

**MEMORANDUM TO THE
SPECIAL SELECT COMMITTEE ON
PENAL CODE (AMENDMENT) 2004
AND CRIMINAL PROCEDURE CODE
(AMENDMENT) 2004**

Comments and Recommendations on:

- 1. Criminal Procedure Code (Amendment) Bill 2004
and Penal Code (Amendment) Act 2003**
- 2. Marital Rape - Section 375 (Exception) Penal Code**
- 3. Law Reform (Marriage and Divorce) (Amendment)
Bill 2004**
- 4. Domestic Violence Legislation**

Submitted by:

**Joint Action Group Against
Violence Against Women (JAG)**

Comprise:

Women's Centre for Change, Penang (WCC)

Women's Aid Organisation (WAO)

Women's Development Collective (WDC)

All Women's Action Society (AWAM)

Sisters in Islam (SIS)

Malaysian Trade Union Congress (MTUC) – Women's Section

*Penang
28 October 2004*

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I. INTRODUCTION

The Joint Action Group Against Violence Against Women (JAG)¹ was formed in March 1985 as a coalition of women's organizations to address issues of violence against women in the Malaysian society. Since that time, JAG's advocacy has expanded to issues of rape, Islamic family law, sexual harassment, domestic violence, and other laws and policies that discriminate against women. In all of its work, JAG applies a rights framework that stresses both gender equality and non-discrimination.

In 16 August 2004, JAG met up with this Special Select Committee to make presentations focusing on the amendments to the *Penal Code* on Rape. At the said meeting, JAG indicated that it would make a follow-up presentation on other issues relevant to women at the Penang public hearing. The Committee also encouraged JAG not to confine its presentation only to the amendments to the *Penal Code* and the *Criminal Procedure Code* but also to bring up other relevant legal reforms.

This memorandum presents JAG's comments and recommendations on the following :

1. *Criminal Procedure Code (Amendment) Bill 2004* and *Penal Code (Amendment) Act 2003*
2. Marital Rape - Section 375 (Exception) *Penal Code*
3. *Law Reform (Marriage and Divorce) (Amendment) Bill 2004*
4. Domestic Violence Legislation

Apart from the amendments to the *Penal Code* and the *Criminal Procedure Code*, JAG's concerns with items 2, 3, and 4 above relates to the following:-

- With regard to marital rape, JAG recommends the exception in section 375 of the *Penal Code* be deleted to criminalise this form of violence. The appendix shows legislation against marital rape in countries around the world;
- Provisions in the Domestic Violence Act 1994 have to rely on the *Penal Code* and *Criminal Procedure Code* instead of operating independently and this often hampers the effectiveness of the Act. JAG requests the Special Select Committee consider a number of recommendations on amending the *Penal Code* and *Criminal Procedure Code* to better protect victims of domestic violence. In addition, JAG requests a Select Committee recommendation for a comprehensive review and reform of the Domestic Violence Act 1994. These recommendations are the result of JAG's monitoring the implementation of the *Domestic Violence Act* since its coming into effect in 1996;
- JAG is concerned about the proposed amendments to the *Law Reform (Marriage and Divorce) Act 1976*. JAG would like to register its comments on the proposed Bill and request more transparency as the amendment process continues.

JAG thanks the Special Select Committee for taking the time and effort to meet with NGOs and the public about reform of the Penal Code and Criminal Procedure Code. JAG especially appreciates the government's efforts to improve legislation and procedures relating to violence against women.

¹ Currently JAG consists of Women's Centre for Change (WCC) Penang, Women's Aid Organisation (WAO), Women's Development Collective (WDC), All Women's Action Society (AWAM), Sisters in Islam (SIS) and Malaysian Trades Union Congress (MTUC)- Women's Section.

II MEMORANDUM

1. CRIMINAL PROCEDURE CODE (AMENDMENT) BILL 2004 AND PENAL CODE (AMENDMENT) ACT 2003

A. INTRODUCTION

The Criminal Procedure Code (Amendment) Bill 2004 (the Bill) consists of a range of amendments pertaining to the scope, investigation, powers of arrest, trial procedures and sentencing powers for various offences relating predominantly to sexual violence and terrorism. Some of the amendments proposed are in furtherance of the amendments made to the Penal Code vide the Penal Code (Amendment) Act 2003 (the Act) which came into force on 25/12/2003 and created a new category of offences relating to terrorism.

Whilst welcoming many of the changes that have been proposed, the Joint Action Group Against Violence Against Women (JAG) wishes to express its concern as regards the implications of some of the amendments proposed under the Bill and those passed under the Act and to propose amendments considered appropriate in the circumstances.

B. CRIMINAL PROCEDURE CODE (AMENDMENT) BILL 2004 AND PENAL CODE (AMENDMENT) ACT 2003: Provisions, Comments and Recommendations

I. Section 2(1) & Section 293 of the CPC (Sections 2 & 16 of the Bill) Definition of Youthful Offender & Sentences for Youthful Offenders

Proposed Amendment:

The amendments propose to raise the age of “Youthful Offender” from that of a child “above the age of 10 and under the age of 16 years” to one “above the age of 18 and below the age of 21” whilst at the same time retaining the sentencing provisions for youthful offenders provided under section 293 save for subsection (2) which gives the Court a discretion to impose a small fine on the parent or guardian in addition to or instead of punishing the offender. The amendments also propose to substitute all references to the Juvenile Courts Act in section 293 with the Child Act 2001.

Recommendation:

Amend the definition of “youthful offenders” to mean children between 10 and 18 so that it covers all juveniles (ie children under 18) as the sentences prescribed under section 293 are appropriate only for offenders in that age group. Offenders between the age of 18 – 21 can be dealt with under section 294 in appropriate cases as section 294 also provides for binding over of offenders under a bond.

References to the *Juvenile Courts Act* in section 293 can then be substituted with the *Child Act*.

Comments:

It is to be noted that section 293 was framed to suit the sentencing of youthful offenders as currently defined ie children who would be liable to be sentenced pursuant to the provisions of the *Juvenile Courts Act* (now *Child Act*). When this definition is amended to cover only offenders between 18 – 21 then section 293 would not be appropriate and references to the *Juvenile Courts Act* cannot be substituted with the *Child Act* as the *Child Act* only applies to offenders under 18 years of age.

II. Section 130B of the *Penal Code* (section 5 of the Act)

Amendment :

section 130B(2) –“terrorist act” means any act or threat of action within or beyond Malaysia that – *inter alia*

- (a)
- (i) involves prejudice to national security or public safety; where the act or threat is intended or may reasonably be regarded as being intended to
- (aa)
- (bb) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organisation to do or refrain from doing any act.....

Recommendation :

Limit the definition of “terrorist act” by deleting 130B(2)(i) and (bb)

Comments:

Section 130B of the *Penal Code (Amendment) Act 2003* has defined “a terrorist act” to include amongst other things, acts which involves prejudice to national security or public safety where it is intended to influence or compel the Government to do or refrain from doing any act.

This definition appears to be exceedingly broad, especially where it states that any act which involves prejudice to national security or public safety intended to influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or even any international organisation to do or refrain from doing any act can be considered a terrorist act. Such a definition is too wide and may be liable to abuse as the test to be applied of what involves prejudice

to national security or public safety is very subjective and even an innocent act can be considered as being prejudicial to national security or public safety. Furthermore, a wide range of actions eg the work of NGOs involve work that is intended to influence or compel the Government to do or refrain from doing any act. Such a wide definition for what constitutes a terrorist act detracts from the main concern of the legislation, that is, to act against terrorism to protect national security.

III. Ancillary Investigative Powers in relation to Terrorism Offences - Public Prosecutor given the power to intercept communications and admissibility of intercepted communications (New Section 106C)(Section 5 of the Bill)

Proposed Amendment:

The Bill now proposes to empower the Public Prosecutor to authorize a police officer to intercept certain communications if the Public Prosecutor considers that the communications are likely to contain information relating to the commission of a terrorism offence. The information so obtained, whether before or after the person concerned is charged will be admissible at his trial in evidence.

Recommendation:

We recommend that the provision be amended so that this power be given to the Court to authorise interception on the application of the Public Prosecutor if he had reasonable grounds for believing that the communication will contain information relating to the commission of a terrorist offence and not otherwise.

There should be sufficient safeguards incorporated so that this power cannot be exercised arbitrarily against just any person. The Court should also be given the power to decide whether evidence thereby acquired may be admissible in evidence at the trial of the accused concerned.

Comments:

Like other powers by the Court to issue warrants, this power should similarly be given to the Court and not the Public Prosecutor. Furthermore, the power that is proposed to be given to the Public Prosecutor appears to be far too wide since it can be exercised so long as the Public Prosecutor "*considers that it is likely to contain information relating to the commission...*". Such a power may be liable to abuse as the powers of a Public Prosecutor are generally exercisable by Deputy Public Prosecutors throughout the country unless otherwise expressly stated and there is no burden upon the Public Prosecutor to show that he had reasonable grounds for believing that the communication will contain information relating to the commission of a terrorism offence. It may also be used to infringe upon the privacy of any individual regardless of whether or not he is suspected of being involved in a terrorist offence as the provision does not limit the exercise of the said power only to communications pertaining to a person suspected of being involved in a terrorist offence. The power given also means that the Public

Prosecutor can acquire and use the evidence acquired without the knowledge of the accused after he is charged.

IV. Evidence through live video and television links allowed (new Section 272B)(Section 13 of the Bill)

Proposed Amendment:

Subsection 1 of section 272B bill now proposes to introduce a new section into the act to enable a witness, other than the accused, with leave of the court, to give video or live evidence through a live video or live television link in any trial or inquiry if it is expedient and in the interest of justice.

Section 272B(2) then goes on to list specific offences in the Penal Code to which the court can apply this provision, including offences of rape, outrages on decency and inciting a child to act of gross indecency.

Recommendation:

Amend section 272B(2)(c) to read “such other offences as the Court may in its discretion deem appropriate”

Comments:

Whilst the introduction of the ability to give evidence through live video and television links is clearly a step in the right direction, we recommend that the Court be given a discretion to allow the giving of evidence through live video or live television link in appropriate cases.

The above proposal is in view of the fact that apart from the offences specifically mentioned, there are other offences under the Penal Code and Child Act where such a method of giving evidence may be appropriate and it would be too cumbersome if the power to determine for which offences such testimony should be allowed is vested in the Minister instead of the Courts. For instance, it may be appropriate to give evidence in cases of trafficking of children for prostitution (section 372 and 373 of Penal Code) via this method and the Court would be the best judge of when this would be the appropriate mode of giving evidence. However, these provisions have not been mentioned in section 272B.

Rather than having to list every offence where giving evidence through live video and television links may be appropriate, we recommend that the Court be given discretion to allow such a form of evidence.

V. Offences requiring police supervision (Section 295)(section 18 of the Bill)

Proposed Amendment:

The Bill has been amended to require the Court to direct an offender convicted for the sexual offences mentioned (sections 376, 377C & 377E) to undergo police supervision after the expiration of the sentence.

Recommendation :

Widen the range of offences which require police supervision after expiration of sentence

Comments:

We recommend that the range of offences where the offender is required to undergo police supervision upon expiration of the sentence be widened to include other offences such as offences involving the trafficking of women and offences under the Child Act as there is a greater likelihood of such offences being repeated elsewhere by the same offender.

VI. Legislative framework for the operation of the Compensation/ Assistance Board for rape survivors

Proposed Amendment:

None

Recommendation:

Introduce the legislative framework for the operation of the Compensation/ Assistance Board for rape survivors

We propose that the structure of the scheme 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 which in turn relates to a compensation level.

Comments:

There have been reports that the government has indicated support for the proposal made by the Anti-Rape Task Force in the Memorandum on Laws related to Rape that a Compensation/Assistance Board to offer financial compensation to the injuries suffered by victims of sexual violence be set up. However there is no legislative framework for the operation of such a Board as yet.

VII. Mandatory therapy for sexually based offences

Proposed Amendment:

None

Recommendation:

We recommend that in addition to requiring offenders to undergo police supervision, mandatory rehabilitative therapy be prescribed within the legislation for sexual offenders.

Comments:

Counseling, therapy and treatment has been shown to be one of the ways of stopping sexual offenders from re-offending.

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2. MARITAL RAPE – SECTION 375 (EXCEPTION) PENAL CODE

Introduction

At the August 2004 Parliamentary Special Select Committee public hearing held in Kuala Lumpur, the Joint Action Group against Violence Against Women (JAG) presented the Anti-Rape Task Force's Memorandum on Laws Related to Rape which called for, amongst others, the deletion of the Exception to Section 375, so that marital rape can be recognized as a penal offence. At the same time, the Human Rights Commission of Malaysia (SUHAKAM) made a similar call to legislate against sexual abuse and violence within marriage. SUHAKAM's recommendations drew much publicity.

Under the current Malaysian laws, husbands are allowed to rape their wives with impunity. Marital rape is a form of violence against women and is an abuse of the rights of a person. In a civilized society, marital rape would be deemed unacceptable and should be criminalized.

JAG recommends that the marital exception in Section 375 of the Penal Code be abolished:

I. RECOMMENDATION

Section 375: Rape

To delete:

Exception – Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in 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 purpose 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 the Hukum Syara', shall be deemed not to be his wife for the purposes of this section.

II. COMMENTS

The Need to Abolish the Marital Rape Exception in Section 375

The marital rape exception originated from an archaic British 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 British marital rape exception was codified in Malaysia's Penal Code and has remained to this day. 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.

AWAM's statistics for the years 2000-2002 show that 52% of women who had been subjected to domestic violence were forced to have sex with their husbands. Women who are raped by their husbands are likely to be raped many times – often 20 times or more. These wives are often coerced into sex or are unable to refuse because of threats of physical violence, financial dependence on their husbands, fear for the safety and protection of their children. Women in these circumstances are usually trapped in a vicious cycle of sexual abuse.

Research has revealed that marital rape survivors suffer far more severe and long-term psychological consequences as compared to victims raped by strangers due to the violation of trust and its occurrence in the purportedly "safe" and intimate home environment. The shock, terror, and betrayal experienced by rape survivors are often exacerbated rather than mitigated by the marital relationship. In part, because of the repeated abuse, these women live in constant terror.

Muslim Husbands and Marital Rape

Several Muslim religious scholars argued that the recommendations calling for the repeal of the marital rape 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".

Islam is a religion of justice and peace which 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.

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)

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 have 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)

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 1800's. 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..."

Rape is not sex, it is violence

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."

Marital Rape Reporting

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

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 (*Refer to Appendix*).

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.

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.

Conclusion

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.

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3. LAW REFORM (MARRIAGE AND DIVORCE) (AMENDMENT) BILL 2004

I. Introduction

On 29th September 2004, the Attorney-General's Chambers convened a meeting to discuss the proposed amendments to the Law Reform (Marriage and Divorce) Act 1976. The meeting was attended by representatives from the Syariah Judicial Department, ABIM, the Ministry for Women and Family Development, JAIS, Perkim, Syarie Lawyers Association ABIM and UKM, UIA and Sisters in Islam.

The fact that a meeting was sought from members of the public to discuss proposed amendments to statutory laws is welcomed. These days when every proposed law or proposed amendments to laws is shrouded in secrecy and made subject to the *Official Secrets' Act 1972*, this move in soliciting public views and opinions is most welcomed. This move can only strengthen the nation's democratic and participatory processes. However in order to ensure full participatory process, the AG's Chambers should have consulted as wide a section of the public as possible and not merely groups representing the Muslim community.

We note that there are several amendments proposed by the AG's Chambers which are a cause for concern. It would appear that these amendments were precipitated by at least 2 court decisions, both involving children.

The first set of amendments pertain to the issue of conversion of one of the spouses in a civil marriage to Islam and the consequences of that conversion of the non-converting spouse and children of the marriage.

The second set of amendments pertain to extending the period of maintenance of a child beyond 18 years of age. The proposed amendment allows the courts, "on the application of the child or any other person, [to] extend the order for maintenance to cover such period as it thinks reasonable to enable the child to pursue further higher education or training".

We wholly support the second part of the amendment. The courts should have the discretion, in appropriate cases and where either or both parents have the financial capacity, to ensure that a child is able to realize his full potential and aspirations.

We are however concerned over the proposed amendments consequent upon the conversion of a spouse to Islam particularly the selective and arbitrary importation of syariah principles into the civil laws which appear to lead to injustice rather than enhance the protection afforded under the law to the more vulnerable spouse and children.

II. Section 3 & Section 51 Applicability of the Act and Status of Marriage Upon Conversion to Islam

Proposed Amendment :

A. Section 3 - “This Act shall not apply to a Muslim or to any person who is married under Islamic law ...but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under Section 51 from granting a divorce on the petition of *either party* to a marriage where the other party has converted to Islam and such decree *and any relief incidental thereto* shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted.”

B. Section 51(1) – Where one party to a marriage has converted to Islam, *either party* may petition for divorce:”

Recommendation :

To clarify the status of the civil marriage upon conversion of a spouse. If either party may apply for divorce upon conversion of one spouse, then it follows that the civil marriage subsists and remains valid up until the order for dissolution of the said marriage is granted.

This could be done by the addition of a new Section 3(3A) that, “A marriage solemnised under the Act shall remain valid notwithstanding the conversion of either spouse to Islam unless a decree of divorce is granted under this Act.”

Comments :

This clarification will ensure that there is no confusion as to the status of the civil marriage upon conversion and particularly there shall be no derogation of the rights of the parties to maintenance, custody of the children of the marriage and matrimonial property even after conversion of one spouse unless a divorce is granted by the civil courts.

It was previously assumed that once a person has converted to Islam, he (or she) loses his ability to seek any relief before a civil court in matters pertaining to the civil marriage and therefore Sections 3 and 51 were intended only for the benefit of the non-converting spouse. This view cannot be supported under a dual system of law. A marriage that is solemnised pursuant to *Law Reform (Marriage and Divorce) Act 1976* can only be dissolved under the same laws. Either party to the said marriage therefore should be given access to the civil courts to dissolve the marriage as well as seek any relief incidental thereto e.g. custody, maintenance and division of matrimonial property.

Where the jurisdiction to seek divorce and ancillary relief is granted to the civil courts, then such jurisdiction should be made exclusive in order to avoid conflict of laws and contradictory decisions from two separate courts i.e. the syariah court and the civil court. It is undesirable that parties be allowed to submit the same application to both courts simultaneously (“forum-shopping”).

In fact, we would even go so far as to say that unless and until the parties have resolved all matters pertaining to the said marriage, they should not be allowed to enter into a second marriage. This would ensure that the existing family is protected and all provisions are

made for the family prior to the converting spouse marrying again under syariah laws. It goes against all principles of equity and justice to allow a converting spouse to neglect his responsibilities under the civil marriage solely on the grounds that he / she has converted to Islam. Allowing the converting spouse to do otherwise may even encourage abuse of process because any time a spouse wishes to abdicate responsibility, all he/she has to do is convert to Islam. Thus we also recommend that each state consider amendments to this effect to their respective syariah enactments.

III. Section 54 Proof of Breakdown of Marriage

Proposed Amendment :

Section 54(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say –

- (a) that the respondent has committed adultery...
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) That the respondent has deserted the petitioner...
- (d) That the parties to the marriage have lived apart for a continuous period of at least two years.
- (e) *that either party to the marriage has converted to Islam.*

Recommendation :

That Section 54 not be amended.

Comments :

The conversion of one party to Islam is specially dealt with in Section 51. Where special provisions are made under the law, there is no need to rely on general provisions like Section 54.

IV. Section 77 Converting wife cannot be ordered to pay maintenance to incapacitated husband

Proposed Amendment :

Section 77(2) - The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.

(3) Nothing in this section shall authorise the court to make an order for a woman who has so converted to Islam to pay maintenance to her husband or former husband.”

Recommendation :

That Section 77 not be amended as proposed.

Comments:

There is no reason why a husband who is incapacitated should not be maintained by his converting spouse or former spouse. This proposed amendment is discriminatory and would lead to injustice. For example, the couple may be married for 40 years and should the parties then divorce, the incapacitated husband can only look to maintenance from his wife or his former if she does not convert to Islam. Islam is a religion that promotes justice and each Muslim is exhorted to act with kindness and equity.

V. Section 81(2) & Section 95

Termination of responsibility to maintain wife or former wife 3 months upon conversion and maintenance of child to pursue higher education

Proposed Amendment :

A. Section 81(1) Except where an order for maintenance is expressed to be for a ny shorter period or where any such order has been rescinded, and subject to section 82, an order for maintenance shall expire –

- (a) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;
- (b) if the maintenance was secured, on the death of the spouse in whose favour it was made.

(2) Where an order for maintenance is in respect of divorce under subsection 51(1), such order shall expire –

- (a) if the maintenance was unsecured, on the death of the husband or the wife, or three months after the conversion, or if the wife is pregnant upon the birth of the child or termination of the pregnancy, whichever is the earlier; or*
- (b) if the maintenance was secured, on the death of the husband or the wife, or three months after the conversion, or if the wife is pregnant upon the birth of the child or termination of the pregnancy, whichever is the earlier.*

B. Section 95 Except where the order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, whichever is the later.

Provided always that the court may on application by the child or any other person, extend the order for maintenance to cover such period as it thinks reasonable to enable the child to pursue further higher education or training.

Recommendation:

That Section 81 not be amended. Proposed amendment to Section 95 is supported.

Comments:

Save and except where there is sufficient matrimonial assets awarded to the wife, this amendment may potentially result in immediately subjecting the non-converting spouse or former spouse to poverty. The law must be conscious that it is dealing with human lives and to remove the life support of a dependant spouse upon three months notice cannot be justified.

Even in syariah, there is scholarly debate on the meaning of maintenance during iddah, in that the exhortion for Muslim men to provide accommodation and maintenance to his former spouse for a period of approximately three months after divorce should be deemed to be the minimum period and not maximum period in which a man is required to maintain his former spouse.

In any event, a divorced Muslim wife who is denied maintenance after the iddah period under the syariah, has the recourse to apply for mut'ah (compensation) which is calculated on a per diem basis for the duration of the marriage. The selective importation of a syariah principle to limit maintenance to the iddah period without providing any alternative recourse to a divorced non-Muslim wife is a prime example of how the arbitrary selection of syariah principles can lead to injustice and lower public opinion on the capacity of the syariah to provide justice for women.

Furthermore, under syariah law, a father is to maintain his daughter until she is married. Whilst we do not support the arbitrary importation of syariah principles, a curious question to be noted is why the drafters saw fit to select the syariah principle that serves to shorten the period of maintenance to be provided by a Muslim husband to his divorced non-Muslim wife but not the syariah principle that serves to extend the period of maintenance to be provided by a Muslim father to his daughter, whether Muslim or non-Muslim.

**VI. Section 82
Termination of maintenance upon remarriage or adultery**

Proposed Amendment :

Section 82(1) The right of any divorced person to receive maintenance ... shall cease on his or her marriage to or living in adultery with any other person.

(2) The right of any divorced person to receive maintenance ...under any agreement shall cease on his or her marriage to or living in adultery with any other person unless the agreement otherwise provides.

(3) This section does not apply to divorce under Section 51(1).

Recommendation:

That Section 82 not be amended as proposed.

Comments:

We have already recommended that there not be discrimination against the non-converting spouse in that his or her rights upon divorce should not be less than the rights of divorced

persons due to other causes. Therefore there is no necessity to add this new sub-section as proposed by the AG Chambers.

VII. Section 89
Religion of child upon conversion of father

Proposed Amendment :

89(1) An order for custody may be made subject to such conditions as the court may think fit to impose and subject to such conditions, if any. As may from time to time apply, shall entitle the person given custody to decide all questions relation to the upbringing and education of the child.

- (2) Without prejudice to the generality of sub-section (1), an order for custody may –
- (a) contain conditions as to the place where the child is to reside ;
Provided that in deciding the religion in which he or she is to be brought up, the court shall take into consideration the personal law of the child.
 - (b) provide for the child to be temporarily in the care and control of some other person
 - (c) provide for a child to visit a parent deprived of custody
 - (d) give a parent ...the right of access to the child...;
 - (e) prohibit the person given custody from taking the child out of Malaysia.

Recommendation:

To amend to, “***Provided that in deciding the religion in which the child is to be brought up, the court shall take into consideration the personal law of the child at birth.***”

Comments :

The AG’s Chambers in its notes explained that, “According to the principle of conflict of law, children are presumed to follow the religion of the father which under Jewish law, the children are presumed to follow the religion of the mother.”

This presumption does not take into account the fact that the parent who attends to the day to day needs of the child and spends quality time with the child is most likely to have the greatest influence over the child. It is also discriminatory in its effect. Given that the *Constitution* provides that there shall be no discrimination on the basis of gender (see Article 8(2) of the *Constitution*) and given that the law provides that both parents shall have equal parental rights over the child (see Section 5 of the *Guardianship of Infants Act 1961*) which includes the right to determine the religion of the child, such a presumption is untenable. To preserve and apply an archaic discriminatory presumption at law in the face of Article 8(2) is unconstitutional.

A more equitable way of dealing with this issue is to provide that the child’s religion shall remain unchanged except with the consensus of both parents. The child shall then have the right to choose his or her religion upon attaining 18 years of age.

Even if the law were to hold that a child shall be deemed to be Muslim and at age 18 have the option to change his or her religion, this appears to ignore the problems with apostasy under syariah law. It also creates uncertainty in the determination of the child's religion. At law, the welfare and best interest of the child is always of paramount consideration. It is thus better to grant the child the sole right to determine his or her religion upon attaining the age of majority.



4. DOMESTIC VIOLENCE LEGISLATION

Introduction

Domestic violence is one of the most serious crimes in Malaysia because of its pervasiveness in Malaysian society (an estimated 39 percent of Malaysian women have been abused by their partners) and the insidiousness and invisibility of its nature (the crime most often takes place in the intimate, “safe” space of a home).

The Domestic Violence Act 1994 (DVA) is closely tied to provisions in the *Penal Code* and the *Criminal Procedure Code* (CPC). Section 3 of the DVA requires that the Act be read together with the provisions of the *Penal Code*. While the DVA sets out its own procedures for obtaining Interim Protection Orders (IPOs) and Protection Orders (POs), all of the procedures relating to police reports, appearing before courts, and arrests of offenders implicitly work together with provisions in the CPC.

The Joint Action Group Against Violence Against Women (JAG) recognizes that several of the obstacles faced by domestic violence victims in obtaining protection from offenders derive from confusion over this interaction between the DVA and the *Penal Code* and *CPC*. This memo serves to present recommendations on how to clarify provisions in the *Penal Code* and CPC to better protect the victims of domestic violence.

1. (a) **Broaden the definition of domestic violence under the *Domestic Violence Act* (Section 2)**
- (b) **Provide domestic violence as a separate offence under the *Domestic Violence Act* or the *Penal Code* with weighted punishments for varying levels of physical, psychological, emotional, or sexual violence**

Proposed Amendments :

Whoever commits domestic violence, that is,

- (a) wilfully or knowingly placing or attempting to place the victim in fear of physical injury;
- (b) causing physical, *psychological or emotional* injury to the victim by such act which is known or ought to have known would result in physical *psychological or emotional* injury;
- (c) 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~~;
- (d) confining or detaining the victim against the victim’s will;
- (e) causing mischief or destruction of damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;
- (f) *stalking or intimidating the victim by threats, persistent communications, persistent ridicule or belittlement or other forms of emotional or psychological abuse*;

(g) giving, sending, transmitting or publishing offensive materials to the victim or in such a way that the offensive material will be found by or brought to the attention of the victim;

and the act is directed against –

- (i) his or her spouse ***whether de jure or de facto***;
- (ii) his or her former spouse;
- (iii) a child;
- (iv) an incapacitated adult; or
- (v) any other member of the family.

shall be punished with imprisonment for a term which may extend to 7 years or with fine or with both.

Comments :

The above provision is based on the definition of domestic violence as stipulated in Section 2 of the *Domestic Violence Act* (DVA). A central aspect of the dynamics of domestic violence is psychological and emotional abuse, alone or accompanying cycles of violence and intimidation. Even when there is no physical abuse, victims can be subject to stalking, repeated phone calls, threats of withdrawing financial support, threats of harming or taking children away, ridicule or social isolationism. By broadening the definition of domestic violence, these forms of abuse can be addressed.

Section 3 of the DVA provides for the DVA to be read together with the *Penal Code*, but does not introduce domestic violence as a separate, individual offence in the *Penal Code*. This means that the charges under the *Penal Code* are treated like average offences, rather than reflecting the serious and persistent nature of domestic violence.

Because domestic violence is a unique type of crime, typified by repeated and habitual violence and intimidation used in an intimate setting, it cannot be adequately addressed by existing *Penal Code* measures, which are drafted to address individual acts of violence or intimidation rather than repetitive acts. Simply charging an offender with one, two, or even five individual counts of “voluntarily causing hurt” does not do justice to months or years of repetitive acts of physical, verbal, sexual, emotional, and psychological abuse a victim may have experienced. By including a separate offence called “Domestic Violence”, the seriousness of repetitive and intimate violence can be addressed. The offence should also be made seizable.

Penalties for the crime should also be weighted based on severity and duration of the violence. Alternatively, the offence can be charged together with existing crimes or used as a penalty enhancement.

Failure to provide for domestic violence as a separate offence would necessitate amendments to several sections of the *Penal Code* for example Sections 503, 506 and 509 to provide for domestic violence and the punishments in relation thereto.

2. Proposed Amendments to Criminal Procedure Code

(a) Section 23 -Arrest without warrant

Existing Provision

Section 23 stipulates the circumstances under which a police officer or penghulu may arrest a person without a warrant.

Recommendations

To add new subsection 23(1)(l) as follows:-

23(1) Any police officer or penghulu may without an order from the Magistrate and without a warrant of arrest –

(a) any person who has been concerned with any offence in Malaysia which is a seizable offence

(l) any person against whom an IPO has been issued under the Domestic Violence Act 1994(DVA) who has contravened that IPO or PO as specified in section 7(2)

Comments

The existing Section 7 of DVA does not protect the victims from further violence therefore adding a new subsection 23(1)(l) will provide a mandate to police officers to address contravention of the IPO or PO immediately. This will better protect victims of domestic violence from repetitive and persistent attacks.

(b) Section 108 – Special Powers only in Seizable Offences

Existing Provision

Section 108(2) No police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor

Recommendations

To amend add Subsection (2) to section 108 as follows:-

Section 108(2) No police officer shall in a non-seizable case *except in cases involving domestic violence* exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor.

Comments

Domestic violence should be deemed a seizable offence so that victims do not need to wait for a Public Prosecutor to issue an Order to Investigate before they can file for an Interim Protection Order or a Protection Order and so that the police can commence investigation without an order to investigate from the Public Prosecutor.

Section 108 of the CPC should be amended to allow domestic violence cases to proceed immediately without waiting for an Order to Investigate (OTI) from the Public Prosecutor, so that Interim Protection Orders (IPOs) and Protection Orders (POs) can be obtained as quickly as possible. Under the current Act, many of the domestic violence cases are considered non-seizable offences, thus require an OTI issued by a Deputy Public Prosecutor to commence the investigation. This thwarts the aim of protecting victims of domestic violence because the process for obtaining an IPO can be and often is significantly delayed.

3. Proposed Amendments to the Domestic Violence Act

(a) Section 4 - Interim Protection Order & Section 5 - Protection Order

Existing Provision

Application procedures for Interim Protection Order or Protection Order

Recommendation

Simplify and stipulate clearly procedures for applications and issuance of Interim Protection Orders (IPOs) and Protection Orders (POs).

Comments

The procedures for applying for and issuing IPOs and POs should be simplified, and either the DVA or its related regulations should carefully enumerate these simplified procedures. Otherwise, the relevant players – police officers, welfare officers, and the courts have no choice but to establish their own individual procedures that vary from court to court and district to district. For example, some magistrates require the victim to return to court every 2 months for the magistrates to review the case as there is presently no requirement for the police to inform the courts of the status of investigations.

Further the DVA does not provide a timeline regarding when IPOs or POs must be applied for by enforcement offices, so victims are left vulnerable until police officers, welfare officers or magistrates decide to take up the application.

The requirement that investigations must be ongoing in order for the victim to apply for IPOs combined with the CPC requirement that non-seizable offences require an Order to Investigate (OTI) from the public prosecutor means that many victims have

to wait for police to obtain an OTI to open investigations in order to apply for the IPOs. This process delays the issuance of the IPOs.

(b) Section 6 - Types of Orders to be included in Protection Order

Existing Provision

Section 6 - Provides for types of orders that may be included in Protection Order such as right of exclusive possession, restraining the aggressor from entering the victim's residence, ordering the aggressor from communicating with the victim and allowing victim continued use of vehicle

Recommendations

1. Require judges to specifically ask all victims whether orders (a) through (f) need be included in the IPO or PO
2. Expand the availability of the special orders (a) through (f) to Interim Protection Order

Comments

It is unclear whether the victim must request the inclusion of the orders specified in Section 6 to the PO or whether the court automatically considers adding them. These special orders should also be made available for IPOs and not only POs.

Victims who are traumatised by domestic violence might not know or think to ask for these special provisions when they come before the court. The DVA should require judges to specifically question victims on whether the victims require the special orders to be included so that the judge can determine whether to include such orders in the IPO or PO.

(c) Section 7 - Powers of Arrest to be attached to every IPOs and POs

Existing Provision

(1) Where the court is satisfied that the person against whom a protection order is made is likely to cause physical injury to the protected person..., the court may attach a power of arrest to such protection order or interim protection order, as the case may be.

Recommendation

To amend as follows : *(1) The court shall attach a power of arrest to every protection order or interim protection order, as the case may be.*

Comments

Currently, powers of arrest may be attached to IPOs and POs if the court finds there is a likelihood that the protected person will suffer an actual physical injury at the hands of the person against whom the IPO is drawn. This allows for inconsistent attachment of powers of arrest depending on whether the victim requests it, whether the judge independently considers attaching powers of arrest and is satisfied of the potential for physical violence, and the amount of evidence the victim can and must provide about potential violence. As mentioned above, victims also do not always know to ask for powers of arrest to be attached or to provide evidence regarding likely physical injury. Furthermore, powers of arrest are only to be attached based on the likelihood of *actual physical injury*, which does not include trespass, harassment, retaliation, etc. This means that if a defendant is likely to violate the protection order in ways other than actual physical violence, the victim is not protected through the IPO with powers of arrest. It also means that victims are not protected from defendants who do not seem likely to cause physical injury but actually do commit such violence. Powers of arrest should be automatically attached to all IPOs and POs.

(d) Section 16 - Record of Complaints

Existing Provision

Section 16- Record of Complaints

Recommendations

Expand record-keeping requirements to include mandatory analysis of complaints, Interim Protection Orders (IPOs), and Protection Orders (POs), and making records and analysis accessible to the public

Comments

In addition to requiring courts to maintain a registry of records, the Act should require an administrative agency or independent NGO to compile and analyse national statistics on domestic violence. All records and analysis should be accessible to the public. Additionally, reporting procedures should be standardized so that all police districts and all States maintain uniform practices.

(e) Section 17 - Proof of service of Protection Order

Existing Provision

Section 17 –Proof of service of Protection Order to be filed with court within 7 days

Recommendations

Require court registrar to forward order to police for service within 48 hours of pronouncement of the order and require service of Protection Order or Interim

Protection Order on offender within 72 hours. Police to notify complainant and court registrar of service of order.

Comments

The current Act has no requirement for informing the complainant whether the offender has been served. This results in complainants believing they are already protected before the offender has been served or fearing that they are not protected because they do not know whether service took place. The amendments to the Act should require that the police officer serve the IPO or PO on the offender within 72 hours from receipt of the order from the court, then provide proof of that service both to the complainant and to the Registrar. Timeline should also be provided for the court registrar to forward the order to the police.

(f) Section 19 - Duties of Enforcement Officers

Existing Provision

Section 19(1) The duties of an enforcement officer shall include –

- (a) assisting a victim of domestic violence to file a complaint ...
- (b) providing or arranging transportation ...

Recommendations

Expand duties of enforcement officers to include: *“19(1)(f) informing the victim of the status of the investigation, status (including service) of the Interim Protection Order (IPO) or Protection Order (PO), and, if applicable, rights with regard to securing further protection against domestic violence.”*

Comments

Victims of domestic violence are vulnerable, especially after they report the abuse and file for IPOs and POs. Victims are made all the more vulnerable when they lack basic information about their cases. For instance, victims are not protected by an IPO until the IPO is served on the offender. Without knowing whether the IPO has been served, a victim does not know whether she is free to return to a daily routine. When the investigation ends, the IPO expires. Without knowing whether the investigation is concluded, a victim will not know whether she is still safe from violence. Upon the commencement of the criminal proceedings the victim must apply for a Protection Order to retain protection.

(g) To add provision for victims to represent themselves in Court

No Existing Provision

Recommendations

Adding new section that explicitly affirms the right of victims to appear in court on their own behalf and the right of a lawyer to appear in court on behalf of a victim sa

follows, “*Nothing in this Act shall be interpreted to limit a victim’s right to appear in court on her own behalf or limit a lawyer’s right to appear in court on behalf of a victim-client*”.

Comments

Although nothing in the statute restricts victims from appearing in court on their own behalf, unaccompanied by welfare or enforcement officers, nor restricts a lawyer’s right to represent a victim in court, inconsistent implementation of the Act has left victims and lawyers unclear as to their rights of appearance.

Conclusion

While JAG acknowledges the importance of the *Domestic Violence Act* in the fight against domestic violence, it also recognises that several weaknesses in the Act that are intimately linked with the *Penal Code* and the *Criminal Procedure Code*. JAG requests the Committee recommend that the Government comprehensively reviews and reforms the Domestic Violence Act 1994 together with other laws which hinder its effectiveness. JAG believes that implementation of these recommendations will allow police officers, welfare officers, social workers, courts, social service providers, NGOs, and counsellors to better work together to protect victims of domestic violence.

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III. CONCLUSION

For nearly two decades, JAG has been lobbying for legal reforms on women and children to effect gender equality and non-discrimination. This memorandum reflects on-going efforts of JAG to continue to campaign for women's rights and obligations in Malaysia.

JAG wishes to remind the Special Select Committee that Malaysia is a signatory of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1995. Under the convention, Malaysia has the international obligation to implement policies and laws that eliminates discrimination against women and supports equality.

Conventionally, the courts do not consider international instruments ratified by the executive arm of the Government of Malaysia unless that instrument is tabled in Parliament and adopted through legislation as law of the nation. In the premise, it is crucial that the legal obligations of CEDAW be adopted through an act of Parliament. This adoption will ensure that the courts consider and enforce the obligations under CEDAW. It is important that the courts utilise this convention in its deliberations and decisions.

JAG hopes that this Special Select Committee will highly recommend such a move to keep in line with international standards and uphold rights for all citizens.

APPENDIX

Legislation Against Marital Rape: 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 recognize 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.²

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, but rather the overpowering of resistance. Although marital

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.

² 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>

rape and domestic violence are often associated, the existence of “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 perpetrator. The victims of obsessive rapes 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. For example, a study conducted on 133 sexual offenders at Kajang and Sungai Buloh prisons found that only 20% of sexual offenders committed those offences against strangers. The remaining number of sexual offences, 80%, were against victims known to the offenders: 30% against friends, 23% against daughters, 16% against relatives, 8% against neighbours and 1.5% against siblings.³ These statistics are echoed in a 1999 Australian study in which 80 percent of all victims knew the offender.⁴ 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).⁵

Women who are raped by their husbands are likely to be raped many times – often 20 times or more.⁶ 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.⁷ 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.⁸

³ Zarizana Abdul Aziz, “Family Cannot be a Place of Violence”, WCC Penang, 16 September 04, <http://www.wccpenang.org/Family%20cannot%20be%20a%20place%20of%20violence.htm>

⁴ 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*.

⁵ Memorandum on Laws Related To Rape: Proposals for Amendments, Submitted by the Anti-Rape Task Force September 2003

⁶ 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.

⁷ 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*.

⁸ 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.

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.⁹ 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.¹⁰ The shock, terror, and betrayal experienced by rape victims generally are often exacerbated rather than mitigated by the marital relationship. According to research, women who had been raped by their husbands reported greater negative long-term effects (including sexual dysfunction and the inability to trust men and or form intimate relationships) than victims of any other kind of rape.¹¹

Current 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.

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.”¹²

Further, wives were traditionally viewed as property. According to Blackstone's common law “unities” doctrine, a husband and wife merged into a single legal entity upon marriage, with the husband assuming complete control of their joint existence. The unities doctrine thus “legitimated the propertization of women through marriage.”¹³

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

⁹ 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.

¹⁰ David Finkelhor & Kersti Yllo (1985), *License to rape: sexual abuse of wives*, New York: Holy, Rinehart, & Winston.

¹¹ Kersti Yllo, “Marital Rape”, <http://www.bwjp.org/documents/Marital%20Rape%20Word.doc>.

¹² Jennifer Bennice and Patricia Resick (2003), “Marital Rape: History, Research, and Practice”, *Trauma, Violence, & Abuse* 4(3), 228-246.

¹³ Lisa R. Eskow (1996), “The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution”, *Stanford Law Review* 48, 677-709.

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.

Of the three types of rape, force-only rapes are the most difficult to prosecute due to lack of injury and corroborating evidence. This category of rape is currently the most acceptable in the eyes of the law since there is often no accompanying physical violence that could be used to charge the husband with crimes invoked in the Domestic Violence Act. It is the wives who are victims of force-only rape who would be most empowered by clear recognition of their autonomy and right to self-determination through removal of the marital rape exception.

SUHAKAM's (Human Rights Commission of Malaysia) recent proposal to the Parliamentary Select Committee to recognise marital rape as a penal offence drew opposition from some Muslim religious leaders who felt that this additional right to women was due to “Western influence” and was against the intent of God. But Islam is a religion of peace that requires Muslims to uphold human dignity and abhors violence and cruelty against women.¹⁴ Rape is not sex, but a form of violence and cruelty that should not happen to any woman, outside or within a marriage.

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.¹⁵ 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

¹⁴ Zarizana Abdul Aziz, “Family Cannot be a Place of Violence, WCC Penang, 16 September 2004, <http://www.wccpenang.org/Family%20cannot%20be%20a%20place%20of%20violence.htm>

¹⁵ 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

declared that husbands who force their wives to have sex can now be charged with rape.¹⁶ Aggressive lobbying for similar changes is currently taking place in Pakistan.¹⁷

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 sex was not rape when between a husband and wife.¹⁸ 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*.¹⁹

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.²⁰

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, when enacted, allowed marital intercourse without consent.²¹

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.²² 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]”.²³

¹⁶ 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>.

¹⁷ 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=

¹⁸ Editorial, “Guilty Verdict for Marital Rape”, The Hankyoreh, 24 August 2004 <http://www.minjok.com/english/index.php3?code=25171>

¹⁹ 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>

²⁰ “Domestic Violence Now a Crime”, Laksamana.Net, 15 September 2004, http://www.laksamana.net/vnews.cfm?ncat=45&news_id=7498.

²¹ “Sexual Offences”, <http://law.anu.edu.au/criminet/trape.html>.

²² Patricia Weiser Eastal (1992), “Rape”, *Violence Prevention Today*, Canberra: Australian Institute of Criminology.

²³ 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.

China

The PRC law provides: It is a crime “to rape women with force, threat or other means.”²⁴ 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.²⁵ In practice, however, the record is much more complicated.

Hong Kong

In 2000, the Hong Kong Special Administrative Region (SAR) government began public consultation on whether and how the marital rape exception embedded in its British-derived laws should be eliminated.²⁶ The relevant portion of the law, Section 118(3) of the Crimes Ordinance, reads:

A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

The term “unlawful sexual intercourse” 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:

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

²⁴ 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>

²⁵ 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.

²⁶ Chiu Man-chung (2004), “Contextualising the Rhetoric of Sexual Violence in Hong Kong”, *China: An International Journal*2(1), 83-107.

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 2003.²⁷ The bill was enacted by the Indonesian Parliament on 15 September 2004 and is scheduled to be signed by the president later in 2004.²⁸

Japan

Japanese law makes no distinction between spousal rape and any other form of rape.²⁹ Article 177 of its Penal Code defines the act of rape as:

*'A person who, through violence or intimidation, has sexual intercourse with a female person of not less than thirteen (13) years of age commits the crime of rape and shall be punished with imprisonment at forced labour for a limited term of not less than two years. The same shall apply to a person who has sexual intercourse with a female person under thirteen (13) years of age.'*³⁰

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 in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.^{31a} 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

²⁷ "Domestic Violence Now a Crime", Laksamana.Net, 15 September 2004, http://www.laksamana.net/vnews.cfm?ncat=45&news_id=7498.

²⁸ Fauwaz Abdul Aziz, "Scholar: Follow Indonesia, criminalise marital rape", Malaysiakini.com, 9 October 2004, <http://www.malaysiakini.com/news/30655>

²⁹ 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=

³⁰ Interpol, "Legislation of Interpol member states on sexual offences against children – Japan", <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaJapan.asp>

³¹ 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 Feb 2003, para.387, <http://www.hri.ca/forthecord2003/documentation/commission/3-cn4-2003-75-add1.htm>.

^{31a} Crimes Act, 1961, Section 128, <http://www.rapecrisis.org.nz/court/index.asp>

outside of marriage.³² 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 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.³³ 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.³⁴

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. There were 2,042 cases of rape or sexual assault reported in 1999. A total of 627 persons were indicted for the crime of rape and 197 were convicted.³⁵

Tunisia

Marital rape is a crime under the Penal Code of Tunisia.³⁶

United Kingdom

The marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R. v. R.*³⁷ (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, which no longer represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendment to the statutory law was made through Section 147 of the

³² Saurabh Mishra & Sarvesh Singh (2003), "Marital Rape — Myth, Reality and Need for Criminalization", PL WebJour 12, <http://www.abc-india.com/lawyer/articles/645.htm>

³³ Committee on Women, House of Representatives, Philippines, "Anti-Rape Law Signed", <http://www.philwomen.net/house/news/rapelaw.html>

³⁴ Mercedes Llarinas-Angeles, "Monitoring the Philippine Rape Laws: The Policy and the Myths", paper presented at Townsville International Women's Conference – Australia, 3 - 7 July 2002.

³⁵ 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>

³⁶ Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tunisia. 31/05/95. A/50/38, para. 228 at p.55.

³⁷ <http://www.abc-india.com/lawyer/articles/Ref10#Ref10>

Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK* (1996) 21 EHRR 363.³⁸

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.³⁹

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 – when she is unable to consent (eg. she is physically or mentally impaired, unconscious or asleep).⁴⁰

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.⁴¹

Vietnam

Although not specifically or individually mentioned under the Penal Code, marital rape can be addressed under general provisions.⁴²

Conclusion

Marital rape is an extremely 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. This has been extremely important symbolically in these countries, as it demonstrated the government

³⁸ 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>

³⁹ “Marital rape as serious as stranger rape”, BBC News, 25 May 2002, http://news.bbc.co.uk/2/hi/uk_news/england/2007528.stm.

⁴⁰ Raquel Kennedy Bergen (1999), “Marital Rape”, VAWNet Applied Research Forum, <http://www.vaw.umn.edu/documents/vawnet/mrape/mrape.pdf>

⁴¹ 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 Morrison Torrey).

⁴² 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/forthecord2003/documentation/commission/e-cn4-2003-75-add1.htm>.

and society's evolving respect for women and the need to protect women from all forms of violence.

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.