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FRAUDULENT SEX CRIMINALISATION IN SINGAPORE: HAPHAZARD EVOLUTION AND ACCIDENTAL SUCCESS

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In this article, I critically examine the evolution of fraudulent sex criminalisation in Singapore and make two contributions. First, I demonstrate that the major amendments to the relevant *Penal Code* provisions (*ie*, in 2007 and 2019) were made pursuant to an attempted importation of English legal provisions, without due regard to the synergetic relationship between the imported provisions and the existing provisions in both the *Penal Code* and the English statutes. Second, I normatively assess the 2019 reform. I argue that the 2019 reform is desirable for two reasons: (1) the reform finally brings the plain-wording of the statutory provisions in line with what the government is prepared to fully enforce; and (2) the ostensible decriminalisation of fraudulent sex is mitigated by the broadly-worded cheating offences and the undisturbed broad judicial interpretation of how "fear of injury" may vitiate sexual consent.

I. INTRODUCTION

There has always been a pervasive English influence on Singapore's criminal law. While not surprising in light of Singapore's colonial heritage, this English influence is *prima facie* questionable given the different structure and wording of the *Penal Code* as compared to English criminal law statutes.[1] This English influence is acutely problematic for fraudulent sex (*ie*, obtaining of sex through fraud). In the process of consolidating and rationalising various aspects of criminal law into a concise structure, the original *Penal Code* adopted an ostensibly radical approach by applying the same definition of consent for all usage in the Code.[2] In particular, section 90(a) of the *Penal Code* stated that any 'misconception of fact' would vitiate consent, including *vis-à-vis* rape and sexual offences. This is in sharp contrast to the English position. In England, there is a separate statute for sexual offences. In turn, the English courts have narrowly interpreted that sexual consent would only be vitiated

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1 Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (UK: Ashgate, 2011) at 19, 52-54.

2 See Part II.A.

for spousal impersonation and fraud as to the nature of the act. Notwithstanding these critical differences, in the leading case of *Siew Yit Beng v Public Prosecutor* ("*Siew Yit Beng*"),[3] the Singapore's High Court applied an old English case when interpreting provisions in the *Penal Code*,[4] whereas the legislature sought to import the most recent English reforms when considering related amendments to the *Penal Code* in 2007 and 2019.[5]

In this article, I critically examine the evolution of fraudulent sex criminalisation in Singapore from two perspectives, namely (1) the process of legal interpretation and law reform, and (2) the normative assessment of the new law ushered in by the 2019 reform.

For the first perspective, I begin with the *Siew Yit Beng* decision, which sets out the law in Singapore prior to the 2007 reform. I highlight the undesirably cursory application of English case law in *Siew Yit Beng*. I further argue that, notwithstanding Indian cases to the contrary, the outcome in *Siew Yit Beng* may be justified by the ambiguity of the original *Penal Code*. The ambiguity arose from the ostensibly superfluous sub-provision in the section 375. The sub-provision indicates that rape would be committed even if the sexual intercourse is consensual, so long as that consent was under the misconception as to identity.

Next, I investigate the precise process that the led to 2007 and 2019 reforms. For the 2007 reform,[6] I describe how the eventual amendments resolved the ambiguity within the original *Penal Code* in a manner that is entirely at odds with the government's intention. The ostensibly superfluous sub-provision in the rape provision was removed as the government remoulded section 375 in line with the English equivalent under the *Sexual Offences Act 2003*.[7] However, there was no corresponding enactment of the evidential presumption provisions in *Sexual Offences Act 2003*, which otherwise stipulate that sexual consent would be vitiated for misconceptions as to nature of the act, purpose of the act, and identity of the perpetuator. This facilitated subsequent Singapore courts to apply 'misconception of fact' to sexual offences without any articulated restriction, unlike *Siew Yit Beng* and the English cases.

For the 2019 reform,[8] I identify how the reform was a selective implementation of the Penal Code Review Committee's two recommendations: (1) not having a positive definition of consent; and (2) not setting out the particular circumstances where misconceptions would vitiate consent.[9] The 2019 reform exhaustively stipulates that sexual consent can only be vitiated by misconception as to purpose, nature and identity. This curtailing of the scope of consent-vitiating misconceptions is supplemented by a new provision that specifically criminalises fraud as to sexual protection and sexually transmitted diseases. I explain how this selective implementation failed to appreciate that in England and Australia, the positive definition of

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3 [2000] 2 SLR(R) 785 (SGCA) [*Siew Yit Beng*].

4 See Part II.

5 See Parts III & IV.

6 Which culminated in the *Penal Code (Amendment) Act 2007* (No 51 of 2007, Sing) [*2007 reform*].

7 *Sexual Offences Act 2003* (UK), c 42, s 1 [*Sexual Offences Act 2003*].

8 Which culminated in the *Criminal Law Reform Act 2019* (No 15 of 2019, Sing) [*2019 reform*].

9 Penal Code Review Committee, *August 2018 Report: Submitted to the Minister for Home Affairs and Minister for Law* (2018) at 248, online: Ministry of Home Affairs <https://www.mha.gov.sg/docs/default-source/default-document-library/penal-code-review-committee-report3d9709ea6f13421b92d3ef8af69a4ad0.pdf> [Penal Code Review Committee Report].

consent performs an important function of mitigating any potential restrictiveness in the list of stipulated consent-vitiating misconceptions.

Drawing on these findings, I conclude the analysis of the first perspective by arguing that the legislative reforms in 2007 and 2019 suffered from the same fundamental flaw. In both reforms, there is the failure to give due regard to not only (1) the relationship between the imported provisions and the existing provisions in the *Penal Code*, but also (2) the relationship between the imported provisions and the other provisions in the English statute that are not imported. I further argue that the difficulty to give due regard to the relationship between the provisions is aggravated in Singapore. The framers of the original *Penal Code* were insufficiently circumspect when they (mis)placed the sexual offences within the generally applicable definition of consent that was designed with other offences and context in mind.

For the second perspective, I argue that the 2019 reform is desirable for two reasons, notwithstanding the possible disquiet arising from the ostensible decriminalisation. First, the 2019 reform finally brings the plain wording of the statutory provisions in line with what the government is prepared to fully enforce. This is contrast with the 2007 reform, which resulted in a set of provisions that unambiguously state that all fraudulent sex is rape, though that is not publicised as such by public institutions. Second, I argue that the risk of under-criminalisation is mitigated by two existing provisions of the *Penal Code*. The first provision is the broadly worded cheating offence that will catch any fraudulent sex involving inducement of a financial or economic nature.[10] The second provision is the stipulation that consent would be vitiated if given under "fear of injury", with "injury" defined as "harm whatever illegally caused to any person, in body, mind, reputation or property".[11] Since the Singapore's courts had given full effect to the statutory wordings, this will catch any fraudulent sex that has an element of threat, even if the threat does not involve violence or physical harm.

This article is organised into seven parts. Part II discusses the *Siew Yit Beng* case and the ambiguous structure of the original *Penal Code*. Part III analyses the 2007 reform, and the ironic and unintended radical departure from the English position. Part IV examines the 2019 reform and the accidental creation of a unique approach to fraudulent sex criminalisation that is different from both the English and Indian positions. Part V discusses the implications of these findings *vis-à-vis* the law reform perspective. Part VI presents a normative assessment of the 2019 reform. Part VII concludes.

II. *Siew Yit Beng*: Wrong Method, (Possibly) Right Answer

In 1871, the *Penal Code* was enacted in Singapore. Somewhat belatedly, it would take over a century before a Singaporean court had to interpret 'misconception of fact' under section 90(a) in the context of rape. This Part first sets out the relevant *Penal Code* provisions operative at that time and the *Siew Yit Beng* decision, before unpacking the flaws in both the decision and the *Penal Code*.

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10 *Penal Code* (Cap 224, 2008 Rev Ed Sing), s 415 [*Penal Code 2008*].

11 *Ibid*, s 44.

A. *Statutory Provisions*

There are two relevant provisions. First, section 90 defines "consent" for the purpose of the entire *Penal Code*. Second, section 375 defines "rape". Notably, there had been no substantial amendments to either provisions (at least *vis-à-vis* fraudulent sex) between 1871 and 2000, when *Siew Yit Beng* was decided. Both sections are reproduced for convenience below.

> 90. A consent is not such a consent as is intended by any section of this Code —
> (a) if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception[12]

> 375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the 5 following descriptions:
> (a) against her will;
> (b) without her consent;
> (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt;
> (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
> (e) with or without her consent, when she is under 14 years of age.[13]

B. *The Siew Yit Beng Decision*

The 2000 High Court case of *Siew Yit Beng* was the first Singapore case[14] that interpreted 'misconception of fact' under section 90(a) in the context of rape. The case actually involved the offence of knowingly giving false information to the police under section 182. The defendant made a police report that she was raped by her Chinese physician, but later retracted her allegation and admitted that the sexual relationship was consensual. At trial, the defendant claimed that she only agreed to the sexual intercourse because the Chinese physician promised he would cure her thereafter. Thus, the defendant argued that her consent was indeed vitiated under section 90(a).

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12 *Penal Code* (Cap 224, 1985 Rev Ed Sing), s90 [*Penal Code 1985*].

13 *Ibid*, s 375.

14 There was a 1997 case that made a brief observation on s 90 in the context of rape. In *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316, the Court of Appeal at 327 noted in *obiter* that "[t]he facts we have set out clearly indicate that the complainant was tricked into performing fellatio on the respondent. Her consent may well be vitiated by s 90 of the Penal Code.". The deception in question was that the defendant had used up a lot of energy in treating the complainant (via sexual intercourse to remove "poison" in the complainant's vagina) and had to be "revitalized" via fellatio. For a critique of the case, see Michael Hor, "Changing Criminal Law: Singapore Style" in Dora Neo, Tang Hang Wu & Michael Hor, eds, *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian & Tan Sook Yee* (Singapore: Academy Publishing, 2007) at 121, 134 [Michael Hor].

The then-Chief Justice Yong Pung How rejected this defence. Referring to the nineteenth century English case of *R v Flattery* ("*Flattery*"),[15] Yong CJ held that "[w]hat was crucial in this case was that there was no misconception on the part of the appellant regarding the nature of the sexual act. By her own admission as well as the evidence of her husband, she obviously did not regard it as part of the treatment and that she had engaged in the act 'in exchange for treatment.' In my view given that she fully understood the nature of the act, her consent to such an act would not be vitiated under s 90(a) even though Tan did not subsequently manage to cure her."[16]

C. *Analysis*

Siew Yit Beng has been regarded as the core Singapore decision on 'misconception of fact' *vis-à-vis* sexual consent in a journal article,[17] textbook[18] and the 2018 Penal Code Review Committee Report.[19] This is arguably inevitable. There is a paucity of case law on the matter and *Siew Yit Beng* was a decision by the then Chief Justice. However, it is also unfortunate. The Court's treatment of 'misconception of fact' is cursory at best. There was no explanation why the English jurisprudence should be applicable notwithstanding the difference in structure and wording of the criminal law statutes. There was also no examination of the Indian cases that are more directly relevant to interpreting the *Penal Code*. An examination would have revealed that by the mid-1990s, the Indian courts were prepared to uphold rape convictions for sexual offences procured under the false promise of marriage.[20] Indeed, when the defendants were acquitted in India, it was not because the misconception was unrelated to the nature of the act.[21] Rather, the acquittals were because there had been no evidence of the defendant's mental state when making the promise to establish that the defendant never intended to fulfil the promise,[22] or that the court finds that the defendant was sincere at the time of making the promise.[23]

This ruling in *Siew Yit Beng* had been heavily criticised by the eminent criminal law scholar, Stanley Yeo,[24] who wrote (in a 2007 essay)[25] that 'misconception of

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15 (1877) 2 QBD 410.

16 *Siew Yit Beng*, *supra* note 3 at para 35.

17 Jonathan Herring, "Does Yes Mean Yes: The Criminal Law and Mistaken Consent to Sexual Activity" (2002) 22 Sing L Rev 181 at 184 [Herring].

18 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 3d ed (Singapore: LexisNexis, 2018) at 625-628 [Yeo, Morgan & Chan].

19 Penal Code Review Committee Report, *supra* note 9 at 250-255.

20 *Eg*, *Uday v State of Karnataka* ILR 1996 KARNATAKA 312 (Karnataka HC), online: Indian Kanoon <https://indiankanoon.org/doc/1355448/?type=print>.

21 I note the exception of *Mir Wali Mohammad @ Kalu v Bihar* (1990) 2 PLJR 375 (Patna HC) [*Mir Wali*] at para 4. *Mir Wali* did not cite any English case, but rather, the Indian case of *Jayanti Rani Panda v West Bengal* (1984) Cr LJ 1535 (Calcutta HC) [*Jayanti Rani Panda*]. More crucially, the Court in *Mir Wali* at para 5 erred when it opined that *Jayanti Rani Panda* "fully supports this [restrictive] view". The Court in *Jayanti Rani Panda* did not hold that false promise of marriage cannot vitiate consent as misconception of fact, but simply that in the present case there was no evidence that the promise was false.

22 *Eg*, *Vincent v State* (1995) 2 MWN (Cri) 129 (Madras HC).

23 *Eg*, *Abhoy Pradhan v West Bengal* (1999) Cr LJ 3534 (Calcutta HC).

24 See also, Herring, *supra* note 17 at 184. In Herring's article, the case was also mentioned as representing the common law approach, which he argued as too restrictive as a matter of policy and normative considerations.

25 See also Yeo, Morgan & Chan, *supra* note 18 at 625-628.

fact' should not be restricted to the English common law position. He alluded to the "principle of individualistic liberalism [that] lets the consenting party decide what facts are material to his or her decision whether or not to consent." He further highlighted a 1984 Indian decision of *Jayanti Rani Panda* that, in *obiter*, did not adopt such restrictive interpretations for rape.[26] More pertinently, Yeo drew on the other existing provisions of the *Penal Code* to make two arguments that are premised on the framer's intention.

First, Yeo pointed to section 90(b), which then provided that consent would be vitiated "if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent".[27] He argued that "[s]ince the Code framers refer to this specific type of factual error in s. 90(b), they must have intended the expression 'misconception of fact' under s. 90(a) to be more encompassing."[28]

Second, he acknowledged that the way rape was defined posed "some uncertainties" when reading the rape provision with section 90. For example, he noted that section 375(c) provided that consent is vitiated if it was "obtained by putting her in fear of death or hurt", but section 90(a) simply stated "if given under fear of injury".[29] Nonetheless, he argued that this should not mean that "s. 90 is inoperative in relation to the issue of consent in rape cases. The point remains that the term 'consent' appearing in s. 375 requires interpretation, and s. 90 supplies a partial definition. Accordingly, it cannot be that the Code framers meant to limit misconceptions of fact in rape cases to mistaken identity alone on account of s. 375(d). Our courts have acknowledged this by following English case law to hold that consent will be vitiated if it was made under a mistake over the nature of the act consented to. But, there is no good reason why other types of misconceptions of fact cannot also negate consent in rape cases."[30]

This article agrees with the basic thrust of these two arguments. However, both arguments do not directly confront the issue at stake in *Siew Yit Beng*, namely what sort of misconception would vitiate *sexual* consent. The first argument relates to how 'misconception of fact' under section 90(a) should be interpreted across the entire *Penal Code*. However, it has always been less controversial to apply, without restrictions, 'misconception of fact' in other parts of the *Penal Code*.[31] The core issue is the complication posed by section 375, which lists two circumstances where there is "consent", but because the consent has been "obtained by putting her in fear of death or hurt" or through impersonation, rape is still committed. The second

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[26] Stanley Yeo, "Constructing Consent under the Penal Code" in Dora Neo, Tang Hang Wu & Michael Hor, eds, *Lives in the Law: Essays in Honour of Peter Ellinger*, *Koh Kheng Lian & Tan Sook Yee* (Singapore: Faculty of Law, National University of Singapore: Academy Publishing, 2007) at 165, 173-175 [Stanley Yeo].

[27] *Penal Code 1985, supra* note 12 at s90b.

[28] Stanley Yeo, *supra* note 26 at 165, 173.

[29] *Ibid* at 165, 175.

[30] *Ibid*.

[31] *R v Poonai Fattermah* (1869) 12 WR (Cr) 7 (Calcutta HC) (in the context of culpable homicide not amounting to murder, consent to being bitten by poisonous snakes was vitiated by the accused's false claim of having the power to protect the victims from harm). See also *Parshottam Mahadev Patharphod v State* (1963) Cri LJ 573 at paras 10-11 (Bombay HC) (in the context of theft for the purpose of stolen property); *In re N Jaladu* (1913) ILR 36 Mad 453 (Madras HC) (in the context of kidnapping).

argument attempted to address this issue but framed the issue as whether section 90 is inoperative *vis-à-vis* section 375. This framing is unnecessarily and unhelpfully broad. Even if section 90 remains operative, it does not necessarily mean that the Code framers did not intend that its operation in rape be subjected to certain restrictions then prevailing in common law jurisprudence. Indeed, it is important to note that *Siew Yit Beng* did not deny the operation of section 90(a) in section 375, but merely qualified it with the English common law position espoused in *Flattery*.

The above discussion is not to endorse *Siew Yit Beng*. There is no justification for an uncritical application of old English law without any appreciation of the different structure and wording of the *Penal Code*. Yet, while Yeo's arguments correctly identified the complications and nuances that must be navigated in approaching the issue, his arguments were underpinned by a flawed premise, namely that the Code framers had coherent thoughts behind the drafting of section 375 and its intended relationship with section 90.

On its face, sections 375(c) and 375(d) are completely superfluous given how section 90 is drafted. The inclusion does support the notion that the Code framers consider consent for the purpose of rape as different from consent in other settings, especially where "clarifications" of consent is not found in other parts of the *Penal Code*. Nonetheless, while this is an understandable and arguably inevitable position given the prevailing social morals,[32] the Code framers have to be faulted for not explicitly excluding the application of section 90 as they had done for other provisions,[33] or indeed in section 90(c) itself.[34] The half-hearted attempt to caveat sexual consent resulted in "uncertainties" that could—and should—have been avoided.

In summary, the Court in *Siew Yit Beng* should have been more circumspect in interpreting section 90(a) in the context of section 375. However, the conclusion that fraud as to the nature of the act is necessary to vitiate sexual consent is within the realm of justifiable interpretation given the inherent ambiguity of the *Penal Code*.[35]

III. 2007 Reform: Accidental Decoupling of English Influence

Seven years after *Siew Yit Beng*, the Singapore jurisprudence on fraudulent sex criminalisation reached a new milestone. The wording and structure of sexual offences

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[32] Guyora Binder, *Criminal Law* (UK: Oxford University Press, 2016) at 240-241 [Binder]. See also Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles" in Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (UK: Ashgate, 2011) at 19, 49-50 ("The rape provision reflects utilitarian simplicity but also persistent Victorian attitudes.") [Wright].

[33] For example, s 91 provided that "The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given." See also Wright, *ibid* at 19, 50 ("Despite the silence on the question of knowledge of consent in rape, Macaulay's otherwise careful consideration of consent in *other provisions* were informed ... by a individualistic liberalism where individual autonomy is placed ahead of competing interests" [*emphasis added*]).

[34] "[U]nless the contrary appears from the context, if the consent is given by a person who is under 12 years of age".

[35] The flip side is true. The interpretation adopted by the Indian courts and advocated by Stanley Yeo is justifiable as well. Indeed, in *Public Prosecutor v Teo Eng Chan* [1987] SLR(R) 567 [*Teo Eng Chan*], the Singapore High Court did not apply any qualification on the types of threat that would vitiate consent, notwithstanding s 375(c).

vis-à-vis fraudulent sex was given its first ever statutory amendment in 2007. This Part presents the legislative history and eventual amendments, before demonstrating how the 2007 reform unintentionally altered the Singapore's court's approach to section 90(a) and to sexual offences.

A. *Legislative Process and Eventual Amendments*

The 2007 reform was part of a major overhaul review of the *Penal Code*. The review proposed changes that extend beyond sexual offences and included substantial amendments or enactments to offences of fraud, unlawful assembly, and social harmony.[36]

There were many amendments made to sexual offences. However, the rationale for the proposed changes (whether *vis-à-vis* fraudulent sex or otherwise) is difficult to decipher given the brevity of the consultation paper that accompanied the draft amendment bill. As pointedly observed by Michael Hor, "[t]he Bill runs to 41 pages, the [Consultation] Paper a mere 8."[37] The subsequent legislative deliberation also failed to shed substantial light, no less given that the legislative proceedings were dominated by the heated debate over the retention of section 377A (*ie*, the provision that was understood to criminalise male sodomy).[38] Nonetheless, from the annotations of origin under the enacted provisions and amendments, it is clear that the reform to sexual offences was heavily influenced by the *Sexual Offences Act 2003*. Of the 13 sexual offence provisions that were either amended, or enacted, nine were expressly tied to its English equivalent. These include the amendments made to section 375 and a new section 376F.

The new section 376F is based on section 34 of the *Sexual Offences Act 2003*. It criminalised the procurement of sexual activity with a person suffering from a mental disability, insofar as the victim's consent is "obtain[ed]" via "inducement", "threat" or "deception".[39]

For section 375, the provision was reworded based on section 1 of the *Sexual Offences Act 2003*. The resulting provision is as follows:

> 375.—(1) Any man who penetrates the vagina of a woman with his penis —
> (a) without her consent; or
> (b) with or without her consent, when she is under 14 years of age, shall be guilty of an offence.

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[36] See Ministry of Home Affairs, *Consultation Paper on the Proposed Penal Code Amendments* (2006) at 2-5, online: National Archives of Singapore <https://www.nas.gov.sg/archivesonline/data/pdfdoc/20061108982.pdf> [2006 Consultation Paper].

[37] Michael Hor, *supra* note 14 at 121.

[38] *Parliamentary Debates Singapore: Official Report*, vol 83 (22 October 2007); *Parliamentary Debates Singapore: Official Report*, vol 83 (23 October 2007). For an academic discussion on the public and legislative debate, see Jianlin Chen, "Singapore's Culture War over Section 377A: Through the Lens of Public Choice and Multi-Lingual Research" (2013) 38 Law & Social Inquiry 106; Yvonne C L Lee, "'Don't Ever Take a Fence Down until You Know the Reason it was Put up': Singapore Communitarianism and the Case for Conserving 377A" [2008] SJLS 347.

[39] Under s 376F(c), "A obtains B's consent by means of an inducement offered or given, a threat made or a deception practised by A ..."

Notably, section 1 of the *Sexual Offences Act 2003* was meant to consolidate the amendments in the *Sexual Offences (Amendment) Act 1976*,[40] which finally statutorily defined rape as sex without consent.[41] However, the rewording of section 375 to match section 1 of the *Sexual Offences Act 2003* is ostensibly more straightforward. Since the then section 375(b) already defined rape as sexual intercourse without consent, the rewording exercise simply entailed removing the other sub-sections. In particular, this resulted in the removal of sections 375(c) and 375(d).

At this juncture, it is important to highlight that the amendments to section 375 were originally intended to be accompanied by new provisions relating to evidential presumptions *vis-à-vis* sexual consent. The draft amendment bill that accompanied the 2006 Consultation Paper proposed the enactment of sections 377F and 377G.[42] Section 377F was based on section 75 of the *Sexual Offences Act 2003*, and provided that there would be a rebuttable presumption against the existence of consent under circumstances where the complainant was wrongfully restrained, unconscious, or under fear of immediate violence against the complainant or another person.[43] Section 377G was based on section 76 of the *Sexual Offences Act 2003*, and provided that there would be a conclusive presumption against the existence of consent if the defendant "intentionally deceived the complainant as to the nature of the relevant act" and "impersonat[e] a person known personally to the complainant".[44] There was no explanation why these two provisions were subsequently withdrawn from the actual bill tabled in Parliament for first reading on 17 September 2007.[45] In a contemporaneous essay written between the start of the public consultation and the eventual first reading, Hor was highly critical of how these two provisions introduced complicated, disruptive and unnecessary evidential concepts.[46] On the other hand, Yeo was more sympathetic to the provisions, especially on how it could clarify the law relating to the requisite level of defendant's knowledge about the complainant's (lack of) consent.[47]

In any event, the ultimate decision not to include the evidential presumption provisions likely prompted the decision to amend section 90. In the original draft amendment bill and accompanying 2006 Consultation Paper, there were no proposed amendments to section 90.[48] The eventual amendment entails the addition of "wrongful restraint" as a consent-vitiating circumstance. Notably, "wrongful restraint" is the circumstance in the proposed section 377F that is not already explicitly provided for in section 90. This is accompanied by the division of section 90(a) into two further sub-sections, with section 90(a)(i) on "fear of injury or wrongful restraint" and section 90(a)(ii) on 'misconception of fact'.[49] The amendment to section 90 does not

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40 *Sexual Offences (Amendment) Act 1976* (UK), c 82.

41 See Section 1 of the *Sexual Offences Act 1956* (UK), c 69 [*Sexual Offences Act 1956*]. In this prior iteration of the *Sexual Offences Act 2003*, the rape offence is set out without defining what rape is.

42 2006 Consultation Paper, *supra* note 36 at 5; *Draft Penal Code (Amendment) Bill* (2006), s 50 [*2006 Draft Amendment Bill*].

43 *2006 Draft Amendment Bill*, *ibid*, s 50.

44 *Ibid*.

45 Bill 38, *Penal Code (Amendment) Bill*, 2007, s 71 [*2007 Amendment Bill*].

46 Michael Hor, *supra* note 14 at 121, 136-139.

47 Stanley Yeo, *supra* note 26 at 165, 177-179.

48 See 2006 Consultation Paper, *supra* note 36; *2006 Draft Amendment Bill*, *supra* note 40.

49 *2006 Draft Amendment Bill, supra* note 42, s 19.

substantively affect the criminalisation of fraudulent sex beyond facilitating a more pin-point reference (*ie*, section 90(a)(ii)).

In the actual legislative debate, beyond a cursory support by a member on "the Government's move to protect minors and persons with mental disability from being victims of sexual offences",[50] there was no discussion on the amendments relating to sections 90, 375 and 376F.

B. *Analysis*

The 2007 reform was essentially an attempt to remodel Singapore's sexual offences based on the UK *Sexual Offences Act 2003*. The most telling aspect was the attempted importation of the evidential presumptions provisions. These provisions were integral to the innovative (if imperfect) restructuring of the approach towards sexual consent under the Sexual Offences Act 2003.[51] However, these provisions are alien to the existing structure of the Penal Code. As colourfully put by Hor, "[i]t is annoying that so many years after independence, Singapore is still doing this kind of 'hit and run' transplantation of foreign statutory provisions which display such dismaying insensitivity to the provisions of existing legislation."[52]

To the credit of the government, the evidential presumptions provisions were duly withdrawn from the final bill. The end result, however, is startling and in all likelihood unintended. The rewording of section 375 entailed the removal of sections 375(c) and 375(d). As discussed above in Part II.C., these two sub-provisions are key factors that support—albeit inconclusively—a restrictive interpretation of section 90 in the context of rape. Under the *Sexual Offences Act 2003*, the restrictive approach towards consent-vitiating fraud is preserved by the evidential presumptions provisions that only singled out selected types of fraud (*ie*, purpose, nature and identity) as conclusive presumption against the existence of consent. Thus, removing sections 375(c) and 375(d) without introducing the evidential presumption provisions meant that, suddenly, there is no statutory indication why section 90 should not be given its full effect in the context of sexual offence.

This appears to be what happened in the Singapore's courts. Since the 2007 reform, there were three reported cases that dealt with the issue of 'misconception of fact' *vis-à-vis* sexual consent.[53] Two of the cases, *Public Prosecutor v Wee Teong Boo*[54] and *Public Prosecutor v Koh Nai Hock*,[55] involved the defendant using his finger to penetrate the complainant's vagina under the pretext of medical treatment. Such deception would have satisfied even the narrow common law position espoused in

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50 *Parliamentary Debates Singapore: Official Report*, vol 83 at col 2415-2421 (23 October 2007) (Lim Biow Chuan).

51 For a contemporaneous critical discussion, see Jennifer Temkin & Andrew Ashworth, "The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent" [2004] Crim LR 328 at 332-340.

52 Michael Hor, *supra* note 14 at 121, 137.

53 There were two other cases that involved misconception of facts in sexual offence, but given that the defendants had pleaded guilty, they did not involve any discussion of the applicable law: *Public Prosecutor v BVZ* [2019] SGHC 83; *Public Prosecutor v BUT* [2019] SGHC 37.

54 [2019] SGHC 198 [*Wee Teong Boo*].

55 [2016] SGDC 48 [*Koh Nai Hock*].

Siew Yit Beng.[56] It is thus unsurprising that consent was held to be vitiated in both cases.

Nonetheless, there is a notable departure in the court's approach. Instead of referring to the English cases as in *Siew Yit Beng*, the judges in both cases simply looked at section 90(a) and applied 'misconception of fact' without any qualification. In *Koh Nai Hock*, the District Court judge held that "I was of the view that Mrs P was under a misconception of fact that what the accused had been doing to her were legitimate methods to treat her infertility. In this regard, it would be pertinent to refer to section 90 of the *Penal Code* which sets out the circumstances under which a person's consent is regarded to be vitiated. This section states that if the consent was given under fear, wrongful restraint or under a misconception of fact, then that would not be regarded as a valid consent, and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."[57] Similarly in *Wee Teong Boo*, the High Court observed that "even if V did consent, her consent would have been given under a misconception that the accused was truly conducting an internal pelvic examination, and the accused clearly knew that the consent was given in consequence of such misconception. Such a consent would not have been valid: s 90(a)(ii) of the *Penal Code*."[58]

Tellingly, this approach was adopted in the third case, notwithstanding that the facts of this third case did not neatly fit into misconception as to the medical nature of the act. In *Public Prosecutor v Lim Cher Foong*, [59] the defendant told the complainant that anal sex was the way the defendant can pass "chi" or "yang" to the complainant as part of training. On the evidence, there was some ambiguity as to whether the misconception was to nature or purpose of the anal sex. The complainant did, at the onset, appreciate the inherent sexual nature of anal penetration,[60] and the judge also found that the complainant "actually believed the accused's explanation about the *purpose* of the anal sex."[61] Nonetheless, this ambiguity did not matter as the District Court judge[62] simply referred to section 90 of the *Penal Code* and applied the 'misconception of fact' without any qualification.[63]

Admittedly, the exercise of prosecutorial discretion meant that the convictions in these three cases do not represent any radical departure in terms of outcomes. Nonetheless, it is significant that the courts apply the post-2007 *Penal Code* without the shackles of English cases and indeed *Siew Yit Beng*. In this regard, it is all the more ironic that this decoupling of English influence was brought upon by an initial government desire to transplant English law.

The normative considerations of this clean but potentially radical approach of allowing all 'misconceptions of fact' to vitiate sexual consent will be discussed in Part VI. At this stage, it must be pointed out that the 2007 reform still leaves a

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56 See Part II.B.

57 *Koh Nai Hock*, *supra* note 55 at para 145.

58 *Wee Teong Boo*, *supra* note 54 at para 139.

59 *Public Prosecutor v Lim Cher Foong* [2016] SGDC 6 [*Lim Cher Foong*].

60 *Ibid* at paras 14-15, 68-71.

61 *Ibid* at para 130 [emphasis added].

62 The District Court Judge Hamidah Bte Ibrahim was the same judge for *Koh Nai Hock*.

63 This issue of consent is in *obiter*: because the complainant was under 16 and the defendant was charged with s 376A (sexual penetration of minor under 16), of which lack of consent is not a necessary ingredient: *Lim Cher Foong*, *supra* note 59 at paras 126-127.

wrinkle on the structural coherency of fraudulent sex criminalisation in Singapore. This arose from the introduction of section 376F. The underlying intention to protect persons with mental disability from sexual exploitation cannot be faulted. However, the necessity and coherency of the provision is premised on a restrictive approach towards sexual consent. Section 376F(c) sets out the *actus reus* as "A obtains B's consent by means of an inducement offered or given, a threat made or a deception practised by A for that purpose." If there are some limitations on the types of threat (*eg*, to reputation) or deception that could vitiate consent, then section 376F becomes a valuable tool to punish persons who employed those non-consent vitiating threats and deceptions to prey on persons with mental disability. There are these restrictions for the *Sexual Offences Act 2003*, but ostensibly none in the *Penal Code* after the rewording of section 375 and the non-enactment of the evidential presumptions provisions.[64] Admittedly, section 376F(c) also mentions "inducement". Notwithstanding its imprecision and potential breadth,[65] this is a concept not mentioned in section 90, and which could add to the protection of persons with mental disability. Nonetheless, a properly drafted provision that takes into account the existing framework of the *Penal Code* should simply include "inducement" without the mention of threat and deception.

IV. 2019 Reform: Uniquely Singapore through Selectively Implementing Recommendations

A decade after the 2007 reform, the *Penal Code* was again subjected to a comprehensive review. This culminated in the 2019 reform (effective January 1, 2020), which involved major amendments to Singapore's law relating to the fraudulent sex criminalisation. This Part discusses the law reform process and explains the distinguishing features of the eventual amendments.

A. *Legislative Process and Eventual Amendments*

The amendments in 2019 were part of a comprehensive review of the *Penal Code* that was initiated in 2016.[66] A Penal Code Review Committee comprising of senior government officials, lawyers and academics was formed and published a public consultation report in August 2018. Unlike the 2007 review, the publicly available report was detailed and lengthy (nearly 500 pages).[67] In terms of fraudulent sex criminalisation, the Penal Code Review Committee considered two issues. First, the Penal Code Review Committee reviewed whether there is a need for a positive definition

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64 For discussion of the Singaporean courts' liberal approach towards interpreting "fear of injury", see *infra* Part VI.B.

65 Michael Hor, *supra* note 14 at 121, 135.

66 Ministry of Home Affairs, *First Reading of Criminal Law Reform Bill and the Government's Response to Feedback on It* (11 February 2019) at para 3, online: Ministry of Home Affairs <https://www.mha.gov.sg/newsroom/press-release/news/first-reading-of-criminal-law-reform-bill-and-the-government-response-to-feedback-on-it> [Government Response to Criminal Law Reform Bill].

67 Penal Code Review Committee Report, *supra* note 9.

of consent in relation to the *Penal Code* generally and sexual offences specifically.[68] Second, the Penal Code Review Committee examined whether 'misconception of facts' under section 90(a) should be narrowed in any way.[69]

On both issues, the Penal Code Review Committee recommended maintaining the status quo. On the issue of positive consent, the Penal Code Review Committee thought that such a statutory provision would be too broad to be of practical use to the courts.[70] In particular, the Penal Code Review Committee referred to section 74 of the UK *Sexual Offences Act 2003*[71] and opined that its general definition of consent contained "four amorphous concepts of 'agreement', 'choice', 'freedom', 'capacity', which are inherently difficult to define".[72]

On the issue of 'misconception of facts', the Penal Code Review Committee observed that Indian cases have adopted a wide interpretation such that sexual intercourse pursuant to a false promise of marriage could sustain a rape conviction.[73] The Penal Code Review Committee also opined that sexual service fraud in the English case of *R v Linekar* should rightly not be considered as rape and should be punished via the cheating offence.[74] The Penal Code Review Committee reported looking at jurisdictions in UK and Australia for possible solutions, and noted that these jurisdictions have set out, non-exhaustively, the most obvious types of consent-vitiating fraud, namely, (1) nature of the act, (2) purpose of the act, and (3) identity of the wrongdoer.[75] In the end, the Penal Code Review Committee decided not to recommend any changes to section 90 for two reasons. First, it was not possible to exhaustively list all the types of 'misconceptions of fact' that would vitiate consent. Second, "case law such as *Siew Yit Beng*" had sufficiently clarified the scope of section 90 such that it had functioned well enough.[76] The Penal Code Review Committee did add that "we may continue to rely on the judicious exercise of prosecutorial discretion in not pursuing trivial forms of deceptions/misconceptions under serious offences (such as rape), and fall back on intermediate offences such as cheating to punish less egregious forms of deceptions".[77]

The government adopted a mixed approach *vis-à-vis* these two recommendations. In the February 2019 press release by the Ministry of Home Affairs that accompanied the introduction of the bill for first reading, the government approached this issue under the heading "[c]larify the definition of 'consent' for sexual offences".[78] The government noted that representatives of civil society groups have advocated for both a positive definition of "consent" and the provision of illustrations to clarify circumstances where consent would be invalid.[79] The government ultimately decided

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68 *Ibid* at 251-253, 322-324.
69 *Ibid* at 253-255.
70 *Ibid* at 324.
71 *Sexual Offences Act 2003*, *supra* note 7, s 74 ("For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice").
72 Penal Code Review Committee Report, *supra* note 9 at 323.
73 *Ibid* at 253.
74 *Ibid* at 254.
75 *Ibid* at 255.
76 *Ibid*.
77 *Ibid*.
78 Government Response to Criminal Law Reform Bill, *supra* note 66 at para 31.
79 *Ibid* at para 32.

to accept the Penal Code Review Committee's view on the vagueness and breadth of a positive definition of "consent". On the other hand, the government decided that "a new section will be introduced in the *Penal Code* to clarify the types of 'misconceptions of fact' that negate consent in the context of sexual offences" (*ie*, section 377CB).[80]

> 377CB. —(1) Despite section 90(a)(ii), a consent for the purposes of an act which is the physical element of a sexual offence is not a consent given by a person under a misconception of fact only if it is directly related to —
> (a) the nature of the act, namely that it is not of a sexual nature;
> (b) the purpose of the act, namely that it is not for a sexual purpose; or
> (c) the identity of the person doing the act,
> and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such misconception.

There would also be another section on the new offence that criminalise the procurement of sexual activity by deception in relation to sexually protective devices and sexually transmitted diseases (*ie*, section 376H).[81] The fact sheet that accompanied the press release explained that section 376H was to cover cases where "while consent is not legally vitiated [by section 377CB], the consent obtained is compromised and poses a physical risk to the victim".[82] The Minister for Home Affairs, in the second reading, added that these two types of deceptions were chosen for criminalisation because "they carry serious risks to the victim and represent a greater violation of the victim's sexual autonomy" and noted that the government "will continue to assess whether there is a need to expand this offence to cover other circumstances in the future relating to consent".[83]

During the legislative debate in the second readings, Nominated Member Ms Anthea Ong[84] picked up on the prior advocacy by the civil society groups and continued to press for a "clear and positive definition of consent for purposes of judicial review and public education".[85] In addition, she proposed that six circumstances be specifically stipulated as being no consent in law.[86] She appeared to have no issue

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80 *Ibid* at para 33. See also *Parliamentary Debates Singapore: Official Report,* vol 94 (6 May 2019) (Mr Amrin Amin) ("There is a good body of case law on this matter").

81 Government Response to Criminal Law Reform Bill, *supra* note 66 at para 33.

82 Ministry of Home Affairs, *Factsheet on Criminal Law Reform Bill* (11 February 2019) at 13, online: Ministry of Home Affairs <https://www.mha.gov.sg/docs/default-source/default-document-library/factsheet-on-criminal-law-reform-bill.pdf> [Factsheet on Criminal Law Reform Bill].

83 *Parliamentary Debates Singapore: Official Report*, vol 94 (6 May 2019).

84 Upon nomination, she professed to speak up for "social inclusion, mental health and volunteerism": Yasmine Yahya, "9 New Nominated MPs Chosen to Join Parliament" *The Straits Times* (17 September 2018), online: <https://www.straitstimes.com/politics/nine-new-nominated-mps-chosen-to-join-parliament>.

85 *Parliamentary Debates Singapore: Official Report*, vol 94 (6 May 2019) (Ms Anthea Ong) [Anthea Ong Criminal Law Reform Bill Parliamentary Debates].

86 The six situations are: (1) consent expressed under fear of injury or wrongful restraint whether to the person or some other person, (2) a person is unable understand the nature and consequence of the act due to unsoundness of mind, mental incapacity, intoxication or influence of substance, (3) the person is under 16, (4) the person says or does something that show they are not willing to continue the activity, (5) there is abuse of a position of trust, power or authority, and (6) consent is given by someone else: Anthea Ong Criminal Law Reform Bill Parliamentary Debates, *ibid*.

with the proposed section 377CB, and none of her proposed circumstances involved 'misconception of facts'. There was no other mention of these two issues in the legislative debate, and the two provisions was passed without amendments.[87]

B. *Analysis*

The 2019 amendments on fraudulent sex criminalisation were a selective implementation of the Penal Code Review Committee's recommendation. The main problem is that the amendments reflect a failure to appreciate the synergetic relationship between a positive definition of consent and the listing of the types of misconception that would vitiate consent. Explicitly stipulating the types of consent-vitiating misconception is hardly unusual and has been employed in many common law jurisdictions.[88] However, as observed by the Penal Code Review Committee, these jurisdictions have always chosen to set out the list in a non-exhaustive fashion.[89] This makes the exhaustive definition in section 377CB unique.

Moreover, this non-exhaustive list is typically pursuant to a positive definition of consent that was otherwise rejected by the government. The positive definition of consent served an important role in UK and Australia, granting courts the "flexibility to develop the contours of consent, and do justice in each case",[90] notwithstanding that the deception in question falls outside the scope of a stipulated consent-vitiating misconception. For example, the Queensland *Criminal Code Act* has a positive definition of consent[91] and stipulation that consent would be vitiated "by false and fraudulent representations about the nature or purpose of the act".[92] In the 2011 case of *R v Winchester*, the Queensland Court of Appeal decided whether a jury direction that ostensibly indicated to the jury that a false promise of a gift (a horse) would, on its own, be sufficient to negate the existence of free and voluntary consent. While the three judges were unanimous in ordering a retrial on account of the deficient jury direction, two judges were prepared to find that the false promise of the horse might be capable of vitiating consent after taking into account surrounding factors such as the "intellect, maturity, psychological and/or emotional state" of the complainant and the exercise of any physical or psychological control by the defendant.[93]

More pertinently, the English Court of Appeal in the 2013 case of *R v McNally* was confronting the issue of whether consent to digital penetration of the vagina was vitiated by the fact that defendant was biologically female but presented as male

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87 *Parliamentary Debates Singapore: Official Report*, vol 94 (6 May 2019) (House as Committee on the Bill).

88 For academic discussions, see Australia: Jonathan Crowe, "Fraud and Consent in Australian Rape Law" (2014) 38 Crim LJ 236 at 238-239; New Zealand: Chris Gallavin, "Fraud Vitiating Consent to Sexual Activity: Further Confusion in the Making" (2008) 23 NZULR 87 at 90-92; UK: Karl Laird, "Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003" [2014] Crim LR 492 at 493-495.

89 Penal Code Review Committee Report, *supra* note 9 at 254-255.

90 *Ibid* at 254.

91 *Criminal Code Act 1899* (Qld), s 348(1) ("freely and voluntarily given").

92 *Ibid*, s 348(2)(e).

93 *R v Winchester* [2014] 1 Qd R 44 at paras 86-87, 135 (QCA). See Jianlin Chen, "Fraudulent Sex Criminalization in Australia: Disparity, Disarray and the Underrated Procurement Offence" (2020) 43(2) UNSW LJ 581 at 593-595.

to the complainant.[94] The court agreed that the section 76 conclusive presumption was not directly applicable to the facts, and proceeded to address the issue via the positive definition of consent.[95] On the basis that the complainant's "freedom to choose whether or not to have a sexual encounter with a girl ... was removed by the defendant's deception", the Court held that "depending on the circumstances, deception as to gender can vitiate consent".[96] This case has, in turn, generated a series of successful prosecutions for such fraudulent sex.[97] Notably, while the exhaustive list of consent-vitiating misconception under section 377CB is meant to be supplemented by section 376H, deception as to gender is not within the stipulated deception.

This article is not arguing that *McNally* should be followed in Singapore if there is a positive definition of consent in the *Penal Code* and/or section 377CB is not an exhaustive list. Neither is this article suggesting that section 376H should be expanded include deception as to gender. *McNally* has been criticised both for the imprecision of the Court's approach,[98] and more fundamentally, on the adverse policy implications to transgender people.[99] It is beyond the scope of this article to address these otherwise important issues. The point is simply that other common law jurisdictions have adopted statutory stipulations of consent-vitiating misconception in a non-exhaustive manner and this is usually accompanied by a positive definition of consent. The non-exhaustive manner and the positive definition of consent is a critical part of the law. As demonstrated in the *McNally* case, the "flexibility to develop the contours of consent, and do justice in each case"[100] is far from a hypothetical argument. While there are plausible and legitimate reasons to buck the trend, it does not appear that there was any deliberation and appreciation of how the 2019 Singapore amendments were in fact a substantial departure from established practice elsewhere, including the UK.

V. Law Reform is Hard, Reforming *Penal Code* is Harder

It is trite to observe that any legal amendments have to take into the existing laws to ensure the proposed amendments are situated coherently with the existing legal framework.[101] The ever-increasing complexity of law means that specialised and dedicated law reform entities (*eg*, law reform commissions) are crucial to ensure

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94 *R v McNally* [2014] QB 593 at 595-596 (EWCA).

95 *Ibid* at 597 (*ie*, "freedom and capacity to make that choice").

96 *Ibid* at 600.

97 Alex Sharpe, "Queering Judgment: The Case of Gender Identity Fraud" (2017) 81 JCL 417 at 417 [Queering Judgment].

98 Alex Sharpe, "Expanding Liability for Sexual Fraud Through the Concept of "Active Deception": A Flawed Approach" (2016) 80 JCL 28 at 39-44; Gavin A Doig, "Deception as to Gender Vitiates Consent" (2013) 77 JCL 464 at 466-468.

99 Queering Judgment, *supra* note 97 at 432-434; Aeyal Gross, "Rape By Deception and the Policing of Gender and Nationality Borders" (2015) 24 Tulane Journal of Law & Sexuality1 at 24-33.

100 Penal Code Review Committee Report, *supra* note 9 at 254.

101 New Zealand Legislation Design and Advisory Committee, *Legislation Guidelines: 2018 Edition* (2018) at 17-20, online: Legislation and Design Advisory Committee <http://www.ldac.org.nz/assets/documents/Legislation-Guidelines-2018-edition-2020-06-25.pdf>; Ian Dennis, "The Law Commission and the Criminal Law: Reflections on the Codification Project" in Matthew Dyson, James Lee & Shona Wilson Stark, *Fifty Years of the Law Commissions* (UK: Hart Publishing, 2016) at 108, 117-119 [Dennis].

a concerted holistic review to prevent amendments to isolated parts of a statute that inadvertently distort the statute's structure and framework.[102] The 2007 reform is a stark example of how an intended importation of English law can achieve a completely opposite result due to the failure to appreciate the relationship between section 90 and section 375.[103]

In terms of the process of law reform, the 2019 reform is light years ahead of the 2007 reform. The reform was kicked started by a review committee comprising of government officials, private practitioners and legal academics.[104] This arguably desirable combination ensured not only the contribution of valuable perspectives from practice and theory, but also that such perspectives are moderated by what is politically feasible.[105] The publication of a detailed report on the deliberation and rationale of the various recommendations further facilitated a more meaningful public consultation process thereafter. In addition, it is telling to observe that information provided by the government *vis-à-vis* the first reading, which included a fact-sheet setting out point-by-point the government's response to the Penal Code Review Committee's recommendations,[106] was more comprehensive and detailed than the eight page consultation paper in the 2007 reform.

It is thus unfortunate that an attempt to clarify the law through largely (but not completely) adhering to the Penal Code Review Committee's recommendations have inadvertently resulted in a distinctive departure from the English and Indian approaches towards fraudulent sex criminalisation.

To be fair, structural incoherency arising from selective implementation of law reform commissions' recommendations is not uncommon. The experience of Tasmania provides a direct example in the context of fraudulent sex criminalisation. In 1987, Tasmania amended its statutory definition of consent to provide that consent must "not procured by force, fraud, or threats of any kind".[107] This amendment was made explicitly pursuant to the substance of the Tasmania Law Reform Commission's recommendations.[108] Notably, the Tasmania Law Reform Commission also simultaneously recommended the abolishing of the offence that punished procurement of sexual intercourse via "any false pretence or false representation" given its redundancy in light of the proposed (new) statutory definition of consent.[109] However, the

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[102] Dennis, *ibid* at 108, 117-119; David Lloyd Jones, "The Law Commission and the Implementation of Law Reform" (2013) 15 European Journal of Law Reform 333 at 336-337.

[103] See also Stanley Yeo & Barry Wright, "Revitalising Macaulay's Indian Penal Code" in Wing-Cheong Chan, Barry Wright & Stanley Yeo, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (UK: Ashgate, 2011) at 3, 7.

[104] See Part IV.A.

[105] Michael Tilbury, "Why Law Reform Commissions: A Deconstruction and Stakeholder Analysis from an Australian Perspective" (2005) 23 Windsor Yearbook of Access Justice 313 at 333-338; Rosalind Croucher, "Law Reform Agencies and Government: Independence, Survival and Effective Law Reform" (2018) 43 UWAL Rev 78 at 83-86; George Gretton, "Of Law Commissioning" (2013) 17 Edinburgh Law Review 119 at 144-148.

[106] Factsheet on Criminal Law Reform Bill, *supra* note 82.

[107] *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas), ss 2A(2), 4.

[108] Austl, Tasmania, House of Assembly, *Parliamentary Debates* (15 April 1987) at 1488-1489 (Mr Bennett) [Tasmanian Parliamentary Debates].

[109] Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences* at 14, online: National Criminal Justice Reference Service <https://www.ncjrs.gov/pdffiles1/Digitization/90161NCJRS.pdf>.

Tasmanian government chose to retain the offence with little explanation.[110] This resulted in an ostensible duplication between that offence and rape, which is likely to present a complex challenge for the Tasmanian courts when they have to rule on the scope of consent-vitiating fraud.[111] Thus, the analysis in this Part is less of a critique of the Singapore's government implementing the 2019 reform, but more as a continual reminder of the difficulty in fully appreciating the interplay between different provisions (and sub-provisions) and maintaining a coherent legal structure.

Moreover, the analysis in the previous three Parts highlights a core feature of the *Penal Code* that poses unique challenges to sexual offence reforms that are otherwise usually absent in other common law jurisdictions. The *Indian Penal Code* was undoubtedly an innovative breakthrough in terms of how legal rules is organised and presented.[112] The consolidation and rationalisation of various aspects of criminal law into a concise structure, overlaid by a set of generally applicable terminologies and doctrines, greatly enhanced accessibility and clarity of the Code when compared to contemporaneous criminal law statutes.[113] However, placing sexual offences under the same umbrella of generally applicable terminologies and doctrines, especially the definition of consent under section 90, is hugely problematic. While certainly not ideal from the perspective of gender equality and sexual autonomy protection,[114] the law has, for the longest time, treated rape more conservatively than other types of crimes. This is starkly evidenced by the treatment of the use of fraud to obtain property and sex. By the nineteenth century, fraudulent acquisition of property has been criminalised in due recognition of the importance of protecting property interests.[115] The English common law courts took the common law offence of larceny (*ie*, theft) and judicially extended it to larceny-by-trick. Most tellingly, the courts did not place any limits on the type of fraud that would constitute larceny-by-trick.[116] In sharp contrast, only fraud as to nature of the act and spousal impersonation is recognised as capable of constituting rape.[117] As discussed in Part II.C., the Code framer felt compelled to include sections 375(c) and 375(d), even if those two sub-provisions are in apparent contradiction to section 90(a), which was otherwise meant to be applicable "to any section of this Code".

The emergence of a feminist reform movement in the late twentieth century has elevated the legal status of sexual autonomy considerably, but there remains

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110 Tasmanian Parliamentary Debates, *supra* note 108 at 1518 (Mr Bennett).

111 In Western Australia, which had the similar unfortunate duplicate offence situation, the three-member Court of Appeal split three ways on the issue: *Michael v Western Australia* [2008] WASCA 66. See Jianlin Chen, *Two Is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences*, online: Statute Law Review <https://doi.org/10.1093/slr/hmz027>.

112 Wright, *supra* note 32 at 19, 40-41.

113 *Ibid* at 19, 52-54.

114 Ben A McJunkin, "Deconstructing Rape by Fraud" (2014) 28 Colum J Gender & L 1 at 21-25; Ian Leader-Elliot & Ngaire Naffine, "Wittgenstein, Rape Law and the Language Games of Consent" (2000) 26 Mon LR 48 at 73.

115 Binder, *supra* note 32 at 244-254.

116 The debate focused on what was obtained (*eg*, possession vs ownership), rather than the fraud used to obtain it: see Graham Ferris, "The Origins of 'Larceny by a Trick' and 'Constructive Possession'" [1998] Crim LR 175 at 184-186.

117 Karl Laird "Rapist or Rouge? Deception, Consent and the Sexual Offences Act 2003" [2014] Crim LR 492 at 495-498.

widespread hesitation to criminalise all fraudulent sex.[118] It is telling that while Ms Anthea Ong spoke passionately for a positive definition of consent and a new explicit stipulation that consent would be vitiated by an "abuse of a position of trust, power or authority", she took no issue with the exhaustive limitations on consent-vitiating fraud.[119] The author is personally sympathetic to Yeo's arguments that fraud to obtain sex should be treated with parity as other types of fraud.[120] However, the fact remains that such a position is highly controversial and lacks noticeable political and societal support in Singapore.

In summary, this Part argued that there is certainly room for improvement in the law amendment process in terms of more circumspect consideration of the synergetic relationship between provisions, both within the *Penal Code* and *vis-à-vis* the foreign reference statutes. Nonetheless, it is also crucial to appreciate that the challenge to properly account for the synergetic relationship between provisions is substantially aggravated by the (mis)placing of sexual offences within the umbrella of generally applicable terminologies and doctrines under the *Penal Code*, which is designed with other offences in mind. The exclusion of section 90(a)(ii) for sexual offences under the new section 377CB is arguably a long overdue recognition and ratification of this misplacement.

VI. 2019 vs 2007: Clarity and Scope

The previous Parts discussed how the seemingly bold reforms in 2007 and 2019 were, in fact, unintended amidst the failure to appreciate the synergetic relationship between provisions. This Part continues the analysis by normatively examining these two reforms from the perspective of clarity and scope.

A. *Clarity*

Consider this scenario. A person ("**A**") had sexual intercourse with another person ("**B**") after **B** promised **B** could cure **A**'s diseases, but **B** knew that **B** has no such ability. Feeling upset about being deceived, **A** decided to read up on the *Penal Code* to see if any sexual offence was committed. If this was after the 2007 reform and before the implementation of the 2019 reform, **A** would find no indication in the *Penal Code* that there would be any qualification in the operation of section 90(a) 'misconception of fact' on section 375 and other consent-based sexual offences. If **A** had access to legal databases (*eg*, Lawnet),[121] **A** would learn that *Siew Yit Beng* had made a limiting interpretation of section 90(a). Nonetheless, **A** would know that

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[118] Binder, *supra* note 32 at 240. For comparative perspectives on how fraudulent sex is being approached in civil law jurisdictions in Asia, see Jianlin Chen & Phapit Triratpan, "Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand" (2020) 37(1) UCLA Pacific Basin LJ 25 at 43-45; Jianlin Chen, "Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan" (2018) 13(2) NTU L Rev 183 at 193-199.

[119] Anthea Ong Criminal Law Reform Bill Parliamentary Debates, *supra* note 85.

[120] See Part II.C.

[121] Lawnet, online: <https://www.lawnet.sg/lawnet/web/lawnet/home>.

Siew Yit Beng had never been cited by other cases on this issue,[122] and that *Siew Yit Beng* was before the 2007 reform that changed the structure and wording of the relevant provisions. If **A** made diligent searches on Lawnet after 2017, **A** would start finding Singapore case law that seemingly confirms the impression from reading the *Penal Code*, namely that there is no qualification on the operation of section 90(a): 'misconception of fact'. **A**, believing that a rape had been committed by **B**, makes a police report.

This scenario highlights the biggest flaw of the 2007 reform. It resulted in a set of legal provisions that expressly stated all 'misconceptions of fact' are capable of vitiating sexual consent when it is abundantly clear that the government had no intention of adopting a more liberal approach towards fraudulent sex criminalisation. Indeed, the proposed section 377G is narrower than the UK equivalent, providing only that fraud as to "nature" of the act (as opposed to "nature or purpose" of the act) would vitiate consent.[123]

To be clear, the argument here is not about over-criminalisation. Prosecutorial discretion ensures that the courts had only need to apply section 90(a) to fraudulent sex that most people would agree is serious and deserves punishment. There is every reason to expect that this prudent exercise of prosecutorial discretion will continue even without the 2019 reform. Rather, the problem is a disconnect between what the law appears to be from a plain reading of the statutory provision(s), and what the law is intended to be by the government. It goes without saying that such disconnect puts the law in disrepute. It is hardly ideal if the police had to tell **A** that no rape had been committed because the *Penal Code* does not mean what it says.

Notably, this disconnect is on disturbing display on the publicly accessible sexual misconduct policies of the public universities in Singapore. For example, in the Singapore Management University ("SMU") support webpage for students who have experienced sexual misconduct, it stated in 2019 (*ie*, prior to the implementation of the 2019 reform) that "[s]exual consent means a person explicitly, willingly and voluntarily agrees to engage in sexual activity with the other; he/she must be free to make his/her own decision. There must not be any threat, intimidation, pressure or guilt-tripping to make one party commit to a sexual act."[124] This is a glaring omission of how 'misconception of fact' can vitiate consent under section 90(a)(ii) of the *Penal Code*. The National University of Singapore ("NUS") fared better. The definition of consent provided on its Victim Care Unit webpage is "an affirmative, informed, voluntary and ongoing choice by an individual with legal capacity".[125] It provides a link to the "NUS Code of Student Conduct", which further defined the requirement of "informed" as "specific, informed and knowing (*ie*, must be given specifically for the occasion of sexual activity without any mistake or deception as

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[122] The case has been referred to for issues such as sentencing or elements of the offence of knowingly giving false information: *eg*, *Public Prosecutor v Seah Chin Peng* [2019] SGMC 77 at para 7; *Koh Yong Chiah v Public Prosecutor* [2017] 3 SLR 447 at 455 (HC); *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at 74 (HC).

[123] 2006 Draft Amendment Bill, *supra* note 42, s 50.

[124] Singapore Management University Voices, online: <https://voices.smu.edu.sg/defining-harassment #consent>.

[125] NUS Victim Care Unit, online: NUS <https://victimcare.nus.edu.sg/resources/>.

to the identity or the nature of the act)".[126] Nonetheless, as discussed earlier in this section, this is contrary to what a person looking up the issue may understand to be the law.

This is, in turn, to the merit of the 2019 reform. The 2019 reform is a clear rejection of Indian jurisprudence, which does not apply restrictions when interpreting 'misconception of fact' in the context of sexual offences. This could be regarded as unfortunate from the perspective of the "principle of individualistic liberalism", which Yeo considered as underpinning the Code.[127] However, the 2019 reform finally brings the plain-wording of the statutory provisions relating to fraudulent sex to what the government is prepared to fully enforce. One would predict (or at least hope) that public institutions like universities would have an easier time to articulating a definition of consent that accurately reflects the stated law (*ie*, misconception as to purpose, nature or identity).

B. *Scope*

The 2019 reform does narrow the scope of possible fraudulent sex criminalisation in Singapore. The exhaustive nature of section 377CB renders the court unable to expand the scope of criminalisation even on a case-by-case basis. As per the discussion in Part IV.B., there is at least one category of fraudulent sex (*ie*, fraud as to gender) that has been regularly punished in the UK under the positive definition of consent, but which is outside the scope of sections 377CB and 376H. At this juncture, it is also important note that prior to the 2003 reform in the UK, the restrictive common law approach towards consent-vitiating fraud was supplemented by a sexual offence that punished, as a misdemeanour, the procurement of sexual intercourse "by false pretences or false representations".[128] As observed in *Linekar* (*ie*, sexual service fraud), even though the defendant should be acquitted of the rape conviction, the defendant would be guilty of this lesser sexual offence if it was put as an alternative to the jury.[129]

Nonetheless, the potential problem of under-criminalisation is mitigated by two existing provisions in the *Penal Code*. The first provision is the cheating offence. As recognised by the Penal Code Review Committee, the sexual service fraud in *Linekar* could, and should, be punished through the cheating offence.[130] The cheating offence is broadly worded. The material portions provides that "[w]hoever, by deceiving any person . . . intentionally induces the person so deceived to do . . . which he would not do . . . if he were not so deceived . . . and which act . . . is likely to cause damage or harm to any person in body, mind, reputation or property."[131] Indeed, technically

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[126] NUS Code of Student Conduct, online: NUS <http://nus.edu.sg/osa/resources/code-of-student-conduct>.

[127] Stanley Yeo, *supra* note 26 at 165, 173-175.

[128] *Sexual Offences Act 1956*, *supra* note 41, s 3; *Criminal Law Amendment Act 1885* (UK), c 69, s 3(2). For a discussion of how this equivalent provision has been utilised in Hong Kong, see Jianlin Chen, "Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong" (2018) 51 Cornell Int'l LJ 553 at 563-571.

[129] *R v Linekar* [1995] QB 251 at 261 (EWCA).

[130] Penal Code Review Committee Report, *supra* note 9 at 254.

[131] *Penal Code 2008, supra* note 10, s 415.

all forms of fraudulent sex could be punished by this offence. Nonetheless, the cheating offence is situated under Chapter 17 "Offences Against Property". Given the concern of fair-labelling raised by the Penal Code Review Committee,[132] it likely that only fraudulent sex involving inducement of financial or economic nature would be prosecuted under this offence. Even with this caveat, it is worth noting that the cheating offence is likely still applicable to the fourth illustration of section 377CB. The illustration provides that "A deceives B into believing that A is an influential movie director. A is in fact only an administrative assistant to that movie director. B consents to sexual intercourse with A because she believes A is that movie director. B's misconception is as to A's attributes and not of A's identity. B's consent is therefore a valid consent." Insofar as the fraudulent claim of being an influential movie director comes with a promise of career advancement in the entertainment industry upon receiving sex, a prosecution of the cheating offence is arguably as uncontroversial as if the fraudster were to receive money,[133] instead of sex.

The second provision is section 90(a)(i), "fear of injury", read with section 44, which defines "injury" as "any harm whatever illegally caused to any person, in body, mind, reputation or property". In contrast with the approach in *Siew Yit Beng* for 'misconception of fact', the Singapore's courts had less hesitation in giving effect to the plaining reading of the *Penal Code vis-à-vis* "fear of injury". In the 1987 case of *Public Prosecutor v Teo Eng Chan*, the High Court judge, P Coomaraswamy, applied section 90(a) in the context of rape.[134] Quoting section 44, his Honour stated that "the word 'mind' needs emphasis in this case"[135] and held that "consent [of the complainant] was negative by fear of injury to mind, if not to body. There was no consent as required by the provisions of the Code."[136] The 2007 reform only strengthened this straightforward application of section 90(a) with section 44. The Court of Appeal in the 2014 case of *Sivakumar s/o Selvarajah v Public Prosecutor* simply applied the Code provisions to rape and non-consensual sexual offences, and held that "[i]t is clear that pursuant to s 90 read with s 44 of the Code there is no consent if the Prosecution can show that the consent given by a complainant was made under fear of injury to her reputation."[137] A similar application was made in the 2016 District Court case of *Public Prosecutor v Muhammad Firman bin Jumali Chew*.[138]

This broad reading of "fear of injury" helps mitigate the restrictiveness of sections 377CB and 376H because they can readily catch any fraudulent sex that has a threat element in it. Indeed, in both *Sivakumar* and *Muhammad Firman*, the defendants pretended to be police officers and threatened to arrest the complainants if they did not agree to have sex with the defendants. It is also notable there was no threat of physical violence, unlike in the earlier two cases (incidentally prior to 2007), which also involved police impersonation.[139] Notably, this broad reading would also make short

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[132] Penal Code Review Committee Report, *supra* note 9 at 254.

[133] See Scamalert, online: Scamalert <https://www.scamalert.sg/scam-details/job-scam>.

[134] *Teo Eng Chan*, *supra* note 35.

[135] *Ibid* at 572.

[136] *Ibid* at 573.

[137] [2014] 2 SLR 1142 (SGCA) at 1152 [*Sivakumar*].

[138] [2016] SGHC 241 at paras 65-67 [*Muhammad Firman*].

[139] *Public Prosecutor v S/O M P Nathan* [2000] SGHC 43; *Public Prosecutor v Victor Rajoo* [1995] 3 SLR(R) 189 (SGCA).

work of the English case of *R v Jheeta*,[140] where the defendant was impersonating multiple police officers through text messages. Through these text messages, the complainant was told that the complainant should sleep with the defendant because the defendant had suicidal tendencies and required the complainant to take care of him, and that the complainant would be liable for a fine if she did not.[141] The English Court of Appeal found that these deceptions did not fall under section 76 (*ie*, the conclusive presumption provisions for nature or purpose of act) and had to rely on the defendant making a guilty plea *vis-à-vis* the positive definition of consent to sustain the rape conviction.[142] In Singapore, this would fall under a combination of injury to mind, reputation and property, and readily constitute rape.

VII. Conclusion

The 2019 reform is successful in terms of *finally* producing a *set* of law that clearly reflects the intended scope of operation while leaving only limited lacunas. Yet, this should not detract from the torturous process that Singapore has undergone to reach this stage. In the final analysis, the evolution of Singapore's criminalisation of fraudulent sex is not only a recurring cautionary tale of the difficulty of law reform and the perils of importing foreign law, but also the unique challenges of synthesising sexual offences into a comprehensive criminal law code.

[140] [2007] EWCA Crim 1699.
[141] *Ibid* at para 8.
[142] *Ibid* at para 29.