

CONSENSUAL INCEST: THE LEGAL ENVIRONMENT IN MALAYSIA

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ABSTRACT

The issue of consensual incest happens in cases involving “consensual activity within the home”. The idea of this article is that the perpetrator is the parent and the victim is the child is above the age of consent. This article intends to discuss the courts’ and relevant governing bodies’ recognition and regulations in Malaysia on incestuous conduct because of the risk of pregnancy and the heightened risk of genetic defect. In Malaysia laws, it is an offence to have sexual intercourse with a person who under the law, religion, custom or usage that applies to the person he or she is not permitted to marry on account of their relationship. Regardless of the age of the child, there’s still a theory that a parent is always a parent, a child is always a child and, as a result, there truly can’t be a consensual sexual act. The issue in concern would be the efficacy of the existing law(s) in Malaysia despite of the rise of such case over the years. The study is based on the relevant statutory, cases and views of authoritative persons and personnel in the legal fraternity. Apart from that, a discussion is also to seek conformity with the other international countries on their legal standards on the laws and sex education. In line to this issue, this article also touches on the right to education (which is of course focusing on the sex education) since it is part of the fundamental rights and acknowledged in the Federal Constitution. The significant of this study is to give suggestions and improvement in the laws and its enforcement so it may prevent this heinous and immoral conduct from continually done by irresponsible individual in a family unit as well as the urgent needs to introduce sex education realistically.

Keywords: Consensual incest, law, sex education, rights to education.

Introduction

Incest is sexual intercourse between close relatives. It is socially taboo in most cultures around the world, but whether it is illegal depends on the jurisdiction, the type of sexual activity and the nature of the relationship between the family members involved. Incest laws may also vary between individual states or provinces within a country, depend on the age and sex of those involved and often extends to marriage between said individuals. Most reported cases would be the victims are the children and the perpetrators would be within their family unit. Whilst for cases on consensual incest is not so commonly been reported nor talkabout issue, however steps and measures have to be taken to create awareness among the public on this immoral act.

This article intends to identify the scope of the law and workability of the current legislation on criminalizing the consensual conduct to have sex within a family unit in Malaysia. Very fewer of incest cases that we had been reported and heard on which involved both parties consented to this heinous act. One of the reasons is because such issue is a taboo in a family unit that it brings humiliation once it became public and sensationed by the social media. Despite of the hurdle, it is also time for our government to amend the law not shall not be remained just as a “knee-jerk” response to the public or individual outcry but to ensure that the amendments are both comprehensive and well thought-out in order that all situations concerning incest are fully dealt with and that the desired long-term objectives of the legal reform are achieved.

Given the above-mentioned objectives, by enhancing the punishment for incest would, instead of serving their intended purpose, it also likely to the victims or family members who are being abused in such a heinous way to coming forward to report these incidents and the victims are getting necessary support and/or encouragement from the other family members to report such incidents.

The article also touches on the right to education which focusing on the sex education and after all it is part of the fundamental rights as enshrined in our Federal Constitution. *Accurate sexual knowledge is important for healthy sexuality development. Sexual knowledge serve as a foundation to prepare individuals to understand their sexuality development, that later will influence their emotional and psychological wellbeing. Researches indicated that individuals with high levels of sexual knowledge are less likely to involve in risky sexual behavior¹ and effective comprehensive sex education have reduce sexual risky*

¹ Jemmott, L. S., and Jemmott, J. B., III (1990). Sexual knowledge, attitudes, and risky sexual behavior among inner-city black male adolescents. *Journal of Adolescent Research*, 5(3), 346-369.

behavior². Therefore it is paramount and about time for sexuality education to be introduced to deter this immoral act from continuously occurring.

ORIGIN OF INCESTOUS LEGISLATION WORLD WIDE

Incest is a sexual intercourse between persons so related by kindred or affinity that legal marriage cannot take place between them. The term was first introduced in England of which 'incest' formerly was not generally treated as a crime, although, along with other offences against morals, it was made punishable by death in 1650. It is however only in 1908, a specific act of Incest i.e. The Punishment of Incest Act 1908 was passed, under which sexual intercourse of a male with his grand-daughter, daughter, sister or mother is made punishable with penal servitude for not less than 3 or more than 7 years, or with imprisonment for not more than two years with or without hard labour. It is immaterial that the sexual intercourse was had with the consent of the female; indeed, by section 2 a female who consents is on conviction liable to the same punishment as the male. The act also makes an attempt to commit the offence of incest a misdemeanor, punishable by imprisonment for not more than two years with or without hard labour.

In the United States incest is not an indictable offence at common law, but, generally speaking, it has been made punishable by fine and imprisonment by state legislation. It is also a punishable offence in some European countries, notably Germany, Austria and Italy.

In Malaysia, incest was made an offence by way of amendment to the Penal Code in 2002 which can be found in section 376A and upon conviction, section 376B provides that the punishment shall be imprisonment for not less than 10 years and not more than 30 years. In addition, the offender shall be liable to whipping. However, none under these two sections defined clearly on incest, which only described the individuals involved are prohibited from marrying each other under the law, religion, custom or usage. Thus, on this issue, reference has to be made also to the Islamic Family Law (Federal Territories) Act 1984³ for Muslims and the Law Reform (Marriage and Divorce) Act 1976⁴ for non-Muslims.

² Siti Nor Y., Wong Fui-Ping, Rozumah B., Mariani M. Rumaya J., Mansor, A. (2010)., Factors related to sexual knowledge among Malaysian adolescents, *Jurnal Kemanusiaan bil.16, Dis 2010, 22.*

³ Section 9 Islamic Family Law Act 1984 states that: Relationships prohibiting marriage

(1) No man or woman, as the case may be, shall, on the ground of consanguinity, marry -

(a) his mother or father;

(b) his grandmother or upwards, whether on the side of his father or his mother, and his or her ascendants, how-high-soever;

(c) his daughter or her son and his granddaughter or her grandson and his or her descendants, how-low-soever;

(d) his sister or her brother of the same parents, his sister or her brother of the same father, and his sister or her brother of the same mother;

(e) the daughter of his brother or sister, or the son of her brother or sister and the descendants, how-low-soever, of the brother or sister;

(f) his aunt or her uncle on his father's side and her or his ascendants;

(g) his aunt or her uncle on his mother's side and her or his ascendants.

(2) No man or woman, as the case may be, shall, on the ground of affinity, marry -

(a) his mother-in-law or father-in-law and the ascendants of his wife, how-high-soever;

(b) his stepmother or her stepfather, being his father's wife or her mother's husband;

(c) his stepgrandmother, being the wife of his grandfather or the husband of her grandmother, whether on the side of the father or the mother;

(d) his daughter-in-law or her son-in-law;

(e) his stepdaughter or her stepson and her or his descendants, how-low-soever from a wife or a husband with whom the marriage has been consummated.

(3) No man or woman, as the case may be, shall, on the ground of fosterage, marry any woman or any man connected with him or her through some act of suckling where, if it had been instead an act of procreation, the woman or man would have been within the prohibited degrees of consanguinity or affinity.

LEGAL POSITION ON INCESTUOUS CONDUCT IN FEW SELECTED COUNTRIES.

Both in Australia and Germany, sexual intercourse between consenting adult relatives is criminalized as incest. There are however, differences regarding the degree of familial relationship required for the offence both amongst the different Australian jurisdictions and in Germany. The crucial communalism is that in every Australian jurisdiction and in Germany, consensual sexual intercourse between adult relatives is criminalized⁵.

In Germany⁶, an incestuous crime led to a judgment of Federal Constitutional Court in which it led to a criminal offence under Criminal Code. In Australia⁷ on March 2008, a couple was sentenced to a three year behavior bond after pleading guilty to two counts of performing an act of incest. At sentencing the presiding judge said:

Relevant factors include: the need to prevent the high risk of congenital defects of children born of incestuous relationships and to prevent children who are brought up in a family unit founded on an incestuous relationship, suffering psychological harm and social stigmatization.

Looking at the current American laws about consensual adult incest range widely in their scope and application. Some laws criminalize the act of sexual intercourse under any circumstances. Others are more complex; for example, Wisconsin allows first cousins to engage in sexual intercourse as long as they are unable to reproduce for reasons such as age or infertility, but as discovered in Muth's case, the same state considers incestuous parenthood to be legitimate grounds for the state to terminate a couple's parental rights⁸ (Muth v. Frank, 2005). This decision however had raise an issue i.e. is there a certain or specific measure to warrant incestuous parents for their parental rights to be taken away? To what extent should the American government limit the sexual activity of closely-related consenting adults?

In Australia, the criminalization of incest was done based on few grounds. Firstly, the acknowledgment of morality as the basic foundation to prohibit incest. This will lead to a good reason to criminalized incest as a social taboo that is generally considered to be repulsive. Secondly, the risk on increase of genetic defects from incestuous relationship that will indirectly although remote but has impact to social difficulties and challenge to the psychological-self.

Finally, the whole idea of incestuous relationship itself is a global-condemn by the society irrespective religion and culture although there has been rumours for some countries to legalize incestuous act.

LEGAL POSITION OF INCESTUOUS CONDUCT IN MALAYSIA

Over the years, apart from domestic violence, incest cases have become a concern issue in Malaysia.

(4) No man shall have two wives at any one time who are so related to each other by consanguinity, affinity, or fosterage that if either of them had been a male a marriage between them would have been illegal in Hukum Syara'.

⁴ Section 11 Law Reform (Marriage and Divorce) Act 1976: Prohibited relationships

(1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be:

Provided that nothing in this subsection shall prohibit any person who is a Hindu from marrying under Hindu law or custom his sister's daughter (niece) or her mothers's brother (uncle).

(2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse.

(3) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild.

(4) No person shall marry a person whom he or she has adopted or by whom he or she has been adopted.

(5) For the purposes of this section, relationship of the half blood is as much an impediment as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate.

(6) The Chief Minister may in his discretion, notwithstanding this section, grant a licence under this section for a marriage to be solemnized if he is satisfied that such marriage is unobjectionable under the law, religion, custom or usage applicable to the parties thereto and, where such marriage is solemnized under such licence, such marriage shall be deemed to be valid.

⁵ Carl Constantin Lauterwein *The Limits of Criminal Law-A Comparative Analysis of Approaches to Legal Theorizing* Ashgate Publishing Limited 2011

⁶ See BVerfG, NJW 2008, 1137, a case of a brother and sister who met for the first time aged 24 and 16 years respectively. They fell in love and lived together and had four children.

⁷ Incest couple who had made a media sensation news, a father and daughter aged 31 met after 30 years' separation and formed a relationship together with two children whom the first one died within days of birth.

⁸ Kasemset, C. (2009) Should Consensual Incest Between Consanguine Adults Be Restricted? *Intersect*, Volume 2, Number 1, 85.

Table 1: Incest cases in Malaysia from the year 2009-2013⁹

| States | 2009 | 2010 | 2011 | 2012 | 2013 |
|-----------------|------------|------------|------------|------------|------------|
| Perlis | 3 | 4 | 3 | 3 | 4 |
| Kedah | 32 | 37 | 32 | 35 | 16 |
| Pulau Pinang | 15 | 11 | 4 | 6 | 9 |
| Perak | 33 | 42 | 36 | 22 | 19 |
| Selangor | 58 | 61 | 50 | 42 | 31 |
| Kuala Lumpur | 10 | 9 | 19 | 7 | 11 |
| Negeri Sembilan | 30 | 17 | 20 | 19 | 15 |
| Melaka | 11 | 18 | 5 | 7 | 9 |
| Johor | 42 | 65 | 58 | 55 | 29 |
| Pahang | 29 | 29 | 25 | 25 | 20 |
| Terengganu | 11 | 17 | 9 | 15 | 11 |
| Kelantan | 38 | 43 | 19 | 17 | 22 |
| Sabah | 42 | 40 | 45 | 30 | 35 |
| Sarawak | 31 | 20 | 17 | 19 | 18 |
| Total | 385 | 413 | 342 | 302 | 249 |

Referring to the above schedule, as stated by Datuk Ismail Che Rus¹⁰, recalling the increase of incestuous act (regardless non or consensual) as a combat to the social evil that occurred at home, had pressed for stiffer penal sanctions including mandatory death sentence or life imprisonment with whipping which the proposal by him sparked mixed reaction from the public. The increase of the crime actually proves the immeasurable physical, psychological and social consequences of an inadequacy to existing criminal law. Incest whether non-or consensual should be regard as a criminalization sexual intercourse. Reported cases are minimal, this probably due to the reluctance to report such cases and of course to add further the stigma or embarrassment and the culture of silence within communities. Many choose to keep close to their chest on what had happened and refuse to seek justice by reporting to the authorities. This has very much to do with the social stigma harbored by the society on sexual assault victims. The social stigma creates fear for the victims. They will be frowned upon if others get to know the fate that befell them, if the victim gets pregnant, the stigma continues with the child described as illegitimate. Incest is difficult to be discovered because it is a well-suppressed and guarded secret that commonly occurs through persuasion and pressure rather than by physical violence. Economic dependency is also an important reason for the victim's silence as victims of incestuous act have to depend on their abusers for food, shelter and other needs.

There may be seems to be increased awareness and media attention about this abusive act, this low rate of reporting nevertheless seem to indicate apathy from civil society, as too few adults intervene when children are abused, resulting in serious harm and even death (Status Report On Children 's Rights In Malaysia, 2012).

Generally, a sexual intercourse occurs with consent by both parties (adult) and it will not become an offence unless it was done unnaturally (Sec 377-377E Penal Code). Under Sec 375¹¹, rape is a sexual intercourse without consent of the victim. Whereas incest is found under Sec 376A¹² but no element of consent was mentioned. Referring to a statement made by former Minister in

⁹ Kementerian Pembangunan Wanita, Keluarga dan Masyarakat dan PDRM.

¹⁰ Datuk Ismail Che Rus was a former Director of the Federal Criminal Investigation Department in Malaysia.

¹¹ Section 375. 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 recognised in the Federation as valid, is not rape.

Explanation 1-A woman-(a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or(b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section.

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

¹² Section 376A. A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

the Prime Minister's Department, Datuk Seri Utama Dr Rais Yatim¹³, there must be a clear distinction made between non-consensual incest i.e. incest which is provided by law under Sec 376A and consensual incest. He further said that different read and punishment of the offence has to be made clear to draw the line between the offences. He suggested a heavier punishment should be given to the offenders in consensual incest.

In one statement made by Assistant Superintendent Halimah Kawalussin, there were victims who agreed to have sex with their fathers for reason being that the mother has dies or their parents has divorced. In such situation however, should the victim even called a victim since consent was given? Or is the consent given with a free will (without any force, under influence etc.) or should the offence falls under incest since there is consent involved?

Recently, many cases of consensual incest were reported but only few had come to our attention. In Kelantan, a 47-year-old mother and 22-year-old son were fined and jailed for consensual incest. In 2013, a petty trader has claimed trial to having sex with his daughter aged 21-year-old. Teoh Boon Huang was charged in the Sessions Court for having sex with his daughter and facing up to 20 years of prison ad whipping if convicted under Section 376B of the Penal Code. The daughter had admitted to having consensual sex with her father since she was 18.

Under Sec 376A, consent is not an issue. Consent is only a matter in Sec 375. However, under Sec 376A, it is a clear offence of incest where he/she is having a sexual intercourse with a person who is related to him/her who he/she is not permitted to marry. In *Elemen Perseujuan dalam Kesalahan Sumbang Mahram di Malaysia: Satu Analisa*¹⁴, the writer suggested that Sec 376A provides element of consent i.e consensual incest but Sec 376B¹⁵ provides for non-consensual incest. The article also further stated that, consent in incest-relationship is not an issue. The more important factor to be considered is on determining whether the offender is having an incest-relationship which is by law incest is a relationship with a person whom the offender prohibited to marry and such conduct is an offence. Meanwhile in giving out decision, the Court should also take into consideration on the age and the charity of the offender.

For example in Kelantan, in early of the year 2000, a 17-year-old daughter was charged with incest with her father under the Kelantan Syariah Criminal Code. The Syariah prosecutors regarded that the girl was a willing partner in the commission of crime and therefore an offender rather a victim. The girl, is by age, a juvenile and under the control of her father. The same offence if to be charged under Penal Code will be read under rape which serves greater punishment. The 36-year-old father was only jailed for two years, fined a total of RM4, 000 and given five strokes of the rotan when he pleaded guilty to charges of incest and preliminaries adultery.

Hence, we can see the conflict of laws where the failure of the Syariah judicial to understand the dynamics of power relationship led to the prosecution of a daughter, who could be a victim of sexual abuse by the father, as if she was an equal perpetrator and willing partner in a crime¹⁶.

SOME RECOMMENDATIONS AND CONCLUSION

Sex Education

Incest is a social problem of sexual nature which is often neglected and underreported. It is a difficult situation when the victims of incest consented to such act with the perpetrator. At the same time they tend to suffer in silence and are reluctant to report to the authorities since the perpetrator is a person who has familial ties with the victim. Hence, based on the above chronology discussion, a basis step should be taken from the foundation itself.

Generally, discussion on sexuality in Malaysia is labelled as inappropriate. This cultural value governs by perception of religion teaching; seldom encourage discussion on sexual related topic. Sexuality does not only focus on sexual behavior but also covers reproduction health, sexual attitude, sexual health care and relationship which are consistent with cultural, moral and religion value. However, people choose not to discuss sexual development in detail. Most of the parents will not discuss sex related topics with their child. Furthermore, sex education is not a comprehensive subject in school, and it focuses on the topic related to anatomy, reproduction, contraception and sexually transmitted disease which are integrated in science subjects for lower secondary level students. As a result, this nonverbal underlying message may communicate to some individuals that sexuality is

¹³ <http://www.thestar.com.my/news/nation/2003/01/10/tough-laws-for-incest/> Accessed 07/10/2016

¹⁴ Anis Shuhaiza bt Mohd Salleh *Elemen Perseujuan dalam Kesalahan Sumbang Mahram di Malaysia: Satu Analisa* [2010] 1 MLJ lvi

¹⁵Section 376B. (1) Whoever commits incest shall be punished with imprisonment for a term of not less than ten years and not more than thirty years, and shall also be liable to whipping. (2) It shall be a defence to a charge against a person under this section if it is proved—

(a) that he or she did not know that the person with whom he or she had sexual intercourse was a person whose relationship to him or her was such that he or she was not permitted under the law, religion, custom or usage applicable to him or her to marry that person; or

(b) that the act of sexual intercourse was done without his or her consent.

Explanation—A person who is under sixteen years of age, if female, or under thirteen years of age, if male, shall be deemed to be incapable of giving consent.

¹⁶ <http://www.sistersinislam.org.my/news.php?item.850.12> Accessed on 29/08/2016

a sinful subject and inappropriate topic to discuss. The sex education to be implemented should be one that is meticulously and formally planned while being relevant to the age levels of the students. Educational system must step forward in preaching and nurturing the society especially the little ones of their own boundaries in a relationship. Sex education must be taught not just to educate on impact of sex but also the moral aspect. Perhaps, a trained counselor must be placed in every school that can discuss more on moral, principle and life aspect rather than teach what is provided in a syllabus. Sex education can actually be a combination of many topics related to the physical development of children and adolescent, development of the reproductive and fertility system, pregnancy control, the aspect of dealing or judging of sexual advances from men or women and also the widespread of sexually transmitted diseases and also illicit sex. Many countries have taken steps to introduce sex education in their schools. United States, Germany and Australia have taken the steps of introducing sex education as soon as the students reach their puberty. Most of these developed countries have started introducing sex education as soon as the children reach the age of 11-12 with the permission of their guardians¹⁷. Consonant with our Federal Constitution (by virtue of Article 12) – Right to education, it is about time for us to consider this new kind of education to be introduced.

Punishment

As for the punishment, to date, most incest reported cases were charged and punishable under section 376B. One must have thought that the punishment is somehow or rather sufficed; nevertheless it must reflect Malaysian society's abhorrence to crimes of this nature. The offender must be kept away from their daughters/sons as possible – but not just their daughters/sons, perhaps, other younger siblings or relatives, for he may consider them as desirable prey to satiate his/her lust.

Not to forget, provisions on the convicted offender should also be included. Convicted offender must undergo treatment or medication while he/she is in prison. Perhaps this type of offender should be treated as psychiatric disorder in which an adult experiences a primary or exclusive sexual attraction to their own family. Treating his type of offender may still be a new area in Malaysia but, various therapies or treatments can be developed based on the experience of countries that have such cases.

Next, is educating the public. Punishment is also act as deterrence to prevent others from conducting the same act. The existing laws have to be read properly as to lead to a great punishment to punish the perpetrator and also deter others from doing the act. The criminalization of incestuous relationship can be deterrence if it be made known to the public as to understand the defect of having it in the society.

The public also has to also be alarmed and warned on how dangerous of the incestuous relationship psychologically and socially which will create a reminder to them. Perhaps informing of the high risk of having a disable of a born child or being shunned from the society which could affect the emotional-self. In other words, a mistake is taking a life-time punishment. As taboo as it is to be told, the incestuous relationship is a condemn to every religion, country and life-principle which lead to stigma and isolation.

Conclusion

Incest is a despicable and inexcusable offence; it is paramount to amend the law and nevertheless must take caution against on relevant legal amendments such as heavier and more punitive sentences without giving full thought to whether such amendments would bring about the desired social changes. Bearing in mind that the number of reported incest are only the tip of the iceberg and that of these even fewer cases reach the conviction stage, it is time for relevant legal changes to be made to ensure that, firstly, they are not only preventive but also serve as an effective deterrent against the recurrence of incest cases; secondly, the changes must encourage and embolden the victims and other family members to report any incidence of incestuous rape; and thirdly, they must be protective of the victims and give paramount consideration to the interests of the victims from the very moment the legal and judicial process is set into motion.

In furtherance to introducing the sex education, efforts to promote the education must be taken in a positive thought in view of the alarming incest cases. A comprehensive on having a structured and well-planned sex syllabi and curriculum among the Malaysian has to be revamped in schools. For example, the content of the Reproductive and Social Health Education (PEERS) which is currently taught in primary and secondary schools must be upgraded. However, alternatively, sex education does not have to be a standalone subject with a specific curriculum. Students learn about them in Pendidikan Islam, Pendidikan Kesihatan and Science subjects. By incorporating the elements into these existing subjects, and it has been proven workable in some countries as a result of high-quality sex education for both primary and secondary school students.

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¹⁷ Johari Talib et al., *Procedia - Social and Behavioral Sciences* 59 (2012) 347.

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