

MEMORANDUM ON LAWS RELATED TO RAPE

PROPOSALS FOR AMENDMENTS

Submitted by the

Anti-Rape Task Force

Comprised of

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MEMORANDUM ON LAWS RELATED TO RAPE: PROPOSALS FOR AMENDMENTS

I INTRODUCTION

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

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

Observations on Recent Trends in Rape

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

1. In 1993, 2.4 rape cases were reported per day. In 2000, the number increased to 4.1 reported rape cases and in 2002, the number of reported cases dropped to three cases a day.
2. Only one out of ten rape survivors reports rape¹.
3. Sixty-seven percent of rapes occur in places that are supposedly "safe" for women².
4. In 2001, there were 161 reported cases of child rape, out of which 83 percent were allegedly committed by people the children knew³.
5. Only about 10 percent of rape cases reported in the Federal Territory ended up in conviction⁴.

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

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

³ Federal Police Statistics, 2001.

⁴ AWAM Report, fn2 *supra*.

6. There remain many obstacles to conviction, including the need for physical injuries as corroborative evidence and the prolonged trial procedure that is not sensitive to the needs of the survivors⁵.
7. There are also some disturbing trends in recent rape cases. Some of these trends are as follows:
 - a) More and more assailants are of younger ages⁶;
 - b) Young girls are increasingly targeted for rape⁷;
 - c) Increased number of reported cases of rape against children of tender age⁸;
 - d) Rape of women in custody⁹;
 - e) Rape of girls and women by people in positions of trust, e.g. by bomoh, medical doctor, and religious teacher;
 - f) Extreme violence being used in rape cases, with rapists sometimes resorting to murder¹⁰.

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

These trends underscore the need for immediate attention and action.

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

In view of the above developments and the drastic increase in rape crimes, two consultations were conducted in 2001 and 2002 whereby the views and proposals of representatives from NGOs and the Ministry of Women and Family Development and the Attorney-General's Chambers regarding reforms related to rape laws were

⁵ AWAM Report, fn2 *supra*.

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

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

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

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

¹⁰ Those incidents mentioned in fn6 - fn8 above, as well as the recent brutal rape and murder of Canny Ong.

Memorandum on Amendments to Laws Related to RAPE

discussed in depth. The Anti-Rape Task Force¹¹ was then set up to formulate the amendments proposed to the Penal Code, the Evidence Act and the Criminal Procedure Code.

This Memorandum serves to introduce the Anti-Rape Task Force's proposals for amendments to these laws. The memo includes proposals introduced to the Special Select Committee on the Penal Code and Criminal Procedure Code in consultations with the women's NGOs in August and October 2004.

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

II SUMMARY OF THE PROPOSED AMENDMENTS TO LAWS RELATED TO RAPE

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

- ❖ Amendment to Section 375 of the Penal Code to include a wider definition of rape that takes into account the various types of sexual violation and the aggravated situations that happen in rape cases. The expansion of the definition of rape will ensure that the laws are more reflective, responsive and sensitive to the concerns of rape survivors;
- ❖ A review of the burden of proof on the issue of consent to cover situations where there ought to be a reversal of the burden. In a prosecution for rape, there is the tendency by courts to look for evidence of active repulsion on the part of the victim, e.g. a show of struggle or resistance or refusal by the victim, before finding that there was no consent. This limits such findings to situations of fraud or complete helplessness on the part of the complainant, unconsciousness or total mental incapacity. Thus, it appears that the prosecution must not only show lack of assent but also show manifest refusal or resistance, even though such active resistance is not a legal requisition. Even if resistance is proved, it may not amount to dissent if the refusal is deemed to be ambiguous. This is due to the fact that lack of consent must be established beyond reasonable doubt, and therefore, failure to show dissent actively will often be resolved in the accused's favour.¹² With the proposed amendments, submission to the accused induced by force or fear of force and other recognised pressures will not be considered as a valid consent;
- ❖ To make marital rape an offence by removing the existing protection given to husbands. The experience of women's organizations dealing with domestic violence show a high incidence of rape by husbands in cases of domestic violence. Yet, because husbands are specifically excluded by the existing section 375 of the Penal Code, wives are rendered totally helpless and without recourse;
- ❖ Additional Sections to the Penal Code to create the offence of Aggravated Rape, i.e. rape under certain circumstances deemed to be aggravated circumstances, and to impose appropriate sentences to reflect the increased gravity of the offence;
- ❖ Additional Section to the Penal Code to impose increased penalty for second or subsequent rape offences as there are more and more cases of repeat offenders;
- ❖ Recommendation for mandatory rehabilitative counselling for all convicted rapists;
- ❖ To amend the Evidence Act to eliminate the rule of prudence that corroboration be required for a conviction in a rape charge;
- ❖ To remove the requirement in the Evidence Act that evidence given by a child must be corroborated;
- ❖ To restrict admission of evidence of past sexual history of the victim with the accused to limited circumstances; and
- ❖ To create a compensation and assistance body for rape survivors.

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

III PROPOSED AMENDMENTS TO LAWS RELATED TO RAPE

1.0 AMENDMENTS TO THE PENAL CODE: WIDENING THE DEFINITION AND SCOPE OF RAPE

1.1 Existing Section 375

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

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when consent has been obtained by putting her in fear of death or hurt to herself or to any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- (f) with or without her consent, when she is under sixteen years of age.

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

Exception – Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in the Federation as valid, is not rape.

Explanation 1 – A woman –

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

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

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

1.2 Widening the Definition of “Sexual Intercourse”

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

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

- iv. with or without her consent, when she is under sixteen years of age.

Explanation:

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

1.3 Deletion of Explanation of “Penetration”

Delete the following explanation in Section 375:

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

Justification

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

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

- i. To recognise that other forms of violent acts besides penile penetration are taking place in rape cases;
 - ii. To recognise that the insertion of objects should be treated as principal offence, rather than as secondary indecent assaults because this act constitutes a gross act of violation which has equal, if not greater, gravity to the current legal understanding of rape;
 - iii. To ensure that heavier penalties are imposed for all these forms of violent acts.
5. The amendment to include insertion of objects as part of rape aims to discredit the long-held view that rape is merely a result of excessive passion. It reiterates the point that sexual assault is violence and is more than just the penile penetration.
6. The proposed amendment also recognises the fact that a survivor of an assault in which a bottle or other objects are inserted into the vagina or anus may be just as, or much more seriously injured, physically or psychologically, than a female into whose vagina a man's penis is inserted without consent. The fact remains that both are acts of violence against a woman using sex as a weapon.

1.4 Marital Rape

To delete:

1. "Exception – Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in the Federation as valid, is not rape."
2. "Explanation 1 – A woman –
 - a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or
 - b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section."
3. "Explanation 2 – A Muslim woman living separately from her husband during the period of 'iddah', which shall be calculated in accordance with Hukum Syara', shall be deemed not to be his wife for the purposes of this section."

Justification

1. This amendment intends to assert that marital rape means any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, threat of force, or when the wife is unable to consent¹³.

Under the present Penal Code, marital rape is not a crime because of the exception in Section 375. This exception originated from an archaic British

¹³ Röhana Arifin (ed.), (1997), "Shame, Secrecy and Silence. A Study of Rape in Penang", Published by the Women's Crisis Centre (WCC, now known as Women's Centre for Change), Penang, Malaysia.

common law concept whereby the wife, upon entering the contract of marriage, is deemed to have given herself to her husband and is treated as the husband's property. The exception is carried over into the Domestic Violence Act, so that even in a domestic violence situation, a husband can be prosecuted for using physical violence against his wife, but not for raping her.

2. By the removal of the exception, it is proposed that the current protection that is given to men who rape their wives be removed, and that they be made equally liable to be charged with rape.
3. This proposal is based on the premise that sex must be a cooperative act of free will and there is no reason why the same premise is not applicable to parties who are married to each other.
4. The cases handled by women's organisations and studies from Malaysia and other countries demonstrate the existence of marital rape and raise concerns as to the relevance of existing laws in delivering protection to rape survivors.¹⁴
5. The cases indicate a significant number of women have been abused for not cooperating with their husbands when their husbands want to have sex. They have been physically beaten, or had many other necessities taken or withheld from them, or their husbands may have used emotional or psychological abuse, such as threatening to leave them. A woman who has experienced such threats does not have a choice because of fear of reprisal. Women in these circumstances are usually trapped in a vicious cycle of sexual abuse.
6. Many battered women have said that their husbands demanded sex directly following a beating, regardless of the wife's wishes or emotional or physical state. When a woman consents to sex out of fear or coercion, it is rape, and the perpetrator should not be allowed to get away with the offence by the mere fact that he is married to the survivor¹⁵.

In a legal marital relationship, there is a general assumption that a wife has to submit and satisfy her husband's sexual gratification. However, a clear distinction has to be made between having mutual sexual relationship with one's wife and having a forced sexual relationship without the wife's consent. A woman who is raped by her husband is effectively being violated by someone with whom she shares her life, home and children. In marital rape, there is the added element of betrayal and a breach of intimacy, besides the violence used. Research indicates that wife rape survivors are more likely to suffer multiple long lasting psychological injuries when compared with rape by a stranger and acquaintance¹⁶. The shock, terror and betrayal experienced by rape survivors are often exacerbated rather than mitigated by the marital relationship.

At present women do not have any avenues of redress, since husbands know they are protected under the law by virtue of their marriage. The prospect that they may be liable to be prosecuted would be an effective deterrent to marital rape.

¹⁴ AWAM's statistics show that in the years 2000 - 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse. Similarly, a WAO National Research Report on Domestic Violence in Malaysia (1989-1992) showed that of the 60 battered women who sought help from five agencies, 50% of the cases reported their husbands had used physical force during sexual intercourse. Studies from other countries show that women who are raped by their husbands are likely to be raped many times – often 20 times or more.

¹⁵ Center for Research on Partner Violence, <http://www.wellesley.edu>, United States of America

¹⁶ *Id.*

7. It has been argued that the resistance to eliminating the marital rape exception is because a Muslim wife is required to submit to her husband's request for sexual relations. Several Muslim scholars have commented that the recommendations calling for the repeal of the exception (as highlighted by SUHAKAM) were "going against Islam and ruining the marriage institution" (Mingguan Malaysia 21/8/04) or due to "Western influence" (Utusan Malaysia 22/8/04). A religious advisor was reported to have said, "the subject of marital rape, when a husband forces a wife to have sex against her will, is relevant only to non-Muslims" (New Straits Times 23/8/2004) adding that "Islamic law is adequate to check a husband's abuses".
- i. Islam is a religion of justice and peace that exhorts Muslims to uphold human dignity. To say that Islam abhors cruelty and violence is an understatement. Allah (swt) commands Muslims to "Eschew all sin open or secret." Sûrah al An'am 6.120 (translation Yusuf Ali). The message of Islam is universal and without exception.
 - ii. The Prophet Muhammad (saw) himself treated his wives with nothing less than love respect and tenderness. Abdullah bin Umar reported that during the lifetime of the Holy Prophet, the companions treated their wives most politely for fear that a Commandment concerning them might be revealed (Bukhâri). Abu Hurairah reported that the Holy Prophet (saw) said, "The most perfect of the believers in faith is he who is the best in conduct, and the best of you are those who are the best to their wives." (Tarmizi)

In Sûrah al Nisa 4.19 with regard to the treatment of wives, it was commanded, "... On the contrary, live with them on a footing of kindness and equity, If ye take a dislike to them, it may be that ye dislike a thing, and God brings about through it a great deal of good." (translation Yusuf Ali)

- iii. Islam grants rights to both husband and wife. Each has a right over the other. Whilst the husband has a right to have sexual relations with his wife, a wife similarly has the right to sexual relations with her husband. The Prophet (saw) himself advised men not to neglect this duty to meet the needs of their wives. Abdullah bin Amr bin Al-As narrated, "Prophet Muhammad (saw) said, "O Abdullah! I have been informed that you fast all the day and stand in prayer all night?" I said, 'Yes, O Allah's Apostle!' He said, "Do not do that! Observe the fast sometimes and also leave them at other times, stand up for the prayer at night and also sleep at night. Your body has a right over you and your wife has a right over you". (Bukhâri)
- iv. In the Quran and in the Sunnah, it is very clear that sexual relations have their place and are part of nature, decided by Allah for the continuation of the human species. The aspect of fun and pleasure is mentioned in the Sunnah. According to al-Ghazali, in his writings on the ethics of sexual relations, intimate physical relationship should not come suddenly, but that the way should be paved until the husband and wife are stimulated. It is very clear here that sex is with mutual consent and mutual will.

These elements are clearly absent in forced sex/marital rape. A husband does not seek the consent of his wife on the sexual act. Wives are often humiliated, abused and no ethics are observed. Islam does not allow wives to be treated this way and in fact abhors any form of violence towards women.

- v. Under Syariah law, it is a matrimonial offence for the husband to be cruel to his wife. Forced sex reasonably constitutes an act of cruelty. This is detailed in Section 127 & 128 of the Islamic Family Law Act (Federal Territory) (1984)¹⁷.
- vi. Can a Muslim husband force sex on his wife? We stress that rape is rape, even if it is by the husband. In the spirit of mutual consent and consultation, there cannot be forced sex. There are ethics in sexual relations in Islam and mutual wish and desire must be present. According to al-Ghazali, sexual relations is a contract, and therefore it should not happen except through mutual agreement. Therefore, the recognition of marital rape would not be in contradiction to the spirit of Islam in marital relations.
- vii. The myth that a husband is unable to rape his wife due to irrevocable licence for sex as provided under the Penal Code finds its basis not in the laws of Allah (swt) but in English common law prior to the 1800s. In their justification for not recognising marital rape, English law lords often quoted East in his *Treatise on the Pleas of the Crown*, “a husband cannot by law be guilty of ravishing his wife on account of the matrimonial consent which she cannot retract”.

In perpetuating this myth, Muslims are justifying and keeping alive a myth created by Victorian Englishmen (and their forefathers) who viewed women as little more than property, a view certainly rejected by Islam. Sûrah an Nisa 4.19 commands, “O ye who believe! Ye are forbidden to inherit women against their will...”

- 8. No wife who has been raped considers the act to be merely sex. It is a form of violence, aimed at violating the victim in one of the most humiliating manners. Whilst trying to preserve the rights of married persons to engage in consensual sex with each other, it is alarming that the result of equating sex with rape appears to be condoning violence against women in the home. In punishing rape, the law does not prohibit or even restrict married couples from engaging in consensual sex. To equate sex with rape is to equate a caress with a beating.

In an English landmark decision of *Regina v R* [1993] 1 CLJ 1, the law lord said, “Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances.... There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault.”

- 9. Another public discussion relates to implementation. The perception is that if marital rape is criminalised, women will suddenly report rapes in large numbers, sometimes falsely or maliciously. Studies in other countries have shown that criminalising marital rape has not resulted in a large increase in police reports, prosecutions, and convictions for marital rape.

¹⁷ AKTA UNDANG-UNDANG KELUARGA ISLAM (WILAYAH PERSEKUTUAN) 1984 (AKTA 303)

Section 127: Menganiaya isteri

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

Section 128: Tidak memberi keadilan yang sewajarnya kepada isteri

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

- i. Today there are many countries that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. The criminalisation of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights (*See Appendix*).
 - ii. As seen with other forms of domestic violence, wives are generally reluctant to report marital rape because of a fear of retaliation, sense of family loyalty, social and financial dependence, or fear of what will happen to their children. They prefer to avoid the social stigma and scandal that reporting attracts.
 - iii. Thus it is unlikely, as already proven through the experience of other countries, that criminalising rape would open the floodgates. In reality the criminalisation of marital rape would serve to emphasise the fact that the State would not tolerate violence against women including all forms of domestic violence whether they be sexual, physical or psychological. This would ensure that for those women who can no longer tolerate their husbands' violating them physically and sexually (for rape often is accompanied with other forms of assault), the law provides redress.
10. Marital rape is a form of violence against women that cuts across cultural, religious and ethnic boundaries. There is an urgent need to recognize and legislate against marital rape in Malaysia. Legislation against sexual violence within a marriage will send a clear message to all citizens that sexual violence, whether it happens in public or in private, is a violation of rights and will not be tolerated. The government must take the responsibility to legislate and act against perpetrators of violent crimes.

2.0 AMENDMENTS TO THE PENAL CODE: BURDEN OF PROOF ON ISSUE OF CONSENT

2.1 Proposed New Section 375A

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

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

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

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

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

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

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

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

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

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

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

S. 61R Consent

- (1)
- (2) For the purposes of sections 61I (*Sexual Assault*), 61J (*Aggravated Sexual Assault*) and 61JA (*Aggravated Sexual Assault in Company*) and without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:
 - (a) a person who consents to sexual intercourse with another person:
 - i. under a mistaken belief as to the identity of the other person, or
 - ii. under a mistaken belief that the other person is married to the person, is to be taken not to consent to the sexual intercourse, and
 - (b) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes is taken not to consent to the sexual intercourse, and
 - (c) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) or (al) is to be taken to know that the other person does not consent to the sexual intercourse, and
 - (d) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse, and
 - (e) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

- b) the agreement is expressed by words or conduct of any other person other than the complainant²³;
- c) the complainant expresses, by words or conduct, a lack of agreement to engage in sexual intercourse²⁴;
- d) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in sexual intercourse²⁵;
- e) when the man knows that he is not the complainant's husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married²⁶;
- f) when, at the time of giving such consent, the complainant is unable to understand the nature and consequences of that to which she gives consent²⁷;
- g) the complainant is incapable of consenting to the activity²⁸;
- h) the accused being a public servant²⁹, or a person in a position of trust, power or authority or a person with whom the complainant is in a relationship of

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

S. 153.1 Sexual exploitation of person with disability

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

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

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

²⁶ Present Section 375(d), Penal Code

²⁷ Present Section 375(e), Penal Code

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

²⁹ Adapted from S. 376B Indian Penal Code 1860

S.376B Intercourse by Public Servant with Woman in his Custody

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

dependency, abuses such position to counsel or incite the complainant to engage in sexual intercourse with him³⁰.

Explanation

- i. Non-violent threat means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force³¹.
- ii. The fact that a person does not protest or offer physical resistance to sexual intercourse or is not found to have physical signs of resistance does not by itself constitute consent to sexual intercourse for the purposes of this section³².
- iii. In a prosecution for rape where sexual intercourse by the accused is proved and the question is whether it was without the consent of the person alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent³³.
- iv. It is not a defence to a charge of rape that the accused believed that the complainant consented to the act if the accused's belief arose from the accused's:
 - a) self-induced intoxication, or
 - b) recklessness or wilful blindness; or
 - c) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting³⁴.
- vi. Nothing in this section shall be construed as limiting the circumstances in which no consent is obtained³⁵.

Justification

1. In rape law the concept of consent applies in the negative. Logically, the absence of positive assent from the complainant ought to prove this element. Nevertheless, even though physical opposition from the complainant to sexual intercourse is not a legal requisite, as a result of its negative burden it seems that the prosecution has not only to show lack of assent but also manifest refusal or resistance. In early 1980, the Court of Appeal in UK pointed out that earlier authorities emphasised the use of force, but the present legal requirement is clear that lack of consent is the crux of the matter and this may exist though no force is used. The same Court of Appeal in 1995 reaffirmed that the essential in the standard of consent is the absence of consent (without consent) and any attempt to introduce a different legal

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

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

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

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

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

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

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

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

criterion was both mistaken and contrary to law. The point is rather that the fundamental issue as to the state of the woman's mind is that she was not consenting; although evidence of struggle and other resistance will constitute relevant facts to the issue of consent, but such element should not be a required legal condition. In other words, a lack of resistance does not necessarily amount to consent. Therefore it is legally wrong to assume that the complainant must show signs of injury or that she must always physically resist before there can be a conviction for rape under the Penal Code³⁶.

2. Notwithstanding the above, research from all jurisdictions indicate that any woman who has to prove that she did not consent will face enormous difficulty unless she shows signs of fairly serious injury. The amendment seeks to remind the Court that there are many situations of rape where there is little or no struggle at all or even a submission to the act due to the overwhelming circumstances involved. In the 1981 case of R v. Olugboja (which represents the current approach in English law as the standard of consent in rape) said that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission: every consent involves a submission, but it by no means follows that a mere submission involves consent³⁷.
3. The Sessions Court decision in PP v Razali Pilen & Anor is a classic situation where unfair standards were practiced in that where a woman who is mindfully appraised of the situation with which she was confronted was criticised for the fact that she had not resisted. The fundamental issue as to the state of the woman's mind is that she was not consenting; although evidence of struggle and other resistance will constitute relevant facts to the issue of consent, but such element should not be a required legal condition. In other words, a lack of resistance does not necessarily amount to consent. It is therefore wrong to assume that a complainant must show some signs of injury or she must always physically resist before there can be a conviction for rape.
4. There appears to be confusion of legal and factual issues in determining the standard of consent in rape. The legal issue is that not every submission involves consent. The factual issue on the other hand is whether the complainant in a particular case really consented and not just merely submitted. This is a question of fact for the court to consider in light of the surrounding circumstances of the purported non-consent, and facts such as age, physical strength and general disposition may be relevant³⁸.
5. These amendments also cover the main situations in which consent should be deemed to be vitiated and inoperative, e.g. where consent is elicited following "non-violent threats" like a threat of dismissal by an employer; deception by a "bomoh" that sexual intercourse with him would "cure" the complainant or "rid her of the evils possessing her"; and inducement by a police officer of a woman in his custody. In all these situations a presumption that there was no consent is raised, thus reversing the burden of proof on this issue.

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

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

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

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6. These amendments also reinforce the right of a woman to say no to sexual intercourse either by words or conduct at any time, whether before or even whilst she is engaged in any form of sexual activity.
7. These amendments are also important as they seek to impose upon men a greater responsibility and a duty to take reasonable care to ensure that the women do consent fully to sexual intercourse before engaging in it.
8. Apart from that, the amendments also seek to protect women with mental or physical disability and those in a relationship of dependency from being taken advantage of.

3.0 AMENDMENTS TO THE PENAL CODE: AGGRAVATED RAPE

3.1 Proposed New Section 375B

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

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

Justification

1. The offence of aggravated rape is introduced to define any situation involving rape that is deemed to cause additional trauma to the survivor, be it physical or psychological.
2. The aggravating circumstances are proposed on the greater perversity of the offender manifested in the commission of the crime as shown by:
 - i. the motivating factor;
 - ii. the place of commission;
 - iii. the means and ways employed;
 - iv. the time; and/or
 - v. the personal circumstances of the offender or survivor
3. As the law on rape stands, there is no graded scale of punishment for rape cases in Malaysia. Judges have the discretion to punish the rapist to any number of years within the minimum and maximum terms prescribed by the law. The irony is that a man who has consensual sex with his girlfriend who is almost 16 years of age can have the same penalty imposed on him as a man who brutally attacks and rapes a woman. This clearly does not reflect the essence of justice.
4. Under the Malaysian law, there is no additional penalty for aggravated rape or any recognition of the need to impose a more severe punishment for aggravated rape to reflect the more serious nature of the crime.

5. The proposed amendments to define aggravated rape have been taken from various other jurisdictions including India and Philippines. There is a need to distinguish between the various degrees of offences. For example, even with a crime of robbery, the crime is treated more seriously if weapons were used to rob a person. Similarly, the circumstances proposed as aggravated rape warrant a higher degree of sentence. These amendments are necessary, as the Court, on its own, will not make the distinction as demonstrated by various precedents.
6. The proposed inclusion of aggravated rapes distinguishes and classifies the seriousness of the crime in the following situations:

a) Authority

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

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

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

b) Gang Rape

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

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

c) Pregnancy

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

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

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

d) Intoxication

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

e) *Disease*

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

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

4.0 AMENDMENTS TO THE PENAL CODE: PENALTY FOR RAPE OFFENCES

4.1 Existing Section 376

Section 376: Punishment for rape

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

4.2 Proposed Amendments

Section 376: Punishment for rape

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

Section 376A: Punishment for aggravated rape

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

Section 376B: Punishment for second time or subsequent offender

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

Justification

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

Justification for rehabilitative counselling

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

The treatment should be established on a statutory basis. It must be made mandatory that as part of a sex offender's sentence the offender be required to undergo treatment. It must also be accepted that, even if the statutory sentence has been

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served within the prison system, as part of the sentence such an offender should have to continue such treatment in the community until the psychological and psychiatric specialists consider he has been rehabilitated.

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

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

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

5.0 AMENDMENTS TO THE EVIDENCE ACT

5.1 Sexual History of Complainant

(a) Existing Section 146A

Section 146A Restrictions on evidence at trials for rape

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

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

(b) Proposed Amendments

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

New Section 146A

- (1) Notwithstanding anything in this Act, in proceedings in respect of the offence of rape, no evidence and no question in cross-examination shall be adduced or asked, by or on behalf of the accused, concerning the sexual activity of the complainant with any other person unless –
 - (a) it is evidence of, or a question on, specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
 - (b) it is evidence of, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant.
- (2) In proceedings in respect of the offence of rape, evidence that the victim has engaged in sexual activity with the accused may only be adduced if it is evidence:
 - a) of specific instances of sexual activity that took place 24 hours before the offence;
 - b) which relates to the subject matter of the charge; and
 - c) which is not prejudicial against the victim.

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

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

Justification

1. The existing Section 146A allows survivor's sexual history be brought up in the following manner:
 - a. Any sexual activity of the survivor with the accused can be raised;
 - b. When the prosecution has raised something and the defence counsel deems necessary that the sexual history of the survivor be examined in order to rebut the prosecution's statement;
 - c. When there is evidence that the survivor had intercourse with another on the occasion set out in the charge;
 - d. When there is a question on the identity of the rapist; or
 - e. Accused believed that the survivor had consented to the intercourse.

2. Other evidence that has been introduced regarding the sexual history of the survivor³⁹ are:
 - a. Evidence of past sexual history with other men, such as to show bad character – that by having had a sexual past she is thus likely to have consented to the rape; or to show that she is unreliable and as such her evidence is suspect; or that she is a mother and as such have had previous sexual history, and therefore must have consented.;
 - b. Social experiences – the fact that the survivor was a waitress had been used against her;
 - c. Signs of resistance – the survivor had to show bruises or any other physical signs of resistance;
 - d. Delays in making complaint – although there was reasonable cause for the delay (for example that she was in jail);
 - e. Absence of complaints – the fact that a survivor had refused to lodge a complaint or that a complaint was lodged on her behalf was used against her. Sometimes the Court also holds against her the fact that the survivor had not complained to members of the family or friends about the alleged rape.

3. As can be seen, evidence of these factors is prejudicial to the survivor, and the prejudicial value of the evidence is higher than its probative value. Rape is a crime of violence and should not be considered as a violation of a woman's chastity. Nowhere in the present legal definition of rape is there a requirement that the offended party be celibate, virgin or is pure. However, looking at the current adversarial system in a rape trial, it may be implied that only celibate, virgin or pure survivors are worthy of being believed and other survivors are liars. Rape violates the very core of the survivor's person, as much as murder or any other crimes, hence it should be considered as a crime against persons. However currently, only the latter is considered so.

4. Even though current legislation provides for restriction in evidence regarding a woman's sexual history, it is insufficient to protect the survivor from prejudicial examination, as demonstrated from various judicial precedents. The underlying

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

values and misconceptions from myths surrounding rape still prevail in the utilisation of Section 146A in admitting evidence.

5. Survivor's sexual history with the accused may be adduced under strict conditions and circumstances to ensure that the interest of the survivor is protected and that only relevant and probative evidence shall be admitted in Court. The survivor's privacy must be protected and respected at all times so that her sexual history cannot be 'paraded' in open Court. This adds further trauma to the survivor and discourages other survivors from reporting rape.
6. Studies had shown that there is an increase in rape committed by persons known by the survivor. These crimes are always looked upon with suspicion by the police and by society at large. Many of these cases involve survivors who had been raped by their boyfriends or by someone they had come in contact with over a period of time. However, it had been assumed that since the survivor had placed herself in a 'consenting' position such as agreeing to go on a date, having a relationship, agreeing to go to a party, she is to be held responsible for being raped. Survivors have been accused of 'asking for it' and 'of crying rape'. These myths have been perpetuated in our society because of the misunderstanding of the dynamics of rape: that rape is not just about sex but it is about the imbalance of power between a man and a woman. To blame a survivor because she agreed to go out on a date is similar to blaming a businessman who was robbed on a way to the bank for carrying money.

5.2 Corroboration

(a) Eliminate the rule of prudence requiring corroboration in rape trials

(1) Proposed New Section 146B

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

Current Practice

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

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

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

Justification

- a) Where most crimes are concerned the accused can be convicted on the testimony of one individual but as shown above, when the crime is sexual in nature, the evidence of one survivor has been deemed to be insufficient and it needs to be

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

corroborated in some ways. This rule of practice arises out of the belief that women would deliberately lie about being assaulted to explain away premarital intercourse, infidelity, pregnancy or to retaliate against a lover. However, AWAM's research on rape showed that it is very rare for women to report rape because of current prosecution practice, the stigma as a rape survivor and their psychological desire to forget about the crime. Therefore these beliefs are in actual fact, false.

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

(b) Evidence of Child of Tender Years

(1) Existing Section 133A

Section 133A Evidence of child of tender years

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

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

(2) Proposed Amendment

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

Proviso to Section 133A

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

The Current Practice

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

A child of tender years may give un-sworn evidence if the Court is satisfied that he possessed sufficient intelligence to justify reception of the evidence and understands the duty of speaking the truth. This section applies only to un-sworn evidence.

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

"the learned judge had warned herself of the rule of prudence that before an accused can be convicted on the sworn evidence of a child, the sworn evidence must be

corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony"⁴¹;

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

Justification

1. Children's testimonies should be admitted by Court as evidence without having it to be corroborated by some other material evidence to secure conviction for the accused.
2. It has been presumed that the need for children's evidence to be corroborated arises from 'the notorious unreliability of children as witnesses and in particular their known aptitude to confuse fact with fantasy'⁴³.
3. It has been argued that: 'It is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy ... they find it difficult after a lapse of time to distinguish between the result of observation and the result of imagination'⁴⁴, or 'the children's tendencies to invent and distort'⁴⁵.
4. However service providers (child psychiatrists, paediatricians and police) interviewed for the AWAM Rape Report believed strongly that children do not normally lie about sexual abuse or rape. A child psychiatrist of 20 years' experience in preparing children for court trials believes that pre-school children do not tend to lie about sexual abuse. A police officer of 12 years' experience investigating abuses and rapes finds that child witnesses would always tell the truth. If the child could not verbalise the details, they will demonstrate the actions.
5. This proves that there is no basis in not believing a child's uncorroborated evidence. When a child is able to relate explicit details of a sexual act, there is no reason not to believe the child. Children have also been known to be able to remember details of a crime although there has been a generous lapse of time between the alleged offence and the complaint.
6. Numerous studies done by leading researchers on child abuse⁴⁶ found that children who had been abused would rarely tell anyone of the crime. This is because they feel ashamed and humiliated, and fear that they will not be believed. Therefore they choose to remain silent.
7. In UK, the need to corroborate the unsworn testimony of a child of tender years was abolished in 1988⁴⁷.

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

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

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

⁴⁴ Per K. C. Vohrah J, see 40 above

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

⁴⁶ Ellen Bass, Laura Davis, David Finkelhor

⁴⁷ Section 34, Criminal Justice Act 1988.

6.0 AMENDMENT TO THE CRIMINAL PROCEDURE CODE

6.1 Existing Section 426

Section 426 Criminal Procedure Code

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

6.2 Proposed Amendments: Compensation/ Assistance Board

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

How it would work

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

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

The structure of a legislative scheme relating to the Compensation/ Assistance Board should ensure that the following aspects be clearly spelt out:

1. Administration of the Scheme – outline the powers of the claims officers to assess applications and to decide on awards;
2. Eligibility to apply for compensation – set out the main types of injuries for which compensation will be available – in particular offences where sexual violence is present. This should include mental as well as physical injuries;
3. Eligibility to receive compensation – set out the circumstances in which the Board may refuse or reduce an award. This should include the applicant’s level of co-operation with the police, whether there is danger of the offender benefiting unfairly from the award;
4. Consideration of applicants – set out how and when the applicant must apply for compensation and how claims officers must decide the application. Importantly, set out the time limit for making and processing of applications and the standard of proof required;
5. Types and limits of compensation – set out the different types of compensation, that is, compensation for injuries suffered, loss of earning capacity and any other special costs that have to be endured by the survivor. Also set out the maximum and minimum monetary compensation available under the scheme;
6. Standard amount for compensation – set out the formula for working out awards for injuries under the tariff. The tariff should list injury descriptions and the levels that the Board can award for each of them;
7. Compensation for loss of earning – set out the conditions under which the applicant can claim for lost earnings or the ability to earn.
8. Compensation for special expenses – set out the conditions under which the applicant can claim for special expenses due to the criminal injury;
9. Compensation in fatal cases – set out the conditions under which compensation may be applied for and paid when the victim of a crime has died after a criminal injury that is covered by the scheme;
10. Effect of award on other payments – whether other relevant payments that the applicant may be entitled to or court awarded compensation will be taken into consideration when considering the award required for loss of earnings or care costs;
11. Determination of applications and payment of awards – set out the rules about deciding and notification regarding applications and method of paying awards;
12. Reconsideration, review and rehearing of cases;
13. Tariff of injuries – Listing of injuries and its associated tariff that in turn relates to a compensation level.

Recommendations

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

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

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

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

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

The Compensation/ Assistance Board's Fund should award the survivor:

a) Financial support, i.e. a sum of money to be decided by the Compensation/ Assistance Board to compensate physical or psychological injuries sustained, loss of earnings or capacity to earn (which may be projected to the reasonable future), and/or any other special costs that has to be endured by the survivor as a result of the rape to be assessed by the Board. If medical examination is required to reach a decision about the sum to be awarded, then the Board will make the necessary arrangements for such an examination by a duly qualified medical practitioner and bear the costs for the examination.

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

Justification

1. It is a well-established fact that survivors of rape experience grave emotional trauma from the crime, which can often last for a significant period of time. Post

rape trauma and post-traumatic stress disorder (PTSD) are not uncommon among rape survivors, which necessitate medical attention. In addition to that, the shock and trauma may result in loss of earnings due to time away from work, or loss of earning capacity. Also, there may be medical expenses incurred from the rape, e.g. where the rape resulted in a miscarriage of pregnancy or where the survivor contracts a sexually transmitted disease from the offender. If the rape results in death, it is also imperative that her surviving family be compensated for the grievance, and this should cover funeral expenses.

2. It is important that rape survivors are adequately compensated for the physical and psychological injuries suffered as a result of this crime of violence, and that the gravity of the crime is acknowledged. Not only that, the financial assistance may prove invaluable support to the survivor as she begins to heal from the rape.
3. Although the existing section 426 may be utilised for the above purpose there may be problems enforcing such orders if the accused person is not in a financially sound position to make the payment ordered or if there is default in payment of the sum ordered. It would therefore be easier for the rape survivor to claim compensation from the Compensation/ Assistance Board.

THE END

APPENDIX

Marital Rape Legislation: other countries

Introduction

Recently, marital rape has become a contentious issue in Malaysia, with some parties advocating the abolition of the Penal Code's marital rape exception and other parties upholding the conjugal rights of a husband. There are however, no just arguments for the raping of one's wife: marital rape is a form of violence against women that is unequivocally wrong and should be criminalised.

The experience of countries in Asia and around the world has been that legislating against marital rape exception is the first step in raising awareness and changing attitudes about the injustice of marital rape. While marital rape itself has not been eliminated in these countries, governments have at least taken a step to recognise it as a violation of a person's rights and declared it a criminal act. Public awareness and knowledge that marital rape is a crime for which husbands may be prosecuted can be an effective deterrent to marital rape.¹

The following sections will first outline the nature and prevalence of marital rape, and then discuss the current status of marital rape under Malaysian laws. The remainder of the paper will present information about marital rape laws around the world.

Types of marital rape

Generally, researchers have classified marital rape into three types: battering rape, force-only rape, and sadistic / obsessive rape.⁴⁸

The first type is "*battering rape*", which describes the experience of women who are the victims of physical beatings and forced sex, often combined with verbal degradation. Far more force than necessary is used to overcome their victims and the forced sex appears to be just one part of the hostility. The sexual assault may occur during or after the battering.

A second and equally common type of marital rape is "*force-only rape*", in which the husband uses only as much force as is necessary to coerce his wife into sex. This coercion often involves just using his greater weight, size, and strength to hold her down. It sometimes includes twisting an arm behind her back or holding a pillow over her face. As terrifying as such bodily force can be, the husband's purpose does not appear to be the infliction of physical injury. Although marital rape and domestic violence are often associated, "*force-only rape*" demonstrates that marital rape must be viewed as a problem distinct from domestic violence.

At the brutal end of the continuum is "*obsessive rape*", which is the least prevalent but most cruel. The husbands tend to be hypersexed, perverse and often involved with pornography. The victim's suffering often becomes a source of pleasure for the

¹ For example, one article from the United States discusses an interview with Ross, a businessman who used forced sex as a weapon against his wife. The article continues, "Ross admits that had spousal rape been a crime for which he could have been prosecuted at the time of this act, he probably would have resisted the forced encounter". Lisa R. Eskow (1996), "The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution", *Stanford Law Review* 48, 677-709.

⁴⁸ Sarah M. Harless (2003), "From the bedroom to the courtroom: the impact of domestic violence law on marital rape victims", 35 Rutgers L. J. 305; Raquel Kennedy Bergen (1999), "Marital Rape", VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>

perpetrator. Victims are unwilling participants who are forced into sex without their consent and despite their resistance.

Marital rape statistics

Statistics demonstrate that most of the rapes that occur in Malaysia and around the world are not perpetrated by strangers. An All Women's Action Society (AWAM) study reports that between 2000 and 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse. Similar statistics were also seen in the Women's Aid Organisation (WAO) National Research on Domestic Violence (1989-1992).⁴⁹

Women who are raped by their husbands are likely to be raped many times – often 20 times or more.⁵⁰ In a 1999 Australian study, 47% of married / *de facto* married women had been victimised two or more times, compared with 18% of never married victims.⁵¹ One study in the United States found that stranger rape survivors reported an average of 1.3 rapes each while women raped by husbands or ex-husbands reported an average of 13.2 rapes each.⁵²

Studies have found that wives who experience both physical and sexual abuse such as marital rape have higher levels of psychological problems than wives who have only been battered.⁵³ These effects are elevated partially because women who are victims of marital rape are assaulted, often repeatedly, by those they once presumably trusted. Furthermore, these assaults often take place in the intimate and “safe” space of the home. As is often mentioned in marital rape discussions, when a woman is raped by a stranger, she has to live with the memory of the rape; when a woman is raped by her husband, she is forced to live with her rapist.⁵⁴ The shock, terror, and betrayal experienced by rape victims generally are often exacerbated rather than mitigated by the marital relationship.

Existing Malaysian Law

Under current Malaysian law, Section 375 of the Penal Code (Act 574) provides that “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” is *not* rape, but rather is an *exception* to the offence of rape. Hence men cannot be prosecuted for marital rape and women do not have an inherent right to refuse their husbands.

⁴⁹ Memorandum on Laws Related To Rape: Proposals for Amendments, Submitted by the Anti-Rape Task Force September 2003

⁵⁰ Raquel Kennedy Bergen (1999), “Marital Rape”, VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>, citing Raquel Kennedy Bergen (1996), *Wife Rape: Understanding the response of survivors and service providers*, Thousand Oaks, CA: Sage; David Finkelhor & Kersti Yllo (1985), *License to rape: sexual abuse of wives*, New York: Holy, Rinehart, & Winston; Diana Russell (1990), *Rape in Marriage*, New York: Macmillan Press.

⁵¹ Denise Lievore (2003), “Intimate Partner Sexual Assault: The Impact of Competing Demands on Victims' Decisions to Seek Criminal Justice Solutions”, Australian Institute of Criminology, http://www.aic.gov.au/conferences/other/lievore_denise/2003-02-AIFS.pdf, citing Australian Bureau of Statistics 1999, *Crime and Safety Australia, April 1998*.

⁵² Patricia Mahoney (1999), “High Rape Chronicity and Low Rates of Help-Seeking Among Wife Rape Survivors in a Non-Clinical Sample: Implications for Research and Practice”, *Violence Against Women* 5(9), 993-1016.

⁵³ Jennifer Bennice and Patricia Resick (2003), “Marital Rape: History, Research, and Practice”, *Trauma, Violence, & Abuse* 4(3), 228-246, citing J.A. Bennice, P. Resick, M.B. Mechanic, and M. Astin (2003), “The relative effects of intimate partner physical and sexual violence on PTSD symptomatology”, *Violence & Victims* 18(1), 87-94; Diana Russell (1990), *Rape in Marriage*, New York: Macmillan Press; N.M. Shields, P.A. Resick, & C.R. Hanneke (1990), “Victims of marital rape”, in R.T. Ammerman & M. Hersen (Eds), *Treatment of family violence* (pp. 165-182), New York: Wiley; M.A. Whatley (1993), “For better or worse: The case of marital rape”, *Violence & Victims*, 8(1), 29-39; Kersti Yllo, “Marital Rape”, <http://www.bwjp.org/documents/Marital%20Rape%20Word.doc>.

⁵⁴ David Finkelhor & Kersti Yllo (1985), *License to rape: sexual abuse of wives*, New York: Holy, Rinehart, & Winston.

The marital rape exception in the Penal Code is said to derive from British common law, particularly from the writings of an early British jurist by the name of Sir Matthew Hale. He wrote in the *History of the Pleas of the Crown*, published in 1736: "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract."⁵⁵

The British marital rape exception was codified in Malaysia's Penal Code and has remained to this day. Because of the marital rape exception in the Penal Code, marital rape is also excluded from the Domestic Violence Act 1994. Part (c) of the definition of domestic violence under the Domestic Violence Act reads:

"domestic violence" means 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.*

Because women do not have a right to abstain from forced sexual intercourse under section 375 of the Penal Code, marital rape does not fit within the definition of domestic violence and cannot be prosecuted as a crime. Thus, it is only when marital rape is coupled with other physical violence that the crime of domestic violence arises, and the crime is not the rape itself, but the other physical violence. In effect, Malaysian laws do not allow a husband to beat his wife, but they allow him to rape her.

A comparative analysis of marital rape law reform

Marital rape is recognised as a crime in many countries around the world, including Albania, Algeria, Belgium, Canada, Denmark, France, Germany, Ireland, Italy, Mauritania, Norway, Scotland, South Africa, Sweden, Tunisia, the United Kingdom and all 50 states in the United States.⁵⁶ In the Asia Pacific, Australia, Hong Kong, Japan, New Zealand, the Philippines, Taiwan, Vietnam, and most recently Indonesia have criminalised marital rape, generally through removal of the marital rape exception. Australia and New Zealand wrote a definition of marital rape into law about 20 years ago, and the other countries' legislative changes have been more recent. China's rape laws do not technically include an exception for rape within a marriage, though they have sometimes been interpreted to exclude marital rape. In May 2002, The Supreme Court of Nepal has declared that husbands who force their wives to have sex can now be charged with rape.⁵⁷ Aggressive lobbying for similar changes is currently taking place in Pakistan.⁵⁸

One recent development in this area took place on 8 August 2004 when the Seoul, Korea, Central District Court decided that sexual acts cannot be demanded by force, even amongst married couples. It found that the "sexual choice must not be infringed upon between married persons," and in doing so provides legal basis for punishing marital rape in the same way as rape in other situations. The court's decision runs counter to a judgment by the Korean Supreme Court, which in 1970 said that forced

⁵⁵ Jennifer Bennice and Patricia Resick (2003), "Marital Rape: History, Research, and Practice", *Trauma, Violence, & Abuse* 4(3), 228-246.

⁵⁶ The Society for the Scientific Study of Sexuality, "What Social Scientists Know...: about Rape" http://www.sexscience.org/publications/index.php?category_id=440&subcategory_id=335

⁵⁷ Ramyata Limbu, "Marital Rape Outlawed By Nepal's Supreme Court", Panos London, 1 October 2002 <http://www.panos.org.uk/newsfeatures/featuredetails.asp?id=1062>; "Nepali women score victory as court rules marital rape", We! newsletter from Isis International Manila, May 2002, <http://www.isiswomen.org/pub/we/archive/msg00075.html#nepaliwomen>.

⁵⁸ AFP, "A small step on marital rape, but Asia remains divided", Khaleej Times, 27 August 2004, http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2004/August/theworld_August726.xml§ion=theworld&col=

sex was not rape when between a husband and wife.⁵⁹ The Court distinguished this case from the 1970 Supreme Court case because the husband stopped short of penetration, thus the case was about sexual abuse and not marital rape *per se*.⁶⁰

On 15 September 2004, Indonesia enacted a domestic violence law that effectively bans marital rape through criminalisation of “forced [non-consensual] sexual relations” within a household. Although the bill does not mention the word “rape”, courts could interpret this provision to mean that marital rape is now a crime.⁶¹

The following represents a brief overview of marital rape laws in several countries in Asia and around the world.

Australia

By 1991, every state in Australia had abolished the marital rape exception. That year, the High Court considered the issue of marital rape in *R v L* (1991), BFW at 860, and rejected the defendant’s argument that the immunity conflicted with a Commonwealth law that allowed marital intercourse without consent.⁶²

Researchers in Australia have found that rapes committed by strangers are far more likely to be reported than rapes committed by acquaintances, friends, or partners.⁶³ One 1999 study found that “assault not involving injury and assault perpetrated by a current partner were less likely than other types of assault to be reported [to police]”.⁶⁴

China

The PRC law provides: It is a crime “to rape women with force, threat or other means.”⁶⁵ The law has never had an explicit exception for marriage, nor does it provide an explanation of what constitutes rape in marriage. Some Chinese legal scholars believe that the rape laws do not shield husbands from prosecutions.⁶⁶ In practice, however, the record is much more complicated.

Hong Kong

In 2000, the Hong Kong Special Administrative Region government began public consultation on whether and how the marital rape exception embedded in its laws should be eliminated.⁶⁷ The term “unlawful sexual intercourse” in the rape law was traditionally interpreted according to British law, thus incorporating the Hale doctrine that rape cannot occur within a marriage.

On 4 July 2002, the Hong Kong Legislative Council amended the rape laws by enacting two provisions that expand the meaning of “unlawful sexual intercourse” to include marital intercourse:

⁵⁹ Editorial, “Guilty Verdict for Marital Rape”, The Hankyoreh, 24 August 2004
<http://www.minjok.com/english/index.php3?code=25171>

⁶⁰ Ji-Seong Jeon & Jin-Kyeong Kim, “Man Convicted of Sexually Assaulting Wife in First-of-its-kind Ruling”, 20 August 2004, <http://english.donga.com/srv/service.php3?bicode=040000&biid=2004082114278>

⁶¹ “Domestic Violence Now a Crime”, Laksamana.Net, 15 September 2004,
http://www.laksamana.net/vnews.cfm?ncat=45&news_id=7498.

⁶² “Sexual Offences”, <http://law.anu.edu.au/criminet/trape.html>.

⁶³ Patricia Weiser Easteal (1992), “Rape”, *Violence Prevention Today*, Canberra: Australian Institute of Criminology.

⁶⁴ C. Coumarelos and J. Allen (1999), *Predicting Women’s Responses to Violence: The 1996 Women’s Safety Survey*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice no. 47, NSW Bureau of Crime Statistics and Research, Sydney.

⁶⁵ Li Dun, “A Discussion Caused by Marital Rape”, Women of China website,
<http://www.womenofchina.com.cn/WOC/ShowArticle2.asp?ID=1237&ArticlePage=2&BigClassId=7>

⁶⁶ Wang Ying (2004), “More and more women saying no to abusers”, China Daily, 3 March,
http://www.chinadaily.com.cn/english/doc/2004-03/03/content_311452.htm.

⁶⁷ Chiu Man-chung (2004), “Contextualising the Rhetoric of Sexual Violence in Hong Kong”, *China: An International Journal* 2(1), 83-107.

117(1B) For the avoidance of doubt, it is declared that for the purposes of sections 118, 119, 120, and 121 and without affecting the generality of any other provisions of this Part, 'unlawful sexual intercourse' does not exclude sexual intercourse that a man has with his wife.

118(3A) For the avoidance of doubt, and without limiting the generality of any other section, it is declared that in subsection (3)(a), 'unlawful sexual intercourse' includes sexual intercourse between a husband and his wife.

It is unclear the extent to which these provisions have been used in the Hong Kong criminal justice system.

Indonesia

Indonesia is the latest nation to adopt a domestic violence bill, which includes a provision that could be interpreted to criminalise marital rape. This provision states that the penalty for forcing another person in the same household to have sex with a person is a jail sentence ranging from 4 years to 15 years; or a fine ranging from Rp12 million to Rp300 million. Although it does not mention marital rape, either to include or exclude it, a judge could interpret it to include rape within a marriage. The victim alone can initiate proceedings without any other witnesses. Prior to the enactment of the bill, 5,934 complaints of violence against women – not marital rape or even stranger or acquaintance rape – were reported to the police in 2003.⁶⁸ The bill was enacted by the Indonesian Parliament on 15 September 2004 and is scheduled to be signed by the president later in 2004.⁶⁹

Japan

Japanese law makes no distinction between spousal rape and any other form of rape.⁷⁰

Mauritania

Spousal rape is illegal under Mauritania's rape laws.³¹

New Zealand

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence notwithstanding that they are married at the time the sexual connection occurred.^{71a} Further, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence *R. v. D.* (1987) 2 NZLR 272 (CA). There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.⁷² New Zealand provides for a maximum penalty of 20 years' imprisonment for having sex with anyone, including spouses, without consent.

Philippines

The Anti-Rape Law, RA 8353, signed on 30 September 1997, broadened the definition of rape and reclassified it as a crime against persons and not just against chastity. The

⁶⁸ "Domestic Violence Now a Crime", Laksamana.Net, 15 September 2004, http://www.laksamana.net/vnews.cfm?ncat=45&news_id=7498.

⁶⁹ Fauwaz Abdul Aziz, "Scholar: Follow Indonesia, criminalise marital rape", Malaysiakini.com, 9 October 2004, <http://www.malaysiakini.com/news/30655>

⁷⁰ AFP, "A small step on marital rape, but Asia remains divided", Khaleej Times, 27 August 2004, http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2004/August/theworld_August726.xml§ion=theworld&col=

^{71a} Crimes Act, 1961, Section 128, <http://www.rapecrisis.org.nz/court/index.asp>

⁷² Saurabh Mishra & Sarvesh Singh (2003), "Marital Rape — Myth, Reality and Need for Criminalization", PL WebJour 12, <http://www.ebc-india.com/lawyer/articles/645.htm>

law allows for marital rape but provides that the "subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty." If the marriage is proven void, however, the crime and the penalty shall not be extinguished.⁷³ A twin law, RA 8505, the Rape Assistance and Protection Act, was enacted in 1998 to provide a rape shield ruling out use of the sexual history of the victim in court and protective measures for rape survivors.⁷⁴

Taiwan

In Taiwan, courts recognise the right of a woman to sue her husband for rape or assault if she is forced into sex against her will. In 1999, the Taiwan government passed legislation that permits the prosecution of the crime of rape without requiring the victim to press charges. According to a law passed in 1997, rape trials no longer are public unless the victim consents. The Code of Criminal Procedure establishes the punishment for rape as not less than 5 years' imprisonment, and those convicted usually are sentenced to from 5 to 10 years in prison.⁷⁵

Tunisia

Marital rape is a crime under the Penal Code of Tunisia.⁷⁶

United Kingdom

The marital rape exemption was abolished in its entirety in the United Kingdom in 1991. The House of Lords held in *R. v. R.*⁷⁷ (1992) 1 AC 599, (1991) 4 All ER 481 (HL) that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction that no longer represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendments to the statutory law were made in Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in *SW v. UK* (1996) 21 EHRR 363.⁷⁸

Despite the fact that the relationship between the victim and the offender is one of the sentencing factors, the chair of the British Sentencing Advisory Panel stated that: "Sentencing practice does appear to be more lenient when the victim and offender were known to each other." This same sentencing panel released a report calling for courts to deal with intimate rapes the same way as stranger rapes and an eight-year minimum jail term for horrific rapes.⁷⁹

United States

In the United States, rape laws are governed by the individual states, not by the federal government. On 5 July 1993, marital rape became a crime in all 50 states under at least one section of the states' sexual offence codes. Nevertheless, in 33 states, there are still some exemptions given to husbands from rape prosecution –

⁷³ Committee on Women, House of Representatives, Philippines, "Anti-Rape Law Signed", <http://www.philwomen.net/house/news/rapelaw.html>

⁷⁴ Mercedes Llarinas-Angeles, "Monitoring the Philippine Rape Laws: The Policy and the Myths", paper presented at Townsville International Women's Conference, 3-7 July 2002.

⁷⁵ United States Department of State, Bureau of Democracy, Human Rights, and Labor (2001), "Country Reports on Human Rights Practices – 2000, China (Taiwan only)", <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/783.htm>

⁷⁶ Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tunisia. 31/05/95. A/50/38, para. 228 at p.55.

⁷⁷ <http://www.ebc-india.com/lawyer/articles/Ref10#Ref10>

⁷⁸ Saurabh Mishra & Sarvesh Singh (2003), "Marital Rape — Myth, Reality and Need for Criminalization", PL WebJour 12, <http://www.ebc-india.com/lawyer/articles/645.htm>

⁷⁹ "Marital rape as serious as stranger rape", BBC News, 25 May 2002, http://news.bbc.co.uk/2/hi/uk_news/england/2007528.stm.

when she is unable to consent (e.g. she is physically or mentally impaired, unconscious or asleep).⁸⁰

In the United States, studies in the mid-1990s suggested that marital rape accounts for 25 percent of all rapes, and that one-third to one-half of battered women are raped by their partners at least once. Studies from the United States indicate that only 2 percent of rape reports are false reports, the same as for most other felony crimes.⁸¹

Vietnam

Although not specifically or individually mentioned under the Penal Code, marital rape can be addressed under general provisions.⁸²

Conclusion

Marital rape is a serious crime, prevalent throughout Western and Eastern societies. Women who experience rape in marriage suffer severe physical and psychological trauma from the abuse, which is often repeated many times. In Asia and around the world, many countries have abolished the marital rape exception, thereby providing for the possibility of prosecuting husbands who rape their wives. The symbolic value of abolishing the marital rape exception is extremely high. Eliminating the exception sends a clear signal that any rape – within or outside a marriage – is inherently wrong and unacceptable in a modern society.

⁸⁰ Raquel Kennedy Bergen (1999), "Marital Rape", VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>

⁸¹ Lisa R. Eskow (1996), "The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution", *Stanford Law Review* 48, 677-709 at 694, citing Eloise Salholz, Sex Crimes: Women on Trial, Newsweek, Dec. 16, 1991, at 23 (quoting M Torrey).

⁸² Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, "Integration of the Human Rights of Women and the Gender Perspective on Violence Against Women, Addendum 1: International, regional and national developments in the area of violence against women, 1994-2003", 27 February 2003, para. 1235 and 1237, <http://www.hri.ca/fortherecord2003/documentation/commission/e-cn4-2003-75-add1.htm>.

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