

MEMORANDUM ON LAWS RELATED TO RAPE

PROPOSALS FOR AMENDMENTS

**Submitted by the
Anti-Rape Task Force**

**Prepared by
All Women's Action Society (AWAM)
Women's Centre for Change, Penang (WCC)
Sisters in Islam (SIS)
Women's Aid Organisation (WAO)
Protect and Save the Children (P.S. the Children)**

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**COORDINATING ORGANISATION
ALL WOMEN'S ACTION SOCIETY (AWAM)
85, JALAN 21/1, SEAPARK, 46300 PETALING JAYA.
TEL: 03 – 7877 4221 FAX : 03 – 7874 3312
EMAIL : awam@awam.org.my**

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I INTRODUCTION

In 1989 a number of amendments were made to the laws related to rape and they comprised the following:

- Imposing a mandatory minimum jail sentence of five years and whipping for convicted rapists. Prior to 1989, there was no mandatory minimum jail term or whipping. Rapists were able to get away with a one or two year jail term (or even less), or with being bound over;
- Raising the age of statutory rape from 14 to 16 years;
- Restricting the cross-examination of the rape survivor's past sexual history, except in relation to the accused;
- Allowing rape survivors an abortion if medical practitioners deem this the best course of action to safeguard the mental and physical health of the mother. This amendment to Section 312 of the Penal Code widened the scope of the law, which previously only allowed abortion if the mother was faced with life-threatening circumstances.
- Increasing the maximum jail term for sexual molestation from two to ten years.

II SOME OBSERVATIONS OF RECENT TRENDS IN RAPE

Notwithstanding these amendments the statistics on cases reported since then have given rise to a number of serious concerns as regards the effectiveness of the laws related to rape in providing justice and protection for survivors of violence:

1. In 1993, 2.4 rape cases were reported per day. In 2000, the number increased to 4.1 reported rape cases and in 2002, the number of reported cases dropped to three cases a day;
2. Only one out of ten rape survivors reports rape;¹
3. 67% of rapes occur in places that are supposedly "safe" for women;²
4. In 2001, there were 161 reported cases of child rape, out of which 83% were allegedly committed by people they knew;³

¹ Rohana Ariffin, (ed) (1997) *Shame, Secrecy and Silence. A Study of Rape in Penang*. Published by the Women's Crisis Centre, Penang (WCC), now known as the Women's Centre for Change, Penang.

² AWAM, 1999, *The Rape Report: An Overview of Rape In Malaysia 2000*

³ Federal Police Statistics, 2001.

5. Only about 10% of rape cases reported in the Federal Territory, ended up in conviction;⁴
6. There remain many obstacles to conviction: e.g the need for physical injuries as corroborative evidence and the prolonged trial procedure that is not sensitive to the needs of the survivors;⁵
7. There are also some disturbing trends and they are as follow:
 - a) More and more assailants are of younger ages;⁶
 - b) Young girls are increasingly targeted for rape;⁷
 - c) Increased number of reported cases of rape against children of tender age;⁸
 - d) Rape of women in custody;⁹
 - e) Rape of girls and women by people in positions of trust, e.g. by bomoh, medical doctor, and religious teacher;
 - f) Extreme violence being used in rape cases, with rapists sometimes resorting to murder ;¹⁰

These are but a few examples of the shocking and heinous acts of rape that are happening with greater frequency in our society. Young girls and women are targets because of their vulnerability and the process of socialisation that reinforce young girls' and women's subordinate position in society. Society has, over time, reinforced unequal gender relations, whereby men dominate and assume power and ownership over young girls and women, and where women are viewed as little more than sexual objects. Such unequal gender relations and stereotypical portrayals have indirectly impressed upon, or encouraged, men to rape young girls and women. Rape is a crime of violence using sex as a weapon, often to dominate and humiliate the survivor.

These trends underscore the need for immediate attention and action.

⁴ AWAM Report – see 2 above

⁵ AWAM Report – see 2 above

⁶ e.g. 17 youths gang-raped a 16-year-old Form Four student - The SUN, 4 September 2002.

⁷ e.g. The brutal rape and murder of schoolgirl, Nurul Hanis Kamil, schoolgirl Audrey Melissa and 15 year old Rosnani Daud.

⁸ e.g. The brutal rape and murder of 5-year-old Siti Nadira Budah in 2001.

⁹ e.g. Rape of 2 migrant women while being held under police custody and rape of a 13-year-old Filipina detainee while in a temporary detention centre in Kota Kinabalu (The STAR, 6 September 2002).

¹⁰ As in 6 – 8 above, also the recent brutal rape and murder of Canny Ong

When a rape is reported there are several authorities and departments that become involved: Hospital, Welfare Department, Police and Court. These Government bodies bear the responsibility of responding to the needs of these rape survivors swiftly, effectively and sympathetically. Rape victims have the right to expect the law to protect them fully and effectively. Furthermore, the Malaysian government has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995, and as such, has an obligation to ensure that such violence arising from unequal gender relations are adequately and effectively dealt with.

In view of the above developments and the drastic increase in rape crimes 2 consultations were conducted in 2001 and 2002 whereby the views and proposals of representatives from NGOs and the Ministry of Women and Family Development and the Attorney-General's Chambers regarding reforms related to rape laws were discussed in depth. The Anti-Rape Task Force¹¹ was then set up to formulate the amendments proposed to the Penal Code, the Evidence Act and the Criminal Procedure Code.

III SUMMARY OF THE PROPOSED AMENDMENTS TO LAWS RELATED TO RAPE

The **Proposed Amendments to Laws Related to Rape** can be summarised as follows:

- ✓ Amendment to Section 375 of the Penal Code to include a wider definition of rape to take into account the various types of sexual violation and the aggravated situations that happen in rape cases. The expansion of the definition of rape will ensure that the laws are more reflective, responsive and sensitive to the concerns of rape survivors;
- ✓ A review of the burden of proof on the issue of consent to cover situations where there ought to be a reversal of the burden. In a prosecution for rape, there is the tendency by the Courts to look for evidence of active repulsion, e.g. a show of struggle or resistance or refusal by the victim before finding that there was no consent thus limiting such findings to situations of fraud or complete helplessness on the part of the complainant, unconsciousness or total mental incapacity. Thus it appears that the prosecution has not only to show lack of assent but also to show manifest refusal or resistance although such active resistance is not a legal requisition. Even if resistance is proved, it may not amount to dissent if the refusal is deemed to be ambiguous. This is due to the fact that lack of consent must be established beyond reasonable doubt, and therefore, failure to show dissent actively will often

¹¹ The Anti-Rape Task Force is made up of the All Women's Action Society (AWAM), Women's Center for Change (WCC), Women's Aid Organisation (WAO), Sisters-in-Islam (SIS) and Protect and Save the Children (PS the Children)

be resolved in the accused's favour.¹² With the proposed amendments, submission to the accused induced by force or fear of force and other recognised pressures will not be considered as a valid consent;

- ✓ To make marital rape an offence by removing the existing protection given to husbands. The experience of women's organizations dealing with domestic violence show a high incidence of rape by husbands in cases of domestic violence. Yet, because husbands are specifically excluded by the existing section 375 of the Penal Code wives are rendered totally helpless and without recourse;
- ✓ Additional Sections to the Penal Code to create the offence of Aggravated Rape, i.e. rape under certain circumstances deemed to be aggravated circumstances and to impose appropriate sentences to reflect the increased gravity of the offence;
- ✓ Additional Section to the Penal Code to impose increased penalty for 2nd or subsequent rape offences as there are more and more cases of repeat offenders;
- ✓ Recommendation for mandatory rehabilitative counseling for all convicted rapists;
- ✓ To amend the Evidence Act to eliminate the rule of prudence that corroboration be required for a conviction in a rape charge;
- ✓ To remove the requirement in the Evidence Act that child evidence must be corroborated;
- ✓ To restrict admission of evidence of past sexual history of the victim with the accused to limited circumstances; and
- ✓ The creation of a compensation body to provide compensation for rape survivors.

¹² Mohamad Ismail bin Hj. Mohamad Yunus (2002) The Essentiality of Physical Resistance in Rape: A Comparative Legal Dimension. Journal of the Malaysian Bar, The Issue: XXX1 No. 3. Malaysia.

IV THE PROPOSED AMENDMENTS TO LAWS RELATED TO RAPE

AMENDMENTS TO THE PENAL CODE

The law as it is today:

Section 375

A man is said to commit “rape” who, except in the case hereafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when consent has been obtained by putting her in fear of death or hurt to herself or to 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;
- (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- (e) with 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;
- (f) with or without her consent, when she is under sixteen years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception – 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.

Explanation 1 – A woman –

- (a) living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or
- (b) who has obtained an injunction restraining her husband from having sexual intercourse with her,

shall be deemed not to be his wife for the purposes of this section.

Explanation 2 – A Muslim woman living separately from her husband during the period of ‘*iddah*’, which shall be calculated in accordance with Hukum Syara’, shall be deemed not to be his wife for the purposes of this section.

Proposed Amendments

1.0 WIDENING THE DEFINITION AND SCOPE OF RAPE

Changes proposed:

1.1 Widening the definition of “sexual intercourse”

Section 375 A man is said to commit “rape” who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- i. against her will;
- ii. without her consent;
- iii. with her consent, when consent has been obtained or was given in any of the circumstances set out in Section 375A;
- iv. with or without her consent, when she is under sixteen years of age.

Explanation:

1. Sexual intercourse for the purposes of this section includes:
 - i. insertion of, or causing the insertion of, the penis into the vagina, anus and mouth;
 - ii. insertion of, or causing the insertion of, any part of the body or object into the vaginal or anal orifice except when such insertion is made strictly for medical purposes by a medical practitioner.
2. Delay in reporting the rape or the absence of complaints shall not affect the credibility of the victim.

1.2 Deletion.

Deleting the following explanation in Section 375:

“Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”.

Justification

1. Under the present Penal Code, rape is narrowly defined as penile penetration. This implies that rape only happens when there is penile penetration.
2. Cases have shown that objects have been used e.g. 10-foot pole shoved into a child's vagina, insertions of bottles and clothe hangers. These cases show that rape is not just a sexual act, but a crime that can result in brutal violence.
3. The fact that the existing Penal Code does not recognise other forms of penetration in rape cases has limited the circumstances in which rape is said to have been committed. A classic example is when a medical examination shows that penetration has occurred and could possibly be caused by a hard, blunt object. Unfortunately, the doctor may not be able to verify that it is a penile penetration due to an absence of sperm. When such evidence is presented in court, and there is no other evidence of penile penetration, the prosecutor will not be able to prove rape because of the existing narrow definition of rape.
4. Lighter sentencing for the use of an object in rape trivialises the violence that takes place. For example, when a man uses his finger to rape a child, he is charged with outraging the decency under Section 377D of the Penal Code, which carries only a maximum two years' imprisonment. This is a considerably lower sentence than rape although the violation is of equal gravity. Similarly, if a man rapes a woman by inserting a bottle into her vagina, he would be charged with assault with intent to outrage modesty under Section 354 of the Penal Code, which carries a maximum sentence of ten years.

Therefore, in the amendments there is a need to redefine rape with the following considerations:

- i. To recognise that other forms of violent acts, besides penile penetration, are taking place in rape cases
 - ii. To recognise that the insertion of objects should be treated as principal offence, rather than as secondary indecent assaults because it constitutes a gross act of violation which has equal, if not greater, gravity to the current legal understanding of rape.
 - iii. To ensure that heavier penalties are imposed for all these forms of violent acts.
5. The amendment to include insertion of objects as part of rape aims to discredit the long-held view that rape is merely a result of excessive passion. It reiterates the point that sexual assault is violence and it is more than just the penile penetration.

6. The proposed amendment also recognises the fact that a survivor of an assault in which a bottle or other objects are inserted into the vagina or anus may be just as, or much more seriously injured, physically or psychologically, than, a female into whose vagina a man's penis is inserted without consent. The fact remains that both are acts of violence against a woman using sex as a weapon.

1.3 To make Marital Rape an offence

To delete:

1. "Exception – 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."
2. "Explanation 1 – A woman –
 - a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or
 - b) who has obtained an injunction restraining her husband from having sexual intercourse with her,shall be deemed not to be his wife for the purposes of this section.
3. Explanation 2 – A Muslim woman living separately from her husband during the period of 'iddah', which shall be calculated in accordance with Hukum Syara', shall be deemed not to be his wife for the purposes of this section."

Justification

1. This amendment intends to assert that marital rape means any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, threat of force, or when the wife is unable to consent.¹³

However, under the present Penal Code, marital rape is not a crime because of the Exception.

2. By the removal of the Exception, it is proposed that the current protection that is given to men who rape their wives be removed, and that they be made equally liable to be charged with rape.

¹³ Rohana Ariffin, Shame Secrecy and Silence. See 1 above

3. This proposal is based on the premise that sex must be a cooperative act of free will and there is no reason why the same premise should not be applicable to parties who are married to each other.
4. Domestic violence cases handled by women's organisations show that there are many cases of marital rape committed by violent husbands and this is of serious concern in view of the lack of protection given to rape survivors who are unfortunately married to their rapists.¹⁴
5. The cases indicate a significant number of women have been abused for not cooperating with their husband when their husband want to have sex. They have been physically beaten, or had many other necessities taken or withheld from them, or their husbands may have used emotional or psychological abuse, such as threatening to leave them. A woman who has experienced such threats does not have a choice as she fears reprisal.
6. Many battered women have said that their husbands demanded sex directly following a beating, regardless of the wife's wishes or emotional or physical state. When a woman consents to sex out of fear or coercion, it is rape, and the perpetrator should not be allowed to get away with the offence by the mere fact that he is married to the survivor.¹⁵
7. In a legal marital relationship, there is a general assumption that a wife has to submit and satisfy her husband's sexual gratification. However, a clear distinction has to be made between having mutual sexual relationship with one's wife and one that is forced and does not have her consent. A woman who is raped by her husband is effectively being violated by someone with whom she shares her life, home and children. In marital rape, there is the added element of betrayal and a breach of intimacy, besides the violence used. Research indicates that marital rape survivors are more likely to suffer multiple long lasting psychological injuries when compared with rape by a stranger and acquaintance.¹⁶
8. At present married women do not have any avenues of redress as their husbands know that they are protected under the law by virtue of their marriage. The prospect that they may be liable to be charged for rape would be an effective deterrent to marital rape.
9. It has been argued that criminalising marital rape would be against Islamic principles due to the fact that a Muslim wife is required to submit to her husband's request for sexual relations. However, these arguments have to be viewed in the light of the following :

¹⁴ AWAM's statistics show that in the years 2000 – 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse. Similarly a WAO National Research on Domestic Violence (1989–1992), Malaysia, showed that of the 60 battered women who sought help from five agencies, 50% of the cases reported their husbands had used physical force during sexual intercourse.

¹⁵ Center for Research on Partner Violence, www.wellesley.edu America

¹⁶ Center for Research on Partner Violence, see 15 above

- i. In the Quran and in the Sunnah, it is very clear that sexual relations has its place and are part of nature, decided by Allah for the continuation of the human species. The aspect of fun and pleasure is mentioned in the Sunnah. According to al-Ghazali, in his writings on the ethics of sexual relations, intimate physical relationship should not come suddenly, but that the way should be paved until the husband and wife are stimulated. It is very clear from this that sex is necessarily meant to be sex with mutual consent and mutual will;
- ii. These elements are clearly absent in forced sex/marital rape where the husband does not seek the consent of his wife on the sexual act. Wives are often humiliated, abused and no ethics are observed. Islam does not allow wives to be treated this way and in fact abhors any form of violence towards women.
- iii. Under Syariah law, it is a matrimonial offence for the husband to be cruel to his wife. Forced sex reasonably constitutes an act of cruelty. This is detailed in Sections 127 & 128 of the Islamic Family Law Act (Federal Territory) (1984)¹⁷
- iv. Can a Muslim husband force sex on his wife? We stress that rape is rape, even if it is by the husband. In the spirit of mutual consent and consultation, there cannot be forced sex. There are ethics in sexual relation in Islam and mutual wish and desire must be present. According to al-Ghazali, sexual relations is a contract, and therefore it should not happen except through mutual agreement. Therefore, the recognition of marital rape would not be in contradiction to the spirit of Islam in marital relations.

2.0 Burden of Proof on Issue of Consent

To insert new Section 375A

¹⁷

AKTA UNDANG-UNDANG KELUARGA ISLAM (WILAYAH PERSEKUTUAN) 1984 (AKTA 303)

Section 127

Menganiaya isteri

Seseorang yang menganiaya isterinya atau menipu harta isterinya adalah melakukan suatu kesalahan dan hendaklah dihukum denda tidak melebihi satu ribu ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya denda dan penjara itu.

Section 128

Tidak memberi keadilan yang sewajarnya kepada isteri

Seseorang yang tidak memberi keadilan sewajar kepada isterinya mengikut Hukum Syara' adalah melakukan suatu kesalahan dan hendaklah dihukum denda tidak melebihi satu ribu ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya denda dan penjara itu.

No consent is obtained, for the purposes of Section 375 above, if:

- a) the complainant submits or does not resist by reason of
 - i. actual or threatened application of force to the complainant or to any other person other than the complainant¹⁸;
 - ii. non-violent threats¹⁹ or fear of the application of force to the complainant or to any other person other than the complainant²⁰;
 - iii. false and fraudulent representation as to the nature and quality of the act²¹; or
 - iv. the complainant being deceived into believing that the sexual intercourse is for religious, medical, hygienic or curative purposes²²;

¹⁸ Adapted from S. 128A of the New Zealand Crimes Act 1961 as amended by the Crimes Amendment Act (No. 3) 1985

S.128A. Matters that do not constitute consent to sexual connection

- (1) The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the purposes of section 128 of this Act.
- (2) The following matters do not constitute consent to sexual connection for the purposes of section 128 of this Act:
 - (a) The fact that a person submits to or acquiesces in sexual connection by reason of ..
 - (i) The actual or threatened application of force to that person or some other person; or
 - (ii) The fear of the application of force to that person or some other person;
 - (b) The fact that a person consents to sexual connection by reason of...
 - (i) A mistake as to the identity of the other person; or
 - (ii) A mistake as to the nature and quality of the act

¹⁹ Adapted from S. 65A Crimes Act 1900 of the Australian New South Wales Consolidated Acts:

S.65A Sexual intercourse procured by intimidation, coercion and other non-violent threats

- (1) In this section:
Non-violent threat means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.
- (2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably be expected to resist the threat, be liable to imprisonment for 6 years.
- (3) A person does not commit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

²⁰ Adapted from S. 128A of the New Zealand Crimes Act 1961 as amended by the Crimes Amendment Act (No. 3) 1985, see 18 above.

²¹ Adapted from S. 128A of the New Zealand Crimes Act 1961 as amended by the Crimes Amendment Act (No. 3) 1985, see 18 above.

²² Adapted from S. 61R Crimes Act 1900 of the Australian New South Wales Consolidated Acts:

S. 61R Consent

(1).....

- (2) For the purposes of sections 61I (*Sexual Assault*), 61J (*Aggravated Sexual Assault*) and 61JA (*Aggravated Sexual Assault in Company*) and without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:
 - (a) a person who consents to sexual intercourse with another person:
 - (i) under a mistaken belief as to the identity of the other person, or
 - (ii) under a mistaken belief that the other person is married to the person,is to be taken not to consent to the sexual intercourse, and
 - (al) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes is taken not to consent to the sexual intercourse, and
 - (b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) or (al) is to be taken to know that the other person does not consent to the sexual intercourse, and

- b) the agreement is expressed by words or conduct of any other person other than the complainant²³;
- c) the complainant expresses, by words or conduct, a lack of agreement to engage in sexual intercourse²⁴;
- d) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in sexual intercourse²⁵;
- e) when the man knows that he is not the complainant's husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married²⁶;
- f) when, at the time of giving such consent, the complainant is unable to understand the nature and consequences of that to which she gives consent²⁷;

-
- (c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse, and
 - (d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

²³ Adapted from S.153.1(3)(a) Canadian Criminal Code

S. 153.1 Sexual exploitation of person with disability

- (1) Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person's consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly with a part of the body or with an object, is guilty of
 - (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
 - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
- (2) Definition of "consent"
Subject to subsection (3), "consent" means, for the purposes of this section, the voluntary agreement of the complainant to engage in the sexual activity in question.
- (3) When no consent obtained
No consent is obtained, for the purposes of this section, if
 - (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- (4) Subsection (3) not limiting
Nothing in subsection (3) shall be construed as limiting the circumstances in which no consent is obtained.
- (5) When belief in consent not a defense
It is not a defence to a charge under this section that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if
 - (a) the accused's belief arose from the accused's
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness; or
 - (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting

²⁴ Adapted from S.153.1(3)(d) Canadian Criminal Code, see 23 above

²⁵ Adapted from S.153.1(3)(e) Canadian Criminal Code, see 23 above

²⁶ Present Section 375(d), Penal Code

- g) the complainant is incapable of consenting to the activity²⁸;
- h) the accused being a public servant²⁹, or a person in a position of trust, power or authority or a person with whom the complainant is in a relationship of dependency, abuses such position to counsel or incite the complainant to engage in sexual intercourse with him³⁰.

Explanation

- i. Non-violent threat means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force³¹.
- ii. The fact that a person does not protest or offer physical resistance to sexual intercourse or is not found to have physical signs of resistance does not by itself constitute consent to sexual intercourse for the purposes of this section³².
- iii. In a prosecution for rape where sexual intercourse by the accused is proved and the question is whether it was without the consent of the person alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent³³.
- iv. It is not a defence to a charge of rape that the accused believed that the complainant consented to the act if the accused's belief arose from the accused's:

²⁷ Present Section 375(e), Penal Code

²⁸ Adapted from S.153.1(3)(b) Canadian Criminal Code, see 23 above

²⁹ Adapted from S. 376B Indian Penal Code 1860

S.376B Intercourse by Public Servant with Woman in his Custody
Whoever being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine

³⁰ Adapted from S.153.1(1) & (3)(c) Canadian Criminal Code, see 23 above

³¹ Adapted from S. 65A(1) Crimes Act 1900 of the Australian New South Wales Consolidated Acts, see 19 above

³² Adapted from S. 128A of the New Zealand Crimes Act 1961 as amended by the Crimes Amendment Act (No. 3) 1985. See 18 above

³³ Adapted from S. 114A of the Indian Evidence Act, 1872

S. 114A Presumption as to absence of consent in certain prosecutions for rape.

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of subsection (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

- a) self-induced intoxication, or
 - b) recklessness or willful blindness; or
 - c) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting³⁴.
- vi. Nothing in this section shall be construed as limiting the circumstances in which no consent is obtained³⁵.

Justification

1. In rape law the concept of consent applies in the negative. Logically, the absence of positive assent from the complainant ought to prove this element. Nevertheless, even though physical opposition from the complainant to sexual intercourse is not a legal requisite, as a result of its negative burden it seems that the prosecution has not only to show lack of assent but also manifest refusal or resistance. In early 1980, the Court of Appeal in UK pointed out that earlier authorities emphasised the use of force, but the present legal requirement is clear that lack of consent is the crux of the matter and this may exist though no force is used. The same Court of Appeal in 1995 reaffirmed that the essential in the standard of consent is the absence of consent (without consent) and any attempt to introduce a different legal criterion was both mistaken and contrary to law. The point is rather that the fundamental issue as to the state of the woman's mind is that she was not consenting; although evidence of struggle and other resistance will constitute relevant facts to the issue of consent, but such element should not be a required legal condition. In other words, a lack of resistance does not necessarily amount to consent. Therefore it is legally wrong to assume that the complainant must show signs of injury or that she must always physically resist before there can be a conviction for rape under the Penal Code³⁶.
2. Notwithstanding the above, research from all jurisdictions indicate that any woman who has to prove that she did not consent will face enormous difficulty unless she shows signs of fairly serious injury. The amendment seeks to remind the Court that there are many situations of rape where there is little or no struggle at all or even a submission to the act due to the overwhelming circumstances involved. In the 1981 case of R v. Olugboja (which represents the current approach in English law as the standard of consent in rape) said that consent, or the absence of it, is to be given its

³⁴ Adapted from S.153.1(5)(a) Canadian Criminal Code, see 23 above

³⁵ Adapted from S.153.1(4) Canadian Criminal Code, see 23 above

³⁶ Mohamad Ismail bin Hj. Mohamad Yunus (2002) The Essentiality of Physical Resistance in Rape: A Comparative Legal Dimension. See 12 above

ordinary meaning and if need be, by way of example, that there is a difference between consent and submission: every consent involves a submission, but it by no means follows that a mere submission involves consent³⁷.

3. The Sessions Court decision in *PP v Razali Pilen & Anor* is a classic situation where unfair standards were practiced in that where a woman who is mindfully apprised of the situation with which she was confronted was criticised for the fact that she had not resisted. The fundamental issue as to the state of the woman's mind is that she was not consenting; although evidence of struggle and other resistance will constitute relevant facts to the issue of consent, but such element should not be a required legal condition. In other words, a lack of resistance does not necessarily amount to consent. It is therefore wrong to assume that a complainant must show some signs of injury or she must always physically resist before there can be a conviction for rape.
4. There appears to be confusion of legal and factual issues in determining the standard of consent in rape. The legal issue is that not every submission involves consent. The factual issue on the other hand is whether the complainant in a particular case really consented and not just merely submitted. This is a question of fact for the court to consider in light of the surrounding circumstances of the purported non-consent, and facts such as age, physical strength and general disposition may be relevant³⁸.
5. These amendments also cover the main situations in which consent should be deemed to be vitiated and inoperative, e.g. where consent is elicited following "non-violent threats" like a threat of dismissal by an employer; deception by a "bomoh" that sexual intercourse with him would "cure" the complainant or "rid her of the evils possessing her"; and inducement by a police officer of a woman in his custody. In all these situations a presumption that there was no consent is raised, thus reversing the burden of proof on this issue.
6. These amendments also reinforce the right of a woman to say no to sexual intercourse either by words or conduct at any time, whether before or even whilst she is engaged in any form of sexual activity.
7. These amendments are also important as they seek to impose upon men a greater responsibility and a duty to take reasonable care to ensure that the women do consent fully to sexual intercourse before engaging in it.

³⁷ Mohamad Ismail bin Hj. Mohamad Yunus (2002) *The Essentiality of Physical Resistance in Rape: A Comparative Legal Dimension*. See 12 above

³⁸ Mohamad Ismail bin Hj. Mohamad Yunus (2002) *The Essentiality of Physical Resistance in Rape: A Comparative Legal Dimension*. See 12 above

8. Apart from that, the amendments also seek to protect women with mental or physical disability and those in a relationship of dependency from being taken advantage of.

3.0 AGGRAVATED RAPE

To insert:

New Section 375B

The crime of aggravated rape is committed in any of the following circumstances:

- a) when the rape is committed by a person in position of authority or trust over the victim or in relation to the victim;
- b) when the rape is committed in the presence of any other persons physically, virtually or through recording;
- c) when the offender is infected with Human Immuno-Deficiency Virus (HIV) / Acquired Immune Deficiency Syndrome (AIDS) or any other sexually transmitted infections;
- d) when the victim is pregnant at the time of the commission of the crime;
- e) when the victim is mentally ill and/or has physical disability at the time of the commission of the crime;
- f) when the crime of rape is committed by more than one man;
- g) when the victim is intoxicated or drugged;
- h) when the offender uses a weapon or threatens to use a weapon on the victim in committing rape.

Justification

1. The offence of aggravated rape is introduced to define any situation involving rape that is deemed to cause additional trauma to the survivor, be it physical or psychological.
2. The aggravating circumstances are proposed on the greater perversity of the offender manifested in the commission of the crime as shown by:

- i. the motivating factor;
 - ii. the place of commission;
 - iii. the means and ways employed;
 - iv. the time; and/or
 - v. the personal circumstances of the offender or survivor
3. As the law on rape stands, there is no graded scale of punishment for rape cases in Malaysia. Judges have the discretion to punish the rapist to any number of years within the minimum and maximum terms prescribed by the law. The irony is that a man who has consensual sex with his girlfriend who is almost 16 years of age can have the same penalty imposed on him as a man who brutally attacks and rapes a woman. This clearly does not reflect the essence of justice.
4. Under the Malaysian law, there is no additional penalty for aggravated rape or any recognition of the need to impose a more severe punishment for aggravated rape to reflect the more serious nature of the crime.
5. The proposed amendments to define aggravated rape have been taken from various other jurisdictions including India and Philippines. There is a need to distinguish between the various degrees of offences. For example, even with a crime of robbery, the crime is treated more seriously if weapons were used to rob a person. Similarly, the circumstances proposed as aggravated rape warrant a higher degree of sentence. These amendments are necessary as the Court, on its own, will not make the distinction as demonstrated by various precedents.
6. The proposed inclusion of aggravated rapes distinguishes and classifies the seriousness of the crime in the following situations:

a) Authority

A person acting in an official government position that takes advantage of his official position and induces any woman to have sexual intercourse or rapes any woman under his custody or the custody of his subordinates must be taken to have committed a crime of aggravated rape. It represents flagrant abuse of authority and the person must be additionally penalised for such a crime.

An officer of a jail or remand cell or other places of custody that has been established by or under the law, who rapes any woman under such custody should also be categorised similarly.

Any member of the management or staff of a hospital - be it private or government - who rapes any woman under such custody should also be categorised similarly.

b) Gang Rape

This type of rape is perpetrated by a group of offenders that “take turns” to rape a survivor. Group members may also participate by forcing the survivor to submit (by physical force or threat) while other group members commit the rape. The motivation for the gang rapist is to assert his ‘manhood’ and power, and/or to gain acceptance by a group of his peers.

There were four recent cases this year: a 14-year-old girl was raped in a car park at a shopping complex in a busy Jalan Tunku Abdul Rahman, another in a secluded spot in Jalan Sultan Ismail, and the third 14-year-old was raped by her boyfriend and his seven friends in Malacca. In the fourth case, an 18-year-old girl was raped by at least five youths at 3 a.m. at a cemetery in Cheras.

c) *Pregnancy*

Raping a pregnant woman must be treated as aggravated rape due to the additional trauma inflicted upon the survivor. Further, the foetus may be injured and/or the woman’s life or health may be endangered.

In early March this year an eight month pregnant woman was gang raped by four men at a food court in Penang. She was dragged to a deserted spot where they took turns raping her.

The knowledge of the offender upon the pregnancy of the survivor is immaterial, as the additional trauma faced by the survivor is in itself an aggravated factor.

d) *Intoxication*

It is proposed that it is immaterial whether the survivor is drugged or intoxicated out of her own free will or not. The rape would be constituted as aggravated rape as the offender has taken advantage of her situation and vulnerability.

e) *Disease*

In the situation where the offender is infected with HIV and/or any other forms of sexually transmissible infections, the survivor faces increased risk of being infected, and if so, will certainly be faced with death or physical and mental suffering in addition to the trauma of the rape. As such, it is a case of aggravated rape.

The knowledge of the offender upon his condition is immaterial, as the additional trauma faced by the survivor is in itself an aggravated factor.

4.0 PENALTY FOR RAPE OFFENCES

The law as it is today:

Section 376: Punishment for rape

Whoever commits rape shall be punished with imprisonment for a term not less than five years and not more than twenty years, and shall also be liable to whipping.

The proposed amendments

Section 376: Punishment for rape

Whoever commits rape shall be punished with imprisonment for a term not less than five years and not more than twenty years, and shall also be liable to whipping, and he shall be ordered to undergo a period of mandatory rehabilitative counselling as the court deems necessary.

Section 376A: Punishment for aggravated rape

Whoever commits aggravated rape shall be punished with imprisonment for a term of not less than ten years and not more than twenty-five years, and shall also be liable to whipping, and he shall be ordered to undergo a period of mandatory rehabilitative counselling as the court deems necessary.

Section 376B: Punishment for second time or subsequent offender

When the offender has been previously convicted of rape or any sexual offence, he shall be punished with imprisonment for a term of not less than ten years and not more than twenty-five years, and shall also be liable to whipping, and he shall be ordered to undergo a period of mandatory rehabilitative counselling as the court deems necessary.

Justification

The punishment for a crime of aggravated rape must reflect the gravity of the offence, different to that of rape without the aggravating circumstances. A more severe punishment is demanded here. The level of punishment for a crime of rape is sufficient as it stands. A minimum of 5 years is imposed on a conviction for rape. The proposal recommends that for a crime of aggravated rape the minimum of ten years be imposed on such a conviction. Similarly, repeated rape offenders should be penalised with heavier sentences to signify its added repugnance.

Justification for rehabilitative counselling

Research abroad has shown that the only way a sex offender can be justly, humanely and positively helped to make a return to society and not re-offend is through a level of counselling and treatment that should begin within the prison system and continue outside in the community, if needed. Much work has been done in that regard in Britain.

The treatment should be established on a statutory basis. It must be made mandatory that as part of a sex offender's sentence he be required to undergo treatment. It must also be accepted that, even if the statutory sentence has been served within the prison system, as part of the sentence such an offender should have to continue such treatment in the community until the psychological and psychiatric specialists consider he has been rehabilitated.

The treatment required has to be long term as research has shown a high level of denial of acceptance of responsibility for such offences and that in itself takes time to work out. This is one of the reasons why it is suggested that the term of the prison sentence must be increased.

We are serious in our attempt to deal with sex offences, and have learned painfully, from what is happening that we must provide rehabilitative treatment as part of a sentence.

Upon identifying offenders, simply punishing them and allowing them to leave prison without adequately rehabilitating them, simply encourages acts of violence and harm against innocent women to continue. Given the recidivist nature of sexual offence, such rehabilitation is as important as other areas of our penal code.

5.0 AMENDMENTS TO THE EVIDENCE ACT

5.1 SEXUAL HISTORY OF COMPLAINANT

The law as it is today:

Sec 146A Restrictions on evidence at trials for rape

Notwithstanding anything in this Act, in proceedings in respect of the offence of rape, no evidence and no question in-cross examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any other person other than the accused unless –

- (a) it is evidence that rebuts, or a question which tends to rebut evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
- (b) it is evidence of, or a question on, specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- (c) it is evidence of, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.

Proposed Amendments

To substitute Section 146A of the Evidence Act 1950 with the following:

New Section 146A

- (1) Notwithstanding anything in this Act, in proceedings in respect of the offence of rape, no evidence and no question in cross-examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any other person unless –
 - (a) it is evidence of, or a question on, specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
 - (b) it is evidence of, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.

- (2) In proceedings in respect of the offence of rape, evidence that the victim has engaged in sexual activity with the accused may only be adduced if it is evidence:
- a) of specific instances of sexual activity that took place 24 hours before the offence;
 - b) which relates to the subject matter of the charge; and
 - c) which is not prejudicial against the victim.

Explanation 1: This requirement is intended to ensure that it is clear to parties in the trial exactly how far questioning can go, and in reference to which issues.

Explanation 2: All evidence must relate to a specific instance of sexual action. The Court is to disallow any attempt by the defence to introduce irrelevant questioning or evidence which aims to undermine or diminish the victim's credibility.

Justification

1. The existing Section 146A allows survivor's sexual history be brought up in the following manner:
 - a) Any sexual activity of the survivor with the accused can be raised;
 - b) When the prosecution has raised something and the defence counsel deems necessary that the sexual history of the survivor be examined in order to rebut the prosecution's statement;
 - c) When there is evidence that the survivor had intercourse with another on the occasion set out in the charge;
 - d) When there is a question on the identity of the rapist; or
 - e) Accused believed that the survivor had consented to the intercourse.
2. Other evidence that has been brought up regarding the sexual history of the survivor³⁹ are:
 - a) Evidence of past sexual history with other men, such as to show bad character - that by having had a sexual past she is thus likely to have consented to the rape; or to show that she is unreliable and as such her evidence is suspect; or that she is a mother and as such have had previous sexual history, and therefore must have consented.;
 - b) Social experiences – the fact that the survivor was a waitress had been used against her;

³⁹ e.g. Newspaper report 24.9.2002 on PP v Razali Pilen & Anor

- d) Signs of resistance – the survivor had to show bruises or any other physical signs of resistance;
 - e) Delays in making complaint – although there was reasonable cause for the delay (for example that she was in jail);
 - f) Absence of complaints – the fact that a survivor had refused to lodge a complaint or that a complaint was lodged on her behalf was used against her. Sometimes the Court also holds against her the fact that the survivor had not complained to members of the family or friends about the alleged rape.
3. As can be seen, evidence of these factors is prejudicial to the survivor, and their prejudicial value is higher than their probative value. Rape is a crime of violence and should not be considered as a violation of a woman's chastity. Nowhere in the present legal definition of rape is there a requirement that the offended party be celibate, virgin or is pure. However, looking at the current adversarial system in a rape trial, it may be implied that only celibate, virgin or pure survivors are worthy of being believed and other survivors are liars. Rape violates the very core of the survivor's person, as much as murder or any other crimes, hence it should be considered as a crime against persons. However currently, only the latter is considered so.
4. Even though current legislation provides for restriction in evidence regarding a woman's sexual history, it is insufficient to protect the survivor from prejudicial examination, as demonstrated from various judicial precedents. The underlying values and misconceptions from myths surrounding rape still prevail in the utilisation of Section 146A in admitting evidence.
5. Survivor's sexual history with the accused may be adduced under strict conditions and circumstances to ensure that the interest of the survivor is protected and that only relevant and probative evidence shall be admitted in Court. The survivor's privacy must be protected and respected at all times so that her sexual history cannot be 'paraded' in open Court. This adds further trauma to the survivor and discourages other survivors from reporting rape.
6. Studies had shown that there is an increase in rape committed by persons known by the survivor. These crimes are always looked upon with suspicion by the police and by society at large. Many of these cases involve survivors who had been raped by their boyfriends or by someone they had come in contact with over a period of time. However, it had been assumed that since the survivor had placed herself in a 'consenting' position such as agreeing to go on a date, having a relationship, agreeing to go to a party, she is to be held responsible for being raped. Survivors have been accused of 'asking for it' and 'of crying rape'. These myths have been perpetuated in our society because of the misunderstanding of the dynamics of rape: that rape is not just about sex but it is about the imbalance of power between a man

and a woman. To blame a survivor because she agreed to go out on a date is similar to blaming a businessman who was robbed on a way to the bank for carrying money.

5.2 CORROBORATION

a) To eliminate the rule of prudence requiring corroboration in rape trials

To insert:

New Section 146B

Where an accused is charged with an offence of rape, no corroboration shall be required for a conviction.

Current Practice

In Malaysia, it is a rule of practice that the evidence of a survivor in a sexual offence needs to be corroborated. Although corroborating evidence is not specifically required by law, there is a *rule of practice and prudence* that the judge must warn himself that it is unwise to convict on an uncorroborated evidence of the survivor.

The judge must make it clear that he has the risk in question in his mind – ‘what is necessary is that the judge’s mind upon the matter should be clearly revealed’⁴⁰.

In Aparv Sathiah v PP (1997) 2 CLJ 391, the court stated that the direct way for the survivor to show credibility is through corroboration.

Justification

- a) Where most crimes are concerned the accused can be convicted on the testimony of one individual but as shown above, when the crime is sexual in nature, the evidence of one survivor has been deemed to be insufficient and it needs to be corroborated in some ways. This rule of practice arises out of the belief that women would deliberately lie about being assaulted to explain away premarital intercourse, infidelity, pregnancy or to retaliate against a lover. However, AWAM’s research on rape showed that it is very rare for women to report rape because of current prosecution practice, the stigma as a rape survivor and their psychological desire to forget about the crime. Therefore these beliefs are in actual fact, false.

⁴⁰ Chiu Nang Hong v PP (1965) 1 MLJ 40, per Lord Donovan

- b) Many countries have recognised that there is little justification for the requirement of corroboration and that it seriously impedes the conviction of sexual offenders and have thus done away with this requirement for sexual crimes e.g. Canada, United Kingdom, New Zealand and India.

b) Evidence of Child of Tender Years

The law as it is today:

Section 133A Evidence of child of tender years

Where in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of this section :

PROVIDED that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

Proposed Amendment

To delete the proviso to Section 133A and to substitute with the following:

Proviso to Section 133A

Provided that no corroboration shall be required for a conviction where a child's testimony has been admitted in Court as evidence of the offence complained of.

The Current Practice

An inquiry will be held by the Court to determine whether a child should give sworn or un-sworn evidence.

A child of tender years may give un-sworn evidence if the Court is satisfied that he possessed sufficient intelligence to justify reception of the evidence and

understands the duty of speaking the truth. This section applies only to un-sworn evidence.

The law relating to the sworn evidence of a child is still governed by rule of prudence:

"the learned judge had warned herself of the rule of prudence that before an accused can be convicted on the sworn evidence of a child, the sworn evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony"⁴¹;

"he was nevertheless a young person and in our opinion the jury should have been warned of the risk of accepting his evidence"⁴².

Justification

1. Children's testimonies should be admitted by Court as evidence without having it to be corroborated by some other material evidence to secure conviction for the accused.
2. It has been presumed that the need for children's evidence to be corroborated arises from 'the notorious unreliability of children as witnesses and in particular their known aptitude to confuse fact with fantasy'⁴³.
3. It has been argued that: 'It is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy ... they find it difficult after a lapse of time to distinguish between the result of observation and the result of imagination'⁴⁴, or 'the children's tendencies to invent and distort'⁴⁵.
4. However service providers (child psychiatrists, paediatricians and police) interviewed for the AWAM Rape Report believed strongly that children do not normally lie about sexual abuse or rape. A child psychiatrist of 20 years' experience in preparing children for court trials believes that pre-school children do not tend to lie about sexual abuse. A police officer of 12 years' experience investigating abuses and rapes finds that child witnesses would always tell the truth. If the child could not verbalise the details, they will demonstrate the actions.

⁴¹ PP v Mohd Noor bin Abdullah (1992) 1 CLJ 702, per K. C. Vohrah J.

⁴² Loo Chuan Huat v PP (1971) 2 MLJ 167, Per Azmi LP.

⁴³ Din v PP (1964) MLJ 300, per Thomson LP.

⁴⁴ Per K. C. Vohrah J, see 40 above

⁴⁵ Tham Kai Yau and Ors v PP (1977) 1 MLJ 174, per Raja Azlan Shah J

5. This proves that there is no basis in not believing a child's uncorroborated evidence. When a child is able to relate explicit details of a sexual act, there is no reason not to believe the child. Children have also been known to be able to remember details of a crime although there has been a generous lapse of time between the alleged offence and the complaint.
6. Numerous studies done by leading researchers on child abuse⁴⁶ found that children who had been abused would rarely tell anyone of the crime. This is because they feel ashamed and humiliated, and fear that they will not be believed. Therefore they choose to remain silent.
7. In UK, the need to corroborate the unsworn testimony of a child of tender years has been abolished since 1988⁴⁷

⁴⁶ Ellen Bass, Laura Davis, David Finkelhor

⁴⁷ Section 34, Criminal Justice Act 1988.

6.0 AMENDMENT TO THE CRIMINAL PROCEDURE CODE

The law as it is today:

Section 426 Criminal Procedure Code

- (1) The Court before which a person is convicted of any crime or offence may, in its discretion, make either or both of the following orders against him, namely:
 - (a) an order for the payment by him of the costs of his prosecution or such part thereof as the Court directs;
 - (b) an order for the payment by him of a sum to be fixed by the Court by way of compensation to any person, or to the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed.
- (2) The Court shall specify the person to whom any sum in respect of costs or compensation as aforesaid is to be paid, and the provisions of section 432 [except paragraph (d) of subsection (1) thereof] shall be applicable to any order made under this section.
- (3) The Court may direct that an order for payment of costs, or an order for payment of compensation, shall have priority, and, if no direction be given, an order for payment of costs shall have priority over an order for payment of compensation.
- (4) To the extent of the amount which has been paid to a person, or to the representatives of a person, under an order for compensation, any claim of any such person or representatives for damages sustained by reason of the crime or offence shall be deemed to have been satisfied, but the order for payment shall not prejudice any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order.
- (5) Every order made under this section by a Magistrate shall be appealable to the High Court.

Proposed Amendments

6.1 Compensation/Assistance Board

It is our proposal that, the above provision, which is hardly used in rape cases, be used effectively and that, in addition, the government set up a 'Compensation/Assistance Board' for rape survivors and/or their next-of-kin. This is to offer some form of financial compensation for the trauma and injuries suffered by the survivor as a result of the rape.

How it would work

The Compensation/Assistance Board would be similar to the Fund that the government had set up to assist those who need medical assistance.

Its principle works much like in the crime of Tort where the aggrieved party receives compensation for the damages suffered. However, in this instance, the government pays for the compensation instead of the offender.

It is proposed that the government set up a system of monetary tariffs (scale of fixed levels of compensation for types of injuries sustained; if multiple injuries are sustained then a composite of the different tariffs for a total amount of compensation is to be achieved), with corresponding support services as required, and a tribunal or executive staff members of the Board to decide on the appropriate compensation. This will also eliminate further trauma to the survivor because unlike a civil action where she will have to deal directly with the offender, the Board acts as a neutral and non-aggravating body to offer fiscal compensation.

The standard of proof to be applied in all matters related to the compensation is to be on the balance of probabilities, akin to that of a civil claim.

The Board will consist of government servants, lawyers and non-governmental organisations and individuals who have and are working with rape survivors.

The government is to set up a fund for the Board for this purpose, and the compensation is to be provided by the government directly to the survivor (or surviving family members). After that, the government is to pursue the offender to recompense the said fund, as far as practicable. This is to make the offender accountable and responsible for the injuries and financial damages that he has also caused by virtue of his crime.

Upon conviction of the offender, the Court may refer the case to the Board for compensation or the survivor may make a claim to the Board on her own accord. If so, then the procedure should be simple with no necessity for legal representation on the part of the survivor. Either way, the survivor should be provided with clear information and guidelines on how the compensation process works and an estimated time when she can expect a decision from the Board. As far as practicable, the decision should not take longer than 6 months.

The Compensation/Assistance Board's Fund will award the survivor and/or her next-of-kin:

- (a) Financial support, i.e. a sum of money to be decided by the Compensation/Assistance Board to compensate physical or psychological injuries sustained, loss of earnings or capacity to earn (which may be projected to the reasonable future), and/or any other special costs that has

to be endured by the survivor as a result of the rape to be assessed by the Board. If medical examination is required to reach a decision about the sum to be awarded, then the Board will make the necessary arrangements for such an examination by a duly qualified medical practitioner and bear the costs for the examination.

- (b) Support services, i.e. survivors and where needed, their families (e.g. when a wife had been raped, her husband and children may need counselling) should be given access to welfare, health, counselling, medical and legal assistance that are responsive to their needs. These services are currently available and need not be newly formed. Any costs toward the obtainment of these services by the survivors and/or her families is to be borne by the Board.

Justification

1. It is a well-established fact that survivors of rape experience grave emotional trauma from the crime, which can often last for a significant period of time. Post rape trauma and post-traumatic stress disorder (PTSD) are not uncommon among rape survivors, which necessitate medical attention. In addition to that, the shock and trauma may result in loss of earnings due to time away from work, or loss of earning capacity. Also, there may be medical expenses incurred from the rape, e.g. where the rape resulted in a miscarriage of pregnancy or where the survivor contracts a sexually transmitted disease from the offender. If the rape results in death, it is also imperative that her surviving family be compensated for the grievance, and this should cover funeral expenses.
2. It is important that rape survivors be adequately compensated for the physical and psychological injuries suffered as a result of this crime of violence, and that their gravity be acknowledged. Not only that, the financial assistance may prove invaluable support to the survivor as she begins to heal from the rape.
3. Although the existing section 426 may be utilised for the above purpose there may be problems enforcing such orders if the accused person is not in a financially sound position to make the payment ordered or if there is default in payment of the sum ordered. It would therefore be easier for the rape survivor to claim compensation from the Compensation/Assistance Board.

THE END

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