

RAPE AND ZINA : A COMPARATIVE
STUDY BETWEEN THE ISLAMIC PENAL LAW AND
THE PENAL CODE OF MALAYSIA

BY

ISMAIL SAID

A PROJECT PAPER SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE
DIPLOMA IN LAW AT THE
MARA INSTITUTE OF TECHNOLOGY

SHAH ALAM

SELANGOR

MAY 1984

Preface

Purpose

The primary purpose of this paper is to make a comparative study of the differences and similarities as regards the sexual offences of rape and zina. Many abominate rape and zina but only few appreciate the salient features of these offences. Rape being an offence under the Penal code - which is a set of man-made laws while zina is a sin under the Shariah - a divine set of laws governing every aspect of a muslim individual, offers much to study.

The secondary purpose is to try to understand the reason for the increase in the rate of crimes these days especially in these context. To achieve this, no understanding of the present society will ever be possible without the knowledge and correct appericiation for both legal systems.

With regards to these aim which stir the academic interest the writer finally decided to dwell upon these topic.

Scope

A proper study of this kind needed far more time then the writer was able to devote. However the writer has made his study in various aspect Beginning with the substantive law for each offence in the light of it's definition, elements and evidence. The punishments too received ample observation. It is not

<u>Contents:</u>	<u>Page</u>
1. Title page	
II. Preface	iii
III. Table of Statute cited	vii
IV. Table of cases cited	viii
V. Table of abbreviation	ix
VI. Abstract	x
VII. Chapter One: Rape	1
1. Introduction	1
2. Definition	3
3. Circumstances constituting rape	4
(a) 'Against her will'	4
(b) 'Without her consent'	6
(c) 'Consent by fear of death or hurt'	9
(d) 'Consent under misconception of fact'	11
(e) 'Consent of immature woman'	12
4. Penetration	13
VIII. Chapter Two: Zina	19
1. Introduction	19
2. Definition	20
3. Element to constitute zina	22
4. The element of confession and witnesses in Islam (in zina)	23
5. Zina: the forbidden Act: It's authorities	27
6. Status of child (as result of rape and zina)	30
7. Question of consent in rape + zina)	31
8. Exception (in rape and zina)	33
IX. Chapter Three: Penalties for rape and zina	42
A. Rape	42
B. Zina	49
1. Punishment for married person	55
2. Punishment for unmarried person	59

Abstract

This project paper is on the subject of a comparative study of the offences of rape and zina.

In chapter one the writer deals extensively on the substantive law of rape. Subsequently in chapter two the writer deals with the substantive law of zina. Alongside the writer also discuss the differences and similarities of both offences. In chapter three the study is solely on the penalties of both offences. This covers the theoretical and practical aspect. Further it is necessary to discuss the problems as regards the application of the Islamic law in Malaysia. Unlike the penal code which is a code of general application. There is no impediment to it's applications. With this in mind the writer has dedicated chapter four to this aspect; Problems of Application.

Ultimately the writer tried to present this paper with much details as possible with the limited sources available and other unavoidable limitations. For what ever error remains, then, the writer is solely responsible.

CHAPTER ONERape1. Introduction

Rape has over the past years become a word that associates itself with brutally terrorising night mares. Leaving victims suffering not only emotional implications but cute psychological distress. The act of rape is a violent abuse of the victim's body, dignity and self determination. In four out of five cases it is accompanied by other physical violence. In every case it is accompanied by sexual humiliation. Neither the law nor the community know how to treat rape, both the victims and the accused. Certainly some rape victims are compensated by the law but the majority are not.¹

In terms of punishment it provides the law assess rape as less serious than only treason and murder.²

To the burden of prove it adds the burden of the responsibility for the fate of the accused, both of which are placed squarely on the shoulders of the unhappy accuser.

It must be realised by all parties involved that the concern of the rape victims is not for her chasity but for her freedom her safety and her life. If by resisting she provokes more violence. She will submit. When all she has to show for, the attack is her distress anger and traces of semen, how can the victim convinced