

A COMPARATIVE STUDY OF MARITAL RAPE LAWS IN MALAYSIA, INDONESIA AND SINGAPORE: TOWARDS SAFEGUARDING CHILD BRIDES

Pavitra Kalaiselvan*

Abstract

Pursuant to Article 19 of the Convention on the Rights of Child ('CRC'), a state party is obliged to provide pertinent legal protection for children from all forms of violence, including sexual abuse. Despite being a state party to both CRC and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Malaysia has fallen behind on achieving this. The Malaysian position of simultaneously legalising marital rape and child marriages, without placing any legal protection for girls has placed child brides vulnerable to becoming victims of marital rape. Thus, this paper aims to address the loophole in the existing laws relating to marital rape and child marriages in Malaysia, and suggests law reform to protect child brides. To achieve this aim, the laws relating to marital rape and child marriages in Malaysia and its lacuna will be examined. Following this, a comparative study will be conducted on laws relating to marital rape and child marriages in Indonesia and Singapore.

Keywords: Penal Code, marital rape, child bride, child marriage

I INTRODUCTION

Every individual has the right to be free from sexual violence, irrespective of their gender, age, and marital status. Unfortunately, this is not the case for women and girls in Malaysia as laws that violate this right remain in force. In 1989, lawmakers made a remarkable amendment to section 375 of the Penal Code. First and foremost, the qualifying age for a victim of statutory rape was increased from 14 to 16 years of age.¹ Secondly, the Exception to section 375 ('Exception') was revised by removing the marital rape protection for child brides below the age of 13.² These amendments to section 375 were erratic, where the lawmakers at one end increased the qualifying age for a victim of statutory rape to 16 as a crime control measure, while at the other end, protection from marital rape for child brides below 13 years of age was removed due to the legalisation of child marriages.

* Masters in Criminal Justice (Universiti Malaya), LLB (Multimedia University), Advocate and Solicitor, High Court in Malaya (non-practicing). The researcher appreciates the suggestions and comments by the reviewers and the Editorial Committee of the Journal of Malaysian and Comparative Law, which contributed to developing this article.

¹ Penal Code (Amendment) Act 1989 (Malaysia) s 7.

² Ibid.

These amendments imply that a child below the age of 16 is incapable of giving consent for sexual intercourse unless she is married. The Exception and the legitimisation of child marriages in Malaysia have together placed child brides vulnerable to marital rape. It has been 33 years since the revised law came into effect, and major problems have emerged consequently. However, the Malaysian government has yet to review its decision to either criminalise marital rape or increase the minimum age of marriage to resolve these issues. This is due to the perception that it will violate religious beliefs.

Thus, this paper supports immediate law reform to safeguard child brides, being the most vulnerable victims of marital rape in Malaysia. This study is structured into five layers. The first layer of this paper briefly introduces the outline of this study and the terms used in this paper. In the second layer, this paper addresses the gaps in the current laws. In achieving this, the laws, issues, and Malaysian strategies to protect child brides are explored. In the third layer, the approach of Indonesia and Singapore in protecting child brides from rape within marriage are studied. Following this, the fourth layer discusses the issue of whether criminalising marital rape violates Syariah laws, weaknesses in the Malaysian strategy and the approach of Indonesia and Singapore in protecting child brides. In the final layer, law reform suggestions to remedy the Malaysian situation are proffered by the researcher.

Throughout this paper, the following terms are used, which bears the meaning prescribed as follows:

- (i) 'Child marriage' refers to the marriage of an individual under 18 years of age.
- (ii) 'Child bride' refers to a married female child under 18 years of age.
- (iii) 'Marital rape' refers to sexual intercourse between a husband and wife in a valid marriage, which lacks the wife's consent.
- (iv) 'Statutory rape' refers to a category of rape offence, where the victim is a child under 16 years of age who is deemed by law to be not capable to consent to the sexual act due to her young age.
- (v) 'Qualifying age for a victim of marital rape' refers to the minimum age set by the law to be recognised as a victim for the offence of marital rape.
- (vi) 'Qualifying age for a victim of statutory rape' refers to the minimum age set by the law to be recognised as a victim for the offence of statutory rape.

II LAWS, ISSUES AND THE MALAYSIAN STRATEGY

A Amendment of the Exception and its effect

The Exception in the Malaysian Penal Code is inherited from the Indian Penal Code 1860. The Indian Penal Code 1860 was adopted and introduced to the Straits Settlement Colony³ in 1871 as the Straits Settlement Penal Code [No.14 of 1871 (S.S)] ('SS Penal

³ Penang, Malacca and Johor.

Code').⁴ The enforcement of the Exception in this nation can be traced back to the SS Penal Code.⁵ Initially, the Exception in the SS Penal Code was framed as:

‘Sexual Intercourse by a man with his own wife, the wife not being under 12 years of age, is not rape’.

Marital rape was criminalised in the SS Penal Code if the wife was under 12 years of age. Eventually, in 1936, the application of the SS Penal Code was extended to the Federated Malay States as Penal Code (F.M.S. Cap 45). The Exception in the Penal Code (F.M.S. Cap 45), was slightly varied by increasing the qualifying age for a victim of marital rape from 12 to 13 years of age.⁶ Thereafter, the application of the Penal Code⁷ was extended to the Federation of Malaya⁸ in 1948 and throughout Malaysia⁹ in 1976, without any amendments to the expression of the said Exception. Up until 1989, marital rape was criminalised in Malaysia on the condition that the wife was under 13 years of age. So, there was a certain extent of protection for child brides from marital rape, until the Exception was amended.

In 1989, section 375 was revised again.¹⁰ This time, there were two distinct amendments in the newly substituted section 375. The first alteration increased the qualifying age for a victim of statutory rape from 14 to 16 years of age. Secondly, its Exception was modified by removing the qualifying age for a victim of marital rape set forth as follows:

‘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 recognised in the Federation as valid, is not rape’.

This amendment came into place as a crime control measure due to a sudden spike in the number of rape cases in 1988.¹¹ The qualifying age for a victim of statutory rape was raised due to the inability of a child below 16 years of age to understand the effect and consequence of her consent.¹² Along with this, the qualifying age for a victim of marital rape was removed from the Exception due to the existence of valid marriages of Muslim females below the age of 16 at that time.¹³ The amendment to section 375 is inconsistent, as, on the one hand, the amended law aims to protect children by increasing the qualifying

⁴ Straits Settlement Penal Code [Ordinance No.14 of 1871 (Straits Settlement)] (‘SS Penal Code’).

⁵ Norbani Mohamed Nazeri, (2010), ‘Criminal Law Codification and Reform in Malaysia: An Overview’, *Singapore Journal of Legal Studies* 375-399, 375.

⁶ Penal Code (F.M.S. Cap 45) (Malaysia) Exception to s 375 provides as follows: ‘Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape’.

⁷ Penal Code (Malaysia).

⁸ Penal Code (Amendment and Extended Application) Ordinance 1948 (Malaysia).

⁹ Penal Code (Amendment and Extension) Act 1976 (Malaysia).

¹⁰ Penal Code (Amendment) Act 1989 (Malaysia) s 7.

¹¹ Malaysia, Parliamentary Debates, House of Representatives (22 March 1989), (Tan Sri Dato’ Mohamed Zahir Bin Haji), 2158. Retrieved from: < <http://www.parlimen.gov.my/files/hindex/pdf/DR-22031989.pdf>>

¹² Ibid, 2162.

¹³ Ibid, 2163.

age for a victim of statutory rape to 16 years of age while on the other hand, the existing protection for child brides below 13 years of age was stripped out, as certain Malaysian laws permitted underaged marriages. This current law reform signified that unless a female child below the age of 16 is married, she is incapable of consenting to sexual intercourse. It is also observed that during the amendment process, the lawmakers had failed to delve into the level of maturity of a child under 16 years of age to understand the effects and consequences of her consent for marriage.

It is submitted that this amendment has stripped out the protection for child brides below 13 years of age, and therefore promotes a culture of rape. Over the years, child marriages have become a serious issue in Malaysia where cases of girls as young as 11 years old were married off to older men.¹⁴ Presently, there is no accurate data on child marriages in Malaysia, and the Ministry of Women, Family and Community Development (‘Ministry’) is in the midst of collecting and coordinating statistics for underaged marriages and divorces, through its National Strategy Plan in Handling the Cause of Child Marriage.¹⁵ Nevertheless, the available data revealed by the Ministry in its 2018¹⁶ and 2020¹⁷ parliamentary replies are summarised in Figure 1.

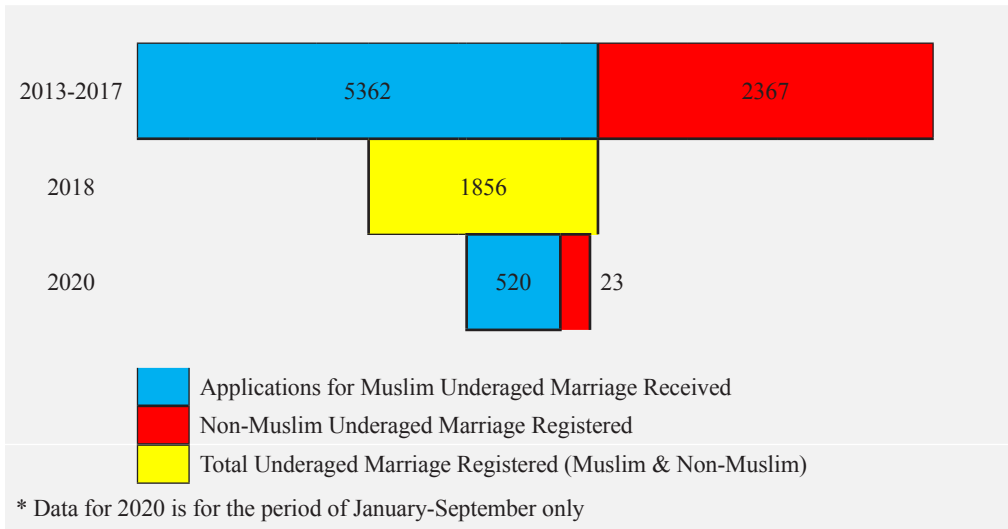


Figure 1: Figures of Underaged Marriage Registered and Applications for Underaged Marriage Received

¹⁴ New Straits Times, (12 August 2018), ‘11 and Married: Malaysia Spars Over Child Brides’, *New Straits Times online*. Retrieved from: <<https://www.nst.com.my/news/nation/2018/07/396076/11-and-married-malaysia-spars-over-child-brides>>

¹⁵ Factor 6, National Strategy Plan in Handling the Causes of Child Marriage.

¹⁶ Malaysia, Parliamentary Debates, House of Representatives (16 August 2018), (Dato’ Mohamad Ariff bin Md Yusof), 7. Retrieved from: <<https://www.parlimen.gov.my/files/hindex/pdf/DR-16082018.pdf>>

¹⁷ Malaysia, Parliamentary Reply, House of Representative, (2 December 2020), Question No.27. Retrieved from: <<https://www.kpwkm.gov.my/kpwkm/uploads/files/Dokumen/Jawapan%20Dewan%20Rakyat/20201202%20-%20final.pdf>>

According to the Ministry, the data for the period of 2013 to 2017 and 2020 were derived from the records of the Syariah Judiciary Department of Malaysia for Muslim marriages and the National Registration Department for non-Muslim marriages. Meanwhile, the data for 2018 was acquired from the Malaysian Department of Statistics. There is no data available for 2019. The Ministry also revealed that Sarawak, Sabah, and Kelantan are the top three states which recorded the highest number of underage Muslim marriage cases for the period of 2013 to 2017¹⁸ and 2020¹⁹. For 2020, the figures only cover the months of January until September. These data do not reflect the true number of child marriages that have taken place for the abovementioned period, for several reasons. Firstly, for Muslim marriages, the actual number of marriages registered was not revealed. Secondly, the data only covers legally registered marriages. The figure of child marriages in the Rohingya community and unregistered customary marriages were not included in these data. Despite lacking accurate data, the available number gives an indication that the rate of child marriages is still significant. In addition to these data, it was revealed during the parliamentary debate on 2 December 2021 that as of this date, 445 children dropped out of school from the period of 2020 for the purpose of getting married, where 411 of them were girls and the balance 34 were boys.²⁰ This latest data reveals that child marriage is an ongoing phenomenon in Malaysia despite the preventive measures of its occurrence having been taken by the Malaysian government.

B Issues arising from the Amendment of the Exception

Throughout the 33 years since the 1989 amendment, legitimisation of child marriages and lack of protection for child brides have caused several issues to emerge which exposes child brides to great risk. Two such identified issues will be discussed further in the following paragraphs.

1 First Issue

Stripping out the protection for child brides and the legalisation of child marriages have paved the way for rapists to marry their child victims to escape the criminal justice system. Past research has found that in the case of a rapist marrying his rape victim, the wife could suffer from physical and mental abuse, be deserted by her husband, and in the worst-case scenario, be left to raise their child.²¹ In the last ten years, there were numerous marriages between rapists and rape victims reported in Malaysia, where, in some instances, the rapists were far older than their victims.²² Past studies have also shown that teens who married much older spouses experienced intimate partner violence such as

¹⁸ Malaysia, Parliamentary Debates, House of Representatives (n 16), 9.

¹⁹ Malaysia, Parliamentary Reply, House of Representatives (n 17).

²⁰ *Ibid*, 12.

²¹ Kelly C. Connerton, (1997-1998), 'The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists', *Albany Law Review* 61 Alb. L. Rev 237.

²² See for example *Riduan Masmud v PP* [2015] 1 LNS 449; *The Straits Times*, (6 October 2016), 'Malaysian Court Orders Retrial Of Rapist Who Married 14-Year-Old Victim', *The Straits Times online*. Retrieved from: <<https://www.straitstimes.com/asia/se-asia/malaysian-court-orders-retrial-of-rapist-who-married-14-year-old-victim>>

non-consensual sex which is unpleasant and painful.²³ In addition, the victim would drop out of school which deprives her of learning income-generating skills and face trouble securing employment.²⁴ This could leave a huge negative impact and deprivation of childhood on the child brides. Several reported cases of rapists marrying their underage victims are discussed in the following paragraphs.

In 2012, Nur Fazira Saad was 13 years of age when she married 20-year-old Mohd Fahmi Mohamed Alias in Kedah. However, their marriage lasted for only about one year.²⁵ After their divorce in 2013, Saad Mustafa, the father of Nur Fazira Saad revealed that his daughter was a gang rape victim of Mohd Fahmi Mohamed Alias and two other teenagers.²⁶ Initially, a police complaint regarding the rape incident was lodged at the Kulim police station against Mohd Fahmi Mohamed Alias. However, his parents had solicited the victim's family to withdraw this complaint.²⁷ Thereafter, the complaint was withdrawn and both families decided to have them married to prevent them from being accused of engaging in pre-marital sexual intercourse.²⁸ It was also claimed that Nur Fazira Saad was abused by her in-law's family.²⁹

In 2014, another case of a rapist marrying his victim emerged in Sabah. In *Riduan Masmud v PP*,³⁰ the accused person, a Sabah-based restaurant manager was charged with raping a child aged only 12 years and six months. The Sessions Court convicted him and sentenced him to 12 years imprisonment, two strokes of whipping, and one year of supervision after serving his sentence. On appeal, the High Court affirmed the Sessions Court's decision. The High Court judge, in his ruling, highlighted the accused's attempt to corrupt and tamper with the witness by marrying the victim halfway through the Sessions Court trial and paying a sum of RM5,000 to the victim's family.³¹ This subsequently resulted in the victim's refusal to testify further against the accused, leading to inconsistency in the victim's testimony.³² In order to clarify the inconsistency in the victim's evidence, the prosecution had to tender the victim's statement pursuant to section 112 of the Criminal Procedure Code.³³ The victim had also attempted to withdraw her police report against the accused.³⁴ Unfortunately, the police refused to allow the

²³ Christine Mwanukuzi and Tumaini Nyamhanga, (2021), 'It Is Painful and Unpleasant: Experiences of Sexual Violence Among Married Adolescent Girls In Shinyanga, Tanzania', 18:1 *Reproductive Health*, 1.

²⁴ Joar Svanemyr, Venkatraman Chandra-Mouli, Charlotte Sigurdson Christiansen and Michael Mbizvo, (2012), 'Preventing Child Marriages: First International Day of The Girl Child "My Life, My Right, End Child Marriage"', 9:31 *Reproductive Health*, 1.

²⁵ Christopher Tan, (29 November 2013), 'Saya Tiada Pilihan' - Bapa Nor Fazira', *Star Online*. Retrieved from: <<https://www.mstar.com.my/lokal/semasa/2013/11/29/saya-tiada-pilihan--bapa-nor-fazira>>

²⁶ Munirah A Sani, (29 November 2013), 'Married Off Because She Was Raped', *Astro Awani online*. Retrieved from: <<https://www.astroawani.com/berita-malaysia/married-because-she-was-raped-26142>>

²⁷ The Star, (29 November 2013), 'Dad: I Agreed To Teen Daughter's Marriage Because She Had Been Raped', *The Star online*. Retrieved from: <<https://www.thestar.com.my/news/nation/2013/11/29/i-had-no-choice-then-says-father-of-teen-girl-dad-i-agreed-to-the-marriage-because-she-had-been-rape/>>

²⁸ Ibid.

²⁹ Ibid.

³⁰ [2015] 1 LNS 449 (Stephen Chung Hian Guan, J) (High Court in Sabah and Sarawak) ('Riduan Masmud').

³¹ Ibid [46].

³² Ibid.

³³ Criminal Procedure Code (Malaysia) s 112.

³⁴ Riduan Masmud (n 30).

withdrawal of the police report.³⁵ This case provides a clear-cut example of a rapist marrying his child victim in an attempt to escape the criminal justice system, although the accused's attempt failed in this case.

In 2015, 22-year-old Ahmad Syukri Yusuf was charged at the Kuching Sessions Court for raping a 14-year-old girl twice in October of that year.³⁶ Two charges were brought against him where if convicted, he could be sentenced to a maximum jail term of 30 years and whipping. Ahmad Syukri Yusuf married his victim after he was charged in the Sessions Court. Thus, upon production of his marriage certificate with the rape victim, the Judge acquitted him.³⁷ Following this, an application was filed in the High Court to review his acquittal, and a retrial was ordered.³⁸ No further data is available on the status of the retrial.

Another marriage between a 35-year-old man and a 14-year-old disabled girl was reported in Seremban in 2015. The man was accused of raping his 11-year-old sister-in-law. He made his 14-year-old wife record his sexual conduct with the victim and the video was circulated through Whatsapp.³⁹ According to the victim, she was raped multiple times by her brother-in-law. Eventually, he was arrested and charged pursuant to section 375(g) of the Penal Code at the Seremban Sessions Court where he pleaded guilty.⁴⁰ It was also reported that his 14-year-old disabled wife was his rape victim prior to his marriage with her, but no police report was lodged against the accused on this count.⁴¹ The accused, by marrying his 14-year-old disabled wife, successfully evaded prosecution and escaped rape charges for offences committed against her. This case also raises doubt about the manner in which consent for marriage was obtained from the disabled child.

The trend of rapists marrying their child victims occurs among both Muslims and non-Muslims. However, non-Muslim child marriages of females below 16 years of age often go unreported as they only go through customary marriage, without registration pursuant to the law.⁴² Although the government, through the intervention by the Department of Social Welfare has taken measures to prevent the occurrence of marriage between the rapist and his victim,⁴³ this can only be executed if the victim reports the rape incident in the first place.

³⁵ Ibid.

³⁶ The Borneo Post, (18 March 2017), 'Sessions Court Adjourns Statutory Rape Case', *Borneo Post Online*. Retrieved from: <<http://www.theborneopost.com/2017/03/18/sessions-court-adjourns-statutory-rape-case>>

³⁷ The Borneo Post, (15 July 2017), 'Bail Revoked for Man Charged With Statutory Rape', *Borneo Post Online*. Retrieved from: <<http://www.theborneopost.com/2017/07/15/bail-revoked-for-man-charged-with-statutory-rape/>>

³⁸ The Straits Times, (6 October 2016), 'Malaysian Court Orders Retrial Of Rapist Who Married 14-Year-Old Victim', *The Straits Times online*. Retrieved from: <<https://www.straitstimes.com/asia/se-asia/malaysian-court-orders-retrial-of-rapist-who-married-14-year-old-victim>>

³⁹ The Star, (5 December 2015), 'Laws To Protect Children,' *The Star Online*. Retrieved from: <<https://www.thestar.com.my/opinion/letters/2015/12/05/laws-to-protect-children/>>

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Law Reform (Marriage and Divorce) Act 1976 (Malaysia), Christian Marriage Ordinance [Sabah Cap. 24] (Malaysia), Civil Marriage Ordinance [Sabah Cap. 92] (Malaysia).

⁴³ Bernama, (4 August 2016), 'Rogol Tetap Rogol. Tidak Boleh Ditutup Dengan Perkahwinan', *Astro Awani online*, statement of Datuk Seri Rohani Abdul Karim, Minister of Women, Family And Community Development.

2 *Second Issue*

The second issue is the occurrence of child marriage in the Rohingya community. According to the statistics provided by the United Nations High Commissioner for Refugees ('UNHCR') as of May 2021, there are 102,560 registered Rohingya refugees and asylum seekers in Malaysia.⁴⁴ As Malaysia is yet to ratify the 1951 Refugee Convention and its 1967 Protocol, refugees and asylum seekers in Malaysia have no legal status and lacks legal protection from the government. Nevertheless, the issue of child marriage is under the purview of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')⁴⁵ and the occurrence of underage marriage among the Rohingya community needs to be addressed for the best interest of child victims in their community.

In general, Rohingya child marriages take place among their community which has settled in Malaysia. These are arranged marriages solemnised by a Kadi, the Islamic affairs judge from their community.⁴⁶ A glimpse of Rohingya child marriages can be seen from the 2019 reported case in Penang, where police and religious authorities intervened and stopped a marriage between an 11-year-old girl and a 21-year-old Rohingya man, following a tip-off by a social activist.⁴⁷ It was revealed by the father of the child bride that the marriage was arranged due to his family's financial difficulties.⁴⁸ Further, the victim would no longer attend school and would be married off when she was older.⁴⁹ It has become a practice among the community to stop the schooling of their daughters upon reaching puberty and marry them off to ease the family's financial burdens. As the ratio of males outweighs females in this community,⁵⁰ Rohingya girls settled in Malaysia are vulnerable to child marriages.

Another option sought by wife-seeking Rohingya men is to approach marriage brokers or agents to arrange trafficked girls into Malaysia for the purpose of marriage. Usually, a sum of money is paid for this purpose. Over the years, a human rights non-governmental organisation based in South East Asia known as Fortify Rights have

Retrieved from: <<https://www.astroawani.com/berita-malaysia/rogol-tetap-rogol-tidak-boleh-ditutup-dengan-perkahwinan-rohani-abdul-karim-113014>>

⁴⁴ See the UNHCR website, 'Figures at a Glance in Malaysia'. Retrieved from: <<https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>>

⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') New York (entered into force 3 September 1981), art 16(2).

⁴⁶ Elly Fazaniza, (2 October 2019), 'Child Marriage Not A Common Practice Among Rohingya Community', *The Sun Daily online*, quoting the statement of Myanmar Ethnic Rohingya Human Rights Organisation Malaysia (Merhrom). Retrieved from: <<https://www.thesundaily.my/local/child-marriage-not-a-common-practice-among-rohingya-community-FL497456>>

⁴⁷ N. Trisha, (12 February 2019), 'It's A Sin To Send Her To School', *The Star online*. Retrieved from: <<https://www.thestar.com.my/news/nation/2019/02/12/its-a-sin-to-send-her-to-school-no-normal-studies-for-rohingya-child-bride-who-has-come-of-age>>

⁴⁸ Ian McIntyre, (2 August 2019), 'Authorities and Social Activist Stop Wedding Of A Rohingya Man To A Child In Penang', *The Sun Daily online*. Retrieved from: <<https://www.thesundaily.my/local/authorities-and-social-activist-stop-wedding-of-a-rohingya-man-to-a-child-in-penang-FL490722>>

⁴⁹ Ibid.

⁵⁰ Figures at a Glance in Malaysia (n 44).

documented numerous cases of child-bride-trafficking into Malaysia.⁵¹ In both types of marriage, there is either no consent from the child bride or consent is derived for the sake of easing their family's financial burden. The latter usually takes place with the hope of a better livelihood.

There are neither accurate statistics of child brides trafficked into Malaysia, nor statistics on child marriages in the Rohingya community. However, investigations conducted by the United Nations International Children's Emergency Fund ('UNICEF')⁵², Al Jazeera⁵³, Rohingya Women Development Network⁵⁴, Fortify Rights⁵⁵, and CNA Insider⁵⁶ have identified numerous marriages of this kind. Recently, the US Department of State revealed in its 2021 Trafficking in Persons Report ('TIP Report') that Malaysia had been downgraded to Tier 3 which is the lowest tier rank. This was due to the insufficient effort to meet the minimum level in eradicating human trafficking and weak law enforcement efforts.⁵⁷ The 2020 TIP Report also disclosed that traffickers tend to recruit foreign women and young girls into Malaysia for the purpose of brokered marriages.⁵⁸ Moreover, statistics provided by UNHCR reveal that the number of registered male refugees and asylum seekers outweighs females, where 68% are males and only 32% are females.⁵⁹ Based on these statistics, an inference can be drawn that as the number of female Rohingya refugees settled in Malaysia is low, it is easy for male Rohingya refugees to resort to child-bride-trafficking as a source of income.

C Malaysian Strategy

In Malaysia, two major reforms were proposed to address the issue of marital rape and child marriage. Firstly, the new section 375A was introduced in the Penal Code as an alternative to the abolition of the Exception. Secondly, in 2018, the Federal Government proposed an increase to the minimum age of marriage in preventing child marriages. These two proposals will be discussed in detail in the following paragraphs.

1 Enactment of section 375A of the Penal Code

In 2006, the CEDAW Committee requested that Malaysia enacts laws to criminalise marital rape. However, instead of criminalising marital rape, section 375A of the Penal

⁵¹ See the website of Fortify Rights, 'Malaysia: End Child Marriage, Protect Rohingya Refugee Girls'. Retrieved from: <<https://www.fortifyrights.org/mly-inv-jnr-2019-02-21/>>

⁵² Noor Aziah Mohd Awal and Mohd Al Adib Samuri, 'Child Marriage in Malaysia', (Working Paper, Universiti Kebangsaan Malaysia for UNICEF MALAYSIA.

⁵³ Kaamil Ahmed, (8 May 2019), 'Rohingya Women, Girls Being Trafficked To Malaysia For Marriage', *Al Jazeera online*. Retrieved from: <<https://www.aljazeera.com/features/2019/5/8/rohingya-women-girls-being-trafficked-to-malaysia-for-marriage>>

⁵⁴ Fortify Rights, (21 February 2019), 'Malaysia: End Child Marriage, Protect Rohingya Refugee Girls'. Retrieved from: <<https://www.fortifyrights.org/mly-inv-jnr-2019-02-21/>>

⁵⁵ Ibid.

⁵⁶ CNA Insider, (22 February 2017), 'Rohingya Brides For Sale in Malaysia'.

⁵⁷ Department of State, United States of America, Trafficking in Persons Report, June 2021, 369.

⁵⁸ Ibid, 113, 150, 151, 161.

⁵⁹ Figures at a Glance in Malaysia (n 44).

Code was enacted in 2007 as a compromise.⁶⁰ Prior to the implementation of section 375A, a Special Select Committee was established to study the Penal Code (Amendment) Bill 2004. The committee's investigation found that marital rape contradicts the views of 'Syariah laws and other religions',⁶¹ hence it would be inappropriate to criminalise marital rape in Malaysia.⁶² During the second and third reading of the Penal Code (Amendment) Bill 2004 in Parliament, the question as to whether the husband has the right to have sexual intercourse with his wife regardless of consent⁶³ and the proposed abolishment of the Exception were raised. Unfortunately, the attempt to repeal the Exception failed. However, section 375A was successfully enacted.⁶⁴

Section 375A of the Penal Code criminalises the act of a husband causing hurt, or fear of death, or fear of hurt to his wife or any other person for the purpose of having sexual intercourse with his wife. The gist of section 375A is to punish the husband for causing hurt, or fear of death, on his wife and not for having non-consensual sexual intercourse with his wife. On conviction under this section, the accused person can be sentenced to a maximum imprisonment term of five years. Ever since this law was enforced in 2007, there has only been one reported case of a charge being filed under this provision.

In the case of *PP Iwn Mahathir Abu Bakar*,⁶⁵ the accused was charged with two offences. The first charge was for abetting rape⁶⁶ committed by a person named 'Ayie' on the accused's wife and the second charge was framed under section 375A, for causing fear of hurt to the victim (his wife) in order to have sexual intercourse. During the trial, the victim testified that the accused threatened her and forced her to have sexual intercourse with 'Ayie', while he watched the act taking place.⁶⁷ The Kangar Sessions Court found the accused guilty on both charges and sentenced him to six years imprisonment on the first charge and one year imprisonment on the second charge.⁶⁸ On appeal, the High Court found that the first charge was defective due to the prosecution's failure to specify the manner in which the accused abetted Ayie's rape, thereby proving that 'Ayie' was the main perpetrator for the rape. Hence, the accused was acquitted of the first charge. On the second charge, the High Court affirmed the findings of the Sessions Court and increased the imprisonment term to four years.⁶⁹ Upon analysing this case, the researcher is of the view that the punishment imposed pursuant to section 375A is lenient. In addressing this point, the elements of section 375A will be compared with the offences of criminal intimidation and rape under the Penal Code in the following paragraphs.

⁶⁰ Women's Aid Organisation, 'CEDAW & Malaysia', (April 2012), Malaysian Non-Government Organisations Alternative Report, 35. Retrieved from: <<https://wao.org.my/wp-content/uploads/2018/08/Malaysian-NGO-CEDAW-Alternative-Report-2012.pdf>>

⁶¹ Malaysia, Parliamentary Debates, House of Representatives, (12 July 2006), (Tan Sri Dato' Seri Diraja Ramli bin Ngah Talib), 75. Retrieved from: <<http://www.parlimen.gov.my/files/hindex/pdf/DR-12072006.pdf>>

⁶² Ibid.

⁶³ Malaysia, Parliamentary Debates, House of Representatives, (13 July 2006), (Tan Sri Dato' Seri Diraja Ramli bin Ngah Talib), 39. Retrieved from: <<https://www.parlimen.gov.my/files/hindex/pdf/DR-13072006.pdf>>

⁶⁴ Vide the Penal Code (Amendment) Act 2006 (Malaysia).

⁶⁵ [2016] 10 CLJ 567 (Abu Bakar Katar, JC) (High Court in Malaya) ('Mahathir Abu Bakar').

⁶⁶ Penal Code (Malaysia) s 109, s 376.

⁶⁷ Mahathir Abu Bakar (n 65) 572.

⁶⁸ Ibid, 567.

⁶⁹ Ibid, 568.

Firstly, as the gist of section 375A is to punish the husband's act of causing hurt, fear of death, or fear of hurt for the purpose of having sexual intercourse, it is crucial to compare this section with the offence of criminal intimidation pursuant to sections 503 and 506 of the Penal Code. Section 503 of the Penal Code explains 'criminal intimidation' as an act of threatening with injury to another person, with intent to cause alarm to the threatened individual.⁷⁰ While section 506 of the Penal Code adds on that '... if the threat is to cause death or grievous hurt.... shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both'.⁷¹ Even though the wordings used to define the offence of 'criminal intimidation' differs from that of section 375A, the element of these offences are the same. However, unlike section 375A, section 506 imposes a longer imprisonment term of seven years.

Secondly, as the facts of *Mahathir Abu Bakar* reveals that the victim had non-consensual sexual intercourse with 'Ayie' and her husband, it is necessary to compare section 375A with the offences of rape and gang rape. Section 375(b) of the Penal Code interprets 'rape' as an act of a man having sexual intercourse with a woman without her consent. A person can be sentenced to a maximum imprisonment term of 20 years and is also liable to whipping on conviction.⁷² On the other hand, section 375B of the Penal Code imposes an imprisonment term of ten to 30 years for the offence of gang rape, which is interpreted as an offence of raping a woman by one or more individuals in a group. In contrast to section 375A, the offence of rape and gang rape imposes a heavier punishment. The researcher is of the view that the Exception has hindered the accused from being charged for an offence of gang rape, despite the fact that the victim had non-consensual sexual intercourse with the accused and his friend, named 'Ayie'.

At this juncture, a comparison of punishment imposed for the offences of criminal intimidation, rape and gang rape under the Malaysian Penal Code would reveal that punishment under section 375A is very light. Thus, this sparks the question of whether the lighter punishment under section 375A provides a deterrent for the occurrence of marital rape, or protects a husband from a heavier sentence. Currently, as there are no available arrest statistics or crime reporting under section 375A, the effectiveness of this measure in combating 'marital rape' or forced sexual intercourse cannot be assessed based on these data. Despite the lack of data on section 375A, previous research has found that 9 to 11% of domestic violence victims reported sexual violence, particularly,

⁷⁰ Penal Code (Malaysia) s 503 provides as follows:

'Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation'.

⁷¹ Penal Code (Malaysia) s 506 provides as follows:

'Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both'.

⁷² See Penal Code (Malaysia) s 376(1).

forced sexual intercourse.⁷³ Even though section 375A was enacted to protect domestic violence victims, the law expressly criminalises the husband's act of causing hurt, fear of death, or fear of hurt to have sexual intercourse, and not for non-consensual sexual intercourse. The lack of the wife's consent is not an element embodied under section 375A. As such, at this point, whether section 375A comprehensively protects a victim from marital rape is questionable.

The wording of section 375A does not expressly incorporate non-consensual sexual intercourse between a legally married husband and wife and thus, imposes a lighter sentence. Hence, the researcher is of the view that Malaysia's approach of enacting section 375A as an alternative to criminalise marital rape does not comprehensively remedy the occurrence of spousal rape. Instead, the lighter sentencing imposed under section 375A shields a husband from sexual violence against his wife.

2 *Increasing the Minimum Age of Marriage*

The process of raising the minimum age of marriage in Malaysia is challenging, as there are several pieces of legislation that apply to different groups of people, setting different minimum ages across these groups.

The solemnisation and registration of non-Muslim marriages in Malaysia are governed by the Law Reform (Marriage and Divorce) Act 1976 ('LRA').⁷⁴ However, its application does not extend to Muslims⁷⁵ and natives of Sabah and Sarawak who are bound by native customary law or aboriginal customs, unless the parties opt to register the marriage pursuant to the LRA.⁷⁶ In addition, it also does not apply to marriages contracted under the Christian Marriage Ordinance [Sabah Cap. 24] or the Church and Civil Marriage Ordinance [Sabah Cap. 92].⁷⁷ Pursuant to section 10 of the LRA,⁷⁸ the minimum age for marriage is 18 years. However, a female aged 16 is allowed to marry with the authorisation of the Chief Minister.

On the other hand, Muslim marriages are governed by Islamic personal laws which differ from state to state. The Malaysian Federal Constitution confers powers upon the State Legislature to enact laws⁷⁹ pertaining to Islamic marriages.⁸⁰ For this reason, each state in Malaysia has its own Islamic Family Law Act, as tabulated in Table 1.

⁷³ Women's Aid Organisation Policy Brief (October 2018), 'Marriage Not a License to Rape'. Retrieved from: <<https://wao.org.my/wp-content/uploads/2018/11/WAO-Policy-Brief-2018-1-Marital-Rape.pdf>>

⁷⁴ See Law Reform (Marriage & Divorce) Act 1976 ('LRA') (Malaysia) s 3.

⁷⁵ *Ibid*, s 3(3).

⁷⁶ *Ibid*, s 3(4)(a).

⁷⁷ *Ibid*, s 3(4)(b), (c).

⁷⁸ *Ibid*, s 10.

⁷⁹ Federal Constitution (Malaysia) art 74(2), art 77.

⁸⁰ *Ibid*, See Item No1 of List II of the Ninth Schedule.

Table 1: List of Islamic Family Law Acts in accordance with the States in Malaysia⁸¹

States	Islamic Family Law Acts
Federal Territories of Kuala Lumpur, Labuan & Putrajaya	Islamic Family Law (Federal Territory) Act 1984 (Act 303)
Selangor	Islamic Family Law (State Of Selangor) Enactment 2003
Negeri Sembilan	Islamic Family Law (Negeri Sembilan) Enactment 2003
Malacca	Islamic Family Law (State Of Malacca) Enactment 2002
Johore	Islamic Family Law (State Of Johore) Enactment 2003
Pahang	Islamic Family Law Enactment 2005
Perak	Islamic Family Law (Perak) Enactment 2004
Kelantan	Islamic Family Law Enactment 2002
Terengganu	Administration Of Islamic Family Law Enactment 1985
Kedah	Islamic Family Law (Kedah Darul Aman) Enactment 2008
Perlis	Islamic Family Law Enactment 2006
Pulau Pinang	Islamic Family Law (State Of Penang) Enactment 2004
Sabah	Islamic Family Law Enactment 2004
Sarawak	Islamic Family Law Ordinance, 2001

In all these Acts, the minimum age for females to marry is 16, but it allows the marriage of a child below the specified age with the written permission of a Syariah Judge.⁸² Permission of a Syariah Judge can be obtained through filing an application for underage marriage by the underaged individual. This must be done at the lower Syariah Court in the jurisdiction of the applicant's residence.⁸³ The applicant is required to submit a Notice of Application, which is supported by an affidavit enclosed with the required documents,⁸⁴ obtain a supporting letter from the marriage registrar, and pay a sum of fee fixed for the application.⁸⁵ The Syariah Court Judge will study the reasons for the underage marriage application, the family background of both the applicant and spouse, compatibility in marriage, sexual or reproductive background, and the applicant's understanding of marriage⁸⁶ before approving the application.

⁸¹ Data collected and compiled from E-Syariah Official Portal: <<http://www.esyariah.gov.my/portal/page/portal/Portal%20E-Syariah%20BI/Portal%20E-Syariah%20Carian%20Bahan%20Rujukan/Portal%20E-Syariah%20Undang-Undang>>

⁸² Minimum age of marriage is prescribed under sections 7 or 8 of the legislation listed in Table 2.

⁸³ 'Applications For Marriage Requires Court Order / Permission', MyGovernment website: <<https://www.malaysia.gov.my/portal/content/27657>>

⁸⁴ A copy of identity card, certificate of conversion to Islam (if applicable), marriage application form for the bride, marriage application form for the groom, and other related documents.

⁸⁵ 'Applications For Marriage Requires Court Order / Permission', (n 83).

⁸⁶ Malaysia, Parliamentary Reply, House of Representative, (16 December 2021), 7. Retrieved from: < www.parlimen.gov.my/files/hindex/pdf/DR-16122021.pdf>

Meanwhile, the marriage laws of the natives of Sabah and Sarawak are governed by their native laws and customs which fall under the jurisdiction of their respective states,⁸⁷ as provided in Table 2. However, unlike the LRA and the state Islamic Family Law Acts,⁸⁸ the various native laws do not specify a minimum age for marriage.

Table 2 : List of Customary Laws in Sabah and Sarawak⁸⁹

Orang Asli	Akta Orang Asli 1954
Sarawak	<ol style="list-style-type: none"> 1. Native Customs (Declaration) Ordinance 1996 2. Majlis Adat Istiadat Ordinance 1997 3. Native Courts Ordinance 1992 4. Adat Iban 1993 5. Adat Bidayuh 1994 6. Adat Kayan-Kenyah 1994 7. Adat Bisaya 2004 8. Adat Lun Bawang 2004 9. Adat Kelabit 2008 10. Adat Penan 2011
Sabah	Native Courts Ordinance 1992 (Kaedah-Kaedah Mahkamah Anak Negeri (UndangUndang Adat Anak Negeri) 1995

In 2018, the former Prime Minister of Malaysia, Tun Dr. Mahathir Mohamad issued a directive to all states to increase the minimum age of marriage to 18.⁹⁰ Unfortunately, unanimity was not reached among the states for the same. Thus far, only Selangor has passed a bill to increase the marriage age to 18 years.⁹¹ The bill to amend the Islamic Family Law (State Of Selangor) Enactment 2003 has also added a new section 8A, which sets out a stringent procedure for males and females below 18 years of age to get married. There is no total abolition of child marriages in Selangor, but the State has moved one step further toward preventing child marriages. Meanwhile, the Kelantan State government conducted a roundtable in 2018 which decided that underage marriages are consistent with Syariah law and has therefore declined to implement the relevant aspects of the Convention on the Rights of Child (‘CRC’) and CEDAW for Muslims in Kelantan.⁹²

On 16 December 2021, Tuan Haji Idris bin Haji Ahmad, minister at the Prime Minister’s Department, revealed during the parliamentary session that the Malaysian government had studied the proposal to increase the minimum age of marriage for Muslim

⁸⁷ See List IIA of the Ninth Schedule to the Federal Constitution.

⁸⁸ See Table 1.

⁸⁹ Data obtained from National Strategy Plan in Handling the Causes of Child Marriage.

⁹⁰ The Sun Daily, (21 October 2018), ‘Tun Mahathir Orders State Govts To Raise Min Marriage Age To 18’, *The Sun Daily online*. Retrieved from: <<https://www.thesundaily.my/archive/tun-mahathir-orders-state-govts-raise-min-marriage-age-18-MUARCH585535>>

⁹¹ Islamic Family Law (State of Selangor) (Amendment) Enactment 2018 (Enactment A56).

⁹² Malaysiakini, (29 November 2018), ‘“Child Marriage A Necessity In Kelantan” – Roundtable By PAS Gov’t Concludes’, *Malaysiakini online*. Retrieved from: <<https://www.malaysiakini.com/news/453901>>

females from 16 to 18 years of age.⁹³ Based on the feedback and opinions received, most of the states in Malaysia would like to maintain the minimum age of marriage as it is in their respective states' Islamic Family Law Act.⁹⁴ As such, the Malaysian government is of the view that there is no need to amend the minimum age of marriage for Muslim females in Malaysia.⁹⁵ It was also revealed that the Syariah Judiciary Department of Malaysia has implemented a strict Standard of Procedure ('SOP')⁹⁶ with effect from 28 September 2018 for underage Muslim marriages.⁹⁷ Further, following the adherence to this SOP, the number of approved Muslim underage marriages from the period of 1 September 2018 until 31 October 2021 have shown a reduction of 783 marriages compared to the period of 1 September 2015 until 31 August 2018.⁹⁸ Tuan Haji Idris bin Haji Ahmad also disclosed that the said strict SOP specifies certain criteria that will be taken into consideration such as the reasons for the marriage application, family background of the applicant and the future spouse, financial ability, education level, personal characteristics, health condition, sexual background, understanding on marriage, compatibility in marriage, presence of *wali*⁹⁹ (only for Muslim female applicants), and reports from the Department of Social Welfare Malaysia, Ministry of Health of Malaysia and the Royal Malaysian Police, if necessary.¹⁰⁰ Even though at one end the statistics revealed by Tuan Haji Idris bin Haji Ahmad shows a reduction in approval of underaged Muslim marriages, at the other end, the number of students dropping out from school for the purpose of getting married from the period of 2020 until 2 December 2021¹⁰¹ remains relatively high.

In January 2020, the Ministry launched a five year National Strategy Plan in Handling the Causes of Child Marriage ('National Strategy Plan') which aims to increase awareness and change social perception relating to the marriage of minors.¹⁰² Strategies and programmes were drafted to address six factors identified as the causes of underage marriages, of which loose laws that permit the marriage of a minor is one of the factors.¹⁰³ In its strategy, the government has taken a stand to increase the marriageable age for females under the Islamic Family Laws and customary laws listed in Tables 1 and 2 respectively.

The progress of the National Strategy Plan was questioned in parliament on 14 December 2020. Subsequently, the Ministry revealed that as of December 2020, only seven states have agreed to increase the minimum age of marriage to 18 years, and

⁹³ Malaysia, Parliamentary Reply, House of Representative, (n 86), 5.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Surat Pekeliling Ketua Pengarah, Ketua Hakim Syarie Jabatan Kehakiman Syariah Malaysia Bil.1/2018.

⁹⁷ Malaysia, Parliamentary Reply, House of Representative, (n 86).

⁹⁸ Ibid.

⁹⁹ A male relation such as father, grandfather, brother or uncle who has the authority to give the bride in hand of marriage.

¹⁰⁰ Malaysia, Parliamentary Reply, House of Representative, (n 86), 7.

¹⁰¹ Malaysia, Parliamentary Reply, House of Representatives, (n 17), 12.

¹⁰² Azura Abbas, (15 June 2021), 'Malaysia Unveils National Plan To Address Underaged Marriages', *New Straits Times online*. Retrieved from: <<https://www.nst.com.my/news/nation/2020/01/557060/malaysia-unveils-national-plan-address-underaged-marriages-nsttv>>

¹⁰³ Ministry of Women, Family and Community Development, (16 January 2020), 'Executive Summary of National Strategy Plan In Handling The Causes Of Child Marriage', 5-10.

consultations will be conducted with other states to this end.¹⁰⁴ Even though the Federal Government has revealed its strategy to increase the minimum age of marriage to 18 years, it is observed that the minimum age of marriage for females as provided in section 10 of the LRA which applies to non-Muslims, is yet to be amended.

III OTHER JURISDICTIONS

In this section, the approaches undertaken in Indonesia and Singapore in protecting child brides from rape within a marriage will be explored. These countries are chosen for a comparative study of law due to their striking similarity with Malaysia from the perspectives of geographical location, religious belief and cultural values, besides being a state party to the CRC and CEDAW.

A *Indonesia*

1 *Marital Rape*

Like the Malaysian Penal Code, the Penal Code of Indonesia 1982¹⁰⁵ is the main legislation relating to criminal offences in this Republic. In 2004, the Law of the Republic of Indonesia Number 23 of Year 2004 Regarding Elimination of Violence in Household ('Act 23') was enacted as a preventive measure for household violence, and for protection of victims of household violence.¹⁰⁶ In addition to these statutes, the Aceh province of Indonesia practises Islamic Criminal Law and has its own criminal code known as Qanun Jinnayat. These Indonesian legal frameworks will be explored here to examine the position of marital rape in Indonesia.

Article 285 of the Indonesian Penal Code defines 'rape' as:

'Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years'.

Similar to Malaysia's Exception, Article 285 provides immunity for intercourse during the marriage from the offence of rape. On the other hand, Article 288 provides a certain level of protection for child brides, where the law reads as follows:

'(1) Any person who in marriage has carnal knowledge of a woman of whom he knows or reasonably should presume that she is not yet marriageable, shall, if the act results in bodily harm, be punished by a maximum imprisonment of four years.

¹⁰⁴ Malaysia, Parliamentary Reply, House of Representative, (14 December 2020), (Question no. 31). Retrieved from:

<<https://www.kpwkm.gov.my/kpwkm/uploads/files/Dokumen/Jawapan%20Dewan%20Rakyat/20201214.pdf>>

¹⁰⁵ Also known as Kitab Undang-Undang Hukum Pidana.

¹⁰⁶ Law Of The Republic Of Indonesia Number 23 Of Year 2004 Regarding Elimination Of Violence In Household ('Act 23') (Indonesia) art 4.

- (2) If the act results in serious physical injury maximum imprisonment of eight years shall be imposed.
- (3) If the act results in death, maximum imprisonment of twelve years shall be imposed’.

Article 288 criminalises sexual intercourse which causes bodily harm¹⁰⁷, serious physical injury,¹⁰⁸ or causes death,¹⁰⁹ on a wife who is presumed to be ‘not yet marriageable’. However, an interpretation of the term ‘not yet marriageable’ is not provided under the Indonesian Penal Code. Nevertheless, Indonesian law¹¹⁰ sets 19 years as the minimum age of marriage for females. Hence, if Article 288 and Indonesia’s minimum age of marriage are read together, it can be interpreted that wives below the age of 19 are protected under Article 288. Article 288 does not use the term ‘marital rape’ or ‘non-consensual sexual intercourse’ but punishes a husband who has sexual intercourse which causes bodily harm or physical injury.

Meanwhile, in examining Act 23, Article 5 thereof criminalises sexual violence committed against an individual within the scope of the household.¹¹¹ On conviction, the accused can be imprisoned for a term of four to 15 years or fined pursuant to Article 47¹¹² of Act 23. ‘Sexual Violence’ is interpreted in Article 8 of Act 23 as forced sexual intercourse with an individual living within the household.¹¹³ There is no exception placed on the husband, as the scope of ‘the household’ defined under Article 2(1) of Act 23 expressly includes the husband.¹¹⁴ Even though the term ‘marital rape’ is omitted in the phrasing of the law, the law states that forced sexual intercourse committed by a

¹⁰⁷ Penal Code of Indonesia (‘PCI’) art 288(1).

¹⁰⁸ See *ibid* art 288(2).

¹⁰⁹ *Ibid*, art 288(3).

¹¹⁰ Law No.1 of 1974 on Marriage (Indonesia) art 7(1).

¹¹¹ Act 23 (n 106) art 5 provides as follows:

‘Anyone shall be prohibited to carry out violence in household against an individual within the scope of the household, by means of:

- a. physical violence;
- b. psychic violence;
- c. sexual violence; or
- d. negligence of household’.

¹¹² Act 23 (n 106) art 47 provides as follows:

‘Anyone forcing an individual living in the same house to commit sexual intercourse as referred to in Article 8 letter b shall be punished with imprisonment of not shorter than 4 (four) yeas and imprisonment of not longer than 15 (fifteen) years or fine of at least Rp12,000,000.00 (twelve million rupiah) or fine of not more than Rp300,000,000.00 (three hundred million rupiah)’.

¹¹³ Act 23(n 106) art 8 provides as follows:

‘The sexual violence referred to in Article 5 letter c shall include:

- a. forcing sexual intercourse carried out against an individual living within the scope of the household; b. forcing sexual intercourse against one of the individuals within the scope of the household for commercial purpose and/or a certain purpose’.

¹¹⁴ Act 23 (n 106) art 2 provides as follows:

‘(1) The scope of household in this Law shall include:

- a. husband, wife, and children;
- b. people whose family relationship with the individual referred to under letter a is due to blood relationship, marriage, suckling at the same breast, care, and guardianship, who lives in the household; and/or
- c. the individual working to assist the household and living in the household’.

husband on his wife, without her consent is an offence punishable under Act 23. In terms of punishment, the punishment prescribed under Act 23 is higher compared to Article 288 of the Indonesian Penal Code.

Contrary to the Malaysian position, Indonesia has moved forward to criminalise forced sexual intercourse as a step towards eradicating domestic violence by enacting Act 23. Despite this move, the terminology used in Act 23 was highlighted as problematic by CEDAW. In its concluding observation on Indonesia's combined 6th and 7th periodic report, CEDAW raised concerns about the Republic's failure to criminalise marital rape under its Penal Code and the absence of any explicit reference to rape or marital rape in Act 23.¹¹⁵ CEDAW further recommended that Indonesia defines and criminalises marital rape, in line with the Convention and general recommendation No. 19 (1992) of the Committee on violence against women.¹¹⁶

From the Islamic perspective, Aceh's *Qanun Jinnayat* which is based on the *Al-Quran* and *Hadith*, interprets 'rape' under Article 1, No.30 as sexual intercourse against the vagina, rectum or mouth of the victim by the perpetrator's penis, mouth, or other objects used by the perpetrator with violence, force or threat to the victim.¹¹⁷

Unlike Article 285 of the Indonesian Penal Code, *Qanun Jinnayat's* definition of 'rape' explains the *actus reus* of the offence with no exclusion placed on the spouse. Sexual intercourse with violence, force, or threat to the victim amounts to 'rape', where on conviction the offender could face imprisonment for a minimum term of 125 months and a maximum term of 175 months.¹¹⁸ As the law does not exclude legally married couples, the interpretation covers the element of 'marital rape', which is forced sexual intercourse by a husband on his wife. *Qanun Jinnayat* had made headlines and has been constantly criticised for being discriminatory in favour of women. Nevertheless, when it comes to 'marital rape', even though the interpretation covers elements of marital rape, its application to husbands is not explicit. Despite the certainty of its application to married couples, the definition of 'rape' in *Qanun Jinnayat* illustrates that marital rape is in line with Syariah Laws. Besides the definition of 'rape' in *Qanun Jinnayat*, a fatwa¹¹⁹ issued by the Indonesian Women's Ulama Congress, in 2017 declares that marital rape and child marriages are forbidden among the Muslim communities.¹²⁰ This further strengthens the view that criminalising marital rape will not violate Syariah Laws.

¹¹⁵ 'Concluding observations of the Committee on the Elimination of Discrimination against Women', CEDAW/C/IDN/CO/6-7, 27 July 2012 No.25(d).

¹¹⁶ Ibid.

¹¹⁷ *Qanun Aceh Nomor 6 Tahun 2014 Tentang Hukum Jinayat ('Qanun Aceh')* (Aceh) art 1, no. 30 provides as follows (in its original language):

'30. Pemerkosaan adalah hubungan seksual terhadap faraj atau dubur orang lain sebagai korban dengan zakar pelaku atau benda lainnya yang digunakan pelaku atau terhadap faraj atau zakar korban dengan mulut pelaku atau terhadap mulut korban dengan zakar pelaku, dengan kekerasan atau paksaan atau ancaman terhadap korban'.

¹¹⁸ *Qanun Aceh* (n 117) art 48.

¹¹⁹ Religious verdict that assists in regulating Muslim conduct of activities in the country.

¹²⁰ Meghan Werft, (29 April 2017), 'Female Muslim Clerics Issue Fatwa on Child Marriage & Marital Rape', *Global Citizen*. Retrieved from: <<https://www.globalcitizen.org/en/content/female-muslim-clerics-issue-fatwa-on-child-marriage/>>

2 Child Marriages

The Indonesian law relating to marriages is governed by Law No. 1 of 1974 on Marriage ('Law No 1'). Originally, Article 7(1) of the legislation sets the minimum age of marriage as 19 years for males and 16 years for females. Article 7(2) permits marriage below the minimum age if the dispensation is obtained by the parents of the bride or groom from the courts. A crucial amendment¹²¹ was made to this statute in 2019, whereby Article 7(1) was amended by lifting the minimum age of marriage for females from 16 to 19 years. Simultaneously, Article 7(2) was also revised to permit marriage below the age of 19, in the event the parents of the bride and/or groom obtain a dispensation from the courts for urgent reasons which are supported by appropriate evidence. Even though the minimum age of marriage for females was raised, the law allows the opportunity for females below the age of 19 to marry in some circumstances.

According to the statistics on child marriages in Indonesia by the National Socio-Economic Household Survey (SUSENAS), only a slight decline was recorded from the period of 2008 to 2018.¹²² A 2018 census revealed that one out of nine females aged between 20 to 24 years were married before the age of 18 years.¹²³ Increasing the minimum age of marriage is a measure taken by the Indonesian state to combat child marriages.¹²⁴ However, even after the minimum age of marriage was increased to 19 in 2019, the number of child marriages in Indonesia has still surged.¹²⁵ This surge is the consequence of the economic difficulties faced by the Indonesian society during the Covid-19 pandemic, and pregnancies out of wedlock which resulted in parents marrying off their children.¹²⁶ Furthermore, the loophole in Indonesia's amended law made the approval process for marriage dispensation easy.¹²⁷ In fact, a recent study in Indonesia reported that the Religious Courts received 34,000 marriage dispensation applications in the first half of 2020¹²⁸, and 97% of the applications were approved.¹²⁹ In granting marriage dispensations, the Religious Courts' judges are bound by the guidelines set under the Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019,¹³⁰ where a dispensation is granted on the basis of the best interests of the child,

¹²¹ Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan (Law No.16 of 2019) (Indonesia).

¹²² United Nations Children's Fund (UNICEF), Statistics Indonesia (BPS), National Development Planning Agency (Bappenas), 'Prevention of Child Marriage Acceleration that Cannot Wait', (Report, 2020) 7 <<https://www.unicef.org/indonesia/sites/unicef.org.indonesia/files/2020-06/Prevention-of-Child-Marriage-Report-2020.pdf>>

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Arlina Arshad, (3 October 2020), 'Child Marriages On The Rise In Indonesia Amid Covid-19 Outbreak', *The Straits Times online*. Retrieved from: <<https://www.straitstimes.com/asia/se-asia/child-marriages-on-the-rise-in-indonesia-amid-covid-19-outbreak>>

¹²⁶ Elga Andina, (2021), 'Increasing Number Of Child Marriages During Covid-19 Pandemic', *Info Singkat*, Vol. XIII, No. 4/II/Puslit/February/2021, 13-18, 14.

¹²⁷ Ibid, 15.

¹²⁸ January to June 2020.

¹²⁹ Elga Andina (n 126), 14.

¹³⁰ Peraturan Mahkamah Agung Republik Indonesia Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kahwin ('PERMA No 5') [Regulations of the Supreme Court of the Republic of Indonesia No 5 of 2019 Guidance for Adjudication of Marriage Dispensations] (Indonesia) <https://jdih.mahkamahagung.go.id/index.php?option=com_remository&Itemid=46&func=fileinfo&id=8395>

gender equality and non-discrimination.¹³¹ Prior to granting the dispensation, the judge is required to advise the applicant, bride or groom, their prospective spouse, and their parents on the risks of an early marriage.¹³² The judge is also obliged to examine the grounds for the marriage,¹³³ the understanding and consent of the child,¹³⁴ and the age gap between the bride and groom.¹³⁵ Despite these procedures being in place in a preventive capacity, the number of child marriages has increased during the pandemic due to financial burdens on families, pre-marital sexual intercourse, and subsequent pregnancy out of wedlock.¹³⁶

B Singapore

1 *Marital Rape*

Historically, both the Malaysian and Singaporean Penal Code¹³⁷ evolved from the SS Penal Code.¹³⁸ As these Acts originated from the same source, similarities in the law can be seen in these two statutes. Laws relating to marital rape in Singapore are embodied in the Exception to section 375 and section 376 A of the Penal Code. These laws will be discussed further.

(a) *Exception to section 375*

Initially, equivalent to the Malaysian position before the 1989 amendment, the Singapore Penal Code¹³⁹ in its Exception to section 375 had given husbands immunity from marital rape unless the wife was below 13 years. Eventually, in 2007, section 375 was amended¹⁴⁰ by removing the Exception and replacing it with new subsections 4 and 5 as follows:

- ‘(4) No man shall be guilty of an offense under subsection (1) against his wife, who is not under 13 years of age, except where at the time of the offense —
- (a) his wife was living apart from him —
 - (i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;
 - (ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;
 - (iii) under a judgment or decree of judicial separation; or
 - (iv) under a written separation agreement;

¹³¹ Ibid art 2.

¹³² Ibid, art 12.

¹³³ Ibid, art 16c.

¹³⁴ Ibid, art 16e.

¹³⁵ Ibid, art 16f.

¹³⁶ Elga Andina (n 126), 15.

¹³⁷ Penal Code 1871, 2020 Revised Edition (Singapore).

¹³⁸ Norbani Mohamed Nazeri, (2010), ‘Criminal Law Codification and Reform in Malaysia: An Overview’, *Singapore Journal of Legal Studies* 375-399, 375.

¹³⁹ Chapter 224, Revised Edition 1985, (‘Chapter 224’) effective from 30 March 1987 until 11 November 1993.

¹⁴⁰ Penal Code (Amendment) Act 2007 (No.51 of 2007) (‘PCA 2007’) (Singapore) s 68.

- (b) his wife was living apart from him and proceedings have been commenced for divorce, nullity, or judicial separation, and such proceedings have not been terminated or concluded;
 - (c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;
 - (d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or
 - (e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded.
- (5) Notwithstanding subsection (4), no man shall be guilty of an offence under subsection (1)(b) for an act of penetration against his wife with her consent⁷.

Through this amendment, regardless of the wife's age, marital rape was punishable only if the wife was living apart from the husband and legal proceedings for separation of the spouse had been commenced or if a protection order had been obtained by the wife against her husband. Through this amendment, the lack of the wife's consent for sexual intercourse was made punishable as rape, if the conditions under section 375(4) were met.

Subsequently, section 375 was amended once again in 2019. The revised section 375(4) and (5) stipulate that:

- '(4) No man shall be guilty of an offence under subsection (1)(b) or (1A)(b) for an act of penetration against his wife with her consent.
- (5) Despite section 79, no man shall be guilty of an offence under subsection (1) (a) or (1A)(a) if he proves that by reason of mistake of fact in good faith, he believed that the act of penetration against a person was done with consent⁷.

Through this amendment,¹⁴¹ the conditions laid down before a husband could be punished for marital rape were removed. The current section 375(4) of the Singapore Penal Code criminalises marital rape, if the sexual intercourse lacks the wife's consent, and is in line with the CEDAW committee's comment¹⁴² to specifically criminalise marital rape and define rape to include the lack of the victim's consent. This victim-centric amendment came into place as the former law was insufficient to provide protection from grave abuse within a marriage and was well received by lawmakers.¹⁴³ Despite this development that criminalises marital rape, the new subsection 5 acts as an escape route from the charge, in the event the accused successfully raises the defence of mistake of fact.

¹⁴¹ Criminal Law Reform Act 2019 (Singapore) s 110.

¹⁴² 'Concluding Observations of the Committee on the Elimination of Discrimination Against Women', CEDAW/C/SGP/CO/4/Rev.1, 5 January 2012 Retrieved from: <<https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-SGP-CO-4.pdf>>

¹⁴³ Singapore, Parliamentary Debates, (6 May 2019), (Mr Tan Chuan-Jin), Retrieved from: <https://sprs.parl.gov.sg/search/fullreport?sittingdate=06-05-2019>

Prior to this amendment taking place, the Islamic Religious Council of Singapore held a closed-door discussion on 12th September 2018 among 30 Islamic religious teachers to deliberate the abolishment of marital rape immunity from the Singapore Penal Code. The discussion concluded unanimously that marital rape had no place in Islam and fully supported the amendment.¹⁴⁴ This is another indication that forced sexual intercourse by the husband without the wife's consent is un-Islamic. However, on the other hand, the Singapore Islamic Scholars and Religious Teachers Association ('PERGAS'), through its media statement dated 29 September 2018, expressed that while marriage forbids sexual violence, however, the use of the term 'rape' contravenes the element of consent in a marriage. They proposed the enactment of a new law to criminalise sexual violence instead of abolishing marital rape immunity altogether.¹⁴⁵

(b) *Section 376A*

Section 376A which specifically caters to sexual offences against a minor under the age of 16 years was introduced into the Singapore Penal Code in 2007.¹⁴⁶ Section 376A(4) provides that:

'No person shall be guilty of an offence under this section for an act of penetration against his or her spouse with the consent of that spouse'.

Sexual penetration pursuant to this section extends to penetration of the vagina, anus or mouth and penetration other than by the penis.¹⁴⁷ The scope of the victim under section 376A(4) is not limited to females but also applies to male victims. In line with section 375(4), section 376A(4) embodies the lack of consent of the victim as the element of the offence.

However, when section 376A was added vide the PCA 2007 the conditions which appeared in the 2007 amendments to section 375(4) were reproduced under its section 376A(5)¹⁴⁸ as well.

¹⁴⁴ Mediacorp, (12 September 2018), 'Masyarakat Islam S'pura Tegass Menentang Rogol Dalam Rumahtangga', *Berita Mediacorp online*. Retrieved from: <<https://berita.mediacorp.sg/mobilem/singapura/masyarakat-islam-s-pura-tegass-menentang-rogol-dalam-rumahtangga/4128152.html>>

¹⁴⁵ Singapore Islamic Scholars and Religious Teachers Association ('SISRTA'), 'Feedback on Repeal of Marital Immunity Law For Rape' (Media Statement, 29 September 2018), [7]-[8].

¹⁴⁶ Vide the Penal Code (Amendment) Act 2007 (No. 51 of 2007) (Singapore) s 68.

¹⁴⁷ Singapore Penal Code (Chapter 224) Revised Edition 2008 ('Chapter 224, 2008') (Singapore), s 376A(1)(a), (b).

¹⁴⁸ *Ibid*, s 376A(5) reads as follows:

'(5) No man shall be guilty of an offence under subsection (1)(a) for penetrating with his penis the vagina of his wife without her consent, if his wife is not under 13 years of age, except where at the time of the offence —

- (a) his wife was living apart from him —
 - (i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;
 - (ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;
 - (iii) under a judgment or decree of judicial separation; or
 - (iv) under a written separation agreement;
- (b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

Initially, sexual penetration towards a child bride below the age of 16 years was punishable pursuant to section 376A(4), but only if the conditions under section 376A(5) were met. Eventually, section 376A(5) was repealed in 2019.¹⁴⁹ In addition to the removal of section 376A(5), a new subsection (1B) was added which prohibits the accused from raising the defence of consent by the victim to the sexual penetration.¹⁵⁰ This differs from section 375(5). On conviction under section 376A(2)(b), the accused could face a maximum of ten years imprisonment if the victim is aged between 14 to 16 years,¹⁵¹ or a maximum term of 20 years imprisonment if the victim is below 14 years of age.¹⁵² Section 376A uses the term ‘sexual penetration’ in lieu of ‘rape’ as its scope does not limit to penile penetration but extends to penetration by the perpetrator’s body part or anything else.¹⁵³ Nevertheless, the element of marital rape, which is sexual intercourse that lacks the wife’s consent is embodied here and provides wider protection for child brides. The currently enforced section 376A is rigid, victim-centric, and it safeguards child brides below 16 years of age from sexual abuse by their husbands.

2 *Child Marriages*

Section 9 of the Women’s Charter 1961 sets the minimum age of marriage as 18 years for non-Muslims.¹⁵⁴ However, the Minister of Social and Family Development has the discretion to authorise marriages below the minimum age in the event a special marriage licence is obtained¹⁵⁵ and subject to the consent¹⁵⁶ of the parents, guardian, or protectors of the minor¹⁵⁷. In 2011, a new section 17A was added in the Women’s Charter¹⁵⁸ which requires a person below the minimum age of marriage to attend and complete a marriage preparation programme as a pre-condition for the grant of a special marriage licence. This programme aims to prepare the underaged couple for the everyday struggles of married

-
- (c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;
 - (d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women’s Charter (Cap. 353) made against him for the benefit of his wife; or
 - (e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded’.

¹⁴⁹ See Singapore Penal Code (n 137), s 112(e).

¹⁵⁰ See *ibid*, (n 137), s 112(c).

¹⁵¹ See Singapore Penal Code (n 137), s 376A(2)(b).

¹⁵² See *ibid*, s 376A(3).

¹⁵³ See *ibid*, s 376A(1)(b).

¹⁵⁴ See Women’s Charter 1961 (Singapore) s 3(2).

¹⁵⁵ See *ibid*, s 9, 21(2).

¹⁵⁶ *Ibid*, s 13(1); Second Schedule.

¹⁵⁷ *Ibid*, section which defines a ‘minor’ as a person who is below the age of 21 years and who is not married or a widower or widow.

¹⁵⁸ Vide the Women’s Charter (Amendment) Act 2011 (Singapore) s 3.

life.¹⁵⁹ As part of the special marriage licence application process, the Ministry of Social and Family Development interviews applicants to evaluate their aptness for marriage.¹⁶⁰

Meanwhile, Muslim marriages in Singapore is governed by the Administration of Muslim Law Act 1966. Initially, the minimum age for Muslim marriages was set at 16 years and eventually increased to 18 years¹⁶¹ with an amendment introduced in 2008.¹⁶² Under special circumstances, a Muslim female below the age of 18 who has reached the age of puberty can be married.¹⁶³ Similar to non-Muslim underaged marriages, the consent of the parents or guardians is required¹⁶⁴ in addition to the condition to attend and complete the marriage preparation programme. This pre-requisite for Muslims came into effect in 2018.¹⁶⁵

Singapore's move to set the minimum age of marriage at 18 and additional conditions for underaged marriages was successful, as the statistics on child marriages in Singapore shows a steady decline over the last decade for both Muslim and non-Muslim marriages, as shown in Table 3.

Table 3: Statistics of Underaged Marriages (Brides aged below 21)¹⁶⁶

Year	Women's Charter	Administration of Muslim Law Act
2010	2.3%	6.6%
2020	0.6%	2.5%

Along with the reduction in the number of marriages of minors, the Singapore Ministry of Social and Family Development's statistics on special marriage licence application and issuance also exhibits a tremendous decline over the course of 10 years, as shown in Table 4.

¹⁵⁹ Singapore, Parliamentary Debates, (10 January 2011), (Mr Abdullah Tarmugi). Retrieved from: <<https://sprs.parl.gov.sg/search/report?sittingdate=10-01-2011>>

¹⁶⁰ Singapore Ministry of Social and Family Development Official Website: <<https://www.msf.gov.sg/research-and-data/Research-and-Statistics/Pages/Special-Marriage-License.aspx>>

¹⁶¹ Administration of Muslim Law Act 1966 (Singapore) s 96(4).

¹⁶² Vide Administration of Muslim Law (Amendment) Act 2008 (Singapore) s 19.

¹⁶³ Ibid, s 96(5).

¹⁶⁴ Ibid, s 94B(1), 4th Schedule.

¹⁶⁵ Vide the Administration of Muslim Law (Amendment) Act 2017 (Singapore) s 23.

¹⁶⁶ Data derived from 'Statistics on Marriage and Divorces, Reference Year 2020', retrieved from: <<https://www.singstat.gov.sg/-/media/files/publications/population/smd2020.pdf>>

Table 4: Number of Special Marriage Licence (SML) Applications Received and SMLs Issued¹⁶⁷

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Number of SML applications received	41	38	25	29	24	16	23	19	11	16
Number of SML issued (out of the applications received within the same year)	13	26	19	15	12	12	16	9	4	2

The numbers projected above show that the Singapore government has applied a strict approach in issuing special marriage licences, as less than 50% of the applications received were approved. The steady decline in the number of special marriage licence applications indicates that the approach applied by Singapore is effective in preventing underaged marriages.

IV DISCUSSION

Despite the shortfall of accurate data on child marriages in Malaysia, the existing data shows that the number of child marriages is significant in Malaysia. Even though it was revealed recently that the rate of approval of Muslim child marriages in Malaysia has decreased due to strict adherence to SOP by the Syariah Judges, the adaptation of the SOP does not solve the issue. This is proven as the statistics also show that a massive number of girls have dropped out of school for the purpose of getting married. The position of Malaysian law which legalises marital rape and child marriages without placing any legal protection has made child brides vulnerable to becoming victims of marital rape. It is also found that child brides are likely to face intimate partner violence due to their young age, level of maturity, and social skills.¹⁶⁸ These factors make them more vulnerable to marital rape compared to adult brides. These laws also create room for the occurrence of rapists marrying their rape victims and the practice of child-bride-trafficking in the Rohingya community. These practices should be halted to protect child brides from suffering after their marriage. As previous studies have shown, besides the deprivation of education, child brides are also prone to abuse and violence.¹⁶⁹ Hence there is an urgent need for the Malaysian government to review these laws. At this juncture, after reviewing the Malaysian laws, issues, and strategy, and studying the Indonesian and Singaporean positions, four key points will be addressed.

¹⁶⁷ Data derived from 'Special Marriage Licence', at the website of the Singapore Ministry of Social and Family Development: < <https://www.msf.gov.sg/research-and-data/Research-and-Statistics/Pages/Special-Marriage-License.aspx> >

¹⁶⁸ Report of the United Kingdom Department for International Development (DFID), (May 2017), 'Understanding Intimate Partner Violence In Rural Prevention And Response', 52. Retrieved from: < <http://cdn-odi-production.s3-website-eu-west-1.amazonaws.com/media/documents/11517.pdf> >

¹⁶⁹ Kelly C. Connerton (n 21); Joar Svanemyr et al (n 24).

Firstly, on the issue of whether criminalising marital rape is in violation of Syariah laws and other religions, the 1989 amendment to the Penal Code in Malaysia removed the wife's age from the Exception due to legitimisation of child marriages and not due to inconsistency with religious views. The issue that criminalising marital rape contradicts religious beliefs only surfaced after CEDAW urged its state parties to criminalise this particular type of sexual violence. Moreover, during the parliamentary debate, the Special Select Committee's claim that criminalising marital rape violates religious teachings was unsubstantiated.¹⁷⁰ It is crucial to note that there are various past literature that have addressed this misconception. According to Muh Endriyo Susila, marital rape is not recognised in Islam, as the religion commands a husband the responsibility to treat his wife well.¹⁷¹ Similarly, Usharani Balasingam and Johan Shamsuddin Sabaruddin propounded that marital rape which contains elements of violence is un-Islamic.¹⁷² Meanwhile, several previous studies¹⁷³ put forward that Islam propounds the principle of gender equality, and oppressive interpretations of Quranic verses have caused the misconception that a wife has the duty to submit to her husband, who is superior. This consequently contributes to the view that marital rape is in line with Islamic teachings. In addition to these literature, the *fatwa* issued by the Indonesian Women's Ulama Congress forbids marital rape and child marriages, and Singapore's PERGAS is of the view that marital rape is against the teaching of Islam.¹⁷⁴ Both are indications that the criminalisation of marital rape does not violate Syariah laws.

Secondly, even though PERGAS were in support of criminalising marital rape during the closed-door discussion on 12 September 2018,¹⁷⁵ their opinion needs to be taken into consideration. PERGAS viewed that sexual violence is prohibited in marriage, however, the usage of the terminology 'rape' contradicts consent in Muslim marriage or nikah. This is due to marriage or nikah being interpreted as an agreement between a man and woman which permits sexual intercourse between the contracting parties.¹⁷⁶ Similarly, Indonesia has not abolished marital rape immunity in Article 285 of Penal Code, and the terminology 'forced sexual intercourse' is used in Article 8 of Act 23 instead of the phrase 'rape'. This further signifies that forced sexual intercourse which lacks the wife's

¹⁷⁰ Malaysia, Parliamentary Debates, House of Representatives, (n 63), 75.

¹⁷¹ Muhammad Endriyo Susila, (2013), 'Islamic Perspective On Marital Rape', 20(2) *Jurnal Media Hukum* 327-328.

¹⁷² Usharani Balashingam and Johan Shamsuddin Hj Sabaruddin, (2015), 'Section 375 Exception and Section 375 A Malaysian Penal Code - Legitimising Rape within Marriage : A Call for Reform', 42(2) *Journal of Malaysian and Comparative Law* 69, 97.

¹⁷³ Mohd. Shahrizad Mohd. Diah, (1996), '*The Legal & Social Issues of Wife Battering and Marital Rape in Malaysia*', Dewan Bahasa dan Pustaka Kuala Lumpur; Dr. Jamal A. Badawi, (2016), '*Gender Equity in Islam, Basic Principles*', Islamic Dawah Movement of Southern Africa; Shagufta Zia, (2014), 'Marriage in Islam: Life Partnership or Discriminatory Family Set up? An Analysis of Some Protective Legal and Moral Shariah Provisions for Women with Special Reference to Surah An-Nisa'.

¹⁷⁴ MediCorp, (12 September 2018), 'Masyarakat Islam S'pura Tegag Menentang Rogol Dalam Rumahtangga', Berita MediCorp online. Retrieved from: <<https://berita.mediacorp.sg/mobilem/singapura/masyarakat-islam-s-pura-tegag-menentang-rogol-dalam-rumahtangga/4128152.html>>

¹⁷⁵ Ibid.

¹⁷⁶ SISRTA (n 145).

consent is in line with Syariah law, however, usage of the term ‘rape’ against a husband could be offensive and rejected by society.

Thirdly, the Malaysian strategy to safeguard child brides from marital rape is weak. The scope of section 375A does not expressly incorporate non-consensual sexual intercourse between a legally married husband and wife and hence imposes a light sentence. Therefore, it does not provide comprehensive protection for marital rape victims. On the other hand, even though the Ministry has taken the effort to initiate the National Strategy Plan to prevent child marriages, this strategy is time-consuming. Whether the process of increasing the minimum age of marriage can be achieved within the five-year period of The National Strategy Plan remains a live question, as there are obstacles in achieving this. The amendment involves numerous statutes which cannot be amended or created simultaneously. Amending the Islamic Family Law Acts¹⁷⁷ is the major challenge for the Federal government. This is due to the lack of consensus from the State governments as religious belief is a factor that hinders the process.¹⁷⁸ Moreover, the Malaysian government after studying this issue, revealed recently that there is no need to amend the minimum age of marriage for Muslim females.¹⁷⁹ Similarly, there is no minimum age specified in the customary laws governing the natives of Sabah and Sarawak. Further research is also needed before these statutes can be amended to avoid offending the natives’ beliefs, traditions, and cultural practices. These situations concerning the Islamic Family Law Acts and the customary laws further spark the question of whether the Malaysian government’s strategy to amend loose laws that permit marriage of a minor vide its National Strategy Plan will proceed? Another weakness observed in the Malaysian strategy to raise the marriage age is that there will be no total abolition of child marriages. By setting out procedures to permit the occurrence of underaged marriages, the law creates room for child marriages to take place, and its efficiency to reduce marriages of minors is doubted. Further, prevention of child-bride-trafficking is not provided for under The National Strategy Plan. Aside from raising the minimum age, enhancement of law and enforcement pertaining to child-bride-trafficking is clearly necessary to prevent the marriage of trafficked child victims. This is crucial as marriages of trafficked child brides are unregistered and go unreported, leading to difficulty in tracing potential victims. Hence, the prevention of child-bride-trafficking is vital.

Fourthly, a comparative study of the laws of Indonesia and Singapore reveals that lifting the minimum age of marriage and simultaneously providing avenues for underaged marriages may not reduce the number of child marriages. The Indonesian experience should be taken as a lesson here. Not only did the dispensation for underaged marriages escalate even after the minimum age of marriage was raised, but ‘stringent procedures’ were also put in place to prevent underaged marriages. Singapore’s approach of setting requirements for prospective couples to attend a marriage preparation course as a precondition to obtain the special marriage licence and the practice of interviewing applicants to assess their fitness for marriage should be considered in the Malaysian context as

¹⁷⁷ See Table 2.

¹⁷⁸ Ibid.

¹⁷⁹ Malaysia, Parliamentary Reply, House of Representative, (n 86).

well to prevent child marriages from occurring. Within the context of marital rape, both Indonesia and Singapore have amended their laws to safeguard vulnerable victims. Even though Indonesia adopts the term ‘forced sexual intercourse’ as an alternative to ‘rape’, the offence under Article 8 of Act 23 includes the element of rape within a marriage, which is sexual intercourse without the wife’s consent. Indonesia has taken this necessary step to provide protection for the vulnerable victims of marital rape. On the other hand, Singapore’s approach is exceptional of which not only does section 375(4) criminalise marital rape but it provides additional protections for child brides below the age of 16 years under section 376A(4).

V LAW REFORM SUGGESTIONS AND CONCLUSIONS

The clear issue on criminalising marital rape in Malaysia is not the violation of religious beliefs, but the usage of the terminology ‘rape’ against the accused husband. This can be seen from the approach of Indonesia to criminalise forced sexual intercourse instead of abolishing marital rape immunity. Similarly, PERGAS is in support of criminalising sexual violence in marriage instead of criminalising marital rape. PERGAS also considers that forced sexual intercourse without the wife’s consent is a form of torture and not rape. Since Malaysia is firm in maintaining the Exception, and the process of increasing the minimum age of marriage in Malaysia is time-consuming, it is proposed that the element of marital rape, which is sexual intercourse without the consent of the wife should be criminalised as forced sexual intercourse. Modelled after Act 23 in Indonesia, this crime could fall under the Domestic Violence Act 1994. At the same time, as it is likely that lifting the minimum age of marriage will be a long process, the Malaysian government should adopt Singapore’s approach. By implementing a pre-condition of completion of marriage preparation programmes and assessment of the fitness or maturity of the prospective child bride/groom before granting marriage authorisation. In this way, child marriages can be prevented.

To conclude, law reform is necessary as the current position of Malaysian laws places child brides as the vulnerable victims of marital rape, who lack legal protection. In view of the increasing domestic violence cases and remarkable rates of child marriages in Malaysia, it is time to update Malaysian laws in safeguarding these vulnerable victims.

REFERENCES

A Articles/Books/Reports

- CEDAW ‘*Concluding observations of the Committee on the Elimination of Discrimination against Women*’, CEDAW/C/IDN/CO/6-7, 27th July 2012
- CEDAW, ‘*Concluding Observations of the Committee on the Elimination of Discrimination Against Women*’, CEDAW/C/SGP/CO/4/Rev.1, 5th January 2012
- Christine Mwanukuzi and Tumaini Nyamhanga, ‘It Is Painful and Unpleasant: Experiences of Sexual Violence Among Married Adolescent Girls In Shinyanga, Tanzania’, (2021) 18:1 *Reprod Health* 1

- Department of State, United States of America, *Trafficking in Persons Report, June 2021*, (Report, June 2021) 369
- Dr. Jamal A. Badawi, *Gender Equity in Islam, Basic Principles*, (Islamic Dawah Movement of Southern Africa 2016)
- Elga Andina, 'Increasing Number Of Child Marriages During Covid-19 Pandemic', *Info Singkat*, Vol. XIII, No. 4/II/Puslit/February/2021
- Joar Svanemyr, Venkatraman Chandra-Mouli, Charlotte Sigurdson Christiansen and Michael Mbizvo, 'Preventing Child Marriages: First International Day of The Girl Child "My Life, My Right, End Child Marriage"' (2012) 9:31 *Reproductive Health* 1
- Kelly C. Connerton, 'The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists', (1997-1998) *Albany Law Review* 61 *Alb. L. Rev* 237
- Mohd. Shahrizad Mohd. Diah, *The Legal & Social Issues of Wife Battering and Marital Rape in Malaysia*, (Dewan Bahasa dan Pustaka Kuala Lumpur, 1996)
- Muhammad Endriyo Susila, 'Islamic Perspective On Marital Rape', (2013) 20(2) *Jurnal Media Hukum* 327-328
- Norbani Mohamed Nazeri, 'Criminal Law Codification and Reform in Malaysia: An Overview', [2010] *Singapore Journal of Legal Studies* 375-399
- Shagufta Zia, 'Marriage in Islam: Life Partnership or Discriminatory Family Set up? An Analysis of Some Protective Legal and Moral Shariah Provisions for Women with Special Reference to Surah An-Nisa' (5th September 2014) *SSRN*
- UK Department for International Development (DFID), 'Understanding Intimate Partner Violence In Rural Bangladesh Prevention And Response', (Report, May 2017)
- UNICEF, 'Prevention of Child Marriage Acceleration that Cannot Wait', (Report, 2020)
- Usharani Balasingam and Johan Shamsuddin Hj Sabaruddin, 'Section 375 Exception and Section 375 A Malaysian Penal Code- Legitimising Rape within Marriage: A Call for Reform' (2015) 42(2) *Journal of Malaysian and Comparative Law* 69, 97
- Women's Aid Organisation, *CEDAW & MALAYSIA, Malaysian Non-Government Organisations Alternative Report*, (Report, April 2012) 35

B Cases

- PP lwn. Mahathir Abu Bakar* [2016] 10 CLJ 567
- Riduan Masmud vs PP* [2015] 1 LNS 449

C Legislation

- Administration Of Islamic Family Law Enactment 1985 (Malaysia)
- Administration of Muslim Law (Amendment) Act 2008 (Act 29 of 2008)* (Singapore)
- Administration of Muslim Law (Amendment) Act 2017* (Singapore)
- Administration of Muslim Law Act 1966* (Singapore)
- Christian Marriage Ordinance [Sabah Cap. 24]* (Malaysia)
- Civil Marriage Ordinance [Sabah Cap. 92]* (Malaysia)
- Criminal Law Reform Act 2019 (No. 15 Of 2019)* (Singapore)

- Criminal Procedure Code (Act 593) (Malaysia)*
- Federal Constitution (Malaysia)*
- Islamic Family Law (Federal Territory) Act 1984 (Act 303) (Malaysia)*
- Islamic Family Law (Kedah Darul Aman) Enactment 2008 (Malaysia)*
- Islamic Family Law (Negeri Sembilan) Enactment 2003 (Malaysia)*
- Islamic Family Law (Perak) Enactment 2004 (Malaysia)*
- Islamic Family Law (State Of Johore) Enactment 2003 (Malaysia)*
- Islamic Family Law (State Of Malacca) Enactment 2002 (Malaysia)*
- Islamic Family Law (State Of Penang) Enactment 2004 (Malaysia)*
- Islamic Family Law (State Of Selangor) Enactment 2003 (Malaysia)*
- Islamic Family Law (State of Selangor)(Amendment)Enactment 2018 (Enactment A56) (Malaysia)*
- Islamic Family Law Enactment 2002 (Malaysia)*
- Islamic Family Law Enactment 2004 (Malaysia)*
- Islamic Family Law Enactment 2005 (Malaysia)*
- Islamic Family Law Enactment 2006 (Malaysia)*
- Islamic Family Law Ordinance, 2001 (Malaysia)*
- Law Of The Republic Of Indonesia Number 23 Of Year 2004 Regarding Elimination Of Violence In Household (Indonesia)*
- Law Reform (Marriage & Divorce) Act 1976 (Malaysia)*
- Penal Code (Act 574) (Malaysia)*
- Penal Code (Amendment and Extended Application) Ordinance 1948 (Malaysia)*
- Penal Code (Amendment And Extension) Act 1976 Act A327 (Malaysia)*
- Penal Code (Amendment) Act 1989 Act A727 (Malaysia)*
- Penal Code (Amendment) Act 2006 Act A 1273 (Malaysia)*
- Penal Code (Amendment) Act 2007 (No.51 of 2007) (Singapore)*
- Penal Code (Chapter 224) Revised Edition 2008 (Singapore)*
- Penal Code (Chapter 224), Revised Edition 1985 (Singapore)*
- Penal Code (F.M.S. Cap 45) (Malaysia)*
- Penal Code 1871, Revised Edition 2020 (Singapore)*
- Penal Code Act 574 (Malaysia)*
- Penal Code of Indonesia 1982 (Indonesia)*
- Qanun Aceh Nomor 6 Tahun 2014 Tentang Hukum Jinayat (Aceh)*
- Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 (Indonesia)*
- Straits Settlement Penal Code [Ordinance No.14 of 1871] (Straits Settlement)*
- Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan (Law No. 1 of 1974) (Indonesia)*
- Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan (Law No.16 of 2019) (Indonesia)*
- Women's Charter (Amendment) Act 2011 (Singapore)*
- Women's Charter 1961 (Singapore)*

D Newspaper Articles

- ‘Child Marriage A Necessity In Kelantan’ – Roundtable By PAS Gov’t Concludes’, *Malaysia Kini* (online, 29th November 2018) <<https://www.malaysiakini.com/news/453901>>
- ‘Bail Revoked for Man Charged With Statutory Rape’, *Borneo Post Online* (online, 15th July 2017) <<https://www.theborneopost.com/2017/07/15/bail-revoked-for-man-charged-with-statutory-rape/>>
- ‘Dad: I Agreed To Teen Daughter’s Marriage Because She Had Been Raped’, *The Star Online*, (online, 29th November 2013) <<https://www.thestar.com.my/news/nation/2013/11/29/i-had-no-choice-then-says-father-of-teen-girl-dad-i-agreed-to-the-marriage-because-she-had-been-rape/>>
- ‘Laws To Protect Children,’ *The Star Online* (online, 5th December 2015) <<https://www.thestar.com.my/opinion/letters/2015/12/05/laws-to-protect-children/>>
- ‘Malaysian Court Orders Retrial Of Rapist Who Married 14-Year-Old Victim’, *The Straits Times* (online, 6th October 2016) <<https://www.straitstimes.com/asia/se-asia/malaysian-court-orders-retrial-of-rapist-who-married-14-year-old-victim>>
- ‘Masyarakat Islam S’pura Tegas Menentang Rogol Dalam Rumah tangga’, *Berita Mediacorp* (online, 12th September 2018) <<https://berita.mediacorp.sg/mobilem/singapura/masyarakat-islam-s-pura-tegas-menentang-rogol-dalam-rumahtangga/4128152.html>>
- ‘Sessions Court Adjourns Statutory Rape Case’, *Borneo Post Online* (online, 18th March 2017) <<http://www.theborneopost.com/2017/03/18/sessions-court-adjourns-statutory-rape-case>>
- ‘Tun Mahathir Orders State Govts To Raise Min Marriage Age To 18’, *The Sun Daily* (online, 21st October 2018) <<https://www.thesundaily.my/archive/tun-mahathir-orders-state-govts-raise-min-marriage-age-18-MUARCH585535>>
- Arlina Arshad, ‘Child Marriages On The Rise In Indonesia Amid Covid-19 Outbreak’, *The Straits Times* (online, 3rd October 2020) <<https://www.straitstimes.com/asia/se-asia/child-marriages-on-the-rise-in-indonesia-amid-covid-19-outbreak>>
- Azura Abbas, ‘Malaysia Unveils National Plan To Address Underaged Marriages’, *New Straits Times* (online, 15th June 2021) <<https://www.nst.com.my/news/nation/2020/01/557060/malaysia-unveils-national-plan-address-underaged-marriages-nsttv>>
- Bernama, ‘Rogol Tetap Rogol. Tidak Boleh Ditutup Dengan Perkahwinan’ *Astro Awani*, (online, 4th August 2016) Statement of Datuk Seri Rohani Abdul Karim, Minister of Women, Family And Community Development, <<https://www.astroawani.com/berita-malaysia/rogol-tetap-rogol-tidak-boleh-ditutup-dengan-perkahwinan-rohani-abdul-karim-113014>>
- Christoper Tan, ‘*Saya Tiada Pilihan*’ - Bapa Nor Fazira’, *mStar* (online, 29th November 2013) <<https://www.mstar.com.my/lokal/semasa/2013/11/29/saya-tiada-pilihan--bapa-nor-fazira>>

- Ian McIntyre, 'Authorities and Social Activist Stop Wedding Of A Rohingya Man To A Child In Penang', *The Sun Daily* (online, 2nd August 2019) <<https://www.thesundaily.my/local/authorities-and-social-activist-stop-wedding-of-a-rohingya-man-to-a-child-in-penang-FL490722>>
- Kaamil Ahmed 'Rohingya Women, Girls Being Trafficked To Malaysia For Marriage', *Al Jazeera* (online, 8th May 2019) <<https://www.aljazeera.com/features/2019/5/8/rohingya-women-girls-being-trafficked-to-malaysia-for-marriage>>
- Meghan Werft, 'Female Muslim Clerics Issue Fatwa on Child Marriage & Marital Rape', *Global Citizen* (online, 29th April 2017) <<https://www.globalcitizen.org/en/content/female-muslim-clerics-issue-fatwa-on-child-marriage/>>
- Munirah A Sani, 'Married Off Because She Was Raped', *Astro Awani* (online, 29th November 2013) <<https://www.astroawani.com/berita-malaysia/married-because-she-was-raped-26142>>
- N.Trisha, 'It's A Sin To Send Her To School', *The Star* (online, 12th February 2019) <<https://www.thestar.com.my/news/nation/2019/02/12/its-a-sin-to-send-her-to-school-no-normal-studies-for-rohingya-child-bride-who-has-come-of-age>>
- New York Times, '11 and Married: Malaysia Spars Over Child Brides', *New Straits Times* (online, 12th August 2018) <<https://www.nst.com.my/news/nation/2018/07/396076/11-and-married-malaysia-spars-over-child-brides>>

E Parliamentary Papers

- Malaysia, Parliamentary Debates, House of Representatives 16th August 2018, 7 (Dato' Mohamad Ariff bin Md Yusof)
- Malaysia, Parliamentary Debates, House of Representatives 22nd March 1989, 2158 (Tan Sri Dato' Mohamed Zahir Bin Haji)
- Malaysia, *Parliamentary Debates*, House of Representatives, 12th July 2006, 75 (Tan Sri Dato' Seri Diraja Ramli bin Ngah Talib)
- Malaysia, *Parliamentary Debates*, House of Representatives, 13th July 2006, 39 (Tan Sri Dato' Seri Diraja Ramli bin Ngah Talib)
- Malaysia, *Parliamentary Reply*, House of Representative, 14th December 2020, (Question no. 31)
- Malaysia, *Parliamentary Reply*, House of Representative, 16th December 2021, 7
- Malaysia, *Parliamentary Reply*, House of Representative, 16th December 2021, 5
- Malaysia, *Parliamentary Reply*, House of Representatives 2nd December 2021, 12
- Singapore, *Parliamentary Debates*, 10th January 2011, (Mr Abdullah Tarmugi)
- Singapore, *Parliamentary Debates*, 6th May 2019 (Mr Tan Chuan-Jin)

F Treaties

- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of Child

G Other Sources

- ‘Applications For Marriage Requires Court Order / Permission’, *MyGovernment* (Web Page) <<https://www.malaysia.gov.my/portal/content/27657>>
- ‘Figures at a Glance in Malaysia’, *UNHCR* (Web Page) <<https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>>
- ‘Malaysia: End Child Marriage, Protect Rohingya Refugee Girls’, *Fortify Rights* (Web Page) <<https://www.fortifyrights.org/mly-inv-jnr-2019-02-21/>>
- ‘Special Marriage Licence’, *Singapore Ministry of Social and Family Development* (Web Page) <<https://www.msf.gov.sg/research-and-data/Research-and-Statistics/Pages/Special-Marriage-License.aspx>>
- “*Rohingya brides for sale in Malaysia*”, Published by CNA Insider on 22.02.2017 (YouTube Video) <https://www.youtube.com/watch?v=-jv1e_9IHG8>
- Ministry of Women, Family and Community Development ‘Executive Summary of National Strategy Plan In Handling The Causes Of Child Marriage’, (Executive Summary, 16th January 2020)
- Noor Aziah Mohd Awal, Mohd Al Adib Samuri, ‘Child Marriage in Malaysia’, (Working Paper, Universiti Kebangsaan Malaysia for UNICEF MALAYSIA)
- Singapore Islamic Scholars and Religious Teachers Association ‘Feedback on Repeal of Marital Immunity Law For Rape’ (Media Statement, 29th September 2018), [7]-[8]
- Singapore Ministry of Social and Family Development Official Website <<https://www.msf.gov.sg/research-and-data/Research-and-Statistics/Pages/Special-Marriage-License.aspx>>
- Women’s Aid Organisation ‘Marriage Not a License to Rape’ (Policy Brief, October 2018)