and Malaysia: Cases, Materials and Comments*, vol. 1 (Singapore: Law Book Co., 1974).

[24] Before it was revised in 1997.

[25] 1976 Penal Code Amendment Act, *supra* note 21.

[26] *Ibid.* at s. 6.

[27] Malaysia, *Parliamentary Debates*, vol. 1, col. 80 at 9514 (19 December 1975) (Tan Sri Abdul Kadir bin Yusof).

[28] (Act 345, 1953). See also 1976 Penal Code Amendment Act, *supra* note 21, at s. 2. Punishment by rigorous imprisonment and simple imprisonment were also abolished. It now reads "imprisonment for a term specified" in the provision; see also Penal Code Amendment Act 1965 (Act 24, 1965). Prior to 1965, the 1936 Penal Code, *supra* note 8 at s. 53 read,

> The punishments which are liable under the provisions of this Code, are—
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> First—Death
> Secondly—Penal Servitude
> Thirdly—Imprisonment, which is of two descriptions, namely—
> (1) Rigorous, that is, with hard labour;
> (2) Simple, that is, without hard labour.
> Fourthly—Forfeiture of property;
> Fifthly—Fine;
> Sixthly—Whipping.

[29] See 1976 Penal Code Amendment Act, *ibid.* at ss. 57 and 130A.

[30] ESCAR was introduced by s. 2 of Emergency (Essential Powers) Ordinance No. 1, 1969, which allowed the executive to make law. ESCAR was introduced as the security of the nation was being threatened by

The Penal Code continues to operate as the general statute of criminal law in Malaysia today. Yet, in order to deal with specialized[31] forms of criminality, other statutes were introduced to deal with specific crimes. For example, the Internal Security Act 1960[32] was introduced at a time when Malaysia was under the threat of subversion and communism.[33] The Internal Security Act 1960 introduced provisions for preventive detention, and it provided for relevant offences committed in areas proclaimed as a 'security area'.[34] A recent example is the Anti-Trafficking in Persons Act,[35] which was introduced to counter human trafficking and to give protection to victims of trafficking. The Malaysian Anti-Corruption Commission Act[36] came into operation in January 2009, which deals with matters relating to, and the prevention of corruption.

Although various laws have been introduced to counter specific offences, the Penal Code also went through various amendments since it was extended throughout Malaysia in 1976. The amendments are discussed below.[37]

A. *Sexual Offences*

1. *Increased protection of women against sexual violence*

In 1989,[38] amendments were made in response to calls from women's groups for change in the law for better protection for women. Demonstrations were also held by concerned citizens who took to the streets to demonstrate for better protection[39] after a nine-year-old girl was raped and murdered in 1987. The amendment was passed by Parliament taking into consideration proposals made by the NCWO.

The amendment in 1989 also took into consideration the position of Muslim women during *iddah*,[40] the period whilst her divorce is being finalized. The provision

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armed communists and their ideology. The threat had been increased as their operation had gone into town areas. A provision for death penalty was introduced for a strict liability offence of possession of firearms.

31 For example, the Malayan Communist Party, which took up armed struggle against the government and its subjects.

32 (Act 82, 1972 Rev. Ed. M'sia.).

33 The preamble reads "An Act to provide the internal security of Malaysia, preventive detention the prevention of subversion, the suppression of organized violence against persons and property in specific areas of Malaysia, and for matters incidental thereto."

34 See Internal Security Act 1960, *supra* note 32 at s. 47.

35 (Act 670, 2007).

36 (Act 694, 2009). The Act repealed the earlier *Anti-Corruption Act* (Act 575, 1997).

37 Selected amendments will be discussed.

38 *Penal Code (Amendment) Act 1989* (Act A727, 1989).

39 In 1986, a memorandum demanding the reform of all laws that discriminate against women, including laws related to rape, was handed in by the National Council of Women's Organizations ("NCWO") to the Ministry of Justice. It was not until 1987, when the brutal rape and murder of a nine-year-old girl sparked massive public outrage, resulting in concerned citizens taking to the streets to demonstrate, that the legislators and politicians decided to take the issue seriously. See Lai Suat Yen, *et al.*, *The Rape Report: An Overview of Rape in Malaysia* (Petaling Jaya, Selangor: AWAM, SIRD, 2002) [Lai, *The Rape Report*] at 48.

40 *Iddah* is a post-divorce period of three months from a divorce, where the couple is given the opportunity to reconcile before the divorce is made final, *i.e*. the end of three months, during which the woman is prohibited from marrying.

is included as *Explanation 2* to s. 375 which reads,

> A Muslim woman living separately from her husband during the period of 'iddah' which shall be calculated in accordance with 'Hukum Syara',[41] shall be deemed not to be his wife for the purpose of this section.

The amendment puts into proper prospective the rights of divorced women during her *iddah*. The rationale behind the *iddah* is to ensure that there is no issue pertaining to the likelihood of the woman being impregnated by her former husband during this period. It is also a period for the couple to attempt to rebuild their relationship for a possible reconciliation. During this period, the former husband is still responsible for the welfare of the woman but has no other right on her person or property.[42]

Rape was given a more comprehensive definition by this amendment. The age of consent in the offence of statutory rape in s. 375 was substituted with the age of 16 from the age of 14. The legislature believes that a girl under the age of 16 years is not mature enough to understand the consequence of consenting to sexual intercourse. The age of consent has always been an issue within the Penal Code. There are different ages provided for in the Code itself. For example, consent in s. 90 of the Code provides for the age of 12 years, but for the offence of kidnapping, the age of consent is 14 years for a boy and 16 for a girl. The age of 16 in this case is in line with the age of consent to marry within the Law Reform (Marriage and Divorce) Act.[43]

The amendment also took into consideration consent based on a misconception of fact on the part of the woman. But the main part of the amendment lies in its punishment in s. 376. It was reported by the Minister in charge during the reading of the amendment in Parliament that due to the violence involved in cases of rape and the impact it has on the victim, be it emotional or physical, it was proposed that a more stringent punishment was needed. It was proposed that the punishment should be made more of a deterrent.[44] The amendment also took into consideration the obligation of the government in playing a more protective role with respect to girls under the age of 16 years[45] from sexual exploitation, whether done with or without her consent.[46] Before the amendment in 1989, s. 376 of the Penal Code read, "Whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine, or to whipping." Factors which guided the courts in sentencing offenders in cases of rape revolve around the use of force and violence and the effect of such offence on the victim. This was illustrated by the case of *Brabakaran v. Public Prosecutor*,[47] where the court sentenced the accused to 3 years imprisonment for raping his fourteen-year-old niece. This was due to the fact that there was no evidence of threat or use of force or violence, and that the child

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41 *Hukum Syara* means 'according to Islamic law'.

42 Ahmad Ibrahim, *Undang-Undang Keluarga Islam di Malaysia* (Kuala Lumpur: Malayan Law Journal, 1999), 86–89.

43 (Act 164, 1976) at s. 10.

44 Malaysia, *Parliamentary Debates*, vol. 3, col. 12 at 92 (22 March 1989) (Dato' Dr Siti Zaharah binti Haji Sulaiman).

45 The age of 16 is taken into consideration as a Muslim girl can get married at that age with consent.

46 Norbani Nazeri & Jal Zabdi, *Perkembangan Kanun Keseksaan Di Malaysia*, *Pentadbiran Keadilan Artikel Terpilih* (Dewan Bahasa Pustaka Kuala Lumpur, 2007) at 324.

47 [1966] 1 M.L.J. 64. See also *Syed Tahir v. Public Prosecutor* [1988] 3 M.L.J. 485.

did not suffer from any trauma from the rape. At the appeal, the Court of Appeal was of the view:[48]

> As regards sentence, in the first place, there is a very wide gulf between this case where, if the girl is a little older, the accused would not have committed any offence and the other types of rape where violence was resorted to overcome resistance. In the second place, the girl is unlikely to suffer any psychological after effects. In the third place, as regards damage to her future prospects of marriage, we do not think there are any serious impediments to such prospect, were she to move to another locality with her family. We accordingly think that the term of 3 years' imprisonment on the excessive side and substitute for it a sentence of 18 months' imprisonment,

The same view was taken by the case of *Ch'ng Lian Eng v. Public Prosecutor*[49] in 1983 where the sentence of 3 years imprisonment was substituted to 18 months imprisonment on appeal to the High Court. According to the High Court:[50]

> The Appellant is on firmer ground as regards his appeal against sentence. Whilst it is true that this was perhaps a case which involved the exploitation of an immature girl by an older man I cannot overlook the fact that the girl was inviting trouble in going out with the Appellant in his car at night knowing he was a married man and then being prepared to share his company in a privacy of a room in a Rest House… Moreover this was not a case where the Appellant chose to ignore the law knowing full well that this is a law for the protection of young girls against themselves…

The amendment in 1989 saw an unprecedented setting of a minimum period of imprisonment imposed on an offence. S. 376 now reads, "[w]hoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall be liable to whipping."[51]

This means that on conviction of the offence of rape, an accused shall be sentenced to a minimum sentence of 5 years imprisonment. The amendment takes away the discretion of the court in terms of the minimum sentence even though the offence did not involve force or violence, such as consensual sex which falls under the provision of statutory rape, that is the girl being under the age of 16 years. The setting of a minimum sentence departs from the principle of deterrence set up by Macaulay where the culpability of the offender is the central issue in punishment and that the culpability of penalties rationally proportioned to the gravity of the offence achieves the objective of deterrence more effectively than the severity of punishment. This seems to be the view taken by the court in the case above.

The minimum sentence is meant to be what the legislature believes to be an effective deterrent sentence. This was explained by the case of *Public Prosecutor v.*

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48 *Brabakaran v. Public Prosecutor*, *ibid.*

49 [1983] 1 M.L.J. 424.

50 *Ibid.*, at 425.

51 The *Criminal Procedure Code* (Act 593, 1999 Rev. Ed. Msia) at s. 288 provides for the maximum of 24 strokes for an adult male and 10 for a youth offender. If a person is sentence to whipping, the number of strokes shall be specified by the court.

Mohd Tajuddin:[52]

> It is observed that the word 'imprisonment' is preceded by the expression 'shall be punished with' whereas the punishment of 'whipping' is preceded by the expression 'shall also be liable to'. The legislature must have intended the expression to mean differently and bear different consequences. It is also observed that the legislature, contrary to its practice normally to fix the maximum sentence has instead fixed the minimum sentence.
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> The legislature has varying modes of indicating in any penal provision the type and extent of punishment to be meted out, whether an imprisonment or a fine or whipping or any combination. It also indicates its intention whether a particular sentence is mandatory or discretionary by the use of such expressions as 'shall be punished with' or 'shall be liable to' the former being mandatory and latter discretionary.

It was also observed by the court that in most offences, the policy of the law is to fix a maximum penalty, which is intended for the worst-case scenario, and to leave it to the discretion of the court to determine the extent of punishment for each particular case following the principle of sentencing. But in the case of s. 376, the intention of the legislature is clear in the language of its provision, that the minimum sentence is imprisonment of not less than 5 years.

Although the intention of the legislature to impose an effective deterrent sentence is clear, there appears to be no consistency in the law, where statutory rape is concerned. S. 16(1)(l) of Women and Girls Protection Act[53] provides,

> Any person who… has carnal knowledge with any female person under the age of 16 years except by marriage… shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or to both such imprisonment and fine.

The provision contradicted s. 376 of the Penal Code, which provides for the offence of statutory rape, with a vast difference in punishment. Perhaps the Women and Girls Protection Act was retained with a purpose, mainly for situations where intercourse was consensual or where no violence was involved. This can be best explained in the case of *Abdul Jamil Ismail v. Public Prosecutor*,[54] the accused was initially charged with rape under s. 376 of the Penal Code. However the charge was amended to a charge under s. 16 of Women and Girls Protection Act. Although there was evidence of force on the victim which the accused had befriended earlier, the court sentenced him to 18 months imprisonment after taking into consideration his plea of guilty. The court treated the case as a case of exploitation of the offender of an underage girl, which is the main purpose of the Women and Girls Protection Act rather than a case of a penal offence.[55] Ultimately the power to institute, conduct and discontinue

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52 [1996] M.L.J.U. 354.

53 (Act 106, 1973). Repealed by the *Child Act* (Act 611, 2001).

54 [2001] 1 L.N.S. 314.

55 See also *Public Prosecutor v. Selvarajah* [1984] 2 C.L.J. 268.

proceedings is in the discretion of the Public Prosecutor;[56] this means that he has discretion to charge the offender under any law applicable at the time.[57]

However, in 2001, the Women and Girls Protection Act was repealed by the Child Act,[58] an act which generally relates to the care, protection and rehabilitation of children. With the abolition of the Women and Girls Protection Act, there is no alternative but to charge a person under s. 376 of the Penal Code, even though the act of sexual intercourse was consensual. This includes a child[59] 'perpetrator'. As mentioned above, punishment for rape is a mandatory imprisonment of at least 5 years. How do we justify such a move? It must also be mentioned that the Child Act provides that in a case, where a child is found guilty of the offence of rape, the offender cannot be given a probation order.[60] This means that the likely order which applies to the child offender is a custodial order.[61]

2006 saw another major amendment made to the offence of rape.[62] This time, the major amendment involved the provision for punishment for rape in s. 376. The consequence of the amendment saw the offence of rape split into two different categories. The first can be categorized as 'simple' rape and the second as 'aggravated' rape with distinct punishments. S. 376(1) provides: "Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping." This provision has reverted to its original form prior to the amendment in 1989, where there was no minimum imprisonment. The amendment gives back to the court the sentencing powers it previously had. The legislature realized that a more stringent punishment should only be made available to situations involving additional trauma to the victim, thus restoring Macaulay's established principle of culpability.

The minimum period of punishment is maintained by the amendment in cases of aggravated rape under ss. 376(2), (3) and (4). S. 376(3) provides for the punishment for incestuous rape, that is a minimum imprisonment of 8 years but not more than 30 years,[63] and shall also be whipped not less than 10 strokes. S. 376(4) provides for punishment if the act causes or results in the death of the victim. The offender shall be punished with death or imprisonment of not less than 15 years and not more than 30 years, and shall also be liable to whipping of not more than 10 strokes. The provision under the former s. 376 is now provided for under s. 376(2). S. 376(2)

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56 See Federal Constitution, *supra* note 10 at Art 145(3) and Criminal Procedure Code, *supra* note 51 at ss. 376 and 377.

57 The Women and Girls Protection Act was repealed in 2002, when the Child Act, *supra* note 53 came into operation.

58 Child Act, *ibid.*

59 *Ibid.* at s. 2 defines a child as those under the age of 18 years, and for purposes of criminal law, between the age of 10 and 18 years.

60 *Ibid.* at s. 98.

61 The child offender may also be subject to an imprisonment order. See *ibid*. at s. 91.

62 The *Penal Code (Amendment) Act 2006* (Act A1273, 2006), enforced on 7 September 2007.

63 The 30 years imprisonment term was introduced for the first time in the Penal Code by the *Penal Code (Amendment) Act 2003* (Act 1210, 2003) (enforced on 6 March 2007) amending s. 57, which defines imprisonment for life, to be from 20 years to 30 years. S. 57 reads, "Fraction of term of imprisonment; In calculating fractions of term of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment of thirty years." The maximum period of imprisonment was also amended from 20 to 30 years in cases of culpable homicide (s. 304), robbery (s. 396), and house breaking resulting in death or grievous hurt (s. 460).

provides for situations where the punishment for the offence of rape is a minimum imprisonment of 5 years and not more than 30 years and shall also be liable to whipping. Unlike subsections (3) and (4), there is no specified number of strokes of the whip. Situations falling under this section are as follows:

(a) at the time of, or immediately before or after the commission of the offence, causes hurt to her or any other person;
(b) at the time of, or immediately before or after the commission of the offence, puts her in fear of death or hurt to herself or any other person;
(c) the offence was committed in the company of or in the presence of any other person;
(d) without her consent, when she is sixteen years old;
(e) with or without her consent when she is under twelve years of age;
(f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her; or
(g) at the time of the offence the woman was pregnant.

One issue which is evident from the above is that statutory rape[64] does not fall under s. 376(2) if it was committed with the consent of the child as the situation falls under subsection (1).[65] The offender will no longer be imprisoned for a minimum of 5 years. Statutory rape will only fall under subsection (2) if it was committed without the consent of the child.

The offence of rape has also been extended in the amendment to persons who use his authority against a woman to obtain her consent to sexual intercourse.[66] The provision is meant to curb the prevalence of abuse of an employer-employee relationship.

2. *Widening the scope of unnatural offences*

1989 also saw the modification of unnatural offences under s. 377. The need for amendment was based on the fact that the definition in s. 377 was not exhaustive, and that the legislature views cases involving unnatural offences as very serious, especially where children and violence are involved. This needs a deterrent sentence.[67] Owing to this, six new sections were introduced. The Penal Code is seen as the keeper of sexual morality.[68] S. 377A gives a new definition for carnal intercourse against the order of nature as having "sexual connection with another person by the introduction of the penis into the anus or mouth of another person". Punishment for voluntarily committing the offence was amended from the maximum imprisonment of 10 years to a maximum of 20 years in the amendment in 1976,[69] which is retained

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64 Unless the child is under 12 years old.

65 In this case, the cases of *Brabakaran v. Public Prosecutor*, *supra* note 47 and *Ch'ng Lian Eng v. Public Prosecutor*, *supra* note 49 still apply.

66 Penal Code, *supra* note 1 at s. 375(f); the original 375(f) which provided for statutory rape was renumbered 375(g).

67 Malaysia, *Parliamentary Debates*, vol. 2, col. 12 at 92 (22 March 1989) (Dato' Dr Siti Zaharah binti Haji Sulaiman).

68 In the case of *Ahmad bin Hassan v. Public Prosecutor* [1958] 1 M.L.J. 186, the word "perversion" was used by the court to describe the offence.

69 1976 Penal Code Amendment Act, *supra* note 21.

by the new s. 377B with the omission of a fine.[70] The seriousness of the offence is reflected in the decision of the case of *Public Prosecutor v. Dato' Seri Anwar Ibrahim*,[71] where the court in sentencing the accused said:

> Another factor which I took into consideration is of the offence for which the accused is convicted. The seriousness of the offence is reflected by Parliament in its wisdom by enacting a law in the form of s. 377B of the Code which provides for a sentence of 20 years imprisonment and whipping on conviction.

In the case where the offence is committed without consent, the offence is treated as equivalent to the offence of rape,[72] with a minimum of 5 years imprisonment and maximum of 20 years and shall also be liable for whipping.[73] The offence of inciting a child to an act of gross indecency was also introduced in s. 377E for the purpose of protection of children under the age of 14 years from any sexual manipulation. It must be mentioned that two different ages were proposed within the same category of offences in the same amendment in 1989. The age of consent for sexual intercourse was raised from under the age of 14 to under the age of 16 years, with the opinion that a girl within the age group does not know the consequence of her consent. This guessing game of the appropriate age of consent has made the law look very uncertain. The consequence of this uncertainty is that if a man has sexual intercourse with a girl aged 15 years, he will be guilty of rape, and on conviction will be sentenced to at least 5 years imprisonment and even whipped. But he will not be committing any offence if he invites her to perform an act of gross indecency with him.

3. *Marital rape and other sexual offences*

The Penal Code (Amendment) Act 2006 [74] also introduced an offence, akin to marital rape, and extended the reach of "Unnatural Offences" to sexual connection by an object.

In consequence of years of lobbying by non-governmental and women organizations[75] on violence against women, the legislature finally responded by introducing a specific offence by a husband against his wife. The offence provided under s. 375A reads,

> Any man 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

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70 Prior to the amendment, unnatural offence is defined in s. 377 which reads, "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for a term which may extend to twenty years, and shall be liable to fine or to whipping."

71 [2001] 1 C.L.J. 313.

72 Malaysia, *Parliamentary Debates*, vol. 3, col. 12 at 98 (22 March 1989) (Dato' Dr Siti Zaharah binti Haji Sulaiman). See also *Jamil Jaya Said v. Public Prosecutor* [2009] 5 C.L.J. 244.

73 See Penal Code, *supra* note 1 at s. 377C.

74 *Supra* note 62.

75 Joint Action Group for Gender Equality (JAG) consists of All Women's Action Society (Awam), Women's Aid Organization (WAO), Women Centre of Change (WCC), Women's Development Collective (WDC), Sisters of Islam (SIS), and Malaysian Trade Union Congress—Women's Committee (MTUC).

with his wife shall be punished with imprisonment for a term which may extend to five years.

The section creates a specific offence committed by a husband against his wife, which is similar to rape. But unlike rape, the husband is punished not for having sexual intercourse with his wife, but for causing hurt, or fear of death or hurt to her in order to have sexual intercourse with her. On closer scrutiny, sexual intercourse or rape is a non-issue in this provision. What the provision did was to create a specific offence for causing hurt or criminal intimidation by a husband to his wife in order to have sexual intercourse with her. The offence brings a maximum sentence of 5 years imprisonment. The provision has nothing to do with marital rape, but is rather an issue of causing hurt or domestic violence. This is also evident as the explanation to s. 375 for the offence of rape has not been abolished or amended to make way for the offence of marital rape. The explanation 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* (emphasis added)."

S. 375A is seen as a compromise provision, or a half-way house to recognizing marital rape. This is due to the fact that there are still differences in opinion amongst the races and religious leaders in the matter.[76] A religious leader from one of the States in Malaysia was quoted as saying that the act of a husband forcing his wife to have sex with him cannot be construed as rape in Islam.[77] According to him, "a husband has the right to be intimate with his wife and the wife must obey. If a wife refuses, the rule of *nusyuz* (recalcitrant) can be applied and the husband will no longer be responsible for his wife".[78] The religious adviser at the Prime Minister's Department was also reported as saying that the Islamic Family law in the country is sufficient to deal with the matter.[79]

The provision was put into test in 2009, when a man was charged under s. 375A for forcing his wife to have sexual intercourse with him. He was convicted and was sentenced to the maximum of 5 years imprisonment.[80]

A new unnatural sexual offence was also created under s. 377CA. The provision provides for the offence of 'Sexual connection by object'. The offence is committed when an object is inserted into the vagina or the anus of the victim without his or her consent.[81] The word object means "inanimate thing".[82] Insertion of objects for medical or law enforcement purposes do not come under the section. Anyone found guilty of the offence shall be punished with imprisonment for a term of 20 years and shall be also be liable to whipping. The reason for the inclusion of such provision is the narrow definition of rape under which such acts were not covered. It was

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76 See Malaysia, *Parliamentary Debates*, col. 46 at 66, 83 (13 July 2006) (Wong Nai Chee, Chong Eng).

77 Prema Devaraj, "Furor Over Marital Rape" *Aliran Monthly* 24:9 25.

78 *Ibid.*

79 *Ibid.* at 27.

80 "Malaysian jailed for marital rape" *The Sydney Morning Herald* (6 August 2010) online: <http://news.smh.com.au/breaking-news-world/malaysian-jailed-for-marital-rape-20090806-eb1q.html> .

81 In September 2007, the body of an eight-year-old child was found one month after she was reported missing. A cucumber and an eggplant were found stuffed in her genitals which caused a rupture of her rectum. To date, the perpetrator has not been caught.

82 Malaysia, *Parliamentary Debates*, col. 43 at 113 (July 2006) (Dato' Seri Mohd. Radzi bin Sheikh Ahmed).

reported that the psychological trauma and physical injuries caused by object rape are comparable to and can be greater than rape alone.[83]

4. *Protection against sexual exploitation*

In 2001, the long awaited Child Act was passed.[84] The Child Act was an amalgamation of three statutes, namely, the Juvenile Courts Act,[85] the Child Protection Act,[86] and the Women and Girls Protection Act, which concerns the protection of girls and women under the age of 21 years. With the passing of the Child Act, the three Acts above were repealed on the basis that the Child Act covers the same age group. The Juvenile Courts Act and Child Protection Act can be fully be amalgamated into the Child Act, as it concerns children under the age of 18 years. The Women and Girls Protection Act, on the other hand, was concerned with the protection of women, and girls under the age of 21 years. With the passing of the Child Act, provisions for protection against vice no longer apply to those between the age of 18 and 21 years. Realizing the importance of the matter, the legislature turned to the Penal Code not only to remedy the lacuna but also to introduce penal provisions on prostitution and vice activities.[87]

The provision considered here is s. 372, which provides for the offence of selling a person under the age of 21 for the purpose of prostitution, immoral or illicit purpose. S. 372 was amended to cover the offence of "exploiting any person for the purpose of prostitution". The provision now applies generally to everyone and not only for those under the age of 21 years. S. 372(1) provides for a wider definition of the offence which also includes selling, letting for hire, receiving or harbouring, or wrongfully restraining any person for the purpose of prostitution, or of having sexual intercourse with any other person. S. 372(3) defines prostitution as: "the act of a person offering that person's body for sexual gratification for hire whether in money or in kind". The amendment also includes a reverse onus clause in s. 372(2) which reads,

> For the purpose of paragraph (d) of subsection (1), it shall be presumed until the contrary is proved that a person wrongfully restraints a person if he—
> (a) *withholds* from that person wearing apparel or any other property belonging to that person or wearing apparel commonly or last used by that person;
> (b) *threatens* that person to whom wearing apparel or any other property has been let or hired out or supplied to with legal proceedings if he takes away such wearing apparel or property;
> (c) *threatens* that person with legal proceedings for the recovery of any debt or alleged debt or uses any other threat whatsoever; or
> (d) *without any lawful authority, detains* that person's identity card issued under the law relating to national registration or that person's passport.
> (emphasis added to indicate the trigger of the presumption).

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83 Lai, *The Rape Report*, *supra* note 39 at 53.
84 *Supra* note 53, enforced in August 2002. The Bill was first brought to Parliament in 1999.
85 (Act 90, 1947).
86 (Act 468, 1991).
87 Malaysia, *Parliamentary Debates*, vol. 3, col. 43 at 80 (9 August 2001) (Datuk Seri Utama Dr, Rais bin Yatim).

The amendment was made on the basis that the government has a responsibility to protect those vulnerable to exploitation in providing for a mandatory punishment of imprisonment which may extend to 15 years and with whipping and a fine. The legislature has also included such a presumption into the Code. It would seem that the reliance on presumptions, although not sound in principle, has become a trend in modern penal statutes.[88]

B. *Incest: Jurisdictional Conflicts with Shariah Court*

In 2001, the offence of incest was introduced for the first time into the Penal Code. According to s. 376A:

> A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, or custom or usage applicable to him or her, to marry that other person.

Following s. 376A, the offence of incest is committed when a person has sexual intercourse with a person whom the person is prohibited from marrying. The prohibition of marriage between parties with close relation by blood or marriage for a non-Muslim is provided by s. 11 of the Law Reform (Marriage and Divorce) Act,[89] and for Muslims, by provisions of the individual State's Enactments, for example, s. 9 of the Islamic Family Law (Federal Territory) Act.[90] S. 376B provides for a mandatory custodial sentence, *i.e*. if convicted, the accused shall be punished with imprisonment for a term of not less than 6 years and not more than 20 years and shall also be liable to whipping.

Prior to the introduction of s. 376A, the only prosecution made was for statutory rape under s. 376, which relates to the rape of a father against his daughter.[91] Incest is also provided as an offence in all state enactments, as a Shariah offence in Malaysia.[92] S. 25 of the Shariah Criminal Offences (Federal Territory) Act[93] provides that anyone convicted of incest shall be liable to a fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to whipping not exceeding 6 strokes or to any combination.

With the introduction of incest in the Penal Code, an issue arises concerning the competing jurisdiction of the Civil and the Shariah Court, with both courts having jurisdiction to try the offence if committed by Muslims.[94] This is not the first time that the Penal Code has 'encroached' into the Shariah jurisdiction. In 1999, the

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88 For *e.g*., the Dangerous Drugs Act (Act 234, 1952), and the Malaysian Anti-Corruption Commission Act, *supra* note 36.

89 *Supra* note 43 at s. 3 states that the Act does not apply to Muslims or any person who is married under Muslim law.

90 (Act 303, 1984). The Federal Territory will be used as example of the Islamic state legislation. All 14 states in Malaysia have their own Islamic Legislation which falls under the State List, *supra* note 12.

91 Malaysia, *Parliamentary Debates*, vol. 3, col. 43 at 99 (9 August 2001) (Datin Paduka Dr. Tan Yee Kew).

92 See *Nor Siah Elyas v. Perak Syarie Prosecutor* [2004] C.L.J. (Sya) 196.

93 (Act 559, 1997). The Federal Territory Act is used as example of provision of incest under the state enactment.

94 See Norbani Mohamed Nazeri and Siti Zubaidah Ismail, *Contesting Jurisdiction in respect of Incest: With Particular Reference to Malaysia*, [2010] LR 247–266.

jurisdictional issue arose in the case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor.*[95] The appellant, a Muslim was accused of committing an act of gross indecency, an offence punishable under s. 377D of the Penal Code and s. 25 of the Shariah Criminal Offences (Federal Territory) Act. He was charged and convicted by the Sessions Court, and sentenced to 6 months imprisonment. He subsequently applied to the High Court for a writ of *habeas corpus* on the ground that the Sessions Court had no jurisdiction to hear, convict or sentence him by virtue of Art 121(1A) of the Federal Constitution and s. 25 of the Shariah Criminal Offences (Federal Territory) Act.

Art 121 of the Federal Constitution provides for the power of the judiciary and reads,

> (1) There shall be two High Courts of co-ordinate jurisdiction and status namely—
>
> (a) one in the state of Malaya, which shall be known as the High Court in Malaya and shall have its principle registry in Kuala Lumpur; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its registry at such place in the State of Sabah and Sarawak as the Yang di Pertuan Agong may determine;
>
> and such inferior courts as may be provided for by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by the or under federal law.
>
> (1A) The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Court.

The Court of Appeal examined the meaning of Art 121(1A) and came to the conclusion that the purpose behind Art 121(1A) was to prevent the High Court from exercising its powers of judicial review over decisions of the Shariah Court. Art 121(1A) does not give 'exclusive jurisdiction' to the Shariah Court over the matter. The Court of Appeal then decided that Art 121(1) did not exclude the Civil Court from hearing all matters, including offences under the Penal Code, committed by Muslims, which is also within the jurisdiction of the Shariah Court. The court then held that, on a charge of incest made under the Penal Code, the Sessions Court has clear jurisdiction to try the case.[96] According to Gopal Sri Ram JCA:

> In our view, the Art. 121(1A) should receive that meaning which advances the purpose for which it was introduced into the Federal Constitution. If it becomes necessary to make an implication, as we think the present case does, then we shall make it. We are satisfied that such an approach would harmonise the article in question with the rest of the Constitution. It would … certainly remove the spectre of a conflict between that Article and other provisions of the Constitution, in particular the Ninth Schedule, with regard to any question of legislative competence upon the subject of criminal law. Equally, *it will ensure that well-established provisions of the Penal Code are not rendered nugatory*. (emphasis added.)

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[95] [1999] 1 C.L.J. 181.

[96] *Ibid.* at 446-447.

His Lordship in this case was of the view that the purpose of Art 121(1A) was not to give the Shariah Court exclusive jurisdiction over matters which are still within the purview of the Federal List,[97] and although those matters could still be covered by the State Enactments, the Shariah Court would not automatically possess the jurisdiction to try such cases and set aside the jurisdiction of the civil court.[98] More importantly, his Lordship also emphasized the importance of the Penal Code and in preserving its well established provisions. On appeal to the Federal Court, the court affirmed the decision by the Court of Appeal. The Federal Court held that where the offender had committed an offence triable by either the Civil Court or the Shariah Court, he may be tried by either court.

The jurisdiction of the court again became an issue in the case of *Sulaiman bin Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications.*[99] In this case, Art 121(1A) of the Federal Constitution was found not to be in issue, and the Federal Court held that:[100]

> [I]f… a similar offence has been created and is found, in the federal law, since even prior to the Merdeka Day [independence], that must be accepted as 'criminal law'. But, where no similar 'criminal offence' has been created, then… the [Supreme Court] would have to decide on it.

Following the decision, the court's jurisdiction is not an issue in cases falling under s. 377D above (which was originally s. 377A before it was amended in 1989). The provision existed before independence, before the Federal Constitution was created. But incest in s. 376A was not an offence until its creation in 2002. Incest, on the other hand, has always been an offence under the State Enactments for Muslims. In this case following the decision of the Federal Court, the issue must be examined and decided on a case-to-case basis.

In examining Art 74[101] of the Federal Constitution, it is stated that Islamic law is a matter which falls under the State List, a matter within the powers of the State Legislature. Art 74 reads,

(1) Without prejudice to any power to make law conferred on it by any other Article, Parliament may make laws with respect to any matters enumerated in the Federal List or the Concurrent List (that is to say, the first or third set out in the Ninth schedule);
(2) Without prejudice to any power conferred on it by any Article, the Legislature of the State may make laws with respect of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent list.

The State List[102] provides that the State Legislature may make laws "for the creation and punishment of offences by persons professing the religion of Islam against the

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97 *Supra* note 16.
98 Sharifah Suhanah Syed Ahmad, *Malaysian Legal System in Survey of Malaysian Law 1999* (University of Malaya Press, 1999) at 446.
99 [2009] 6 M.L.J. 354.
100 *Ibid.* at para. 72.
101 See also Ninth Schedule, Federal Constitution, *supra* note 10.
102 *Supra* note 12.

precepts of the religion, except in regard to matters in the Federal List".[103] This means that the State Legislature may make provisions for an offence which fall under the precepts of Islam, except in matters falling under the Federal List. The Federal List[104] includes civil law, criminal law, procedure and the administration of justice. What does 'criminal law' mean in this context? The Penal Code is "[a]n Act relating to criminal offences." It is an Act of general application. It applies to all persons following ss. 2 and 3 of the Code. Based on these facts, it seems that the Penal Code should take precedence. The issue on the application of Islamic Law was also discussed in the case of *Che Omar bin Che Soh v. Public Prosecutor.*[105] The Supreme Court held that although Art 3(1) states that Islam is the religion of the Federation, "in the context means only such acts as relates to rituals and ceremonies".[106] The court went on to conclude that, "the law in this country is still what it is today, secular law".

It must also be mentioned that the Shariah Court (Criminal Jurisdiction) Act[107] provides that the Shariah Court has jurisdiction to impose a maximum sentence of only 3 years imprisonment and, a fine of not more than RM5000 and whipping of not more than 6 stokes. Incest and unnatural offences under the Penal Code on the other hand carries a minimum punishment of 6 and 5 years imprisonment and a maximum of 20 years and the whip. What happens when two people are charged with incest, one a Muslim in the Shariah Court and the other a non-Muslim under the Penal Code? This comment reiterates that urgent steps should be taken to reform the current legal position and, as suggested above, based on the Federal Constitution such that the Penal Code should take precedent.

C. *Reversing the Onus: White Collar Crime*

In 1993, the Penal Code went through another major amendment.[108] Whilst the 1989 amendment focused on sexual offences, the amendment in 1993 focused solely on 'white collar crimes',[109] mainly the offence of criminal misappropriation of property, criminal breach of trust and cheating.

The amendment was made by Parliament for the simple reason that the number of cases involving crime of this nature was increasing and report from the Royal Malaysian Police indicated that criminals had become more organized and sophisticated, making detection of the crime difficult.[110] On this, a policy decision was

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[103] See also Sharifah Suhanah Syed Ahmad, *Malaysian Legal System*, 2nd ed. (Lexis Nexis, 2007) at 158.

[104] *Supra* note 16 at Limb 4.

[105] *Supra* note 4.

[106] *Ibid.* at 55.

[107] *Supra* note 15.

[108] *Penal Code (Amendment) Act 1993* (Act A860, 1993).

[109] White collar crime can be divided into 2 types: occupational crime and corporate crime. Occupational crime consists of offences committed by individuals for themselves in the course of their occupations and offences of employees against their employers. Corporate crime is defined as the offence committed by corporate officials for their corporation and the offences of the corporation itself. See Supt Lim Hong Shuan, *White Collar Crime in Malaysia*, Royal Malaysian Police, online: <http://rmpckl.rmp.gov.my/Journal/BI/whitecollarcrime.pdf>.

[110] Malaysia, *Parliamentary Debates*, vol. 3, col. 27 at 18-19 (4 August 1993) (Dato' Syed Hamid bin Syed Jaafar Albar).

made to create a presumption clause for the offence of criminal misappropriation of property and criminal breach of trust. The new s. 409B reads,

> (1) Where in any proceeding it is proved—
>
> (a) For any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or
>
> (b) For any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or dominion over property had—
>
> (i) misappropriated that property;
>
> (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
>
> (iii) suffered any person to do any of the acts described in sub-paragraph (i) or (ii) above,
>
> *it shall be presumed that he had acted dishonestly until the contrary is proved.* (Emphasis added.)

The effect of the presumption is the shifting of the burden of proof from the prosecution to the offender who now has to rebut the presumption on a balance of probabilities.[111]

The position of the law before the amendment was illustrated by the case of *Pariasamy a/l Sinnappan & Anor v. Public Prosecutor*,[112] which decided that the offence of criminal breach of trust is not an offence of strict liability and so dishonest intention, which is the *mens rea*, must be proved. The *actus reus* above cannot be treated as sufficient proof of the offence. The position is still the same today, *i.e*. the offence is not a strict liability one but with the introduction of the presumption of dishonesty in s. 409B, the *actus reus* becomes the important element of the offence.[113] The change brought about by the amendment can be seen from the case of *Ooi Meng Sua v. Public Prosecutor*,[114] that once the *actus reus* is established, it is presumed that the accused had acted dishonestly, and the burden now lies on him to prove the contrary on a balance of probabilities.[115]

The imposition of a presumption is an unprecedented move on the Penal Code, although such provisions are commonly used in a number of more modern statutes such as the Dangerous Drugs Act,[116] the Internal Security Act 1960 and recently, the Malaysian Anti-Corruption Commission Act.[117] Such moves go against the fundamental principle of proof beyond a reasonable doubt or the presumption of

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[111] The prosecution nevertheless bears the burden to prove an offence against the offender. The offender is presumed innocent until proven otherwise. See *Evidence Act 1950* (Act 56, 1950) at s. 101. See also *Mohamed Radhi bin Yaakob v. Public Prosecutor* [1991] 3 M.L.J. 169.

[112] [1996] 3 C.L.J. 187.

[113] See Malaysia, *Parliamentary Debates*, vol. 3 col 27 at 108-109 (August 1993) (Dato' Syed Hamid bin Syed Jaafar Albar). Although the legislature calls it strict liability, the reality of it is that the *mens rea* is not displaced with the introduction of presumption.

[114] [2009] 1 L.N.S. 341.

[115] *Hj Maamor Hj Abdul Hamid v. Public Prosecutor* [2003] 1 C.L.J. 370: it was ruled that in the absence of direct evidence, the prosecution is entitled to rely on s. 409B to establish dishonest intention of the offender.

[116] *Supra* note 88 at s. 37(da): "shall be presumed to be trafficking…"

[117] *Supra* note 36 at s. 50: "the gratification shall be presumed to be corruptly received…"

innocence until proven guilty. The fact that without it, the prosecution of such offence is difficult or almost impossible should never justify the need for such provision. The amendment might well become an unhealthy precedent for the use of presumptions in a host of other offences in the Penal Code.

Another unprecedented move by the amendment was in the form of a mandatory punishment of whipping. Those found guilty of crimes of dishonest misappropriation of property and criminal breach of trust, "shall be punished with imprisonment for a term not exceeding … years and with whipping". Whipping in this case is different from the punishment of whipping in cases involving criminal force.[118] In the case of offenders falling under this category, "whipping shall be inflicted in the way of school discipline with a light rattan".[119] It must be noted that when the amendment was tabled, there was much hue and cry that stricter punishment should be imposed on such offender and that the mandatory whipping was inserted to purportedly deter these offenders. One cannot help but question such a move because if deterrence is the objective of such a punishment then would whipping an offender with a light cane be able to achieve it?[120] It may be argued that traditional principles of the law indicate that whipping should only be reserved for violent offenders or for those who use force or aggression[121] and that it is not appropriate for offenders of white collar crimes. However, once such penal punishment is provided in the statute, in an effort to deter offenders, the aim of deterrence will never be achieved when it is enforced in such a 'half hearted' manner.[122]

D. *Anti-Terrorism: New Offences for New Threats*

Since September 11, many countries used criminal law to counter terrorism. In fact the world wide expansion of terrorism laws was facilitated by the United Nations Security Council Resolution 1373,[123] which required all states to ensure that terrorist acts, including financing of terrorism, are established as serious offences in domestic laws and regulations, and that the punishment duly reflects the seriousness of such terrorist acts.[124] The term terrorism has no definitive definition. Some believe that terrorism forms a special kind of threat that demands specialist response to overcome normal processes within the criminal justice system. Lord Hope in *R v. Director of Public Prosecution, ex parte Kilbilene* viewed that,[125]

> There is the nature of the threat which terrorism posses to a free and democratic society. It seeks to achieve its ends by violence and intimidation. It is often

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118 Malaysia, *Parliamentary Debates*, vol. 3, col. 27 at 97 (4 August 1993) (Dato' Syed Hamid bin Syed Jaafar Albar).

119 See Criminal Procedure Code, *supra* note 51, amended by Act A908/95 at s. 288(4).

120 Mimi Kamariah Majid, *Criminal Procedure in Malaysia* (Kuala Lumpur: University of Malaya Press, 1999) at 513.

121 See *Ho Kin Luan & Anor. v. Public Prosecutor* [1959] M.L.J. 159.

122 *Supra* note 67.

123 UN Security Council, *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001).

124 Kent Roach, "The Criminal Law and Terrorism" in Victor V. Ramraj, *et al.*, eds., *Global Anti-Terrorism Law and Policy* (Cambridge, UK: Cambridge University Press, 2005) at 129.

125 [1999] 3 W.L.R. 972.

> indiscriminate in its effects, and sophisticated methods are used to avoid detection both before and after the event. Society has a strong interest in preventing acts of terrorism before they are perpetrated—to spare the lives of innocent people and to avoid the massive damage and dislocation to ordinary life which may follow from explosions which destroy or damage property.[126]

Malaysia is not alien to the threat of terrorism. The country gained its independence in 1957 whilst in the state of emergency. The state of emergency was declared in 1948 due to the threat posed by the Communist Party of Malaya (CPM), which launched an armed struggle against the government. The state of emergency was lifted on 31 July 1960, but with it came a controversial statute, that is the Internal Security Act 1960, as the country was still under threat by the CPM. The Internal Security Act 1960 amongst others allows for detention without trial. S. 8 of Internal Security Act 1960 provides for preventive detention which allows the Minister of Home Affairs to detain a person for a period of 2 years (this can be renewed indefinitely) on mere suspicion or belief that the detention is necessary in the interest of public order and safety.

The Internal Security Act 1960 was not the first legislation introduced to counter terrorism. The Penal Code in fact is one of the earliest Codes which introduced such provisions. Chapter VI of the Penal Code especially provides for "Offences against the State".[127] The provisions of Chapter VI of the Penal Code make it an offence for an individual or group of people to stage or to intend to stage an insurrection against the government through the use of force and violence. To date, there is only one case which has been reported where the provision was invoked, that is for the prosecution of the *Al-Maunah* group in the case of *Mohd Amin Mohd Razali & Ors v. Public Prosecutor*.[128] The appellants in this case were charged under s. 121 of the Penal Code for the offence of waging war against the *Yang di Pertuan Agong*.[129] They sought to overthrow the government by the use of arms for the purpose of establishing an Islamic State. The facts showed that the appellants staged an armed robbery at two military camps, and then set up base camp and took hostages who were subsequently killed. The appellants were apprehended when Special Forces stormed the camp after 3 days of stand off. The appellants were found guilty and convicted. Three were sentenced to death and the other sixteen to life imprisonment.

Post-September 11 saw measures taken by the Government of Malaysia to enhance its domestic counter terrorism capabilities. To comply with the International Convention for the Suppression of the Financing of Terrorism[130] and the International Convention against the Taking of Hostages,[131] the Penal Code was amended in

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[126] *Ibid.* at 1000; see also Johan Shamsuddin, Talat Mahmood, *The Malaysian Experience in Anti Terrorism Law: A Need for Regional Cooperation, Recent Trends of Building a Regional Community in Asia and Its Legal Issues* (KLRI, 2005) at 17.

[127] See Penal Code, *supra* note 1 at ss. 121-130A.

[128] [2003] 3 C.L.J. 425.

[129] S. 121 reads, "Whoever wages war against the Yang diPertuan Agong or against any of the Rulers or Yang di-Pertua Negeri, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and if not sentenced to death, shall also be liable to fine."

[130] UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, online: <http://www.unhcr.org/refworld/docid/3dda0b867.html>.

[131] *International Convention Against the Taking of Hostages*, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983.

2003,[132] amongst others, making the commission of terrorist acts, the financing of terrorist acts, and hostage taking as specific offences.[133] The amendments under the heading "Offences Relating to Terrorism" was included in a new Chapter VIA of the Penal Code, and a new s. 374A providing for the offence of 'hostage taking'.

Chapter VIA provides a broad meaning of the word terrorism. S. 130B defines 'terrorist' to mean "any person who commits, or attempts to commit, any terrorist act, or participates in or facilitates the commission of any terrorist act".

'Terrorist act' in s. 130B(2) is defined to mean:

> an act or threat of action within or beyond Malaysia that—
> (a) an act or threat falls within subsection (3) and does not fall within subsection (4);
> (b) the act is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the act or threat is intended or may reasonably be regarded as being intended to
> (i) intimidate the public or a section of the public; or
> (ii) influence or compel the government of Malaysia or the government of any state in Malaysia, any other government, or any international organization to do or refrain from doing any act.

S. 130B(3) reads,

> An act or threat falls within this subsection if it—
> (a) involves serious bodily injury to a person;
> (b) involves serious damage to property;
> (c) endangers a persons life;
> (d) creates a serious risk to the health or the safety of the public or a section of the public;
> (e) involves the use of firearms, explosives or other lethal devices;
> (f) involves releasing into the environment or any part of the environment or disturbing or exposing the public to—
> (i) any dangerous, hazardous, radioactive, or harmful substance;
> (ii) any toxic chemical; or
> (iii) any microbial or other biological agent or toxin;
> (g) is designed or intended to disrupt, or seriously interfere with, any computer system or the provision of any services directly related to communication infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
> (h) is designed or intended to disrupt or seriously interfere with, any computer system or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
> (i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;

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[132] Penal Code (Amendment) Act 2003, *supra* note 63.

[133] Malaysia, *Parliamentary Debates*, vol. 5, col. 61 at 117 (29 October 2003) (Datuk M Kayveas).

(j) involves prejudice to national security or public safety;
(k) involves any combination of any of the acts specified in paragraphs (a) to (j), and includes any act or omission constituting an offence under the Aviation Offences Act 1984.

'Terrorist act' in s. 130B possesses two limbs, with subsection (3) providing the *actus reus*, read disjunctively, and subsection (2)(b) and (c) the *mens rea.* The acts mentioned above amount to a 'terrorist act' if it is committed or threatened with the intention of advancing political, religious or ideological cause, and the act or threat is intended or may be reasonably regarded with having intended to intimidate the public or section of the public, or intended to influence or compel the Government of Malaysia or the Government of any state in Malaysia, any other government, or any international organization to do or refrain from doing any act. In the focus to combat terrorism, the term 'terrorist act' is given such a wide meaning. Opposition political parties and non-governmental organizations has voiced out its concerns that the provision will be politically used, where peaceful public protest, demonstrations, civil disobedience, trade union strikes, are vulnerable to the provision, as the Internal Security Act 1960.[134]

The offence of hostage taking was introduced in a new s. 374A. The provision reads,

> Whoever seizes or detains and threatens to kill, to injure or to continue to detain another person ("the hostage") to compel the Government of Malaysia or the Government of any State in Malaysia, any other government or any international organization or any other person or group of persons to do or refrain from doing any act as an explicit condition for the release of the hostage…

The definitions given above is not limited to threat or acts of terrorism in the country to its citizens internally, as for example under the Internal Security Act 1960, but also to threats or acts from outside Malaysia against the public or government organizations outside Malaysia. The scope is also indicated in s. 130B(5), where it states that a reference to any person or property is a reference to any person or property wherever situated, within or outside Malaysia. It also provides that a reference to the public includes a reference to the public of a country or territory other than Malaysia. This clearly indicates Malaysia's commitment to combat terrorism not only within the country but also outside, and the awareness of the importance of regional cooperation. The consequence is the extension of the extraterritorial offences of the Penal Code.[135]

Punishment for committing a terrorist act, whether directly or indirectly,[136] and hostage taking[137] is the mandatory death penalty if the act results in death, but in all other cases, imprisonment not exceeding 30 years, and also liability to a fine. The amendment took 4 years to come into force[138] from the date of its royal assent as it required other consequential amendments to be made to other legislation namely the Criminal Procedure Code, the Subordinate Courts Act and the Court of Judicature

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134 Mah Weng Kwai, *Government Response to Terrorism*, presented at Lawasia Conference, 21 March 2005, Australia [Mah, *Government Response to Terrorism*].
135 See also Penal Code, *supra* note 1 at s. 4.
136 *Ibid.* at s. 130C.
137 *Ibid.* at s. 374A.
138 Enforcement date: 6 March 2007.

Act.[139] There was also the concern from the members of the Bar Council Malaysia of the very broad nature of the provisions on terrorism.[140]

It is highly questionable whether there is a need for the new Chapter VIA. As discussed above, there has only been one terrorism-related prosecution in the history of the country. Existing laws in the country is adequate in prosecuting any terrorist act.[141] In fact the Penal Code provisions of Chapter VI are adequate and wide enough to cover terrorist acts under the new s. 130B which includes offences against the state through the use of force or violence.

E. *Increased Penalties*

In 2003,[142] amendments were also made to provisions on punishment for certain serious offences. S. 57 of the Penal Code on 'Fraction of terms of punishment' was amended from 20 years imprisonment to 30 years. S. 57 reads, "In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for thirty years." Punishment for offences which result or may result in the death or grievous hurt of the victim has also been amended from the maximum imprisonment of 20 years to 30 years. Such offences include the offence of culpable homicide not amounting to murder,[143] gang robbery with murder,[144] kidnapping or abduction in order to murder,[145] and house breaking causing death or grievous hurt.[146] A new provision of punishment for raping a woman, with whom his relationship is such that he is not permitted to marry, which is similar to involuntary incest, is minimum imprisonment of 8 years and maximum 30 years with whipping of not more than 10 stokes.[147]

The issue which arises is: what is the objective of amending the maximum period of imprisonment? Unfortunately, the issue was not raised or discussed during the parliamentary debate. Perhaps the amendment may have been done in line with the change in views about the objective of punishment from retributive to deterrent and restoration. This is evident when the importance of rehabilitation was discussed in parliament during the debate on issue of incest.[148] Although the increase in punishment has been the trend in the Penal Code, positive changers have been made under the Prison Act 1999[149] where the parole system[150] has been put in place although its main aim is to reduce congestion in prison and reduce the high maintenance cost of

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139 Statement by Malaysian Delegation on Agenda ITEM 148: Measure to eliminate international terrorism, 6th Committee during the 59th session of the UN General Assembly (18 Oct. 2004).

140 See Mah, *Government Response to Terrorism*, *supra* note 134.

141 *Ibid.*

142 Penal Code (Amendment) Act 2003, *supra* note 63.

143 Penal Code, *supra* note 1 at s. 304(A).

144 *Ibid.* at s. 396.

145 *Ibid.* at s. 364.

146 *Ibid.* at s. 460.

147 *Ibid.* at s. 376(3). Punishment for incest in s. 376B is a minimum sentence of 6 years and maximum 20 years, and shall be liable to whipping.

148 Malaysia, *Parliamentary Debates*, vol. 3, col. 43 at 98-100 (9 August 2001) (Datin Paduka Dr. Tan Yee Kew).

149 (Act 537, 1999).

150 *Prisons (Amendment) Act 2008* (Act A1332, 2008).

the Prison Department. The Criminal Procedure Code has also introduced community service orders[151] for youth offenders,[152] and rehabilitative counseling[153] within the period of detention for offenders convicted for the offence of rape and unnatural offences.[154]

III. Summary and Conclusion

Islam is not the supreme law of the land, but is rather, the official religion of the Federation. British colonization of the country resulted in what appears to be the secularization of a largely Islamic country. Many of the originating principles of Thomas Macaulay's Indian Penal Code were inevitably compromised, however, after the code was imported and adapted in this context. While recognizing that the Penal Code of Malaysia is a product of colonization, what is evident today is that the strong Islamic influence has managed to penetrate the secular barricade that accompanied the code. Whilst constitutional lawyers and politicians would disagree that Malaysia is an Islamic country,[155] Islam and its culture still has a very strong influence over the laws of the country. Take for example the offences categorized as "Unnatural offences". While other Commonwealth countries have or are in the process of decriminalizing such offences,[156] Malaysia has not only retained them but has redefined such offence.

Women's organizations in the country have been very active in their goal of improving the position of women in the society. They have managed to convince the legislature to modify provisions on rape and sexual exploitation offences involving women and children over the past 20 years. But their call to introduce marital rape into the Penal Code was compromised by the difference in opinion of religious leaders in the country.

Issues concerning conflicting jurisdictions are not alien in Malaysia which has parallel judicial system. Until the issue was settled in 1988 with the amendment to Art 121(1A) of the Federal Constitution, the Shariah Court was always regarded as inferior to the civil courts.[157] Unfortunately, what the amendment did not anticipate was the overlapping of both Islamic and the civil law jurisdiction over offences like incest and unnatural offences. The Federal Court in the case of *Sukma Darmawan Sasmitaat v. Public Prosecutor*[158] decided that in a case where the provision is provided in both laws, then both the Shariah and the Civil Court have jurisdiction over the matter. Apart from the problem highlighted earlier in this comment, this decision also raises an additional legal conundrum. The criminal jurisdiction of

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151 s. 293, inserted by Act A1274/2006.

152 Penal Code, *supra* note 1 at s. 2: a person convicted of an offence punishable by fine or imprisonment who is above or of the age of 18 years and below the age of 21 years.

153 *Ibid.* at s. 295A, inserted by Act A1274/2006.

154 *Ibid.* at ss. 376, 377C, 377CA and 377E.

155 Although Federal Constitution, *supra* note 10 at Art 3 provides that Islam is the official religion of the Federation, Islamic law is not the supreme law of the Federation.

156 For *e.g.*, England and Singapore.

157 Art 121(1A) states that the civil court has no jurisdiction in respect of matters within the jurisdiction of the Shariah Court.

158 [1999] 1 C.L.J. 481.

the Shariah Court is limited, and way below the jurisdiction provided for the civil court.[159]

Turning to the subject matter of punishment, it will be immediately noticed that the severity of punishment have increased with every amendment. As mentioned earlier, the provision on imprisonment for life under s. 57 of the Penal Code was increased from 10 years to 20 in 1976 to 30 years in 2007. Much reliance has also been placed on minimum prison sentences, limiting the powers of the courts in its sentencing discretion. It must be mentioned that the approach used for punishment in all the amendments has been a one size fits all approach in order to solve a particular crime, *i.e*. to enhance the punishment with the aim of deterrence. This is too narrow. New approaches, such as restorative justice, are new in Malaysia. It has not been put to test. It is quite worrying to see the trend of an increasing use of imprisonment each time an amendment is considered. Nevertheless, the introduction of parole, community services and rehabilitative counseling is a positive move by the government. Let us hope that this positive move becomes the trend in years to come.

Last but not least, the call for feedback from the public with regards to the Penal Code Amendment 2006 must be mentioned. This unprecedented move from the government deserves special mention. Unlike previous draft amendments which were always stamped '*sulit*' or secret, the Government welcomed feedback to the Parliament Select Committee considering amendments to the Penal Code. Although the draft was distributed with very little or no explanation, for example in the form of consultation papers published in many Commonwealth countries,[160] it is still a positive step towards the reform of the penal process in Malaysia. It is hoped that this process continues to develop and become a precedent for all future amendments.

[159] Courts of Judicature Act 1964 (Act 91, 1964) at s. 24: maximum death sentence; Criminal Procedure Code, *supra* note 51 at s. 288: maximum 24 strokes of the whip.

[160] For *e.g*., England.