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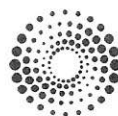
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CONTENTS

Articles	421
Public Interest in Assessing Sentence: A Case Study of the Bruneian Criminal Law System <i>Ahmad Masum and Hajah Hanan Haji Awang Abdul Aziz</i>	421
The New Economic Policy: Racial Discrimination or Socio-economic Reconstruction? <i>Nurhamizah Mahmud and Shahrul Mizan Ismail</i>	434
The Principle of Autonomy in the Light of Brittany Maynard's Assisted Suicide Death <i>Omipidan Bashir Adeniyi</i>	451
Common Pitfalls in Project Implementation and Administration: Taking a Holistic and Professional Approach in Practice <i>Harbans Singh</i>	467
Pembangunan Undang-Undang Persaingan Pra dan Pasca Akta Persaingan 2010 <i>Noradura Hamzah, Safinaz Mohd Hussien dan Mahmud Zuhdi Mohd Nor</i>	480
Liability of Non-Executive Directors under UK Companies Act 2006 and Malaysian Companies Act 2016 <i>Jaganraj Ramachandran and Saravanabavan Mathialagan</i>	504
A Need for Legal Framework on Sexual Offences against Elderly Woman <i>Mohamad Ismail Mohamad Yunus</i>	515
Pre-Trial Discovery in Criminal Trials in Brunei Darussalam: A Study in Light of the Legal Position in Malaysia <i>Hajah Fatimah Haji Ahmad, Md Khalil Ruslan and Zulazhar Tahir</i>	521
Empowering the Elderly and the Community in Dealing with Elder Issues: The Way Forward for Malaysia <i>Siti Zaharah Jamaluddin, Jal Zabdi Mohd Yusoff, Sridevi Thambapillay, Zulazhar Tahir, Mohammad Abu Taher and Nur Faizira Abdul Rahman</i>	546
Legislation Update	561
Courts (Modes of Commencement of Civil Actions) Act 2017 (Act 790).....	561
Tourism Tax Act 2017 (Act 791)	562
Sexual Offences Against Children Act 2017 (Act 792)	564
Padi Cultivators (Control of Rent and Security of Tenure) Act 1967 (Act 793) (Revised 2017)	565

Married Women and Children (Enforcement of Maintenance) Act 1968 (Act 794) (Revised 2017)	566
Access to Biological Resources and Benefit Sharing Act 2017 (Act 795)	566
Employment (Restriction) Act 1968 (Act 796) (Revised 2017)	567
Sabah Ports Authority (Consequential Provisions) Act 1968 (Act 797) (Revised 2017)	568
Local Authorities (Conditions of Service) Act 1964 (Act 798) (Revised 2017).....	569
Malaysian Border Security Agency Act 2017 (Act 799)	569
Employment Insurance System Act 2017 (Act 800)	570
Finance (No. 2) Act 2017 (Act 801).....	571
Strategic Trade (Amendment) Act 2017 (Act A1537).....	572
Domestic Violence (Amendment) Act 2017 (Act A1538).....	573
Securities Commission Malaysia (Amendment) Act 2017 (Act A1539)	574
Lembaga Kemajuan Terengganu Tengah (Amendment) Act 2017 (Act A1540)	575
Lembaga Kemajuan Wilayah Kedah (Amendment) Act 2017 (Act A1541)	576
Lembaga Kemajuan Johor Tenggara (Amendment) Act 2017 (Act A1542)	577
Lembaga Kemajuan Kelantan Selatan (Amendment) Act 2017 (Act A1543)	578
Price Control and Anti-Profiteering (Amendment) Act 2017 (Act A1544)	579
Trade Descriptions (Amendment) Act 2017 (Act A1545).....	579
Law Reform (Marriage and Divorce) (Amendment) Act 2017 (Act A1546).....	580
Tabung Angkatan Tentera (Amendment) Act 2017 (Act A1547).....	580
Legal Aid (Amendment) Act 2017 (Act A1548)	581
Prevention of Crime (Amendment) Act 2017 (Act A1549).....	582
Valuers, Appraisers and Estate Agents (Amendment) Act 2017 (Act A1550).....	583
Merchant Shipping (Amendment) Act 2017 (Act A1551)	585
Land Public Transport (Amendment) Act 2017 (Act A1552).....	586
Commercial Vehicles Licensing Board (Amendment) Act 2017 (Act A1553).....	588
Private Employment Agencies (Amendment) Act 2017 (Act A1554)	589
Labuan Business Activity Tax (Amendment) (No. 2) Act 2017 (Act A1555)	591
Income Tax (Amendment) Act 2017 (Act A1556)	592
Supply Act 2018 (Act A1557).....	592
Dangerous Drugs (Amendment) Act 2017 (Act A1558)	593
Note on Commencement of Acts.....	593

A Need for Legal Framework on Sexual Offences against Elderly Woman

*Dr Mohamad Ismail Mohamad Yunus**

Abstract

Recently Malaysian Parliament has approved the Sexual Offences against Children Bill 2017, to protect anyone less than 18 years from sexual crimes.¹ It is observed that like child sexual crimes, elder sexual crime is also a problem in our society to which attention must be given, and the victims of this "crime" must also be given protection and the offenders must be punished accordingly. The objective of this article is to formulate a legal framework to legally recognise this offence as a specific crime and to find solutions to the issue, particularly in Malaysia, by studying the laws of other jurisdictions which have already introduced laws regarding the matter. The Islamic point of view in this matter is also highlighted.

Introduction

Being a rape victim is undoubtedly the worst nightmare for any woman, but there are no words that could describe the agony of a 63-year-old woman from Padang Sanai, who was raped twice by a stranger solicited by her husband. A source said the victim had claimed that her ordeal began in March 2017 when her 69-year-old husband asked his friend to come over to their house to give her a massage. The report said the victim had refused to be touched by the 61-year-old man, but caved in for fear of being beaten by her abusive husband. The suspect had allegedly started massaging the victim's legs before forcing himself on her as her husband stood by the side their bed and watched his wife being raped. To add to the sickening act, the victim claimed that the rapist had paid her husband RM20 to watch her being sexually assaulted. The report added that the victim finally summoned up her courage to lodge a police report, after the same man, who again paid her husband another RM20, raped her for the second time on the following day. The case is being investigated under s 376 of the Penal Code for rape and s 372B of the Penal Code for soliciting for purpose of prostitution.²

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1 <http://www.thestar.com.my/news/nation/2017/03/29/mps-react-to-new-bill-on-child-sexual-crimes/> retrieved in March 2017.

2 <http://www.nst.com.my/news/2017/04/228244/man-allegedly-rapes-elderly-woman-pays-husband-watch/> retrieved in April 2017.

Elderly sexual crime is still understudied and rarely understood. Victims of elderly sexual crime usually have medical conditions that cause memory loss, confusion, or problems with communication. Even the Malaysian Penal Code s 376(2) is silent on the aggravated punishment against elderly sexual crime perpetrator. Elderly sexual crime is a malicious act prevalent in our society, which people do not recognise as a crime. People consistently talk about child sexual crimes, but neglect the helpless elderly citizens in the society who also need to be protected. Like children, they need to be heard and given due care and attention. Elderly people need to be given respect and dignity in the society, and treated with equality before the law.³

Definition of elderly sexual crime and elderly person

Elderly sexual crime is defined as any unwanted sexual contact against a person over the age of 60 years.⁴ The elder sexual crime may cause harm by tricking, manipulating, or coercing the elder person into undesired sexual relationship. This includes sexual connection with an elderly person who is unable to communicate consent or disapproval.⁵

Studies conducted by the National Institute of Justice ("NIJ") found that the older the victim was, the less likely it was for the sexual offender to actually be convicted. The same NIJ study found that elderly sexual crime victims were less likely to be believed if there were no signs of physical trauma.⁶

It is noted that the actual age used in the definition of "senior citizens" or "elderly" has differed among researchers and writers. However, the United Nations World Assembly on Ageing which was held in Vienna, 1982, used "60 years and over" as the cut off age in deliberating ageing trends. Consequently, Malaysian policy makers have adopted this demarcation and it is officially used in planning for senior citizens.⁷ Hence, this definition will be adopted to define elderly person in Malaysia.

Studies of elderly sexual abuse

There have been research studies conducted by the National Institute of Justice (NIJ) where it was found that the oldest victims are less likely to

3 Aishath Muneeza, "Elder Abuse in Malaysia", [2010] 6 MLJ vii.

4 Peter P Yin, "Fear of Crime Among the Elderly: Some Issues and Suggestions" *Social Problems*, Vol 27, Issue 4, April 1, 1980, 492; <https://www.nursinghomeabusecenter.com/elder-abuse/types/sexual-abuse/> retrieved in December 2017.

5 Ibid.

6 United States. National Institute of Justice, "Sexual Abuse of the Elderly", Office of Justice Programs, 2007; <http://www.nij.gov/topics/crime/elder-abuse/sexual-abuse.htm/> retrieved in April 2017.

7 Rabieyah Mat and Hajar Md Taha, Department of Statistics, "Socio-Economic Characteristics of the Elderly in Malaysia, 2003", 21st Population Census Conference: Tokyo. 15.

aid in the conviction of an adult sexual offender who perpetrated the crime against them. The same research indicated that victims of elder sexual abuse are less likely to have someone believe them, especially if there have been no signs of trauma to the body. Those elderly sexual abuse victims who reside in a nursing facility were the least able to get a conviction out of the acts perpetrated against them.⁸ Elder sexual abuse is most often being reported in nursing homes, by both employees and residents as perpetrators. While research has found varying results as to whether or not sexual abuse occurs 4.5% of those 65 and older are in nursing homes. 1.1% is between 65 and 74, 4.7% are between 75 and 84, and 18.2% are 85 and older. While abuse is certainly happening in other care facilities and the community, this section is designed to help the advocate understand the culture of nursing homes since they tend to house the most vulnerable of elders.⁹

For instance, in United Kingdom, on February 13, 2017, a man accused of subjecting an 81-year-old woman to a 96-minute rape ordeal after she got off a bus. Anthony Roberts allegedly abducted the pensioner after she got off a bus. The 41-year-old from Tooting is charged with two counts of rape and one of kidnap with the intention of committing a sexual offence.¹⁰

Similarly, it was reported "a 41-year-old man entered the unsecured door of an assisted living facility and raped an 83-year-old woman in her room. The woman reported she was awakened to the man being in her room and that he stated, "Don't scream or I am going to kill you." She further stated that he held her down and assaulted her, taunting her, and ordering her to use profanity. She refused. After the assault, the man ran into a facility employee and asked her to help him find a friend who he said worked at the facility. He then put his hand over her mouth and wrestled her to the ground, grabbing her checkbook. He escaped and the employee called 911. The police arrived at 2.45 a.m. and found the perpetrator a few blocks away. When shown videos of himself at the facility, he admitted he entered the premises to sexually assault someone. The victim's son reported that his mother's personality changed after the attack. She became withdrawn and reclusive, the opposite of her pre-assault life style."¹¹

8 <https://www.nursinghomeabusecenter.com/elder-abuse/types/sexual-abuse/> retrieved in December 2017.

9 https://www.nsvrc.org/sites/default/files/Elder_Sexual_Assault_Technical-Assistance-Manual/ retrieved in December 2017.

10 <http://www.dailymail.co.uk/news/article-4219462/Man-appears-court-charged-rape-81-year-old.html#ixzz4fXxMDV21/> retrieved in September 2017.

11 https://www.nsvrc.org/sites/default/files/Elder_Sexual_Assault_Technical-Assistance-Manual/ retrieved in December 2017.

Elderly sexual crime in Malaysia

In Malaysia, sexual crime against the elderly is not covered under the Penal Code. It is covered under the Domestic Violence Act 1994 only within a limited scope. According to subsection (2) of s 1 of the Domestic Violence Act 1994, the Act is applicable to all people in Malaysia. Section 2 of the Act defines some of the words. It defines domestic violence as follows:

“domestic violence” means the commission of any of the following acts: wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury; compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain by a person against her spouse; her former spouse; or any other member of the family.

The above definition is limited to cover only sexual abuse by the family members. How about by a person who is a stranger to the victim? This shows that although elderly sexual abuse is not termed as a specific sexual crime under the existing legal framework of the country, but it can be considered as a species of domestic violence. This definition is good to cover a type of elderly sexual crime within family members. This is at least a relief. However, this would not solve the problem of elderly sexual crime in Malaysia committed by a stranger against the victim. There is a need to enact a specific section or Act like Sexual Offences against Children 2017 to criminalise this inhuman and unnatural conduct. Then only the seriousness of this “crime” can be acknowledged by the society.

The rights of elderly persons in Islam

Generally, under the Islamic teachings, abuse of elderly persons is indeed prohibited. From the primary sources of Islamic law [following the holy book of the Quran, the *Sunnah* and the traditions of the Prophet (pbuh)], it is clear that the elderly persons should be respected and treated kindly. There are many rights of elders under Islamic law.

In Islamic countries, old folk homes are rare to find because of the religious respect given to the parents and elderly people in general. The strain of caring for one’s elders in the most difficult time of their lives is considered an honour and a blessing and an opportunity for great spiritual growth. In Islam, it is not enough to just pray for the elderly but they should be treated with boundless kindness, remembering that they were the ones who took care of us with love and mercy when we were helpless children.

In Islam, serving one’s elders is a duty second to prayer, and it is their right to expect it. It is considered despicable to express any irritation when, through no fault of their own, the elders become difficult. The following verse of the Quran summarises this:

Your Lord has commanded that you worship none but Him, and that you be kind to your parents. If one of them or both of them reach old age with you, do not say to them a word of disrespect, or scold them, but say a generous word to them. And act humbly to them in mercy, and say, 'My Lord, have mercy on them, since they cared for me when I was small.'¹²

Furthermore, the following traditions of the Prophet (pbuh) proves how much Islam loves treating the elderly persons, justly and kindly with compassion and empathy. The Prophet (pbuh) said:

He is not of us who does not have mercy on young children, nor honor the elderly.¹³

Narrated by Abdullah ibn Amr ibn al-'As. The Prophet (pbuh) said:

Those who do not show mercy to our young ones and do not realise the right of our elders are not from us.¹⁴

The Prophet (pbuh) said:

He does not belong to us who does not show mercy to our young ones and respect to our old ones, who does not recommend what is reputable and prohibit what is disreputable.¹⁵

Islam advocates a system of social interaction in which juniors are loved and seniors are respected. The Holy Prophet (pbuh) explained this cardinal principle of his teachings in the following immutable words:

He is not amongst us who is not kind to our juniors and shows no respect to our elders.¹⁶

Proposal

It is proposed that in Malaysia, there is a need to educate society on the issue, codify the law and then criminalise the offenders. Malaysia ought to recognise elder sexual crime as a specific offence. Prior to this, there is a need to educate and create public awareness on this matter, and for this purpose, the recording of proper and accurate statistics would be essential. Shelter homes and institutions that protect the elders who are being made victims of this crime must be made available. Indeed, the Department of Social Welfare of Malaysia can play a vital role in this. As for a proper legal framework to criminalise this, which is the main focus of this article, there are several suggestions to do this.

12 Surah al-Isra' (17) : 23–24.

13 Al-Tirmidhi, A I1986. Sunan al-Tirmidhi. *Beirut: Dar Ihya'al-Turath.*

14 Al-Sijistani, A D1994. Sunan Abi Daud. *Beirut: Maktabah al-'Asriyyah.*

15 Al-Naisaburi, MBAH, 2005. Sahih Muslim. *CD Maktabah Syamilah al-Isdar al-Sani.*

16 Al-Tirmidhi, A I1986. Sunan al-Tirmidhi. *Beirut: Dar Ihya'al-Turath.*

- (a) The Legislature needs to amend the Penal Code and add a clause pertaining to aggravated punishments under s 376(2) of the Penal Code for sexual offences against the elderly woman;
- (b) There is also a need to define terms and criminal procedure that are related to elderly sexual crime, such as who is an "elderly person". There is also a need to set up a reporting requirement and investigating procedures of elderly sexual crime cases; and
- (c) To introduce a new Act to protect the elderly persons such as Sexual Offences Against Elderly Persons Act or Elderly Persons Protection Act.

Conclusion

Some sexual offenders are attracted to vulnerability. Perpetrators seek out potential victims who they perceive as easy to overpower and manipulate. They look for those who would be unlikely to report the assault and who would not be deemed credible if the assault were reported. Older adults are especially vulnerable to sexual violence, and elder sexual assault is one of most hidden crimes. Unfortunately, while elder sexual assault victims may require more assistance and specialised help, they often receive less services and intervention than younger victims for a number of reasons.

The offenders who mistreat elderly people should be made accountable for their actions and they should be punished for the felony accordingly. Law, equity and justice requires this to be done.

In order to do this in Malaysia, the foremost thing that needs to be done is to criminalise it. Without doing this, it would be impossible to recognise the seriousness of the crime. For the sake of the ageing population in the country, there is a vital need to formulate a comprehensive piece of legislation to address this matter properly. The most effective way to curb the silent cancer of elderly sexual crime is by educating the public. The public would be the source to detect it. At present, the Domestic Violence Act 1994 and the Penal Code in Malaysia are inadequate to punish the perpetrators of this crime. Malaysia needs a law which specifically deals with elderly sexual crimes. By enacting a new section or legislation and extending the shade of law to this matter would indeed prove that in Malaysia, elderly people are not vulnerable, and whole society stands for them, and any sexual crimes or abuse against them would be intolerable.