

SEXUAL OFFENCES AND TRANSMISSION OF HIV/AIDS UNDER PENAL CODE (ACT 574) IN MALAYSIA

Asmar Abdul Rahim*, Marina Hj Hashim* and Mazita Mohamed*

The law relating to the sexual offences in Malaysia is provided under Chapter XVI of the Penal Code (Act 574). This chapter covers offences affecting the human body covering relationship between husband and wife, rape, incest and unnatural offences. HIV is an infectious disease which can be transmitted sexually. The discussion of this paper will focus only on four categories of sexual offences under the Penal Code that may transmit HIV namely (i) relationship between husband and wife; (ii) rape; (iii) incest; and (iv) unnatural offences - carnal intercourse against the order of nature. The paper concludes that the amendment of section 376(2)(i) of the Penal Code has inserted a provision pertaining to HIV as a sexually transmissible disease. The application of this provision however is limited to rape cases only.

Keywords: sexual offences, HIV/AIDS, section 376(2)(i) of the Penal Code (act 574)

I. INTRODUCTION

The Penal Code (Act 574) is the first statute which provides for general criminal offences in Malaysia (Norbani Mohamed Nazeri, 2010). The statute also went through several stages of amendments since British colonization. Before the Penal Code, the law applicable in most states was Islamic law (Case: Che Omar bin Che Soh v. Public Prosecutor [1988] 2 MLJ 55). The law relating to the sexual offences is provided under Chapter XVI of the Penal Code. This chapter covers offences affecting the human body covers relationship between husband and wife, rape, incest and unnatural offences. Most cases of HIV/ AIDS transmission were caused by sexual activity (Marina Hashim, 2014). However HIV/AIDS can also be transmitted through various ways (Orr, A., 1988 & Laurie, G. T. 1991).

The first HIV case in Malaysia was reported in December 1986, involving an American of Chinese-Malaysia (National Plan of action for the Prevention and Control of AIDS, 1988). Since 1986 most of the people living with HIV in Malaysia are men and this virus has been transmitted through the sharing of needles among drug addicts (National Plan of action for the Prevention and Control of AIDS, 1988). However, the trend of transmission of HIV/AIDS in Malaysia has changed and spread rapidly among the women. This disease is increasingly spreading and requires urgent attention (Adeeba Kamarulzaman, 2006).

AIDS is an acronym for 'acquired immune deficiency syndrome'. The word 'acquired' means a situation where it is not birth defects, but it is derived from others. 'Immune deficiency' means that the immune system has repeatedly been attacked by disease or infection so that it becomes extremely weak and unable to

* School of Law, Universiti Utara Malaysia, E-mail: asmar@uum.edu.my; marina@uum.edu.my; mazita@uum.edu.my

perform his duties. ‘Syndrome’ is a sign or symptom that describes something that collectively characterize a disease (Stine, G. J., 2009), Wallece (2007) & Malik Badri (2000). On the other hand, HIV is a ‘human immune deficiency virus’ that attacks and paralyzes the natural immune system. When the immune system has been damaged, the body of a person is not able to protect themselves from infection or disease (Marina Hashim, 2014).

The discussion of this paper will focus only on four categories of sexual offences under the Penal Code that may transmit HIV namely (i) relationship between husband and wife; (ii) rape; (iii) incest; and (iv) unnatural offences - carnal intercourse against the order of nature. Hence this paper is very important in providing an answer to those who have been infected by the HIV/ AIDS.

II. CATEGORIES OF SEXUAL OFFENCES UNDER THE PENAL CODE

“Sexual activity” refers to sexual activity occasioned by the introduction into the vagina, anus or mouth of any person of any part of the penis of another person (section 23(7) Singapore Infectious Disease Act (Chapter 137). While sexual intercourse, also known as ‘copulation’ or ‘coitus’, usually refers to the act in which the male reproductive organ penetrates into the female reproductive organs (Meriam Webster, 1828). Sexual offences under Malaysian Penal Code are categorized as in Table 1.

TABLE I: CATEGORIES OF SEXUAL OFFENCES

<i>Section</i>	<i>Sexual Offences</i>
354	Outrage of Modesty
366	Kidnapping or abducting a woman
372A	Persons living on or trading in prostitution
375	Rape
375(f)	Statutory rape (sexual intercourse with person under 16)
376A	Incest
377A	Carnal intercourse against the order of nature
377C	Carnal intercourse against the order of nature without consent
377D	Outrage of decency
377E	Inciting a child to an act of gross indecency
509	Word or gesture intended to insult the modesty of a woman
511A	attempt (to do any of the above crimes)

This act represents a range of sexual offences with differing dynamics. However, the four categories of sexual offences under the Penal Code that may transmit HIV namely;

(A) Relationship between husband and wife

The provision on the relationship of husband and wife in the Malaysian Penal Code is set out in section 375A which was introduced in 2006 (Dewan Negara,

2014). This provision seeks to punish the husband who causes injury to the wife for the purpose of having sexual intercourse (Marina Hashim, 2014). If the husband slapped, punched or frightened his wife because she refused to have sexual intercourse with him therefore the acts of causing injury to his wife amounts to the offence under this section (Baljit S. S., 2007).

Section 375A of the Penal Code provides that any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years. The aim of this section is to punish the act of the husband causing hurt to the wife before the sexual relations. This section provides a protection of abused wife by their husbands before a sexual intercourse took place. However it is also important to protect the wife against 'injury' that she may experience after having sexual relationship because the transmission of HIV/AIDS only happens after the sexual relation (Marina Hashim, 2014).

(B) Rape

Rape is a serious sexual offence. When a woman is raped, not only physical injury is inflicted but also a deep sense of shame, fear and mental torture. Closely connected to the horror of rape is the impact of the HIV/AIDS pandemic. Rape is commonly defined as sexual intercourse with a woman against her will and without her consent. Rape is not sex or a crime of passion; rather, rape is an expression of violence, anger, and power meant to humiliate their victim. The act of rape is a heinous crime and it violates the most basic right of a person i.e. the right over one's body (Women Center for Change Penang, 2009). It also may cause trauma on the victim.

Section 375 of the Penal Code states 'a man is said to commit "rape" if he has sexual intercourse with a woman under seven circumstances as follows:

- against her will;
- without her consent;
- with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;

- with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her; and
- with or without her consent, when she is under sixteen years of age.

In case of *Public Prosecutor v Mohd Ridzwan bin Md Borhan* ([2004] 5 MLJ 300, p 305) Justice Low Hop Bing stated that three elements the prosecution has to prove pursuant to section 375 of the Penal Code, namely (i) sexual intercourse; (ii) penetration; and (iii) without consent. Thus, in the case of rape the non-existence of consent is important.

(C) Incest

Incest involves an abuse of sexual or abuse of power by those in authority over the victim by blood relationship or a close family member (Marina Hashim, 2014). Under the Penal Code, section 376A provides 'a person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person'. Whoever commits incest shall be punished with imprisonment for a term of not less than ten years and not more than thirty years, and shall also be liable to whipping. It shall be a defence to a charge against a person if it is proved - (a) that he or she did not know that the person with whom he or she had sexual intercourse was a person whose relationship to him or her was such that he or she was not permitted under the law, religion, custom or usage applicable to him or her to marry that person; or (b) that the act of sexual intercourse was done without his or her consent (Section 376B, Penal Code).

In the case of *Ismail Rasid v PP* ([1999] 4 CLJ 402) the appellant had pleaded guilty to two charges of rape of his 14-year old daughter, and was sentenced to 12 years imprisonment and 3 strokes of the rotan on each of the charges. KN Segara J in his judgement stated that "Incest is a sin that can hardly be forgiven. Therefore, when a father rapes his daughter and is convicted in court, any sentence passed must reflect the abhorrence of society to such a heinous and despicable act. A sufficiently strong and effective signal must also be sent out to would-be rapists of this species that the court would not hesitate to come down hard on them, in order to protect those naive, helpless and innocent children who had placed unquestioning trust, faith, loyalty and confidence in their fathers to be role models as well as pillars of strength and protection at all times, only to see their lives shattered, humiliated and traumatized by an act of lust that could have easily been curbed and controlled by any self-respecting human being".

Even though there is no reported cases on incest and HIV, but if this happen, the victim will be traumatized due to incest and also infected by the virus that has no cure, namely HIV.

(D) Unnatural offences - Carnal intercourse against the order of nature

Sexual intercourse between males is considered contrary to the order of nature and it is highly potential in transmitting the HIV/AIDS (Harlina Halizah Siraj, 2011). A person is said to commit carnal intercourse against the order of nature if he has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person (Section 377A, Penal Code). The punishment for committing carnal intercourse against the order of nature with consent is imprisonment for a term which may extend to twenty years, and shall also be liable to whipping (Section 377B, Penal Code).

Where in case of committing carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping (Section 377C, Penal Code). The possibility of transmitting HIV through unnatural offences and the need to protect the society from the virus has been affirmed in the case of *Abd Rahim bin Abd Rahaman v Public Prosecutor* ([2011] 2 MLJ 28). In this case the accused was charged with 22 counts of sodomy under s 377B of the Penal Code. The offences were committed against a 14-year-7-month old male victim. The accused was suffering from HIV. The accused pleaded guilty to all 22 charges and was convicted and sentenced. In respect of the ten charges in Sessions Court No 5, the accused was sentenced to a total of 28 years' imprisonment and ten strokes of the cane. In respect of the 12 charges in Sessions Court No 6, the accused was sentenced to a total of 32 years' imprisonment and 12 strokes of the cane. The accused then appealed to the High Court against the sentences but the appeal was dismissed and the sentences affirmed. The accused thus appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal held that the sentences were not excessive or against any known legal principles. The accused was suffering from HIV. With his sexual inclination, to release him among young boys would do no good to society. The sessions court judges had struck a balance between the interest of the public and the interest of the accused.

III. RECENT AMENDMENT TO SECTION 376 OF THE PENAL CODE – HIV/AIDS

For the better protection to the women with regard to the sexual offences and HIV/AIDS, the Penal Code has been amended recently in the year 2014 (Marina Hashim, Mazita Mohamed & Asmar Abdul Rahim (2016)). The recent amendment to Section 376 (2) of the Penal Code has inserted four new sub sections namely (h), (i), (j) and (k) as shown in Table 2.

TABLE II: THE NEW SUBSECTION OF SECTION 376(2) OF THE PENAL CODE

<i>Section</i>	<i>Forms of Rape Offences</i>	<i>Punishment</i>
S376(2)	Newly inserted provisions (h) when by reason or on occasion of the rape, the woman becomes insane; (i) when he knows that he is afflicted with the Human Immuno-Deficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) or any other sexually transmissible disease and the virus or disease is or may be transmitted to the woman; (j) when by reason or on occasion of the rape, the woman commits suicide; or (k) when he knew of the mental disability, emotional disorder or physical handicap of the woman at the time of the commission of the crime	shall be punished with imprisonment for a term of not less than ten years and not more than thirty years and shall also be liable to whipping.

Interestingly, section 376(2)(i) of the Penal Code has timely addressed the need to legally curb the spreading of HIV/AIDS in Malaysia. This provision is designed to cover the transmission of HIV in rape cases only. However HIV can also be transmitted through other sexual acts as mentioned in Table 1. HIV is more potentially infectious in unnatural sexual offences (Kohsin, S., 2010). For instant, 'anogenital' (anal penetration by penis) is the most dangerous sex and transmission of HIV is potentially higher infected to those who practice anal sex than vaginal.

Besides, the new subsection introduced under section 376(2), the minimum period of imprisonment has been increased from five years to 10 years. The urge to increase the punishment for rape by Women Center for Change before this has finally came into picture even though the application of this provision is limited to the transmission of HIV in rape cases only and not in other sexual offences.

IV. CONCLUSION

In general, the amendment to section 376 (2) of the Penal Code has given a signal that rape is a serious offences. Although the victim cannot be put in the position as before the rape occurred, this amendment is to prevent the potential criminal offender from committing the sexual offences. This is in line with the philosophy of the punishment in criminal law. The amendment of Section 376 (2) (i) of the Penal Code has witnessed the need to prevent the transmission of HIV/AIDS in Malaysia in rape cases. No doubt the Penal Code also has recognised other sexual offences such as incest and unnatural offences. However the transmission of HIV can also occur in these kinds of sexual offences.

Acknowledgement

Special thanks to the Ministry of Higher Education Malaysia and RIMC UUM for facilitating and providing us a grant for this research.

References

- Adeeba Kamarulzaman. (2006). Married to Aids. *New Straits Times*. 22 March: 1 and 6.
- Baljit Singh Sidhu. (2007). Potential Impact of the Changes in the Malaysian Penal Code. *Malayan Law Journal*. Vol 2: 97-105.
- Dewan Negara . (2014). 29.4.2014.
- Harlina Halizah Siraj. (2011). Homoseksualiti Menongkah Fitrah. 38 *Solusi* 14, p 15.
- James Lochhead and Tan Pek Leng. (2009). *Seeking Justice for Victims of Sexual Crime*. Women Center for Change. Penang.
- Laurie, G. T. (1991). Aids And Criminal Liability Under Scots Law. *Journal Of The Law Society of Scotland*. Vol 36 (8): 312 -322.
- Malik Badri. (2000). *The AIDS Crisis: A Natural Product of Modernity's Sexual Revolution*. 3rd Ed. Madeena Books. Kuala Lumpur.
- Marina Hashim. (2014). *Pemindahan Hiv/Aids Secara Seksual: Sejauh Manakah Pemakaian Undang-Undang Jenayah Dan Cabarannya Di Malaysia*. (Unpublished doctoral thesis). Universiti Kebangsaan Malaysia, Malaysia.
- Marina Hj Hashim, Mazita Mahamed, & Asmar Abdul Rahim. (2016). Perkembangan Pindaan Peruntukan Rogol Dalam Kanun Keseksaan (Akta 574) Di Malaysia. *Seminar on Law & Society (SOLAS 2016)*. (pp 53-56). School of Law, Universiti Utara Malaysia.
- Meriam Webstar. (1828). <https://www.merriam-webster.com/dictionary/copulate> (accessed on 8 March 2017).
- National Plan of action for the Prevention and Control of A.I.D.S. (1988). Kementerian Kesihatan Malaysia. Kuala Lumpur.
- Norbani Mohamed Nazeri. (2010). Criminal law codification and reform in Malaysia: an overview. *Singapore Journal of Legal Studies*, 375-399.
- Orr, A. (1988). AIDS: Adapting the Law. *New Law Journal*, 388-392.
- Roosniza Mohd Shariff. (2005). Penalties and attitudes in preventing rape. 1 *Malayan Law Journal Article*. p Ivii.
- Shirley Kohsin Wang. (2010). Violence & HIV/AIDS: violence against women and girls as a cause and consequences of HIV/AIDS. 17 *Duke J. Gender Law & Policy*. p313.
- Stine, G. J. (2009). *Aids Update 2009*. Mc Graw Hill. New York.
- Wallece. (2007). *Victimology Legal, Psychology, And Social Perspective*. 2nd Ed. Pearson Education. United States of America.