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Physical Elements of Rape under the Core Criminal Laws of Malaysia, Singapore, Pakistan and Australia: A Comparative Review

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Abstract
Rape is a crime that invades the human body, degrades victims, offends the conscience of humankind, and causes physical, mental and reputational damage─ sometimes leading to tragic deaths of many innocent lives resulting from forceful transgression by perpetrators or deliberate cruelty inflicted by their own family members in the name of "honor killing". Rape is a global problem, and one that is increasingly rising in Pakistan and Malaysia. Viewing one's law through the lenses of others, this article critically examines the rape laws of Pakistan, Malaysia, Singapore and Australia (NSW), all of which inherited their laws from the common colonial rule of the British Empire. It finds that Pakistan and Malaysia are still largely reliant upon their archaic penal codes, whilst Singapore and Australia have brought about fundamental new changes in their laws. Although the laws of no country could be claimed to be flawless, it is clear that the reforms adopted by Singapore and Australia have transformed their laws into a more practical and comprehensive formulation compared to those of the other two. This article identifies the loopholes in the physical elements of the offense existing in the laws of the selected four jurisdictions to varying extents, and it submits specific suggestions for legal reform in order to protect their respective societies from the perils of a heinous crime. Against the backdrop of the passivity of the governments of Pakistan and Malaysia in reforming their rape laws with respect to physical elements and recent increase in the incidents of this offense, this article attempts to address the deficiency and impotence of their present laws in light of their equivalents with the latest amendments in Singapore and Australia. Such a comparative and comprehensive analysis does not exist in the current literature, this is where the significance of this research lies. Although the recommendations are tailored to assist in overhauling primarily the laws of the chosen jurisdictions, these can also be utilized by other nations where laws on rape are deficient and ineffective in preventing and punishing the crime.
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1. Introduction

Rape is one of the oldest offenses that human beings commit sometimes inhumanely. It is described as "one way of degrading, belittling, frightening and trespassing" the victims' bodies and crumbling their minds along with burning the social face of their families.[1] Rape is a crime which generally offends the conscience of humankind and negatively affects the victims, their families and the society they live in. It violates the victims' physical integrity causing a direct transgression of the honour of their family and society.[2] It is the most reprehensible and scandalous crime that can be committed by humans against humans,[3] which is evident sometimes in the killing of victims by the members of their own families.

Apart from physical and social injuries, rape─ as pronounced judicially─ violates victim's fundamental right to life with dignity,[4] guaranteed by national constitution of almost every country. Echoing an identical view, Geneva Academy of International Humanitarian Law and Human Rights asserts that "sexual violence is a violation of women's fundamental human rights to physical integrity, dignity, and protection from torture and other ill-treatment, it also implies that those who have been subjected to sexual violence have somehow become 'dishonoured'."[5] Hence, rape in turn flouts the *Universal Declaration of Human Rights1948*[1] and so also the

[1] Mohd Al Faani Mokhtar Rudin & Ahmad Jazimin Jusoh, *Factors That Contribute to Rape in Malaysia*, 17 (6) PALARCH'S J. ARCHAEOL. EGYPT/ EGYPTOL. 11952, 11953 (2020).
[2] Shalini Ghosh, *The Treatment of Sexual Violence in India*, 3 WARWICK STUDENT L. REV. 41, 43 (2013).
[3] Qurratul-Ain-Munir-Minhas & Samia Maqbool Niazi, *Abortion and Rape Laws in Pakistan: A Shari'ah-Based Analysis* 59(3) ISLAM. STUD. 359, 359 (2020).
[4] Safazuddin & Another v. State,(2007) 27 BLD, (HCD) 321 (Bangl.); Chairman, Railway Board v. Chandrima Das, Supreme Court of India (SCI), date of judgment Jan. 28, 2000 (Ind.); Charlotte Bunch & Niamh Reilly, *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights*, Centre for Women's Global Leadership and United Nations Development Fund for Women, New York, p.5, (1994).
[5] Geneva Academy of International Humanitarian Law and Human Rights, *The Situation of Women's Rights 20 Years after the Vienna World*

International Covenant on Civil and Political Rights1966.[2]

Reported incidents of rape occurring in some countries are frightening, as will be seen shortly. Adding to that distress, rape cases are generally underreported primarily owing to social stigma, the uncertainty of ultimate outcomes, the undue influence of perpetrators, the apprehension of further retaliation by offenders, and the future nuptial and social embarrassments of victims and their families, as evident from the following references. According to Riaz, the reasons for such underreporting are "issues of stigma, illiteracy, conservatism, and legal challenges."[3] Referring to the extent of underreporting of rape cases in Pakistan, commentators note that if the undisclosed incidents are to be counted, "there would be thousands more" than what is reported.[4] This applies to most countries particularly in Asia where law enforcement is relatively weak. Commentators view that "[s]hame is more pronounced for victims of sexual assault compared with victims of other types of trauma."[5] Victims are generally worried about facing "negative reactions from different people including law enforcement, medical officers, and society, thereby experiencing secondary victimization.[6] Victims and their families reasonably "do not want to be ostracized by the society."[7] As a dominant factor behind rape, a study conducted jointly by the United Nations Development Programme (UNDP) and UN Women on why men engage in rape reveals─ perhaps most absurdly in the 21st century─ that the foremost common motivation (70-80 percent) for such a heinous offense is that they belief they have the right to have sexual intercourse with women irrespective of consent.[8] Also, one of the reasons of escalating rape incidents is the opportunities created "by chance" circumstances.[9] This is where criminal law has a critical role to play to protect society from the curse of rape.

Law is popularly used to curb crimes everywhere. Accordingly, law is employed as a tool to fight against the menace of rape which exists worldwide to different extents. Accordingly, rape laws are put in place in every country. Nevertheless, rape has taken an epidemic turn in defiance of law in many countries. Trailing such a worsening situation, some domestic laws have appreciably accommodated contemporary developments around the modes and manners of sexual penetration, whilst others remain stagnated apparently being complacent with their antiquated penal laws. For example, rape is on the rise in Pakistan[10] and Malaysia[11] which are still heavily reliant on their archaic colonial laws inherited from the British Empire drafted in the middle of the 19th century. Conversely, Singapore and New South Wales of Australia (NSW) initially received identical or similar laws from the same colonial ruler, but they have brought about significant changes in their respective rape laws to accommodate the modern concepts of rape in order to provide better protection to the society. This article seeks to examine the actus reus (also called physical or conduct element) of rape under the current rape laws of Pakistan, Malaysia, Singapore and New South Wales of Australia (NSW).[12] It considers the offenses involving either at least one party or both parties to a rape incident are adults, setting aside non-consensual sexual penetration between children for a separate endeavor.

An overarching objective of this research is to find out the drawbacks of the laws of Pakistan and Malaysia viewing through their equivalents in Singapore and NSW. However, we admit that the laws of one country can be arguably better than that of the other, but the laws of no single jurisdiction could be identified completely flawless. Hence, we will identify loopholes in all of these four jurisdictions where relevant and offer specific suggestions for reform where appropriate. We admit that the reasons for escalation of rape incidents in some jurisdictions cannot be attributed solely to the flaws in laws, however, legal drawbacks in both theory and practice are widely believed to be a major cause of sexual offenses.[13]

Conference on Human Rights-Academy in-Brief No. 4, p.23 (Jun. 2014) .

[1] "Everyone has the right to life, liberty and security of person": Art. 3 of the *Universal Declaration of Human Rights1948*:

[2] " Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life": Art. 6(1) of the *International Covenant on Civil and Political Rights1966.*

[3] Mehvish Riaz, *Semiotics of Rape in Pakistan: What's Missing in the Digital Illustrations?* 15(4) DISCOURSE COMMUN. 433, 433 (2020).

[4]Zia ur-Rehman & Emily Schmall, *Faced With Protests, Pakistan Says Rapists Could be Chemically Castrated*, NEW YORK TIMES (U.S.) Dec. 16, 2020, at Asia Pacific.

[5] Prachi H Bhuptani, ET AL., *Rape Disclosure and Depression among Community Women: The Mediating Roles of Shame and Experiential Avoidance* 25(10) VIOLENCE AGAINST WOMEN 1226, 1227 (2019).

[6] See Debra Patterson, *The Linkage between Secondary Victimization by Law Enforcement and Rape Case Outcomes.* 26(2) J. INTERPERS. VIOLENCE. 328 (2011).

[7] Janet Ann Fernandez & Azmawaty Mohamad Nor, *Enough of This Nonsense! Rape Is Rape: A Malaysian Perspective*, J. HUMANIST. PSYCHOL. 1, 10 (2019) https://doi.org/10.1177/0022167819883724
DOI: 10.1177/0022167819883724.

[8] Zarizana Abdul Aziz & Maria Cecilia T. Sicangco (eds), COURT COMPANION ON GENDER-BASED VIOLENCE CASES, 51 (Asian Development Bank, Manila, 2021).

[9] Monira Nazmi Jahan, *Analyzing Child Rape in Bangladesh: A Socio-Legal Perspective*, 58 INTERNATIONAL ANNALS OF CRIMINOLOGY 19, 20 (2020).

[10] Sabir Shah, Rape Cases on the Rise. INTERNATIONAL-THE NEWS (Pakistan), Sept. 12, 2020, at Top Story.

[11] Rudin & Jusoh, *supra* note 1, at 11952 (2020); Imran Ariff, *Increased Rape Cases in Sarawak Likely "Tip of the Iceberg"*, FREE MALAYSIA TODAY (Malay.), Aug. 10, 2021; Sharifah Mahsinah Abdullah, *Rape Cases in Kelantan Increase During MCO Period,* NEW STRAITS TIMES (Malay.), Sep. 5, 2021, at Crime & Courts;

[12] Rationale for this comparison is provided in the following Part.

[13] See Paul H. Robinson, *Strict Liability's Criminogenic Effect*, 12 CRIM. LAW AND PHILOS. 411 (2018); Don Soo Chon & Janice E.

The article is split into six parts. This introduction in Part 1 is followed by Part 2 which provides a brief scenario of rape incidents, justifications for comparison, research methods to be followed, and clarification of our approach to gender equality. Part 3 presents the statutory definitions of rape under codified laws of the four selected jurisdictions. Part 4 discusses the actus reus elements of rape drawing from the preceding part, whilst Part 5 examines consent, which is a central and common concern of rape law in all jurisdictions. Part 6 concludes by summarizing the major findings from foregoing discussions and submitting them as recommendations for legal reform where necessary.

To simplify and unify the terms, unless otherwise mentioned anywhere in this article, the letter 'D' represents the 'defendant', 'accused', 'rapist', 'offender' 'actor' and 'perpetrator', penetrator; whilst 'C' stands for the 'complainant', 'victim', prosecutrix 'other person', and 'another person'.

2. A Brief Scenario of Rape Incidents, Justifications for Comparison, and Research Methods

2.1 *A Brief Scenario of Rape Incidents in Selected Jurisdictions*

The Human Rights Commission of Pakistan (HRCP) recently reports that at least 11 rape cases are reported every day with over 22,000 incidents of this offence are reported to the police during the period of last six years (2015-2021) in Pakistan.[1] More alarmingly, Punjab (one of the four provinces of Pakistan) alone has witnessed a total of 2,439 women raped and 90 killed in the name of "family honour" over the past six months, as released by the Punjab Information Commission.[2] Another report notes that the police of Punjab recorded over 8,000 rape cases and 646 gang rape cases between 2014 and 2016.[3] Fawad Chaudhry, a cabinet minister of Pakistan, revealed in Parliament in September 2020 that 5,000 rape cases are reported every year in the country that has a population of over 200 million.[4]

Greatly implausibly, the aforesaid HRCP report adds that the society of Pakistan offers undue favor to offenders by blaming the victims alone, where 77 accused persons out of 22,000 cases were convicted with a conviction rate of 0.3 percent.[5] Victims are thus deprived of justice, as Pakistan is one of the countries where a high number of rape incidents occur with a low rate of conviction of rapists.[6] As affirmed by the official data, there is significant underreporting of rape incidents due to social pressures and legal loopholes, as only 41 percent of rape cases are reported to the police.[7] Consequently, rape incidents are in a sharp rise in Pakistan.[8]

The horrifying situation of so-called "honor killings" in Pakistan deserves to be particularly mentioned. It is disheartening to learn from a recent empirical study that university students in Pakistan shared their views that rape victims do not get support even from their own families, rather the victims are killed by their respective families in most cases, "in the name of honor irrespective of either she is guilty or not. Victim is further treated like animal."[9] For example, Pakistan witnessed as many as 1,019 cases of honor killings between 2005 and 2007 alone.[10] Even before happening such a tragic death, victims on many occasions commit suicide after being raped, as was the case in *Rustam v. State*.[11]

Another instance of deprivation of justice can be found in extra-judicial settlements of rape cases. Sometimes undue influence compels the victim to settle the case outside of the court, which happens very often in Asian countries. For example, the Sindh High Court of Pakistan reduced the sentence of a rape convict from life imprisonment to 10 years based on an out-of-court settlement in *Manzoor Chachar v. State*.[12] Similarly, an extrajudicial compromise influenced the decision of the Supreme Court of Pakistan in *Salman Akram Raja v. The Government of Punjab*,[13] even though the public media profoundly covered the case, prompting the Supreme

Clifford, *The Impacts of International Rape Laws Upon Official Rape Rates*, 65(2-3) INT. J. OFFENDER THER. COMP. CRIMINOL. 244 (2021).

[1] Press Trust of India, *Over 2,400 Women Raped in Pakistan's Punjab Province in 6 Months,* East Mojo (Ind.), Feb. 9, 2022, at Crime.

[2] Press Trust of India, *supra* note 19.

[3] Aziz & Sicangco, *supra* note 13, at 51.

[4] Rehman & Schmall, *supra* note 9 at Asia Pacific.

[5] Press Trust of India *supra* note 19.

[6] Noor Zafar, *The Plight of a Rape Survivor*, 9 PAK. LAW REV. 95, 131 (2018).

[7] Web Desk, *11 Rape Incidents Reported in Pakistan Every Day, Official Statistics Reveal*, THE NEWS (Pakistan), Nov. 13, 2020, at National.

[8] Press Trust of India, *supra* note 19.

[9] Nida Jamshed & Anila Kamal, *Prevalence of Rape Myths and Sexual Double Standards among University Students in Pakistan* 36(15-16) J. INTERPERS. VIOLENCE NP8653, NP8662-63 (2021).

[10] Nasreen Akhtar & Daniel A. Métraux*, Pakistan is a Dangerous and Insecure Place for Women* 30(2) INT. J. WOLRD *PEACE* 35, 60 (2013).

[11] 2013 YLR 2600 (Sindh) (Pak.). For scholarly analyses of the relation between rape and suicide, See Eleanor Glendinning, *Reinventing Lucretia: Rape, Suicide and Redemption from Classical Antiquity to the Medieval Era*, 20 INT. CLASS. TRAD. 61 (2013); Jonathan R. T. Davidson, et.al., *The Association of Sexual Assault and Attempted Suicide within the Community*, 53(6) ARCH. GEN. PSYCHIATRY., 550 (1996); M van Egmond, ET., *The Relationship between Sexual Abuse and Female Suicidal Behavior* 14(3) CRISIS 129 (1993).

[12] 2015 P Cr. LJ 690 (Sindh) (Pak.), as cited in Aziz & Sicangco, *supra* note 13, at 165.

[13] 2013 SCMR 203 (Pak.) as cited in Aziz & Sicangco, *supra* note 13, at 165.

Court to take *suo moto* notice of the matter.[1]

The rape statistics in Malaysia is also alarming. A huge number of rape incidents, between 2,500 and 3,000, are reported to occur there every year with Selangor (a state of Malaysia) recording the highest number of cases, a distressing number of them are children under 12 years of age.[2] Another report reveals that Malaysia has recorded a total of 1,721 cases of sexual crimes against children alone from January to June 2020.[3] Such a high number of incidents happen in Malaysia whose total population is only around 33 million.[4] Like many other countries, a plethora of the rape cases in Malaysia go unreported due to serious social stigma attached to the victim.[5] The increase in rape of adolescents is so appalling that it is compared with cancer in Malaysian society.[6]

Singapore's rape law was previously very much similar to that of Pakistan and Malaysia. Accordingly, the incidents of rape was also high in Singapore. As reported by the Home Affairs Minister in Parliament on January 5, 2021, there were a total of 6,988 reports of sexual assaults in Singapore from 2017 to 2019.[7] However, the rape law of Singapore has been fundamentally changed by the *Criminal Law Reform Act 2019* (Singapore) with effect from January 1, 2020. The 2019 reforms are appreciated as "successful in terms of finally producing a set of law that clearly reflects the intended scope of operation while leaving only limited lacunas."[8] However, we have to wait to see the impact of new amendments on rape incidents in Singapore.

Pakistan, Singapore and Malaysia have all initially inherited their penal codes from their British colonial regime, which enacted the *Penal Code 1860* for its colonies of the time, relying heavily on the common law perception of rape. Although originated in the United Kingdom (UK), the originator itself has substantially reformed and refined its own common law rape mostly through legislation.[9] Also the common law itself has profoundly changed its stance on criminalizing marital rape in the UK.[10] Despite the overhaul brought about by the UK, some of their former colonies, turned independent countries in course of time, have still held the century old law to combat the offense of rape in the 21st century, whilst other former colonies, such as various Australian states, Singapore and India to some extent, have considerably deviated from the 1860 definition of the rape. Although Pakistan too has made some changes, there is still a pressing need to broaden the definition of rape in order to accommodate various acts that constitute rape under modern laws.[11] Similarly, there is a persistent demand in Malaysia to widen the definition of rape to accommodate different methods of commission of this offense.[12]

New South Wales, Australia (NSW) is manifestly dynamic in reforming rape law, which has improved and modernized its law several times over the past decades based on the research of the time and continues to do so, as the latest amendments are legislated in December 2021.[13] Such a dynamism has persuaded us to compare its rape law with its counterparts of other selected jurisdictions, which once shared similar laws under the same colonial empire.

The current versions of s375, which is common in the *Pakistan Penal Code 1860* (PPC1860), the *Penal Code* 1936 of Malaysia (MPC1936)[14] and the *Penal Code 1871* of Singapore (SPC1871),[15] define rape, whilst

[1] HRC No. 13728-P of 2012 as cited in Aziz & Sicangco, *supra* note 13, at 165.
[2] Rudin & Jusoh, *supra* note 1, at 11953.
[3] Nation, *1,721 Cases of Sexual Crimes against Children Recorded in First Half of 2020*, THE STAR, (Malay.), Aug. 18, 2020, at News.
[4] *World Population Review*, Malaysia (live), available at https://worldpopulationreview.com/countries/malaysia-population (last visited Jan. 28, 2022).
[5] Fernandez & Nor, *supra* note 12, at 3.
[6] Rudin & Jusoh, *supra* note 1, at 11953-54.
[7] Amelia Teng, *About 40% of Sexual Assault Cases from 2017 to 2019 Involved Victims Below* 16, THE STRAITS TIMES (Sing.), Jan. 6, 2021, at Singapore.
[8] Jianlin Chen, *Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success*, 2020 SING. J. LEGAL STUD. 479, 501 (2020).
[9] For example, Sexual Offences Act 1956 (UK), Sexual Offences Act 2003 (UK).
[10] Non-consensual sexual intercourse between married couples was not an offense under common law. The House of Lords declared criminalization of such sexual intercourse: R v. R [1991] 1 All E. R. 747; R v. C [1991] 1 All E. R. 755, and R v. J [1991] 1 All E. R. 759.
[11] Minhas & Niazi, *supra* note 3, at 375. *See also* Zafar, *supra* note 24.
[12] See Dinusha Panditaratne, *Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform,* 31 AM. U. INT'l L. REV. 171 (2016); Yee Xiang Yun, *Malaysia to Reform Sex Offender Laws,* JAKARTA POST (Indo.), Jun. 13, 2016, at Southeast Asia.
[13] Major reforms have been made in 1981, 1989, 2007 and 2021. However, the reforms made in 2021 under the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) have not been given effect at the time of writing this article. It received the Royal Assent on Dec. 8, 2021, and will be given effect approximately six months after the Assent. Nonetheless, those reforms will be discussed with respect to consent later in this article.
Further, NSW rape laws are founded on common law principles which have been significantly reformed by the Crimes (Sexual Assault) Amendment Act 1981 (NSW) and further updated by the Crimes (Amendment) Act 1989 (NSW) and the *Crimes Legislation Amendment (Consent─ Sexual Offences) Act 2007* (NSW).
[14] For a discussions of several of the most significant amendments to the Malaysian Penal Code including sexual offenses made in the past two decades: see Norbani Mohamed Nazeri, *Criminal Law Codification and Reform in Malaysia: An Overview*, (2010) *SINGAP. J. LEGAL STUDIES* 375 (2010).
[15] Based on an agreement, Singapore separated from Malaysia in Aug. 1965 to become an independent and sovereign state, when it inherited the then Malaysian version of the Penal Code: For the Malaysian version of the Penal Code 1871, see Nazeri, *id*. For the agreement of this separation, see Singapore and Malaysia (No. 8206) https://treaties.un.org/doc/Publication/UNTS/Volume%20563/volume-563-I-8206-

NSW now calls the offense "sexual assault" in its *Crimes Act 1900* (NSWCA1900). The NSWCA1900 classifies sexual assaults in different categories, of which, offenses in s61I, 61J and 61KA resemble rape. Hence we will consider only those offenses from the NSWCA1900 that are comparable with rape.

2.2 *Reasons for Selecting NSW and Singapore to Compare with Malaysia and Pakistan*

The foremost consideration behind this choice is that all four jurisdictions belong to the common law family and they inherited similar rape laws from the British colonial rule, but they are now largely dissimilar from one another. The reasons for choosing NSW from Australian jurisdictions (six states and two territories) are twofold─ *first*, NSW is the oldest, most populous and leading jurisdiction in Australia with respect to sexual offenses law; and *second*, its already developed law of sexual assault has been lately further amended in 2021in order to keep pace with the societal changes connected with sexual conduct. Comparison with the rape law of Singapore can be premised on two grounds. *First*, Singapore's rape law has been considerably amended in 2019 in line with the *Sexual Offences Act 2003* (UK)[1] and those amendments will be viewed through the lenses of the latest amendment mandated in NSW in December 2021. *Second*, Singapore became independent from Malaysia in 1965, hence a comparison between the current laws of these two countries will identify the latter's lack of progress more meaningfully in updating its (Malaysia) law. Malaysia too has brought about a few reforms in its rape law, but they have failed to yield any appreciable benefit as rape cases are on the increase there, pressing the need for further reforms. Unlike three others, Pakistan remains strict largely to its colonial law and has earned bad reputation of growing rape incidents as shown earlier. A comparison with other selected common law jurisdictions may usher the right path of reforming the rape law of Pakistan to combat rape in the country. To clarify further, although the law of NSW is not claimed to be a model, its law is obviously much more developed compared to others which are likely to find specific guidance for revisiting their own laws further. Given the nature and consequences of rape as an offense, uniformity of laws amongst the chosen jurisdictions is profoundly warranted─ the extent of economic development regardless.

2.3 *Research Methods*

We rely on both doctrinal analysis and comparative methods of legal research. The doctrinal method which is known as a traditional method of legal research elucidates legal concepts and principles of all types including cases, statutes and rules.[2] In employing this method, a researcher is required to identify legal issues involved, analyze them and creatively synthesize them, demonstrating connections between different laws and essential legal principles treasured in the primary materials of law that include legislation and case law.[3] As explained by Pearce Committee in Australia, the doctrinal method refers to research "which provides a systemic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments."[4] Hence, in carrying out this research, we have examined the statutory laws of Pakistan, Malaysia, Singapore and NSW together with the common law principles pertaining to the relevant legislative provisions.

Alongside the doctrinal analysis, we also employ the comparative method of legal research, which judiciously highlights the similarities and differences amongst the laws and legal systems being compared in a given study.[5] This comparison facilitates borrowing by one country from another with a view to improving the former's laws in light of the latter's equivalents by harmonising the laws or legal systems between them. The comparative method is thus described to be a tool used for legal reforms, when the process of such a comparison leads to specific conclusions about idiosyncratic or uncommon characteristics of each of the legal systems being compared and about commonalities as to how the laws address a particular problem at issue.[6]

It is generally argued by comparative lawyers that "If law is seen functionally as a regulator of social facts, the legal problems of all countries are similar. Every legal system ... is open to the same questions and subject to the same standards, even in countries of different social structures or different stages of development."[7] This proposition clearly justifies comparison between the laws of different countries that are unequal and diverse with respect to socio-economic developments. Hence we have justifiably applied both the doctrinal analysis and

English.pdf (last visited Jan. 16, 2022).

[1] See S. Chandra Mohan & Yingqi Lee, *Sexual Grooming as an Offence in Singapore*, 32 SINGAP. ACAD. LAW J. 96 (2020).

[2] Terry Hutchinson & Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research* 17(1) DEAKIN L.REV 83 (2012).

[3] Id. at 85 & 105.

[4] Dennis Pearce, Enid Campbell & Don Harding (Pearce Committee), *Australian Law Schools: A discipline Assessment for the Commonwealth Tertiary Education Commission* (Vol 3, 1987) at 17, quoted from Terry Hutchinson, RESEARCHING AND WRITING IN LAW, 7, NSW: Law Book Co (2018).

[5] John C. Reitz, *Comparative Law in the United States Today: Distinctiveness, Quality, and Tradition 46* AM. J. COM.P LAW 617, 620 (1998).

[6] *Id*. at 624.

[7] Konrad Zweigert & Hein Kotz, INTRODUCTION TO COMPARATIVE LAW 43-44 (3rd edition translated by Tony Weir) Oxford University Press (1998).

comparative methods in conducting the present research.

2.4 *Clarification of Our Approach to Gender Equality*

This article purports to examine the statutory definitions of rape provided in the pieces of main crime legislation of the selected four jurisdictions with an objective of submitting recommendations for reform where necessary. Although overwhelming majority of victims are female, this article recognizes that victims of sexual assaults can be of any gender.[1] Notably, the Supreme Court of the United States in *Meritor Savings Bank v. Vinson* in 1986 focusing on victims recognized the core notion of rape that it is a crime of gender inequality between men and women where the former commit the offense against the latter.[2] However, the Supreme Court later in *Oncale v. Sundowner Offshore Services, Inc* in 1998 extended its recognition that men can also be sexually violated by other men.[3] Hence, it takes a gender-neutral approach to the discussion of laws at hand, with a highlight of females as the foremost victims of the offense. To be fair, persons of any gender who entice or facilitate rape are to be considered with due importance, otherwise only men will always be identified as perpetrators.[4] Likewise, "if male rape victims are not highlighted, men will only be considered as rapists."[5]

A useful legal definition of a particular crime can create deterrence and facilitate conviction. The following thus section presents definitions of rape and its equivalents.

3. Definitions of Rape in the Penal Legislation of the Selected Four Jurisdictions

A universal definition of rape does not exist, so it varies between the laws of the selected countries. Rape is traditionally defined as penetration of a female's vagina with a male's penis against her will and without valid consent. The common law offense of rape denotes peno-vaginal penetration without consent where the female is someone other than the male's wife,[6] and the commission of the offense had required just penetration to any extent. This is clearly a gender-bias perception of this serious offense, whereas equality before the law, meaning equal treatment and protection of law, is not only a principle of rule of law,[7] but a fundamental right under many national constitutions.[8] Importantly in 2008, a total of 58 countries in the United Nations General Assembly, including Malaysia and Pakistan, issued a statement in favor of the principle of non-discrimination on the ground of sexual orientation.[9] These two countries are nonetheless yet to make their laws gender-neutral. The modern concept of rape goes beyond "carnal knowledge".[10] For example, Sir Igor Judge of the UK Court of Appeal─Criminal Division (UKCOA) in *R v Jheeta* in 2007 stated that in "rape cases the 'act' is vaginal, anal or oral intercourse."[11] We begin with the definition of rape as currently provided in the law of NSW, which encompasses the contemporary social perception of this offense.

3.1 *Definition of Rape under the Crimes Act 1900 of NSW*

Sexual offenses in NSW are governed primarily by the NSWCA1900 which replaces common law "rape" with "sexual assault". Several amendments over the past decades have effectively created numerous sexual offenses

[1] See Jessica A. Turchik & Katie M. Edwards, (2012). *Myths about Male Rape: A Literature Review*, 13 PSYCHOL. MEN. MASC. 211-226 (2012); Sarah Crome, *Male Survivors of Sexual Assault and Rape*, ACSSA Wrap (No. 2, Sep. 2006) Australian Centre for the Study of Sexual Assault (ACSSA) https://aifs.gov.au/sites/default/files/publication-documents/acssa_wrap2.pdf (last accessed Jan. 13, 2022); Laura Hammond, et. al., *Perceptions of Male Rape and Sexual Assault in a Male Sample from the United Kingdom*: *Barriers* to *Reporting and tthe Impacts of Victimization*, 14(2) J. INVESTIG. PSYCHOL. OFFENDER PROFILING 133 (2017); Abdus Samad v. The State, High Court Division of the Supreme Court of Bangladesh, Criminal Miscellaneous Suo Moto Rule No. 23508 of 2013; Jahan, *supra* note 14, at 30; In Abdus Samad v. The State, cited above, a madrasa teacher raped a boy of eight years old. The offender was punished under s377 of the Penal Code 1860 (Bangl.) despite the presence of the special law, the Prevention of Oppression against Women and Children Act 2000. The High Court Division, in its motion, issued a rule that male child rape cases fall under s9(1) of the Act of 2000. Regardless of this ruling, cases are still filed under the Penal Code 1860: Jahan, *supra* note 14, at 30; See for male rape victims: Tasnim Nowshin Fariha, 'Unrecognised Male Rape Victims' NEW AGE (Bangl.), Apr. 27, 2021, at Opinion.

[2] Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).

[3] Oncale v. Sundowner Offshore Services, 523 U.S. 75, 78 (1998).

[4] Riaz, *supra* note 8, at 444.

[5] *Id*. For male rape victims in Singapore, see Tenga, *supra* note 38; *Rape of Males in Singapore*, available at https://the-singapore-lgbt-encyclopaedia.fandom.com/wiki/Rape_of_males_in_Singapore (last visited Jan. 28, 2022).

[6] Papadimitropoulos v The Queen 98 CLR 249, 261 (1957).

[7] A. V. Dicey's second principle of the rule of law concerns equality before the law: see Dylan Lino, *The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context*, 81(5) MOD. L. REV. 739, 741 (2018).

[8] "All citizens are equal before the law and are entitled to equal protection of the law: Constitution of Pakistan, Article 25A"; Akhtar & Métraux, supra note 28, at 41; Imtiaz Omar, EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN, 148-49 (The Hague: Kluwer Law International, 2002).

[9] U.N. GAOR, 63rd Sess., 70th plen. mtg. at 30-31, U.N. Doc. A/63/PV.70 (Dec. 18, 2008); UNITED NATIONS, INDEX TO PROCEEDINGS OF THE GENERAL ASSEMBLY: SIXTY-THIRD SESSION - 2008/2009, at 111, U.N. Doc. ST/LIB/SER.B/A.72 (Part I), U.N. Sales No. E. 10.I.3 (2010).

[10] The term 'carnal knowledge 'means 'Sexual intercourse between a man and a woman, where there is at least some slight penetration of the woman's vagina by the man's penis': Legal Information Institute, Cornell University, United States, *Carnal Knowledge*, (2020) available at https://www.law.cornell.edu/wex/carnal_knowledge (last visited Dec.7, 2021).

[11] R v Jheeta 2 Cr App R 34 at [24] [2007].

in NSW,[1] however, our focus will be on the offenses which are akin to or reflective of rape defined in all other chosen jurisdictions. Notably, rape provisions in NSW are currently gender neutral, and they require C's affirmative consent. The definition of rape in NSW is more extensive compared to other chosen jurisdictions, and such an extension has taken place since the 1980s aimed at embracing "a wider and more nuanced spectrum of sexual harm".[2] The expansion continues to breed as evident in the most recent amending legislation, the *Crime Legislation Amendment (Sexual Consent Reform) Act 2021* (NSWCLA2021), which effectively widens the scope of rape by altering the existing consent provisions. The ultimate goals of such definitional expansion of rape are the delivery of a fairer system of justice to the society and driving a "societal level change by shifting social norms and supporting and reinforcing other prevention strategies".[3]

Amongst the different offenses in NSW, sexual assaults and their aggravated versions are comparable with rape. We have further narrowed down the offenses in NSW for our purposes because, the phrase "sexual assault" itself is a broad concept and inclusive of many sexual acts, and our attention will be concentrated on the offenses requiring sexual intercourse or penetration constituting sexual assault.[4] Notably, similar to the laws of Pakistan and Malaysia, which will be discussed shortly, the law of NSW uses the term "sexual intercourse" in its definition of sexual assault equivalent to rape, whilst Singapore originally had the same terminology of the conduct element ("sexual intercourse"), but it has recently changed the act to "penetration"[5].

Section 61I of the NSWCA1900 provides the basic definition of "sexual assault" by stating that "[a]ny person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years."[6] The definition is evidently gender-neutral which implicitly recognizes that persons of any gender can be both offenders and victims. Besides, it retains the circumstance element of "without consent", though omits another circumstance element being "against will".[7]

Section 61J is the aggravated version of the basic offense defined in s61I of the NSWCA1900 with a tougher punishment based on higher degree of criminality evidenced by the surroundings of the commission of the offense representing a circumstance of aggravation. As an aggravated sexual assault, s61J(1) lays down that "[a]ny person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 20 years." The circumstances of aggravation referred to in subsection (1) of s61J are stipulated in its subsection (2) which contains nine instances of them by reference to: (i) causing or threatening to cause physical harm to any person including C; (ii) committing the crime in a company; (iii) age, physical or mental disability of C; (iv) D's breach of a relationship of trust when C is under D's authority; and (v) C's deprivation of liberty. More clearly, subsections 2(a)-(b1) of s61J make D liable for an aggravated sexual assault if D─ at the time of, or immediately before or after, the commission of the offense─ intentionally or recklessly inflicts actual bodily harm (ABH)[8], or threatens to do so by means of an offensive weapon or instrument,[9] or threatens to inflict grievous bodily harm (GBH)[10] or wounding─ on C or any other person who is present at the crime scene or nearby C.[11] Other circumstances of aggravation are stated in s61J(c)-(i). These are: (c) engaging in sexual intercourse by D together with one or more persons against C (gang rape);[12] (d) C's age is under 16 years; (e) C is generally or at the time of sexual intercourse was under D's authority (doctor-patient relation, for example); (f) C has a serious physical disability; (g) C has a cognitive impairment affecting the ability of making such a decision to consent; (h) D enters C's accommodation by breaking C's dwelling house or

[1] See ss61H-81C of the NSWCA1900.
[2] Gail Mason, *Sexual Assault Law and Community Education: A Case Study of* New South Wales, *Australia*, 56 AUST. J. SOC. ISSUES 409, 409 (2021).
[3] *Id*.
[4] NSWCA1900, ss61I-61KA.
[5] Singapore uses penetration as it has amended in line with the law of the UKSOA2003.
[6] Punishments are not our major concerns, however, we will mention them sometimes to distinguish the gravity of sexual conduct or criminality between offenses within certain jurisdictions.
[7] The phrase "against will" still exists in the definition of rape in both Pakistan and Malaysia: PPC1860, s375; MPC1936, s375.
[8] NSWCA1900, s61J(2)(a). The consequence element "actual bodily harm" (ABH) has been made an offense under s59 of the CA1900 (NSW), however, it does not define ABH. However, the higher courts have interpreted this harm. "Harm" such as scratches and bruises are typical examples of ABH: McIntyre v. R (2009) 198 A Crim R 549 at [44]; apart from any physical harm, ABH may also occasion where a victim has been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind: Li v. R [2005] NSWCCA 442 at [45]; whether a certain harm amounts to ABH may be judged objectively whether it is serious due to the nature of the assault notwithstanding minor injuries: see R v. Burke [2001] NSWCCA 47 at [17].
[9] NSWCA1900, s61J(2)(b)
[10] Section 4(1) of the NSWCA1900 defines "grievous bodily harm" (GBH) that includes any permanent or serious disfiguring of the person, the destruction of a foetus, and any grievous bodily disease. The courts apply the ordinary and natural meaning of GBH and notes that "grievous" simply means "really serious": DPP v. Smith [1961] AC 290; Haoui v. R (2008) 188 A Crim R 331 at [137], [160]; Swan v. R [2016] NSWCCA 79 at [54]–[63].
[11] NSWCA1900, s61J(2)(b1). For "GBH", see above-mentioned s4(1) of the NSWCA1900.
[12] NSWCA1900, s61J(2)(c).

other building with the intention of committing the offense or any other serious indictable offense; or finally (i) D deprives C of his/her liberty for an unspecified period before or after having sexual intercourse. For examples of aggravated sexual assault with respect to age of victim,[1] the NSWCCA in *Rylands v R*, where the offense was committed by an act of cunnilingus against a victim aged 15 years and 9 months old, the Court highlighted that a crime of this nature is taken with great seriousness, and that the concepts of general deterrence and retribution entail earnest consideration in the trial of such a case.[2] Similar views were reflected in *Fisher v R* in which the victim was 13 years old[3] and in *R v BWS* where the victim's age was 16 years.[4]

These aggravated offenses require D to commit sexual intercourse as the base offense, then additionally causing or threatening harm, or abusing authority by breaching the relationship of trust, or depriving C of his/her liberty, or sexual intercourse with minors─ which justifies the enhanced punishment. All these aggravating factors sound logical, however, it seems that a serious offense of inflicting GBH and threat of death are missing, though threatening to do so is covered. Any real threat of death or inflicting GBH need to be incorporated into s61J(2), otherwise a literal approach to the interpretation of circumstances of aggravation may leave a threat of death or inflicting GBH out of this offense, which are more serious crime (rape) than causing or threatening to cause ABH.

The circumstance s61J(2)(c) is just another name of "gang rape" as the offense is generally known to the people, whilst the last two circumstances,[5] exceptionally require an extra act of breaking and entering with intent to have sexual intercourse or any other indictable offense.[6] The final circumstance is depriving C of his/her liberty, arguably to obtain consent to sexual intercourse, which eventually takes place with or without C's consent. Wood CJ of the NSWCCA in *R v Hoang*, in which D had sexual intercourse in company without C's consent having deprived C of her liberty for a period prior to the commission of the offence, pronounced that the case "fell within the upper range of seriousness for such an offence …. This community will not, and it cannot, tolerate the activities of marauding young gangs of the kind to which this appellant attached himself, and it is time that he and his ilk understood that to be the case, at the penalty…."[7]

Though mentioned in s61J(2)(c), s61JA defines "aggravated sexual assault in company" separately, which attracts even more stringent punishment of life term imprisonment.[8] It combines more than one circumstance of aggravation as stipulated in s61J that seems to rationalize the maximization of punishment.[9] Section 61JA involves the commission of the base offense in company,[10] with the further offense of inflicting or threatening to inflict ABH on any person (as stated above)[11] by means of an offensive weapon or instrument; however, it again completely ignores inflicting or threatening to inflict GBH during the course of gang rape. The reason for such an omission is unclear. Section 61JA(1)(c)(iii) includes depriving C of his/her liberty for an unspecified period before or after the commission of the offense, which mirrors s61J(2)(i) as an additional circumstance of aggravation (gang rape and deprivation of liberty together). To simplify, s61JA differs from s61J in terms of the number of circumstances of aggravation, as the latter entails only one circumstance, whereas the former necessitates two specified aggravating factors to be present, one of which must be gang rape, then another from the factors specified in itself[12] (rather than those listed in s61J).

Section 61K of the NSWCA1900 adds an uncommon crime to the list of sexual assault compared to other jurisdictions at hand in that assaulting C with intent to have sexual intercourse is regarded as a more punishable crime than having sexual intercourse under s61I.[13] Section 61K spells out the offense of "assault with intent to have sexual intercourse" in following terms:

> Any person who, with intent to have sexual intercourse with another person─ (a) intentionally or recklessly inflicts actual bodily harm on the other person or a third person who is present or nearby, or (b) threatens to inflict actual bodily harm on the other person or a third person who is present or nearby

[1] NSWCA1900, s61J(2)(d).
[2] [2008] NSWCCA 106, at [98].
[3] [2008] NSWCCA 129.
[4] [2007] NSWCCA 59.
[5] NSWCA1900, s61J(2)(h) & (i). Section 61J(2)(h) and (i) were inserted by the *Crimes Amendment (Sexual Offences) Act* 2008, with effect from Jan. 1, 2009.
[6] For examples of sexual assaults involving break and enter, see R v. Johnston [2002] NSWCCA 201; R v. Anderson [2002] NSWCCA 304; R v. Hoang [2003] NSWCCA 380; R v. Allan [2004] NSWCCA 107; R v. DAC [2006] NSWCCA 265, and R v. Oloitoa [2007] NSWCCA 177.
[7] [2003] NSWCCA 380 at [40-[42].
[8] NSWCA1900, s61JA(1)-(2).
[9] Australia has abolished capital punishment, and the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) blocks attempt of any Australian jurisdiction to reinstate the death penalty: see Jo Lennan & George Williams, *The Death Penalty in Australian Law*, 34 SYDNEY L. REV. 659 (2012).
[10] Section 61JA(1)(a)-(b) requires commission of the based offense in a circumstance of aggravation as stated s61I and s61J(2)(c).
[11] "ABH" under s61J(2)(a)-(b) of the NSWCA1900.
[12] NSWCA1900, s61JA(1)(c).
[13] See R v. Jones (1993) 70 A Crim R 449; R v. Armand-Iskak [1999] NSWCCA 414; R v. Smith (1993) 69 A Crim R 47; R v. Leys [2000] NSWCCA 358 and R v. Sanderson [2000] NSWCCA 512.

by means of an offensive weapon or instrument,─ is liable to imprisonment for 20 years.

Some of the offenses under the NSWCA1900 discussed above require physical assault in addition to sexual assault,[1] but s61K imposes 20 years' imprisonment for inflicting or threatening to inflict ABH (with intent to, but arguably without committing sexual assault), whereas the commission of sexual intercourse under s61I itself attracts imprisonment of 14 years. The issue of GBH has been avoided over again. This offense is absent in other jurisdictions, so it can be a good example for others.

Finally, s61KA clarifies an important issue of marital rape. It categorically negates the defense of spousal relationship with respect to offensive sexual assault of any kind,[2] meaning that all prohibited sexual intercourse between married persons or those who are not married to each other will be treated alike, with no exception for marital relation. We may have a different view about such generalization or wholesale equalization of sexual intercourse between persons of such diverse categories (married and unmarried) in every respect that will be raised in discussing "consent" (Part IV), however, we wholeheartedly support the spirit that no one gets a free license of having sexual intercourse with his/her spouse simply by virtue of the special relationship. Having said this, we regard that s61KA can provide good guidance to other jurisdictions covered in this piece of research.

Drawing on the above definitions, the main actus reus features in NSW can be summarized as follows: (i) the offense of rape is categorized into three offenses based on the degree of D's ferocity or criminality involved; (ii) all three of them are gender-neutral; (iii) sexual intercourse is the sole actus reus[3] of all of the three categories; (iv) the absence of C's consent is a common circumstance element; (v) the age of consent is 16 years for all persons as can be inferred from offenses against children;[4] (vi) the explicit removal of martial relationship defense, meaning that the rape law equally applies to spousal relations;[5] (vii) aggravation of the offense by inflicting ABH or threatening to do so; and (viii) a detailed description of sexual intercourse is provided.[6] Both the meanings of "sexual intercourse" and "consent" will be discussed shortly below, embracing amendments to consent made in December 2021.

After NSW, the rape law of Singapore is arguably improved, compared to those of Malaysia and Pakistan, following significant amendments made in 2019 with effect from January 1, 2020[7] largely in reliance on the UK *Sexual Offenses Act 2003* (UKSOA2003). Hence the current Singaporean rape law has been upgraded compared to the original provisions of the legislation. Its provisions of rape, however, are not yet free from flaws, as can be seen below.

3.2 *Definition of Rape in Singapore*

Like those in NSW, the amended SPC1871 classifies sexual offenses into numerous categories.[8] However, unlike the NSWCA1900, the SPC1871 retains the term "rape", and this article looks to the provisions governing rape and its equivalents only. Section 375(1) of the SPC1871 defines "rape" differently by stating that "Any man who penetrates the vagina of a woman with his penis — (a) without her consent; or (b) with or without her consent, when she is under 14 years of age, shall be guilty of an offence." Section 375(1A) then adds that "Any man (A) who penetrates, with A's penis, the anus or mouth of another person (B) — (a)without B's consent; or (b) with or without B's consent, when B is below 14 years of age, shall be guilty of an offence." Section 375(3)[9] further contains the following provisions:

> (3) Whoever — (a) in order to commit or to facilitate the commission of an offence under subsection (1) or (1A) — (i) voluntarily causes hurt to any person; or (ii) puts a person in fear of death or hurt to that person or any other person; (b) commits an offence under subsection (1) or (1A) against a person below 14 years of age without that person's consent; or (c) commits an offence under subsection (1) or (1A) against a person below 14 years of age with whom the offender is in a relationship that is exploitative of that person, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning of not less than 12 strokes.

Section 375(4) is about an exclusion of marital rape and spells out that "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." This exclusion is followed by a defense of mistake of fact, as s375(5) reads that "… 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

[1] NSWCA1900, ss61J, 61JA.
[2] NSWCA1900, ss61I, 61J, 61JA or 61K.
[3] Other sexual acts constitute different offenses: see ss 61I-80AG of the NSWCA1900.
[4] NSWCA1900, ss66A-66D.
[5] NSWCA1900, s61KA.
[6] NSWCA1900, s61HA.
[7] The SPC1871 has been considerably amended by the *Criminal Law Reform Act 2019* (Sing), which has amended ss375, 376,376A, 376B-E, 376F, etc, and inserted new ss376AA, 376-EA-EE.
[8] SPC1871, ss375-377D.
[9] Subsection 2 of s375 of the SPC1871 is more about punishment, as it reads: "Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning."

believed that the act of penetration against a person was done with consent." Subsection (6) of s375 looks even more generous towards D by extending the mistake of fact against C who was under 14, as it provides that "No man shall be punished under subsection (3)(b) if he proves that by reason of mistake of fact in good faith, he believed that the act of penetration against a person below 14 years of age was done with consent.

The above-stated definition of rape in s375 of the SPC1871 is certainly comprehensive involving various aspects of legal considerations of the offense, as amended in 2019 with effect from January 1, 2020.[1] However, there are still drawbacks in the definition.

The salient features of the above s375 of the SPC1871include: (i) it omits requirement of "against victim's will" as a circumstance element, which lessens the prosecutorial burden to prove the case against D; (ii) it is not gender-neutral, because it recognizes only women as potential victims and men as offenders; (iii) the age of consent is 14 years, which is unreasonably low for such a crucial decision; (iv) penetration into vagina or anus or mouth constitutes an offense of rape, which seems to be an improvement from the original actus reus of solely peno-vaginal penetration; (v) subsection (4) effectively permits penetration between spouses without consent of wife, regardless of age of one's wife, hence marital relation remains a valid defense; (v) mistake of fact in good faith is recognized as a defense,[2] which is extended to mistake about consent of girls below 14 years,[3] though their consenting ability is not recognized under the preceding subsection (1)(b). It fails to consider that mistake about age of C and mistake about C's consent are not the same. Subsection (6) is utterly unacceptable and directly antagonistic to subsection (1)(b), these two cannot be reconciled by any means. Apart from s375 of the SPC1871, its s376[4], s376A[5], and s376AA[6] proscribe certain homosexual and heterosexual acts of penetration, and therefore we include s376 in this article on the premise that penetration falls within the scope of rape. We also regard that these additional sections could have been subsumed under rape. However, we avoid s376A and s376AA, which are more concerned with punishments than definition of new offenses, and we concentrate primarily on conduct elements of rape or sexual penetration.

Section 376 separately proscribes "sexual assault involving penetration" and provides that:

> (1) Any man (A) who causes another man (B) to penetrate with B's penis, the anus or mouth of A — (a) without B's consent; or (b) with or without B's consent, when B is below 14 years of age, shall be guilty of an offence.[7]
>
> (2) Any person (A) who — (a) sexually penetrates, with a part of A's body (other than A's penis, if a man) or anything else, the vagina or anus, as the case may be, of another person (B);[8] (b) causes a man (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person including A;[9] or (c) causes another person (B), to sexually penetrate, with a part of B's body (other than B's penis, if a man) or anything else, the vagina or anus, as the case may be, of any person including A or B, shall be guilty of an offence if B did not consent to the penetration or if B is below 14 years of age, whether B did or did not consent to the penetration. (3) Subject to subsection (4), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.
>
> (4) Whoever — (a) in order to commit or to facilitate the commission of an offence under subsection (1) or (2) — (i) voluntarily causes hurt to any person; or (ii) puts any person in fear of death or hurt to himself or any other person; (b) commits an offence under subsection (1) or (2) against a person below 14 years of age without that person's consent; or (c) commits an offence under subsection (1) or (2) against a person below 14 years of age with whom the offender is in a relationship that is exploitative of that person, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.
>
> (5) No person shall be guilty of an offence under subsection (1) or (2) — (a) for an act of penetration against his or her spouse with the consent of that spouse; or (b) if despite section 79, that person proves that by reason of mistake of fact in good faith, the person believed that B mentioned in those subsections did consent to the penetration and B was not below 14 years of age.
>
> (6) No man shall be punished under subsection (4)(b) if he proves that by reason of mistake of fact in good faith, he believed that the act of penetration against a person below 14 years of age was done with

[1] See the notes included in the text of s375 of the SPC1871.
[2] Subsection (5) of s375 of the SPC1871. It does not mention whether the mistake has to be reasonable, so it is uncertain whether subjective or objective test will apply to prove the mistake. If the subjective test is to apply, it would be difficult to prove whether or not it was really a mistake.
[3] SPC1871, s375(6).
[4] Sexual assault involving penetration.
[5] Sexual penetration of minors under 16 year old.
[6] Exploitative sexual penetration of minors of or above 16 but below 18 years of age.
[7] Amended by the Criminal Law Reform Act 2019 (Sing.) [Act 15 of 2019 with effect from 01/01/2020].
[8] Criminal Law Reform Act 2019 (Sing.).
[9] Criminal Law Reform Act 2019 (Sing.).

consent.

Section 376 is apparently complex to be readily grasped its meaning. To simplify, s376(1) proscribes causing another person (C) penetration with C's penis into D's mouth or anus without C's consent when C is 14 years of age or above, or irrespective of consent when C is under 14. It means, C is the penetrator and D is the person being penetrated, still D is liable because D arguably took advantage of C's underage or consent for D's own sexual gratification where C is 14 or above. Notably, it punishes non-vaginal penetration where both parties should be males, but the actual penetrator will not be punished, instead the instigator who is also penetrated by C will be punished.

Section 376(2) describes three offenses which can be either non-penile or penile penetration. However, it is gender-neutral, where the underlying sexual activity may occur between two person of the same or opposite sex. *First*, D (of any gender) penetrates a part of his/her body or anything else (not penis if D is a man) into the vagina or anus (not mouth) of C (of any gender).[1] *Second*, D (of any gender) causes C (a man) to penetrate C's penis into the vagina, anus or mouth of D himself/herself or of another person.[2] So, D (of any gender) will be liable in both cases – where he/she penetrates or causes penile penetration by C (a man). *Third*, D causes another person (C) to sexually penetrate with C's body part (except penis, if a man) or any object, the vagina or anus (not mouth) of any person including D and C himself/herself, without C's consent when C is 14 or above, and regardless of consent if C is under 14 years old. It means D will be liable even if C penetrates her own fingers or any object into her own vagina or anus if the act is caused by D.[3] The third offense seems to concern an unusual provision particularly when C is above 14 years old. The provision lacks a circumstance component in that C can penetrate herself without her own consent. It is unclear as to how that can happen without C's consent when C is 14 or above. Hence, we would argue that there has to be at least C's vitiated consent which amounts to non-consent, because the very word "consent" makes an ultimate difference in sexual offenses. The last part, being "irrespective of consent" when C is under 14, sounds fine simply because C was then underage.

Section 376(4)[4] defines offenses of voluntarily causing hurt to any person (of any gender) or putting any person in fear of death or hurt to C himself (C) or any other person in order to commit an offense defined in the above subsections (1) or (2) of s376, and then also commit an offense under either subsection (1) or (2).[5] This offense is fairly similar to an aggravated sexual assault under the NSWCA1900 discussed earlier. It is, however, ambiguous as to why only "himself" (C) has been used,[6] when the subsection is gender-neutral. The ambiguity existing in the current articulation may unduly favor D to escape liability. It further provides that D commits an offense under subsection (1) or (2) of s376 against C without C's consent when C is under 14 years old;[7]or D commits any of the offenses stated in subsections (1) or (2) against C when D has a relationship which is exploitative of C (eg., doctor-patient relation).[8] The offenses under s376(4) shall be punished with imprisonment for a term between 8 years and 20 years and shall also be punished with caning with not less than 12 strokes. Unlike the preceding subsections (1-3), subsection (4) sets forth a minimum jail term keeping the maximum unchanged. This indicates the gravity of the offense because of C's age and special exploitive relationship between D and C.

Section 376(5) protects D from any offense under subsection (1) or (2) with C's consent if C is D's spouse─ regardless of C's age, meaning the bar of below 14 years of age (C) that applies generally is lifted for spousal relations; or in extramarital relations, D can raise a defense by proving that he/she had mistakenly believed in good faith that C did consent to the penetration when C was 14 years or above. This subsection effectively decriminalizes the conduct that could be otherwise punishable. A mistaken belief of a person is a subjective test, which is generally difficult to prove by the prosecution against D who may lie in self-defense. The defense must be subject to an objective test that D *reasonably* believed C was consenting, regardless of D's personal assessment of fact or C's conduct in relation to the alleged consensual sex. However, the consent of a person below 14 years of age remains unacceptable with respect to sexual intercourse, nonetheless the intercourse is valid with consent of a person below 14─ when D causes hurt or puts in fear of death or hurt.[9] Again, the age of 14 years is too young to consent to sexual consent, so the intercourse should be an offense until the person attains 16 years, even with consent, simply because of age representing cognitive inability to form valid consent. Moreover, s376(4)(b) effectively gives validity to consent of C being below 14 years, which is unacceptable. It is completely unacceptable in that virtually an aggravating factor (C being an underage person) has been considered in favor of D. It is also unfair to remove marital rape when a wife is below 14 years old. This waiver

[1] SPC1871, s376(2)(a).
[2] SPC1871, s376(2)(b).
[3] SPC1871, s376(2)(c).
[4] Section 376(3) of the SPC1871 stipulates punishments, and does not define any offense.
[5] SPC1871, s376(4)(a).
[6] SPC1871, s376(4)(a)(ii)
[7] SPC1871, s376(4)(b).
[8] SPC1871, s376(4)(c).
[9] SPC1871, s376(4)(a)-(b), (a) and (b) should be read together.

unfairly gives an overwhelming majority of married people a free license to have sexual intercourse with their minor spouses.

Section 376(6) offers even more help to D, when it provides that there will be no offense under s376(6)(b)[1] if D (male) mistakenly believed that C consented to the penetration and C was below 14 years of age. It means D had knowledge that C was below 14, however, he mistakenly believed that the minor C was consenting. This subsection largely diminishes the value of the age of C with respect to such a serious sexual offense. It appears to be even more unacceptable in that it exculpates D from liability if he mistakenly believes in good faith that C was consenting when C is of any age under 14 years old. We have consistently argued that the magic age of 14 years or below is too early to make a choice of having sexual intercourse, because a person (C) of that age would be generally unable to understand the nature and consequence of the disputed sexual act.

The above discussion of the SPC1871 demonstrates that although it has been substantially amended with effect from January 2020, it does still have several loopholes which need to be addressed adequately.

The rape laws of Malaysia have also been revised to a limited extent, compared to those of NSW and Singapore, as the discussion ensues.

3.3 *Definition of Rape in Malaysia*

The Malaysian version of s375, contained in the MPC1936,[2] is significantly different from its counterparts in NSW and Singapore, and more similar to that of the PPC1860 with some additional provisions of circumstances and explanations. Section 375 of the MPC1936 reads as follows:

> A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
> (a) against her will; (b) without her consent; (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt 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; (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 recognized in Malaysia 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 [waiting period],[3]which shall be calculated in accordance with Hukum Syara', shall be deemed not to be his wife for the purposes of this section.

As stated in s376 of the MPC1936, the punishment of rape is imprisonment which may extend to a term between five and 20 years and also whipping.

The prominent features of the Malaysian rape law can be summarised below.

First, rape law under the MPC1936 explicitly confines itself to only peno-vaginal intercourse, impliedly excluding all other forms of penetration currently recognised as criminal offense in modern rape laws, as will be shown shortly later. Penetration with a body part (except penis) or any external object can also constitute rape these days in other jurisdictions as shown above. Hence, it manifestly fails to include a wide variety of sexual abuses that are prevalent in contemporary rape cases, as admitted by the Supreme Court of India in a similar context[4] in *Sakshi v. Union of India*.[5] It is also an outdated perception that rape can be committed by penetration

[1] Section 376(4)(b) of the SPC1871exonerates D from liability for having sex with a person under 14 with his/her consent (gender neutral), and subsection (6) of s376 further favors a male D if he mistakenly believed C of under 14 was consenting.
[2] Sections 375 and 376 of the MPC1936 were amended in 2014 in view of the increasing number of rape incidents: Nur Aina Abdulah & Sayed Sikandar Shah Haneef, *The Statutory Rape Law in Malaysia: An Analysis from Shariah Perspective*, 14(5) INTERNATIONAL JOURNAL OF BUSINESS, ECONOMICS AND LAW 9, 9 (2017).
[3] According to Islamic law, divorce cannot be finalized until the divorced wife completes her three menstrual courses (known as period), which aims to determine the paternity of the child if she is pregnant. The wife is not allowed to marry another person during this period. Iddah is a specified period of time that must elapse before a divorcee or widow may legitimately remarry, as stated in the Holy Qur'an (2:228).
[4] Section 375 of the Indian *Penal Code 1860* contains the definition of rape.
[5] AIR 2004 SC 3566.

into women's vaginas alone. Modern rape law considers an act as rape, if a person penetrates anything into mouth or anus to any extent when the act is objectively sexual. *Second*, the Malaysian rape law is utterly biased towards women by recognising males as sole perpetrators and females as only victims, which is now an obsolete perception. *Third*, s375 of the MPC1936 requires sexual intercourse to occur against the "will" and "without consent" of C, whereas the laws of NSW and Singapore omit the circumstance element of against C's "will", it means that the Malaysian law is more protective of victims by adding 'will' requirement, which is appreciable. *Fourth*, consent in law generally denotes genuine consent. Rape law typically does not prevent a man from engaging in sexual intercourse with consent of a woman when both are adults, however, the consent must not be vitiated by any circumstances specified in law. Section 375 of the MPC1936 does not explicitly mention that C's consent must be "free and voluntary", instead it includes some instances where C's consent will not be accepted to protect D. These are as follows:

(i) Obtaining consent by putting C in fear of death or hurt to herself or any other person is common to all four jurisdictions. However, s375 of the MPC1936 does not clarify exactly when and where C or any other person is to be under such a fear. This is important because other jurisdictions require the threat has to be given at the time of commission of sexual intercourse or immediately after or before the disputed sexual act. Also, the location of the other person needs to be clarified. Like in NSW,[1] the person has to be present at the crime scene or nearby C at the time of intercourse. This is so important because such a close proximity deprives C or any other person nearby her of seeking help from friends or authorities concerned before the commission of sexual assault, particularly if D is equipped with firearms.

(ii) Consent obtained when C had a factual misconception, and D knows or has reason to believe that C gave her consent under that misconception. It is a vague requirement in terms of the subject matter of misconception, and so also the test to be applied to prove D's belief. To make the test clearer, the expression that D "has reason to believe" can be replaced with D "reasonably believes" that C gave consent. It will make the test outright objective, hence if the prosecution fails to prove the subjective knowledge of D about C's misconception in question, D's objective knowledge can lead to conviction, negating or diluting the value of consent generated by C's factual misconception. Alongside this proposed amendment, the subject matters of misconception, e.g., about the identity of D or purposes of sexual intercourse (e.g., a medical need), have to be specified first.

(iii) Consent was given based on C's mistaken belief of having marital relation with D. This circumstantial point seems to have been inherited from the colonial era, as it exists in other penal codes originated from the 1860 British legislation.[2] It means, C consents based on a mistaken belief that D is her lawfully married husband, where D knows of C's mistake. This is a common exception to vitiate consent as we will shortly see in the PPC1860 as well.

(iv) Consent is vitiated due to C's inability to understand what she consents to. Consent given by C in a state of mind that she was unable to comprehend the nature and consequence of the act she consents to. It does not mention anything about how the inability may be caused. In light of the law of NSW, such an inability can be caused by various reasons, e.g., intoxication or unsound mind, or impaired/diminished mental capacity. Such consent amounts to non-consent, therefore the sexual intercourse will be punishable as non-consensual sex constituting rape. However, to create deterrence and facilitate conviction, the MPC1936 needs to clarify the grounds for such an inability, as stipulated in the NSWCA1900.[3]

(v) C's age can vitiate consent. Section 375 sets forth 16 years as the age of consent. Hence, when C is below 16 years of age, her consent will bear no legal value to protect D from the rape charge. This is quite reasonable.

Fifth, the next important feature of s375 of the MPC1936, is the ignorance of marital rape. An explanation of s375 plainly negates any marital rape, meaning that there will be no rape between persons in spousal relations so long as the marriage is recognized as valid in Malaysia. It largely corresponds to s375 of the SPC1871 with an exception that s375(4) of the SPC1871 permits having sexual intercourse with wife below 14 years of age with consent only, where C's consent does not protect D in the absence of spousal relation. This is certainly contradictory to the current trends towards rape, as can be seen in the afore-discussed laws of NSW. However, the uncommon exception in Malaysia excluding marital rape does not apply where the court bars husband from having sex with his wife when she is living separately, or when a Muslim wife is observing her 'Iddah'(waiting period). The waiting period (`iddah) prescribed by Islamic law during which a woman is not allowed to remarry after being widowed or divorced. This condition is justified in keeping up the judicial order or upholding an

[1] NSWCA1900, s61J(2).
[2] See s375 of the Indian Penal Code 1860 and the Bangladesh Penal Code 1860.
[3] NSWCA1900, s61HK to be inserted soon when the NSWCLA2021 is given effect.

Islamic religious dictum concerning "Iddah", given that a vast majority of its population are Muslims.[1]

Apart from s375[2] of the MPC1936, its s376A (Incest) and s376B (punishment for Incest) have some relevance to rape, which accommodate prohibitions on sexual penetration effectively based on religious and well established customary principles in Malaysia. These two sections proscribe sexual intercourse between persons who are "not permitted, under the law, religion, custom or usage applicable to him or her, to marry" each other.[3] There are no new actus reus element there, hence, we keep them outside of the scope of this article.[4]

Similar to the definition in the MPC1936, the PPC1860 holds the definition of rape greatly as it was drafted in 1860, as the discussion follows.

3.4. *Definition of Rape in Pakistan*

Like the SPC1871 and MPC1936, the PPC1860 defines rape in its s375, which reads:

> A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,___
> (i) against her will; (ii) without her consent; (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt; (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or (v) 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.

We can identify the following as main features of the definition of rape in s375 of the PPC1860. *First*, like the provision in the MPC1936, the above s375 of the PPC1860 is exclusively restricted to peno-vaginal penetration in deviation from the modern concept of rape. *Second*, similar to rape in the MPC1936, and to some extent in the SPC1871, the PPC1860 is also biased towards women by implicit denial of the fact that men could also be victims, which sharply contradicts the laws of NSW. Also, such a discrimination towards any gender exists in conflict with the contemporary concept and practice of sexual intercourse. *Third*, in conformity with the provisions of the MPC1936, the s375 of the PPC1860 also requires sexual intercourse by D with C against C's "will" and "without her consent". We support this as a broader protection for victims. *Fourth*, ensuring genuine consent is perhaps the best defense for both parties to a disputed penetration. Like its Malaysian counterpart, s375 of the PPC1860 does not directly mention that C's consent has to be "free and voluntary", however, it adds three circumstances to ensure C's genuine consent. These circumstances are:

(i) Consent obtained by putting C in fear of death or of hurt is a common feature in all four jurisdictions. This consent will be regarded as no consent. However, it is unclear as to whether the threat of harm limited to herself (C), be it death or hurt, or extended to any other person as well, under s375 of the MPC1936. The way of wording the threat circumstance of rape in s375 of the PPC1860 arguably refers to C's own death or hurt. From this point of view, it is narrower compared to other chosen jurisdictions. As we have argued above, this limitation comes from the original form of s375 drafted in 1860. It needs to be revised in light of its counterpart in the NSWCA1900.[5]

(ii) Consent given under a mistaken belief of C that D is her husband and D knows of that mistake and takes advantage of it. This is another common and well-accepted element of circumstance that exists in all four jurisdictions. However, the PPC1860 omits another similar provision that D may have a relationship of trust or authority with C, and D abuses that authority in having sex with C. This condition is ambiguously mentioned in s375 of the MPC1936, when it states that consent is given under a misconception.[6] It would be useful if the law mentions with sufficient clarify, such as, a doctor takes advantage of his/her patient, denoting that C is under D's authority which is exploitative.

(iii) Consent will be completely ignored if C's age is below 16 years, assuming that C was too young to comprehend the nature and consequence of the underlying sexual act. This provision is identical to its Malaysian counterpart, and is quite logical.[7]

Second, marital rape has been ignored. The PPC1860 is absolutely silent about marital rape, and impliedly meaning that having sex with wife regardless of her consent is legal. A recent study finds that majority of people

[1] A total of 18,972,327 (61.3 percent) out of 33,427,284 population are Muslims in Malaysia: Population of the World, Population of Malaysia (2022), available at https://www.livepopulation.com/country/malaysia.html (last visited Feb. 3, 2022).
[2] A further summary of s375 can be seen in Fernandez & Nor, *supra* note 12, at 2.
[3] MPC1936, s376A.
[4] Section 376G of the SPC1871 defines "incest" and we have also excluded that for the same reason.
[5] NSWCA1900, s61J(2), s61JA(1(c).
[6] MPC1936, s375(c).
[7] MPC1936, s375(f).

in Pakistan are unfamiliar with the concept spousal rape.[1] A commentator notes that Pakistan never had a law recognizing marital rape, respecting the bodily integrity of wives.[2] This is unacceptable indeed.

Apart from s375 of the PPC1860,[3] some of the circumstances of sexual intercourse that could have been merged with the definition of rape are stated in s376 of the PPC1860, though s376 is typically meant to prescribe punishments for rape.[4] Current s376 combines both circumstance elements of actus reus and corresponding punishments. The punishments prescribed under s376 of the PPC1860 are maximum death penalty and minimum 10 years imprisonment with an unspecified amount of fine for rape.[5] The punishment will be death penalty or life imprisonment with fine if D causes any hurt to "another person" in the course of commission of rape.[6] However, this "hurt" applies to rape under s375 of the PPC1860 as well as to the offenses under some other specific sections,[7] and it increases punishment. Section 376(2) stipulates punishment for gang rape by two or more persons with the common intention of raping C, each of which can be awarded capital punishment or life imprisonment (no mention of fine), whilst the same punishment (death or life term incarceration) along with fine can be imposed on D for raping a minor or a person with mental or physical disability,[8] and so also for committing rape by a public servant including a police officer, medical officer or jailor, taking advantage of his official position.[9] These provisions are also more succinct in comparison with its Malaysian equivalents which are vague.[10] However, it is not clear as to why these circumstance elements have been added to s376, instead of s375 which primarily provides definition of the offense. It is absolutely reasonable that the punishments for rape with aggravating factors are higher[11] than that for rape without any aggravating element.[12] It should be noted that the circumstances of aggravation are still deficient compared to those of Singapore and NSW.

If we compare definitions of rape in Singapore, Malaysia and Pakistan which originally inherited an identical law, they are not identical any longer, rather they are different following subsequent amendments being made independently by each of them. Section 375 of the SPC1871 is noticeably different from its counterparts in Pakistan and Malaysia, representing both merits and demerits. Compared to the PPC1860 and the MPC1936, the definition of rape in the SPC1871is considerably broader in terms of both things to be penetrated and orifices of penetration. A gender bias definition is unacceptable these days, law must recognize the value of consent of both parties to sexual penetration regardless of genders. This is so because "[j]ustice must not only be done, but must also be seen to be done"─ the dictum laid down by Lord Hewart, the then Lord Chief Justice of England in 1924, in *Rex v. Sussex Justices ex parte McCarthy*.[13] Section 375 of the British colonial penal code of 1860 forms the statutory foundation of the rape laws of common law countries, which defined the offense with a gender bias phraseology.[14] Section 375 of the original penal code of 1860 resembles the common law definition of rape.[15] To meet the societal needs, the definition of rape has to be gender inclusive.[16] Section 375 in its initial form is thus outdated and old fashioned and thus ineffective. Such a definition of rape is termed as a monumental failure of penal law in combating rape.[17]

Section 375 in both the PPC1980 and MPC1936 in sexist, and it uniformly identifies 16 years as the age of consent, they exclude marital rape regardless of age of the wife as an exception to rape. Although spousal rape is negated in Malaysia, it provides a further explanation to clarify that despite the existence of a valid marriage, the marital rape exception does not apply if the husband is judicially barred from sexual intercourse when living together, or when living separately by virtue of a court order.[18] A similar prohibition is imposed on the husband whose Muslim wife is observing her period of '*Iddah'* (waiting period) ~~following~~ divorce, any sexual intercourse

[1] Huzaifa Sarfraz, et. al., *Knowledge and Perception of Marital Rape in Pakistan*, 6(1) INT. J. WOMEN EMPOWER. 61, 61 (2020).
[2] See, for details, Fahd Zulfiqar, *Issues on Explaining Legal Recognition of Marital Rape in Islam in Pakistan,* 12(1) INT. J. INTERDISCIP. CIV. POLITICAL STUD. 1, 11 (2017).
[3] The Criminal Law (Amendment) (Offences Relating to Rape) Act 2016 (Pak.) significantly amended the rape law in Pakistan.
[4] See s376 of the MPC1936, s376 of the Indian Penal Code 1860, s375 of the Penal Code of Bangladesh 1860, which contain only punishments of rape defined in their s375.
[5] PPC1860, s376(1).
[6] Section 376(1A) of the PPC1860 provides: Whoever commits an offense punishable under subsection (1) or subsection (2) or section 377 or section 377B and in the course of such commission causes any hurt punishable as an offense under section 333, section 335, clauses (iv), (v) and (vi) of subsection (3) of section 337, section 337C, clauses (v) and (vi) of section 337F shall be punished with death or imprisonment for life and fine. Sections of the PPC1860 referred to in s376(1A) are concerned with hurting another person.
[7] Ibid.
[8] PPC1860, s376(3).
[9] PPC1860, s376(4).
[10] Probably the comparable provision of the MPC1936 is s375(c)- 'consent obtained under a misconception'.
[11] PPC1860, s376(1A)-(4).
[12] PPC1861, s376(1).
[13] [1924] 1 KB 256.
[14] Pallavi Arora, *Proposals to Reform the Law Pertaining to Sexual Offences in India*, 3 J. INDIAN L. & Soc'y 233, 243 (2012).
[15] Ruba Saboor, *Rape Laws in Pakistan: Will We Learn from our Mistakes?* ISLAMABAD LAW REVIEW 65, 86 (2014).
[16] Zafar, *supra* note 24, at 131.
[17] Shariful Islam, *An Overview of the Existent Rape Laws in Bangladesh: Need for Urgent Reformation and Change*, 5(2) Green University Review of Social Science 45, 45 (2019). Notably, Bangladesh has the same inherited definition of rape in its Penal Code 1860 (Bangl.).
[18] MPC1936, s375, Explanation 1.

during that period by her husband amounts to rape.[1] These two explanations are logical, however, the second one should have been extended to the time until the day of delivery of baby where the wife is pregnant. Additional provisions in the MPC1936 include an important instance of circumstance that the women's consent given when they were unable to understand the nature and consequence of the underlying sexual act is appreciable.

The discussion of rape in the selected jurisdictions demonstrates both similarities and differences with respect to actus reus. This article is focused on the differences which have generated by gradual developments of rape laws tailored to cater for the changing needs of contemporary societies. Hence discussions of the actus Reus elements would be worthwhile to formulate specific suggestions for corresponding improvement of the laws which still remain at a standstill, perhaps because their lawmakers are complacent with the antique provisions which are overtly inadequate to deal with current practices in sexual offenses and therefore largely redundant today.

The following discussion turns the spotlight on the main actus reus elements drawing on the foregoing statutory provisions of four jurisdictions.

4. Analysis of Actus Reus of Rape

There are similarities in actus reus in defining rape and its equivalent offenses, such as sexual assault and sexual assault by penetration. The terms "rape" and "sexual assault" are used interchangeably in the remainder of this article. The actus reus elements of rape in modern times including its circumstance components can be identified as: (a) penetration that includes sexual intercourse with D's penis, any body parts or anything else; (b) causing or inciting a person of penetration; (c) cunnilingus which does not require penetration; (d) acts occurred without C's consent as circumstance of actus reus; and (e) with consent where C was unable to give consent freely and voluntarily owing to age, disability or being under undue influence, such as intoxication, disability or fear. These elements largely conform to the direction of the High Court of Australia (HCA), the highest court of the country, which held in a rape case[2] that the prosecution shall have to prove three things as conduct elements of rape. These are: (i) D had sexual intercourse with C; (ii) without C's consent or with consent of C who was unable to consent; and (iii) D knew[3] that C was not consenting or may not be consenting, nonetheless D continued to proceed with the act.[4] Cunnilingus was not relevant to the underlying facts of this HCA direction, so not included therein. The section that follows analyses these physical elements.

The central actus reus element is obviously sexual intercourse or penetration. However, as a matter of fact, sexual intercourse is embedded in penetration which is a broader term encompassing insertion of male's penis, any body part or any object into vagina or any orifices of C as a particular law proscribes. Hence, the act of sexual intercourse always includes penetration where the reverse is not necessarily true in all instances. The very act of penetration of any extent is sufficient in all laws. In the context of Malaysia, rape will be considered to have been committed by just "the tip of the penis between the labia".[5] However, there is one instance exclusively in NSW where rape or sexual assault can be committed without penetration, by the act of "cunnilingus" as an exception to penetration in committing rape.[6]

4.1 *Sexual Intercourse with Penetration*

The requirement of "sexual intercourse" is originated from the common law as only penile penetration by a male of a female's genitalia, and slightest penile insertion is sufficient to commit rape, where neither full penetration, nor emission (the release of sperm cells and seminal plasma from the male reproductive organs) is required.[7] This meaning is echoed in Black's Law Dictionary.[8] However, in the modern definition of rape as stated above, the act of sexual intercourse can be committed by inserting D's any body part or even any object, such as a bottle,[9] a finger,[10] or anything else, into C's vagina, mouth or anus. Reflecting this broader view, Australian Legal Dictionary defines "sexual intercourse" by referring to "[s]exual connection occasioned by the penetration of the female genitalia or the anus of any person by any part of the body of another person, any object manipulated by another person, or by the introduction of any part of the penis of a person into the mouth of another person, or cunnilingus (except where carried out for medical purposes)."[11] The NSWCA1900 provides a

[1] MPC1936, s375, Explanation 2.
[2] DPP (NT) v. WJI [2004] HCA 47; (2004) 219 CLR 43.
[3] 'Knowledge' is one of mens rea elements of rape, however, the fault elements will be discussed in a separate endeavor in order to keep the length of this article within the limit.
[4] DPP (NT) v. WJI [2004] HCA 47; (2004) 219 CLR 43.
[5] Kasinathan Nadesan & Siti Zawiah Omar, *Rape--the Malaysian Scenario* 24(1) MALAYSIAN J. PATHOL. 9, 11 (2002).
[6] NSWCA1900, s61HA.
[7] See De Armond v. State, 285 P.2d 236 (Okla. 1955).
[8] Henry Campbell Black, Black's Law Dictionary, 1134 (St. Paul Minn: West Publishing Co, 6th ed, 1990).
[9] Explanatory Notes of ULSOA2003, para 11.
[10] *Id.*
[11] Peter E. Nygh & Peter Butt (eds), Butterworths Australian Legal Dictionary, 1076 (Sydney: Butterworth, 1997).

statutory definition of the term for the purposes of sexual assaults. Its s61HA defines "sexual intercourse" as:

> (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by— (i) any part of the body of another person, or (ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or (c) cunnilingus, or (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

No definition of "sexual intercourse" as such is provided in the PPC1860 and MPC1936. Statutory clarification or definition of statutory terms by the legislature itself is always better than leaving it for the judiciary to interpret by discerning the legislative intention. The interpretation of legislation by the judiciary is not an easy task because the fundamental responsibility of courts is to apply the law, and when the law is ambiguous or flawed, courts have to interpret them by digging out the legislative intention behind the underlying provision of law or the purpose of the whole legislation.[1] This is always a complex task and it sometimes may produce unpredictable or even absurd outcomes. The above definition of "sexual intercourse" is carefully worded by encompassing the sexual activities amounting to punishable intercourse being currently practised in the society. Other jurisdictions may borrow the well-articulated definition stated above for their respective legislation.

The SPC1871 uses the term "penetration" instead of "sexual intercourse". Other three pieces of legislation clarifies that "penetration" is sufficient to constitute sexual intercourse, but they define neither of the two terms. However, s377C(3) of the SPC1871 defines penetration for the purposes of sexual offenses under the legislation. According to s377C(3)(a), "penetration is a continuing act from entry to withdrawal", which is borrowed from the UKSOX2003.[2] The SPC1871 does not provide any further clarification. However, the Explanatory Notes of the UKSOX2003 (EN-UKSOX2003) prepared by the UK Ministry of Home explains the term further connecting it to consent that "a person consents at the time of entry to penetration, but then withdraws his[3] consent and the penetration continues, the person penetrating may be guilty of rape or assault by penetration."[4] The penetration is prohibited under the rape law when it is "sexual". Section 377C(3)(d) of the SPC1871 contains an interpretation of the word "sexual" which states that "penetration, touching, communication or other activity is "sexual" if —(i) because of its nature it is sexual, whatever its circumstances or any person's purpose in relation to it may be; or (ii) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual".

Although the interpretation is meant to have been adopted from the UKSOX2003, it is not sufficiently clear, unlike its UK counterpart. Section 78 of the UKSOC2003 offers a better clarification that "penetration, touching or any other activity is sexual if a reasonable person would consider that—(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual." According to this clarification, the striking difference in determining whether a disputed act is sexual or not, an objective test has to be applied, without considering D's personal knowledge or belief. The objective test appears to be most appropriate in the present context in that D should not escape liability by claiming that he/she did not personally think the act in question was sexual.

The NSWCA1900 also provides a meaning of "sexual act" for present purposes. Its s61HC reads:

> (1) … "sexual act" means an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual.
> (2) The matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual include--
> (a) whether the area of the body involved in the act is a person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or
> (b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or (c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual. (3) An act carried out for genuine medical or hygienic purposes is not a sexual act.

The spirits and tests of the two definitions are similar, however, s61HC of the NSWCA1900 is clearer than s78 of the UKSOA2003.

The definition of "sexual" penetration as stated above can be adopted by those which have chosen to use

[1] For approaches to statutory interpretation, see Michelle Sanson, STATUTORY INTERPRETATION, 198-224 (Oxford University Press, 2016).
[2] The definition of "penetration" is borrowed from the *Sexual Offences Act 2003* (UK), s79(2).
[3] The UKSOA2003 uses masculine pronouns here, though it should have been gender neutral.
[4] Explanatory Notes on the UKSOS2003, para 148.

"penetration" in their definition of rape. The test must be objective to determine the sexuality of penetration constituting rape.

As it appears in the above stated meanings of "sexual intercourse" and "penetration", the two are inherently interconnected, therefore these are used synonymously in this article unless otherwise stated.

When we closely read the definitions of rape and the meanings of the central terms of "sexual intercourse" and "penetration", the contemporary concepts of these two are much broader than what they were initially defined in 1860. The act of only peno-vaginal penetration narrows down the scope of rape markedly, meaning that a certain sexual act is rape in one country, but the same act is either not an offense or a minor offense in another country. The rape is a violation of human right which must be equally protected for all human beings, their national and residential locations regardless. Hence, these modern concepts should be incorporated into the PPC1860 and the MPC1936.

4.2 *Cunnilingus as Actus Reus of Rape without Penetration*

"Cunnilingus" is a relatively new concept as actus reus of rape, which is added to the law of NSW.[1] Three other selected jurisdictions are absolutely silent about "cunnilingus", thus effectively exclude this act, because they all require either penile and/or at least a sort of penetration. "Cunnilingus" is included in the statutory definition of sexual intercourse, without adding any interpretation of its meaning in the NSWCA1900. However, the NSWCCA in *BA v R* interpreted that it (cunnilingus) need not involve penetration, rather refers to oral stimulation of the female genitals with the mouth or tongue.[2] The court in *R v Corkin* (No 2) proffered a similar interpretation with a further clarification that cunnilingus does not actually entail penetration by tongue into female genitalia.[3] Furthermore, the court in *R v Randall* explained that cunnilingus refers to the licking or sucking of a woman's vagina including labia majora, regardless of whether the tongue touches inner or outer part of the labia.[4]

The MPC1936 and PPC1860 do not mention anything about cunnilingus. However, s377C(3)(d) of the SPC1871 explains that "penetration, touching, communication or other activity" can be "sexual" because of its nature or the circumstance of purpose of any person of doing that act is sexual, as stated earlier. It is unclear about the applicable test to prove the sexual nature of the disputed act. If an objective test is applied, then this interpretation makes a good sense, conversely a subjective test may make it harder for prosecution to prove D's guilt. However, the NSWCA1900 is much clearer about this, suggesting an objective test to apply. Briefly, any act of cunnilingus is obviously sexual, if an objective test is applied to the determination of the nature of the act. Unlike the other two, the PPC1860 and MPC 1936 still hold its old definition of rape steadfastly, hence they do not embrace "cunnilingus" as an actus reus element of rape. They should incorporate this act as part of sexual intercourse to reflect the modern concept of rape.

The rape in the PPC1860 and MPC1936 have even more deficiencies. *First*, they are still circumscribed in peno-vaginal penetration. By contrast, the SPC1871 and the NSWCA1900 criminalize penetration into the vagina, mouth, urethra or anus with D's penis, any body part or any object. *Second*, it is to be mentioned that both of the PPC1860[5] and MPC1936[6] criminalize certain sexual activities branding them as "unnatural offenses". These provisions largely uphold the old concept of homosexuality as an unnatural offense, which is now legally accepted as legitimate acts in many countries.[7] So the prohibitions based on homosexuality can be incorporated into the mainstream definition of rape. However, from religious point of view, some may argue for keeping them separate. Having due regards for the religious proscriptions, we would argue that bringing them to the sex neutral definition of rape would make the prohibitions even stronger. *Third*, amongst the four jurisdictions at hand, only Pakistan still treats sexual offenses against humans and animals alike,[8] whilst others have separated these two distinct offenses.[9] It looks completely odd and unfair to treat humans alongside animals with respect to sexual offenses. Hence, Pakistan should consider overhauling its s377 without further ado. *Fourth*, the provision of Pakistan noticeably differs from its other three counterparts in respect of causing hurt or injury to facilitate commission of sexual intercourse, no unique provision exists amongst the selected jurisdictions. The PPC1860

[1] Section 61HA(c) of the NSWCA1900.
[2] [2015] NSWCCA 189 at [9].
[3] R v. Corkin (No 2) (1988) 50 SASR 28, 289.
[4] R v. Randall (1991) 55 SASR 447, 452.
[5] PPC1860, ss377-377A.
[6] MPC1936, ss377-377E.
[7] Australia, based on a nationwide referendum, has amended and updated the Marriage Act 1961 (Cth) on Dec. 9, 2017 to allow for same sex marriages in the name of "marriage equality": see Australia Government, Attorney-General's Office, Marriage equality in Australia, available at https://www.ag.gov.au/families-and-marriage/marriage/marriage-equality-australia (Dec. 19, 2021). Similarly, The UK Parliament legislated the Marriage (Same Sex Couples) Act 2013 with effect from Mar. 13, 2021, permitting same-sex marriages in England and Wales.
[8] PPC1860, s377.
[9] MPC1936, ss377 (against animals), s377A (against another person): Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature." For sexual penetration by humans with animals, see SPC1871, s377B; NSWCA1900, ss79-80.

has only a single provision of putting C herself in fear of death or hurt for the commission of sexual intercourse, where no actual hurt is required to occur.[1] The MPC1936 goes one step further by including C herself or any other person to be putting in fear of death or hurt for sexual intercourse with C, though no actual hurt is needed to take place.[2] Similar to the MPC1936, the SPC1871 contains the same circumstance of putting C or any other person in fear of death or hurt for committing rape. However, the NSWCA1900 addresses the issue differently and arguably more efficiently. The NSWCA1900 includes this concept in different terms under s61J which defines aggravated sexual assault, adding more seriousness to the sexual assault equivalent to rape. Section 61J(2)(b) makes the rape aggravated attracting a higher punishment if D "threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument" at the time of, or immediately before or after, the commission of the offense; and s61J(2)(b1) makes the rape aggravated if D "threatens to inflict grievous bodily harm or wounding on the alleged victim or any other person who is present or nearby," at the identical timeframe as in s61J(2)(b). It does not mention death, but specifies the nature of hurt more clearly compared to others. In addition, it is also more succinct about "any other person" in that the person has to be present at the crime scene or nearby at the time of, or immediately before or after, the commission of the offense. These clarifications are useful and can be followed by others. However, NSW should include the threat of death as well. *Fifth*, although the PPC1960 and MPC1936 are concerned about the threat of killing or hurting C or another person,[3] they both are absolutely silent about causing hurt connecting to sexual intercourse. To the contrary, both the SPC1871 and NSWCA1900 incorporate causing hurt to any person.[4] The NSWCA1900 provides more specifically that D inflicts ABH on the alleged victim or any other person who is present or nearby.[5] However, it is questionable as to why the NSWCA1900 does not include inflicting GBH. Both the PPC1860 and MPC1936 should include inflicting ABH or GBH to C or another person. Also the NSWCA1900 could consider embracing perpetrating GBH alongside the exiting ABH. *Sixth*, the NSWCA1900 is the only legislation amongst the four pieces at hand, which considers breaking and entering "any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence" of sexual assault as an aggravating factors.[6] In addition, it also counts depriving C his or her liberty for a period before or after the commission of the offense.[7] These two incidents go beyond physical harm. Breaking and entering as well as deprivation of liberty are both reasonable circumstance elements of sexual assaults, hence, they could be added to the rape provisions of other three jurisdictions.

The components of actus reus element of rape in four jurisdictions explained above are to be committed either without consent or with consent which was vitiated by any of the specified factors. In either case, consent is in the essence of rape, which warrants a further analysis. The following section thus concentrates on the need for, and vitiation of, consent as a circumstance component of physical element of rape.

5. Consent as Stated in the Current Legislation

Proving consent as a central concern is the most critical part of any prosecution against rape. Non-consent is the prime substance of the offense, and it is sometimes "the sole issue in deciding whether rape has been committed"[8] particularly when D admits having sexual intercourse with C. Arora finds in the Indian context that those who come forward to punish the culprits, more than 65 percent of them are deprived of justice, that can be attributed to clouded concept of "consent" and "penetration", where consent is not defined in legislation.[9] The investigation into sexual conduct has been inextricably linked to the concept of consent, as its absence implies the presence of sexual violence.[10] The word "consent" generally stands for an individual's positive agreement, which needs to be communicated by either words or actions, to engage in a specific sexual act. Consent signifies "something internal to the actor and not just some ritual in which she intentionally engages."[11] The indiscernible connection between consent and individual autonomy is a commonplace in legal and political discourse.[12] For the purposes of sexual offenses, "consent" in law denotes "a person consents if he agrees by choice, and has the freedom and capacity to make that choice."[13] Generally, for consent to be acceptable in law, the person whose consent is disputed must first manifestly show his/her capability to consent to the act which ought to be rational,

[1] PPC1860, s375(iii).
[2] MPC1936, s375(c).
[3] "Another person" is included in Malaysia only, not in Pakistan.
[4] SPC1871, s375(3)(a).
[5] NSWCA1900, s61J(3)(a).
[6] NSWCA1900, s61J(2)(h).
[7] NSWCA1900, s61J(2)(i).
[8] Nadesan & Omar, *supra* note 154, at 12.
[9] Arora, *supra* note 145, at 259.
[10] Karla O'Regan, LAW AND CONSEN: CONTESTING THE COMMON SENSE, 52, (Taylor & Francis Group, 2019).
[11] Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO St. J.
CRIM. L. 397, 412 (2016).
[12] O'Regan, *supra* note 183, at 20.
[13] Section 74 of the UKSOA2003.

and must be adequately informed of the acts the consent is needed for, and his/her positive response is essentially required to be voluntarily formed by clear-thinking for socially valuable ends.[1] It means the law will look for three most prevalent preconditions─ being knowledge, voluntariness, and rationality in attaching legitimacy to consent.[2]

Wherever consent is a legal consideration, it ought to be generally free, voluntary and informed,[3] irrespective of their mentions in the legislation that defines the wrongful conduct.[4] The valid consent of C typically exonerates D from the liability of rape. Law usually requires prosecution to prove that C did not consent at the starting point of sexual intercourse, or though initially consents, C withdraws his/her consent at one stage─ nonetheless D continues. It is a question of fact whether C consents or continues to consent until the end, therefore the issue has to be decided by the trier of fact (either the jury, or the judge in a judge alone trial), and they will assess the facts by reference to C's actual state of mind at the time when the sexual act takes place.[5] Sjölin elucidates, highlighting the importance and complexity surrounding consent, that consent remains in "the heart of rape and the other non-consent offenses, but it is a complex concept, both in the sense of being difficult and in the sense of consisting of a number of related parts."[6] Such a complexity and significance of consent warrant a statutory definition of the term in order to effectively combat this scandalous offense and ensure justice for the society when rape takes place.

A well-articulated definition in the legislation can be helpful by providing sufficient clarity about presumption of consent, for example, it can make clear that C's failure to resist D will be no reason to argue against his/her non-consent.[7] A detailed and definitive description of circumstances in which presumption of C's consent will be negated *per se* can educate the community about the boundaries of prohibited sexual conduct.[8] Such a view is echoed in the recommendation of the United Nations Division for the Advancement of Women which suggests that the legislative approach to drafting consent should require an "unequivocal and voluntary agreement", and that D shall have to prove the steps taken to ensure whether C was consenting.[9]

The existing provisions of NSW describing specific circumstances[10] to govern C's consent to sex are fairly rich compared to the other three jurisdictions. They were, nevertheless, assessed to be inadequate, leading to the enactment of the NSWCLA2021 by the Parliament of NSW,[11] which ordains significant reforms in the pre-existing consent law.[12] Notably, the NSWCLA2021 received the Royal Assent on December 8, 2021, and will come into force approximately six months after the date of the Assent. Hence, the current version of the NSWCA1900 as of April 2022 does not integrate the amendments made by the NSWCLA2021. However, to keep abreast of the latest development, this article considers both the existing as well as the amended provisions of consent taking into account that they can persuade others to follow suit in revisiting and updating their own laws.[13] It is reasonably presumed that the NSWCLA2021 can serve as a wake-up call for those jurisdictions which are deficient in consent provisions for not providing any or adequate clarification of consent in their respective legislation.

Provisions of consent are currently contained in s61HE of the NSWCA1900.[14] It provides a definition of consent and illustrates the ways of establishing its existence. Section 61HE defines the term in a simple manner that a person "consents" if the person freely and voluntarily agrees to the sexual activity.[15] However, s61HE digs deeper into the critical issue of consent realistically anticipating that where consent is required to be free and voluntary,[16] there is a probability of consent being tainted by intimidation, threat or otherwise undue influence,

[1] O'Regan, *supra* note 183, at 20.
[2] *Id*.
[3] Nadesan & Omar, *supra* note 154, at 12.
[4] See Rachael Burgin & Jonathan Crowe, *The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?* 32(3) CURR. ISSUES CRIM. JUSTICE 346 (2020).
[5] Australian Government, Australian Law Reform Commission, Consent, para 25.72 (2010), https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/25-sexual-offences-3/consent-4/ (las visited Dec. 22, 2021).
[6] C Sjölin, *Ten years on: Consent under the Sexual Offences Act 2003*, 79(1) J. CRIM. L. 20, 20 (2015).
[7] R v Malone [1998] EWCA Crim 1462;
[8] Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences against the Person* (1999), 33, 35. See also: Criminal Justice Sexual Offenses Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 34. A definition of consent was subsequently inserted in the NSW legislation and further revised by the NSWCLA2021 mentioned earlier.
[9] United Nations Department of Economic and Social Affairs Division for the Advancement of Women, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN, 26 (United Nations, New York, 2010).
[10] NSWCA1900, ss61HE(2), (5)-(11).
[11] For a background and recommendations of the Law Reform Commission, see NSW Law Reform Commission, *Consent in Relation to Sexual Offences*, Report 148 (Sep. 2020).
[12] The NSWCLA2021 will delete the existing s61HE of the NSWCA1900 and replace it with a bunch of sections from s61HF to 61HK under a new "Subdivision 1A" on "Consent and knowledge of consent", when the new amendments will be given effect.
[13] For reasons prompting these changes under the NSWCLA2021, see NSW Law Reform Commission, *supra* note 197.
[14] NSWCA1900, s 61HE (formerly s 61HA).
[15] NSWCA1900, s 61HE(2)
[16] Positive definition of consent as "free and voluntary agreement" was introduced in 2007 under s61HE (2).

as it can be seen in the clarifications of D's "knowledge about consent" under the existing law that:

> (3) A person who without the consent of the other person (the 'alleged victim') engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if─ (a) the person knows that the alleged victim does not consent to the sexual activity, or (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.
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> (4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case─ (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but (b) not including any self-induced intoxication of the person.
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> (5) Negation of consent─ A person does not consent to a sexual activity─ (a) if the person does not have the capacity to consent to the sexual activity, including because of age or cognitive incapacity, or (b) if the person does not have the opportunity to consent to the sexual activity because the person is unconscious or asleep, or (c) if the person consents to the sexual activity because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or (d) if the person consents to the sexual activity because the person is unlawfully detained.
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> (6) A person who consents to a sexual activity with or from another person under any of the following mistaken beliefs does not consent to the sexual activity─ (a) a mistaken belief as to the identity of the other person, (b) a mistaken belief that the other person is married to the person, (c) a mistaken belief that the sexual activity is for health or hygienic purposes, (d) any other mistaken belief about the nature of the activity induced by fraudulent means.
>
> (7) For the purposes of subsection (3), the other person knows that the person does not consent to the sexual activity if the other person knows the person consents to the sexual activity under such a mistaken belief.
>
> (8) The grounds on which it may be established that a person does not consent to a sexual activity include─ (a) if the person consents to the sexual activity while substantially intoxicated by alcohol or any drug, or (b) if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or (c) if the person consents to the sexual activity because of the abuse of a position of authority or trust.
>
> (9) A person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.
>
> (10) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.[1]

The above clarifications of the vitiation of consent are self-explanatory, and an added beauty of the list is that it is non-exhaustive. Despite this, s61HE was found to be inadequate to ensure the presence of the essential valid consent of C. Hence, NSW is replacing s61HE with several new sections comprising a new Subdivision 1A (ss61HF- 61HK to replace s61HE) in the NSWCA1900 as mandated by the NSWCLA2021.[2] Strikingly noticeable that each of the sections in Subdivision 1A is dedicated to a certain aspect of consent that will be elucidated where appropriate in the discussion that follows.

The new amendments exceptionally make a start with a statement of the objective of Subdivision 1A in s61HF that the objective is to recognise: "(a) every person has a right to choose whether or not to participate in a sexual activity, (b) consent to a sexual activity is not to be presumed, (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity."[3] The objective is followed by confirmation of the applicability of the amendments in 61HG that they apply to the offenses at hand[4] with respect to C's consent and D's actual or deemed knowledge of C's non-consent. The exiting s61HE which briefly defines the word "consent" can be distinguished from the new clarifications to be contained in s61HI. Section 61HI provides a greater clarity in defining "consent" with the identification of the relevance of "freely and voluntarily" given consent that must exist from beginning to the end of sexual activity to be ensured through mutual communication. Section 61HI spells out: Consent generally─

> (1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity. (2) A person may, by words or conduct, withdraw consent

[1] NSWCA1900, s61HE(3)-(10).
[2] "Subdivision 1A Consent & Knowledge of Consent", will be inserted into the NSWCA1900 to replace s61HE when the NSWCLA2021 comes into effect.
[3] "Sexual activity" is defined in s61HH as being "sexual intercourse, sexual touching or sexual act", which are currently defined in ss61HA, 61HB and 61HC respectively.
[4] Sections ss61I,61J,61JA etc., of the NSWCA1900.

> to a sexual activity at any time. (3) Sexual activity that occurs after consent has been withdrawn occurs without consent. (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity. (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Section 61HI proffers an example of the above subsection (5) by way of illustration that "[a] person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom." Section 61HI further adds that "[a] person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—(a) that person on another occasion, or (b) another person on that or another occasion."[1]

The provisions in s61HI that will render C's consent unacceptable or vitiated are precisely worded in simple terms. They definitely answer many questions about deciding factors that may potentially arise in allegations of offenses of rape. A striking distinction between existing s61HE and new s61HI is that the former contains directly only one of the above six points listed in s61HI, and that sole point is "lack of resistance" by C.[2] This minimum commonality demonstrates the much wider scope of s61HI compared to its predecessor in terms of existence and validity of C's consent to sex with D.

We are not arguing that the new amendments are all perfect, as we admit that achieving perfection in drafting law is not always easy mainly because of unpredictable offensive conduct of unscrupulous people and social acceptance or denouncement of that conduct at a given point of time, which are both ever changing. Accordingly, we are skeptical about the efficacy of s61HI(3) which is linked to continuation of sex by D after C's withdrawal of consent. It may sometimes unreasonably fail to protect truly innocent accused persons from punishment and social stigma. This is so because it might not be an unlikely fact particularly in respect of sex between spouses, that wife may be satisfied well before husband's ejaculation, and therefore she is very likely to withdraw her consent at least verbally, though she may still continue to enjoy and impliedly permits her spouse to continue until his ejaculation. This may probably be the case in homosexual couples as well. It is very unlikely that both actors will have the full satisfaction at exactly the same moment, though the intercourse was meant to be for mutual satisfaction. In such a situation, the continuing party may be unfairly guilty under s61HI(3). We, therefore, submit that lawmakers should invest further thoughts in clarifying difficulties inherent in determining a realistic meaning of "continuation" and setting up certain standards of communication of withdrawal of consent─ whether the unsatisfied party needs to stop immediately or can continue until a reasonable time for mutual satisfaction without causing any real harm to anyone, following the verbal withdrawal of the partner.[3]

The complexity in proving a rape case primarily lies in the fact that most of those cases occur in private environment allowing the presence of no eyewitness. It makes harder to prove guilt not only in terms of corroboration, but also potential dishonesty of either party to a disputed sex about consent. Current s61HE of the NSWCA1900 does provide several specific circumstances[4] which are applicable to the determination of C's consent, but those were found to be deficient. In response, s61HJ, to be added by the NSWCLA2021, tacitly negates the presumption of C's consent by D, and prescribes a longer list of circumstances which will speak for themselves in proving C's non-consent. As s61HJ(1) stipulates: Circumstances in which there is no consent─

> A person does not consent to a sexual activity if— (a) the person does not say or do anything to communicate consent, or (b) the person does not have the capacity to consent to the sexual activity, or (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or (d) the person is unconscious or asleep, or (e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of— (i) when the force or the conduct giving rise to the fear occurs, or (ii) whether it occurs as a single instance or as part of an ongoing pattern, or (f) the person participates in the sexual activity because of coercion,
>
> blackmail or intimidation, regardless of— (i) when the coercion, blackmail or intimidation occurs, or (ii) whether it occurs as a single instance or as part of an ongoing pattern, or (g) the person participates in the sexual activity because the person or another person is unlawfully detained, or (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or (i) the person participates in the sexual activity because the person is mistaken about— (i) the nature of the sexual activity, or (ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or (j) the person participates in the sexual activity with another person because the person is mistaken— (i) about the

[1] NSWCA1900, s61HI(6) to be added when the new amendments are put in place for enforcement.
[2] NSWCA1900, s61HE(9): A person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.
[3] See Theodore Bennett, *Consent Interruptus: Rape Law and Cases of Initial Consent*, 19 FLINDERS L. J. 145, 183 (2017).
[4] See above s61HE of the NSWCA1900.

identity of the other person, or
(ii) that the person is married to the other person, or (k) the person participates in the sexual activity because of a fraudulent inducement.

Although the list is longer compared to its existing counterpart,[1] s61HJ(2) protects the judicial discretion to consider any other facts that may evidence that C did not consent to an alleged consensual sexual act. It means the above list in s61HJ(1) is inclusive.

When s61HE is viewed through the lenses of new s61HJ, the deficiencies in the former becomes evident in that it attempts to consolidate various aspects of consent in one place, whereas the latter is devoted to solely "no consent" circumstances, however they are not completely different as there are still both commonalities and differences between these two important sections. Having said that, we admit taking a holistic view that, s61HJ is much clearer and broader in prescribing the circumstances which will automatically render C's consent invalid, even if it was given under a certain circumstance. It is appreciable that both sections commonly note that the sets of circumstances to nullify C's consent is non-exhaustive.[2] Section 61HJ is believed to be greatly helpful in securing conviction of real culprits who might have intended to avoid liability relying on unacceptable consent of victims.

The SPC1871imposes certain conditions to be complied with in securing acceptance or consent of sex partner. Its s375 contains all of the major restrictions. *First*, the consent of the other party who is below 14 years old is simply meaningless in general, because despite the fact that C under 14 years gives consent, D shall be guilty of rape for both vaginal and non-vaginal penetration.[3] *Second*, a separate offense of voluntarily causing hurt to "any person" or puts such any person in fear of death or hurt that particular person or any other person is a sexual offense, if the hurt or threat is inflicted in order to commit rape under subsection (1) or (1A) of s375.[4] To be found guilty under s375(3) of the SPC1871, D must commit the designated sexual offense after the aforesaid hurt or threat being caused.[5] It means, D must commit two offenses─ infliction of hurt or threatening to kill or hurt, and then rape. Rape is committed if consent obtained by D who has an exploitative relation with C who is below 14 years of age─ C's consent regardless.[6] The offense under s375(3)(c) is already included in ss375(1) and (1A) with a similar punishment,[7] adding "exploitative relation" has prompted to set out the minimum imprisonment of eight years keeping the maximum 20 years unchanged and also canning of at least 12 strokes.[8] Section 375(5) provides a defense against an offense under subsection (1)(b) or (1A)(b), if D proves (burden on D, but not mentioned whether evidential or legal burden) "that by reason of mistake of fact in good faith, he believed that the act of penetration against a person was done with consent." This is highly protective of D in that it relies on D's subjective belief, which has been replaced with an objective test or objective belief in the UK where the SPC1871 has borrowed this provision from.[9] More unacceptably, s375(6) removes the age bar of 14 years with respect to consent as it exculpates D from liability if C was under 14 years old, but D mistakenly believed C consented to penetration. It seems to be self-contradictory because subsections (1), (1A) and (3)(b) of s375 ignore such a C's consent against D, but subsection (6) protects D simply for his (man) subjective mistake, which is always difficult to disprove in the absence of corroborative evidence. Similar provisions are contained in s376A of the SPC1871involving minors aged between 14 and below 16 years, whilst s376AA concerns offenses against C who is in exploitive relation with D, or C is above 16 years of age but below 18 years, consent of such a C is not a defense.[10] Consent provisions in s376AA are similar to those in its s375.

If the consent provisions contained in ss375-376AA of the SPC1871 are compared with those in s61HE of the NSWCA1900, the former are obviously deficient on several counts. *First*, the NSWCA1900 provides two sets of rules, one regarding D's knowledge about consent that C's consent is invalid under certain circumstances,[11] and the other about outright negation of C's consent[12]─the SPC1871 does not have any clear demarcation of provisions as to their contents. *Second* unlike the NSWCA1900 which proffers a precise definition of "consent",[13] the SPC1871 does not provide such a definition, nor does it mention that consent has to be "free and voluntary". *Third*, D's knowledge of C's non-consent will be presumed if D knows that C does not

[1] NSWCA1900, s61HE.
[2] NSWCA1900, ss61HE(10) and s61HJ(2).
[3] SPC1871, s375(1)(b), s375(1A)(b).
[4] SPC1871, s375(3)(a).
[5] SPC1871, s375(3)(b)-(c).
[6] SPC1871, s375(3)(c).
[7] Imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning: SPC1871, s375(2).
[8] SPC1871, s375(3).
[9] See DPP v Morgan [1976] AC 182 HL in which the House of Lords affirmed that D's believe must be genuine and honest, and need not be reasonable. So the subject test was applied. However, the UKSOA2003 requires an objective or a reasonable person test.
[10] SPC1871, s377AA(2)(b).
[11] NSWCA1900, s61HE(3)-(4).
[12] NSWCA1900, s61HE(5).
[13] NSWCA1900, s61HE(2).

consent, or D is reckless as to C's consent or D has no reasonable grounds for believing that C consents. In making determination on such knowledge, the trier of fact shall take a holistic view of all circumstances including any steps taken by D to ensure C's consent, but excluding D's self-induced intoxication.[1] The SPC1871 does not have any comparable provisions, other than D's mistaken subjective believe that C consents. The NSWCA1900 applies objective test (reasonable grounds), whilst the SPC1871suggests subjective test to be applied, this demonstrates a huge difference in terms of prosecutorial burden in securing conviction. This is so because the subjective believe is harder to disprove. In addition, the holistic approach taken in NSW would be more helpful in punishing true culprits. *Fourth*, the provisions of the NSWCA1900 regarding negation of consent[2] are clear, which stipulate that a person does not consent if the person lacks capacity because of age or cognitive incapacity, or does not have the opportunity to consent because of his/her unconsciousness or being asleep, or the person gives consent due to threat of force or terror instilled in C or any other person, or finally C consents because of being unlawfully detained.[3] Corresponding provisions of the SPC1871 are contained in s375(3) and s376(4) which consistently create separate sexual offenses if D voluntarily inflicts hurts to any person, or puts any person in fear of death or hurt to any persons including C in order to commission or facilitation of penetration. *Fifth*, further circumstances of negating C's consent are stated in s61HE(6) of the NSWCA1900. It specifies that consent given under a mistaken belief as to the identity of D, or as to the spousal relation with D, or based on falsity of need for health or hygienic purposes, or any other mistaken belief as to the nature of the sexual activity induced by fraudulent means. This mistaken belief is connected to the knowledge mentioned in s61HE(3), that if D knows that C consents under such a belief, then D also knows that C does not consents. No comparable provision exists in the rape law of the SPC1871. *Sixth*, further clarifications as to the negation of consent are added in s61HE(8) which specifies three grounds based on which C's consent can be negated. These include that C consents: (i) when C was substantially intoxicated,[4] or (ii) as a consequence of "intimidatory or coercive conduct, or other threat, that does not involve a threat of force",[5] or (iii) due to the abuse of a position of authority or trust.[6] No equivalent provisions are found in the SPC1871, other than a reference to D's exploitative relation with C.[7] Additionally, s376AA of the SPC1871 is fully devoted to exploitative sexual penetration of minor of or above 16 but below 18 years of age. Section 377CA of the SPC1871 offers a detailed statutory meaning of "exploitative relationship" by reference to C's age, the nature of the relationship, the degree of control and so on. Arguably, it does cover the segment of "a position of authority or trust" mentioned in the NSWCA1900, however, C's intoxication and victimisation by D's intimidatory or coercive conduct are not well covered in the SPC1871. *Seventh*, the final circumstance of negation of C's consent is listed in s61HE(9) of the NSWCA1900. It negates C's consent presumed based on C's failure to resist D. Such a crucial point is missing from the SPC1871. *Eighth*, the last but not the least, the list of these circumstances in the NSWCA1900 is open-ended, meaning the courts can consider any other circumstantial evidence that may vitiate C's consent for the sake of justice.[8] For example, the NSWCCA in *R v Oloitoa* considered personal degradation of C as an aggravating factor.[9] This flexibility is totally absent from the SPC1871.

The foregoing points of distinction sharply unveil the deficiencies in the rape law of Singapore compared to its counterpart of NSW presently in place. Without having to repeat the previously discussed new amendments proclaimed by the NSWCLA2021, we can confidently argue that even more weaknesses will be evident if the provisions of the SPC1871 are compared with the new consent provisions of NSW to be inserted later in 2022.[10] A simple reason for such an inference is that the NSWCLA2021 is an outcome of long term research carried out by the academia and the NSW Law Reform Commission in a bid to further improve consent provisions, and it is widely believed that the new version of consent law would help deliver justice to the society in a more efficient and effective manner. Having said this, we turn to consider comparatively the consent provisions set out in the MPC1936.

Compared to the NSWCA1900, the MPC1936 is certainly deficient, however, it is somehow in close proximity with the SPC1871. Regarding vitiating elements of consent, s375 of the MPC1936 declares that C's consent will amount to non-consent if: (i) the consent is obtained by putting her (only woman) in fear of death or hurt to herself or any other person,[11] or (ii) the consent is given under a misconception of fact, where D (only

[1] NSWCA1900, s61HE(3)-(4).
[2] NSWCA1900, s61HE(5).
[3] NSWCA1900, s61HE(5)(a)-(d).
[4] NSWCA1900, s61HE(8)(a).
[5] NSWCA1900, s61HE(8)(b).
[6] NSWCA1900, s61HE(8)(c).
[7] SPC1871, s375(3)(c), s376(4)(c).
[8] Thorne v. R [2007] NSWCCA 10 at [82].
[9] [2007] NSWCCA 177 at [42]. See also Cole v. R [2010] NSWCCA 227 at [87].
[10] The date is yet to be fixed, however, it should take place sometime in 2022 when the NSWCLA2021 will come into force.
[11] MPC1936, s375(c).

man) knows or has reason to believe that C's consent was influenced by that misconception;[1] (iii) C gives consent mistakenly believing that D is her husband, where D knows of C's mistake;[2] (iv) C was unable to understand the nature and consequences of sexual act she consents to;[3] and (v) C is under 16 years of age when she consents.[4] Section s375(d) of the MPC1936 adds a clause to C's mistaken belief of having marital relation with D or that D is another man " to whom she would consent",[5] which is different from the SPC1871. It is unclear as to whether it means C would consent to marry that another person or something else. This needs to be clarified. The mistake about the marital relation is mentioned in an illustration of the SPC1871, excluding this additional clause.[6] The age of consent is a critical factor in relation to any sexual activity, and the MPC1936 differs from the SPC1871 on such an age which is 16 years in the MPC1936 and 14 years in the SPC1871. Having considered both of these two differences, the MPC1936 sounds more acceptable if it clarifies the first point ("or to whom she would consent"). Having said this, we can infer without repeating the differences between the laws of NSW and Malaysia, that the deficiencies that exist in the law of Singapore in light of its NSW counterparts, those are applicable to Malaysian law as well. We will find the law of Pakistan even more deficient, as shown below.

Consent vitiating circumstances are subsumed in s375 of the PPC1860. The circumstances largely resemble those which are embodied in the SPC1871 and the MPC1936. The vitiating circumstances in the PPC1860 which are identical to those in the MPC1936 are: (i) C's consent is obtained by putting C into fear;[7] or (ii) consent is given because of mistaken belief of having spousal relationship with D;[8] or (iii) consent is given when C is under 16.[9] The PPC1860 differs from its Malaysian counterpart on two instances: (i) the MPC1936 embraces a general provision of circumstance that C gives consent under a misconception, which is considered ambiguous in terms of the basis or ground of misconception; the PPC1860 does not have any such general vitiating elements;[10] and (ii) the PPC1860 does include mistake about spousal relation, excluding the additional clause which is included in s375(d) of the MPC1936 that D is another man "to whom she would consent".[11] As noted earlier, this additional clause placed within the quotation marks is ambiguous. This addition is totally absent in the PPC1860, like in the SPC1871. Otherwise, the laws governing definitions of rape in Malaysia and Pakistan are identical, therefore the latter is as deficient as the MPC1936, except for the above two differentiating additional points embraced in the MPC1936.

The deficiencies and differences identified about in the chosen laws call for immediate attention to close the gaps and improve the laws to deal with rape cases more efficiently.

Some of the circumstantial incidents deserve greater attention than others in terms of significance and further clarification, as elucidated below.

5.1 *Lack of Resistance and Affirmative Consent*

Rape is generally a sexual aggression by physically stronger party against a weaker counterpart[12] in an environment where the latter is literally helpless. Hence, fruitful resistance or even an attempt to resist may not be expected in most cases. Amongst the selected four jurisdictions, only the NSWCA1900 contains the provision that C's failure to resist does not represent his/her consent. This provision should be incorporated into the rape laws of all countries. It originated in the common law rape, which has been fundamentally changed in NSW. To avoid any question of resistance, the statutory law shifts the focus from confrontation to affirmative consent in C's favor, in order to prevent misinterpretation of C's consent by D. According to the current law of NSW,[13] D commits rape if he/she knows that C is not consenting, or D is reckless as to whether C consents, or D does not have any reasonable ground to believe that C consents to sex.[14] "Consent" is a game changer in a rape case. Hence, either party may lie before the court as a defensive strategy particularly in the absence of corroborative eye-witness or compelling circumstantial evidence. To assist C with establishing the lack of consent, statutory

[1] MPC1936, s375(c).
[2] MPC1936, s375(d).
[3] MPC1936, s375(e).
[4] MPC1936, s375(f).
[5] MPC1936, s375(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".
[6] SPC1871, s377CB(2)- illustration (c).
[7] PPC1860, s375(iii).
[8] PPC1860, s375(iv).
[9] PPC1860, s375((v).
[10] Compare s375(c) of the MPC1936 and s375(iii) of the PPC1860.
[11] Compare s375(d) of the MPC1936 and s375(iv) of the PPC1860.
[12] See Patrick Lussier & Jesse Cale, *Understanding the Origins and the Development of Rape and Sexual Aggression against Women: Four Generations of Research and Theorizing*, 31 AGGRESSION AND VIOLENT BEHAVIOR 66 (2016).
[13] Prior to the amendments to be effected by the NSWCLA2021 in NSW.
[14] For a discussion of the 2021 amendments in the laws of NSW, see Paulinet Tamaray, *NSW Government Proposes Historic Reforms to Sexual Consent Laws,* AUSTRALIAN LAWYER, Nov. 16, 2021, at News.

law in NSW now categorically disproves the presumption that lack of physical resistance by the victim implies his/her consent.[1] Courts in different Australian jurisdictions including NSW in interpreting rape demonstrate in recent decisions that courts "rely heavily on a holistic assessment of the facts" on a case-by-case basis in determining the effectiveness of C's consent.[2] The holistic approach of the judiciary has a significant bearing on the statutory definitions of rape with respect to their applications.[3] This is so because no one's claim will be mutually exclusive in judicial consideration, rather the courts consider both parties' claims and counterclaims in light of circumstantial evidence. This provision of defending C contained in the NSWCLA2021 will be more helpful for prosecutrix in securing conviction of their sex predators when the amendments come into effect, because s61HJ(1)(a) unequivocally provides that it is "no consent" if a "person does not say or do anything to communicate consent". All of the other three jurisdictions should incorporate this provisions as a societal need.

5.2 *Deception Affecting Consent*

These days, particularly during the age of so-called online social media, many people resort to deception to have sex, potentially violent sex, in an apparently consensual manner. This has been a major concern worldwide, particularly with a greater intensity in Asia. Section 375 of both the PPC1860 and the MPC1936 takes into account virtually only one mode of deception, being D's pretense to be C's husband where C consents by mistakenly believing that D is her spouse. Whilst it is a viable means of deception, it is by no means the sole artifice. Nowadays, "rape-by-deception" has been rather a live and growing concern in criminal law.[4] Consent obtained by using any form of deception, trick or fraud is no consent at all, when it relates to rape allegations.[5] Hence D must pay due heed to C's free and voluntary consent.

The scope of deception under s375 in all three jurisdictions, except NSW, should be widened. For example, NSW law[6] categorically states several potential grounds of deception, which invalidate consent secured by convincing C that the sexual activity is required for C's health, hygienic or cosmetic purposes, or by a mistaken identity of another person, or by detaining C unlawfully. The amendments made by NSWCLA2021 can be followed in widening and upgrading the means of potential deception by D under s375 of other three jurisdictions.[7] Besides, case law can also be of help in improving provisions governing deception. For example, attempting to obtain consent by a false promise of wearing condom can be a form of deception;[8] or dishonestly promising to withdraw by D before his ejaculation;[9] or attaining C's consent by convincing C about performing a medical procedure on her;[10] or defrauding C about paying her a certain some of money for the sexual act.[11] All these can be deception.[12] These judicially affirmed instances of deception need to be incorporated into the legislation of all selected jurisdictions.

5.3 *Consent Given Relying on Promise to Marry*

It has been a commonplace particularly in some Asian countries to seek consent of women for sexual intercourse by men giving a promise of marriage.[13] The question of prosecuting such cases under rape law was previously unsettled,[14] simply because statutory laws do not cover such a situation. However, it is now judicially determined that a woman, who voluntarily agreed to have sex with a man who promised her to marry later on, has no remedy under rape law, rather it is treated as consensual sex. For example, the Supreme Court of Pakistan declared that such a sexual intercourse is not rape, as it took place based on mutual consent.[15] Identical findings are available also from the higher judiciary of India and Bangladesh which share s375 in their penal codes of 1860. For

[1] Section 61HE(9) of the NSWCA1900.
[2] Jonathan Crowe & Lara Sveinsson, Intimidation, C*onsent and the Role of Holistic Judgments in an Australian Rape Law*, 42 U.W. AUSTL. L. REV. 136, 137 (2017).
[3] *Id*.
[4] Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1376 (2013).
[5] E.g., McClellan v. Allstate Ins. Co., 247 A.2d 58, 61 (D.C. 1968); Johnson v. State, 921 So. 2d 490, 5o8 (Fla. 2005) Kreag v. Authes, 28 N.E. 773, 774 (Ind. App. 1891).
[6] Section 61HJ(i) contained in the NSWCLA2021.
[7] See above stated s61HI of the NSWCA1900.
[8] Assange v. Swedish Prosecution Authority [2011] EWHC 2849.
[9] R(F) v. DPP [2014] Q.B. 581.
[10] R v. Flattery (1877) 2 QBD 410.
[11] R v. Linekar [1995] 3 All ER 69.
[12] Arushi Garg, *Consent, Conjugality and Crime: Hegemonic Constructions of Rape Laws in India*, 28(6) SOC. LEG. STUD 737, 748 (2019).
[13] For example, see Imran Gabol, *Karachi Woman Allegedly Raped Several Times After being Tricked into Travelling to Lahore Over Promise of Marriage*, DAWAN, (Pak), Nov.29, 2021; Reuters, *Malaysian Minister Says 'Rape-Then-Marry' Case to be Reviewed*, VOICE OF AMERICA, Aug. 04, 2016, at East Asia; Sparsh Upadhyay, *Man Allegedly Commits Rape by a False Promise to Marry, Threatens Victim to Accept Islam: Allahabad HC Denies Him Bail*, LIVE LAW, (Ind.), Jan 7, 2022, at News Updates; Sparsh Upadhyay, *Incorrect to Punish Man for Rape If His Promise to Marry Didn't Fructify Due to Opposition From Family Elders: Calcutta High Court*, LIVE LAW, (Ind.), Dec. 8, 2021, at News Updates.
[14] See Garg, *supra* note 260, at 741.
[15] Our Correspondent, *Relationship with Mutual Consent Cannot be Termed Rape: SC*, THE EXPRESS TRIBUNE,(Pak.), Oct. 19, 2019.

example, the High Court of Karnataka in India in *State of Karnataka v. KP Thimmappa Gowda* involving promise to marry against a rape case, reversed the trial court's decision of acquittal and convicted D of rape in 2004.[1] However, later in 2011 the Supreme Court of India on the final appeal in *KP Thimmappa Gowda v. State of Karnataka* set aside the impugned judgment and order of the Karnataka High Court, and acquitted D of rape charges, giving D the benefit of doubt of consensual sex.[2] Similarly, in 2003 the Supreme Court of India in another case of a similar facts, *Uday v. Karnataka,* reversed the conviction awarded by the trial court and upheld by the High Court decision in acquitting D of rape charges.[3] Quite consistently, the Supreme Court of Bangladesh adopted an identical approach in interpreting a similar version of s375 in *Hanif Sheikh v. Asia Begum*, in which the Court resolutely pronounced that a woman who has sexual intercourse with a man who promised to marry her, that woman will not get any legal remedy because it was consensual sex.[4]

These consistent judicial decisions in interpreting and applying the same statutory law of rape serves as a prior warning to the women who are willing to consent to premarital sex in return for having a promise of getting married with their sex predators. Consensual sex based on promise to marry does differ from sexual intercourse against one's will and without consent. Any failure in understanding the distinction between the sexual acts in two different circumstances may bring irretrievable harm to the victims and they will eventually end up in being fraudulently ripped off by their known and once trusted sexual swindlers.[5]

5.4 *Consent to One Type of Penetration but Occasioned a Different Type*

Another way of deceiving a victim is seeking consent for one type of penetration, but D went further. This will be more important in Pakistan and Malaysia in particular, if the scope of rape is widened as recommended. As is currently the case in NSW, sexual assault equivalent to rape can be committed by various types of penetration, such as oral, vaginal and non-vaginal, or penetration with penis or other objects or body parts. Law should clearly prescribe that D acts within the limit of C's consent. Similarly, it has to be legally clarified that C's consent to sex for one time, does not mean consent for any time or multiple times. Further, once consent is given, does not mean it exists for an indefinite period even on the single occasion. The laws of Pakistan, Malaysia and Singapore do not contain any provision of withdrawal by one party and continuation by another. Taking advantage of this silence of law, the current provisions can be interpreted that once C consents, D can continue as long as D desires. All these issues are clarified, that are due to be included in the NSWCA1900 under s61HI as mandated by the NSWCLA2021, which can be good guidelines for other three jurisdictions.

6. Conclusions

Rape is a frightful crime when its constituent elements are publicly established. It "cannot be presumed to be one way of expressing intimacy, love or pleasure between those involved."[6] Legal ambiguity plays a dominant role in depriving the victims of justice, as it is said in the Indian context which inherited the same penal code from the British era─ as Pakistan, Malaysia and Singapore did.[7]

The foregoing discussions bring up the deficiencies in the rape laws of Pakistan, Malaysia and Singapore, when viewed through the prism of their counterparts in NSW, though the degrees of deficits vary. We do not claim that the law of NSW is a perfect model. However, we acknowledge that the rape law of NSW is a product of comprehensive research carried out over the decades to reflect the behaviors, expectations and needs of the society where it operates. During the age of economic globalisation, the need for social and legal convergence cannot be gainsaid; thanks to the Internet, satellite television channels and social media. Accordingly, the perception of sexual intercourse or penetration has changed, that must be reflected in legislation. But the current versions of the penal codes of Pakistan, Malaysia, and to some extent Singapore do not incorporate the concept of non-discrimination that has a bearing on their rape laws. In addition, there are other disparities and deficiencies as well. To address those shortcomings and loopholes, we submit the following recommendations to the authorities concerned to take into account in reforming their respective laws. It is to be borne in mind that the courts, whose primary responsibility is to interpret and apply the law staying within the bounds of words and intent of legislators, are generally reluctant and also unable, to amend legislation. Otherwise, changing law by the judiciary would tantamount to encroachment upon legislative authorities. Therefore, respective legislatures will have to exercise their legislative powers to update and improve their laws to cater for the needs of the time.

[1] 2004 CriLJ 4785.
[2] KP Thimmappa Gowda v. Karnataka AIR 2011 SC 2564 at [14] (Ind.).
[3] Uday v. State of Karnataka (date of judgment Feb. 19, 2003), Appeal (crl.) 336 of 1996, https://indiankanoon.org/doc/1100330/ (Dec. 26, 2021). For a critique of this appeal decision, see Garg, *supra* note 260.
[4] 1998, 27 CLC (HCD) (Bangl.).
[5] Shahriar Islam Shovon, Does Sex with Inclination to Marriage Amount to "Rape"? THE INDEPENDENT, (Bangl.), Nov. 2020, at Opinion.
[6] Rudin & Jusoh, *supra* note 1, at 11953.
[7] Arora, *supra* note 145, at 259.

6.1 *Gender Neutrality*

The ancient perception of rape that only women can be victim of sexual assault is now obsolete. The current laws of Pakistan, Malaysia and Singapore are biased towards women considering that males cannot be victims of rape, which is certainly a myth, rather than a fact. The existing body of research evidences that any person can be victimized by a sex-predator, regardless of gender.[1] Therefore, the old definition should be retuned with gender-neutral language by recognizing that a law should be designed to protect all persons demonstrating equality without any discrimination on any basis whatsoever. To this end, the laws of rape are required to be amended, having due regard for the assertion that the function of law is to ensure justice for all, and there is a probability that all accused persons are not necessary culprits, and that innocent person can be sometimes implicated with certain ill motives by C.[2]

6.2 *Definition of Sexual Intercourse*

The penal codes of Pakistan, Malaysia and Singapore do not define "sexual intercourse" although it is the prime actus reus element of rape. The SPC1871 uses the term "penetration" as the physical element of the offense, which is inherently linked to "sexual intercourse". However, the word "penetration" is not defined either.[3] Unlike them, the NSWCA1900 provides a comprehensive definition of "sexual intercourse"[4] which can be followed by others. A broad definition of the conduct element would be helpful,[5] in creating deterrence and maximizing conviction, because any legal ambiguity sometimes unduly benefit actual offenders.[6]

6.3 *Interpretation of* "*Sexual Acts*"

When the phrase "sexual act" is used in legislation, a clear meaning of it should be stated in the legislation. The SPC1871 frequently uses the term "sexual" and it does also define it,[7] however, the interpretation is vague and it can be improved by adding that whether a certain act is sexual or not shall be tested by applying an "objective test". An improved definition is provided in the NSW,[8] which embraces an objective test to determine the sexual nature of a disputed act, along with reasonable details of such acts. Both the PPC1860 and the MPC1936 use the term "sexual" without having to offer its particular meaning in the present context. The meaning provided in the NSWCA1900[9] can be followed by Pakistan and Malaysia in defining this core term properly, and Singapore can revise its existing interpretation in light of its counterpart in NSW.

6.4 *Convergence of Sexual Intercourse with Humans and Animals*

The PPC1860 treats the acts of carnal intercourse between humans as well as between humans and animals alike, which is highly unacceptable these days.[10] This equal treatment is inherited from the colonial era in 1860. However, all other three jurisdictions ─ Malaysia,[11] Singapore,[12] and NSW[13]─ have already separated these two distinct sexual acts. Likewise, bestiality should be separated and defined as a discrete offense in a different section in Pakistan.

6.5 *Ability to Consent*

All jurisdictions at hand consider C's capacity to consent in terms of age, such as 14 years[14] or 16 years,[15] where the consent of C below that age is invalid depending on the prescription of a given law. The NSWCA1900 provides a comprehensive and clearer list of physical and cognitive incapacity to consent to sex,[16] which can be followed by other jurisdictions.

6.6 *D's Mistaken Belief of C's Consent*

Rape laws of all jurisdictions add some restrictions or qualifications in varying degrees that vitiate C's consent to

[1] See Oncale v. Sundowner Offshore Services, 523 U.S. 75, 78 (1998), also numerous sources noted in *supra* note 54.
[2] Nadesan & Omar, *supra* note 154, at 10.
[3] Section 377C(3)(a) of the SPC1871 describes that "penetration is a continuing act from entry to withdrawal".
[4] NSWCA1900, s61HA.
[5] See Chon & Clifford, *supra* note 18.
[6] See S M Solaiman, Solaiman, *Investor Protection and Judicial Enforcement of Disclosure Regime in Bangladesh: A Critique*, 34 (3) COMMON LAW WORLD REV. 229 (2005).
[7] SPC1871, s377C(3)(d).
[8] NSWCA1900, s61HC.
[9] NSWCA1900, s61.
[10] PPC1860, s377.
[11] MPC1936, s377-Buggery with an animal, s377A - Carnal intercourse against the order of nature.
[12] SPC1871, s377B- Sexual penetration with living animal.
[13] NSWCA1900, s79-Bestiality, s80 - Attempt to commit bestiality.
[14] SPC1871, s375(3).
[15] PPC1860, s375(v); MPC1936, s375(f).
[16] NSWCA1900, s61HJ-s61HK, as mandated by the NSWCLA2021.

sexual intercourse. These restrictions are imposed with an ultimate intent to ensure that C's consent is "free and voluntary". D can be acquitted, depending a given law, from a rape charge if the prosecution fails to disprove that D had a genuine and reasonable but yet mistaken belief that C was consenting, as happened in NSW in *R v Luke Andrew Lazarus.*[1] Law is crucial to prevent such acquittals. The current law of Australia in general recognizes that C's passivity or silence to prevent penetration, and lack of resistance does not *per se* amount to consent.[2] Victim's dress, intoxication or social contact with D is not indicative of his/her consent.[3] The NSWCLA2021 requires positive consent, which is reasonably expected to reduce, if not to eliminate, the potential of D's mistaken belief leading to acquittal. The requirement of affirmative consent thus should be adopted by all other jurisdictions.

6.7 *Putting in Fear of Death or Assault*

The PPC1860 mentions that C's consent will be no consent if obtained by putting C in fear of death or of hurt.[4] The Malaysian law also considers putting C in such a fear as a vitiating element with a broader scope that C's consent gained by placing C in fear of death or hurt to herself or any other person,[5] as opposed to C alone under the PPC1860. The SPC1871 expresses this circumstance differently, going one step further in that it does incorporate putting in fear as the MPC1936 and PPC1860 do, additionally it includes that if a person voluntarily causes hurt to any person including C in order to commit or to facilitate the commission of rape will vitiate C's consent.[6] Hence the provision of the SPC1860 is wider compared to that of Pakistan and Malaysia. The NSWCA1900 makes it a separate offense called "aggravated sexual assault",[7] which goes beyond putting C in fear and involves to inflict or threaten to inflict ABH or threaten to inflict GBH or wounding on C or any other person who is present or nearby C.[8] It does not include keeping C or another person in fear of death, but offers a reasonable clarification of third person who may be victimized. It is unclear why the fear of death has been omitted, unlike the other three jurisdictions, it also omits inflicting GBH. The NSWCA1900 however, creates a separate offense called "Assault with intent to have sexual intercourse"[9] which involves physical assault along with sexual assault. We recommend that Pakistan, Malaysia and Singapore can revise their provisions in light of that of NSW which is not free from flaws though.

> The law of NSW does not mention death, but specifies the nature of hurt more clearly compared to others. Additionally, it is more succinct about "any other person" as well. These clarifications are useful and can be followed by others. However, NSW should include threat to kill and inflict GBH along with the existing provision of threat to cause GBH or ABH in s61J(2), s61JA and s61K.

6.8 *Breaking and Entering Dwelling House*

The law of NSW creates a new condition in relation to vitiating consent to sexual intercourse. It makes the sexual assault aggravated if D "breaks and enters into any dwelling-house or other building with the intention of committing" sexual assault.[10] It represents the ferocity of D in committing rape, and C's consent must be vitiated by this act, which can be independent of putting C in fear of death or hurt. Other three jurisdictions have no similar provision. Having due consideration of the implication of this incident for C's consent, it should be included in other three jurisdictions as well.

6.9 *Deprivation of Liberty*

The NSWCA1900 includes yet another new potential incident that is likely to vitiate C's consent to sex. This incident is stated to be depriving C of his/her liberty for a period of time before or after the commission of the offense.[11] It is a potential occurrence that may happen in all countries, hence it should be incorporated into other three jurisdictions too.

6.10*Deception to Obtain Consent*

The MPC1936 contains a provision that consent given under a misconception is not a valid consent to sex, if D knows or has reason to believe that C's consent was given in consequence of such a misconception.[12] It has been

[1] R v. Luke Andrew Lazarus, District Court of New South Wales Criminal Jurisdiction (Revised), May 4, 2017 at [70], [72], as cited in Burgin & Crowe, *supra* note 190, at 346-347.
[2] See Crowe, & Sveinsson, *supra* note 250. .
[3] Burgin & Crowe, *supra* note 190, at 347.
[4] PPC1860, s375(iii).
[5] MPC1936, s375(c).
[6] SPC1871, s375(3).
[7] NSWCA1900, s61J.
[8] NSWCA1900, s61J(2)(a-b1).
[9] NSWCA1900, s61K.
[10] NSWCA1900, s61J(2)(h).
[11] NSWCA1900, s61J(2)(i).
[12] MPC1936, s375(c).

added alongside putting C in fear of death or hurt. It does not clarify the issues of misconception (misconception about what─ relation with D, D's identity, or need to have sex, etc.) which will negate C's consent. Other jurisdictions embrace a common clause of C's mistaken believe that D is C's husband and D knows of this mistaken belief of C and then takes advantage of that belief. It is also included in the MPC1936.[1] In principle, consent given under any substantial misconception should be invalid. However, Malaysia needs to clarify what misconceptions it covers. The NSWCA1900 and common law provide more specific grounds of deception, which embrace fraudulently promising to marry, falsely promising to use condom, or dishonestly assuring not to ejaculate by D, and obtaining consent to one type of penetration but D goes beyond or for another type. All these means of deception should be incorporated into the legislation of all four countries, depending on their exiting deficiencies.

6.11 *D's Continuation Despite C's Withdrawal*

The law of NSW exceptionally provides that when C withdraws his/her consent to sex during the course of a consensual sexual act, D must stop at the point of such withdrawal, in order to avoid liability for sexual assault. D may otherwise be held guilty of rape.[2] We agree in principle on the assertion that C's consent given by words or conduct at the time of beginning of having sex is not enough to continue by D as long as D may want. Therefore, we also agree that C's consent must be continued until the end of the disputed sexual act, even more fairly each party involved in the act must ensure that his/her counterpart consents throughout the full duration of the encounter.[3] However, we recommend that this provision needs to be revised in that any consensual sex, particularly between married couples, is meant to be for mutual satisfaction. It is very likely that one may be satisfied before the other. In that event, the unsatisfied party deserves a reasonable amount of time to continue for his/her ejaculation, despite C's verbal withdrawal, indeed such continuation must be without causing any real harm to anyone.

Problem concerning rape is not with "a few misogynistic men but in society as a whole,"[4] because victims are to face hostile treatment even from their own families sometimes. Society needs to admit that no one wants or deserves to be sexually assaulted by another against his/her consent.[5] Victims deserves social support to mitigate their pains. Law is the instrument people use in its attempt to achieve justice in order to live in society with tranquillity and dignity. The current laws of all selected jurisdictions are deficient in varying degrees. Our specific recommendations furnished above are expected to strengthen the legal regimes for curbing rape and protecting victims.[6] However, law alone cannot do much, if it is not effectively enforced. Therefore, the enforcement of rape law in the selected jurisdictions can be a topic of further research. International criminal law concerning rape and its pertinence to domestic laws can also be explored in a separate endeavour.

[1] PMC1936, s375(d).
[2] NSWCA1900, s61HI(3).
[3] Burgin & Crowe, *supra* note 190, at 348.
[4] Fernandez & Nor, *supra* note 12, at 1.
[5] *See* Megan R. Greeson, et.al., "*Nobody Deserves This": Adolescent Sexual Assault Victims' Perceptions of Disbelief and Victim Blame from Police*. 44(1) J. COMMUNITY PSYCHOL., 90 (2016); Shana L.Maier, *The Complexity of Victim-Questioning Attitudes by Rape Victim Advocates: Exploring Some Gray Areas,* 18(2) VIOLENCE AGAINST WOMEN 1413 (2013).
[6] See Zafar, *supra* note 24, at 132.