

Marriage Not a License to Rape

Delete the Exception in Penal Code Section 375

A Policy Brief by Women's Aid Organisation (WAO) | October 2018

OVERVIEW

1. Current Malaysian law explicitly permits husbands to rape their wives.
2. Rape within marriage happens in the context of domestic violence. The law must not empower abusers.
3. Continuing to allow rape in marriage goes against international norms and standards.
4. To recognise the right of wives not to be raped by their husbands, delete the Exception to Penal Code Section 375.

1. Current Malaysian law explicitly permits men to rape their wives

- The **Penal Code** defines rape in Section 375, but **explicitly exempts husbands** (who rape their wives) from the offence.
- **Section 375A** of the Penal Code offers some protection, but **is inadequate** because:
 - A. The **punishment** in Section 375A (up to 5 years imprisonment) is more lenient compared to rape (up to 20 years).
 - B. Section 375A **does not recognise rape**, but rather, a husband causing "hurt or fear of hurt or death". But rape can happen without hurt or fear of hurt – for example through intoxication or other forms of coercion.
 - C. The exception to Section 375 **sends the wrong message** – that sexual assault within marriage is not serious.

Exception under Section 375 (Rape)

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

- (a) Against her will;
- (b) Without her consent;

...

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

Section 375A "Husband causing hurt in order to have sexual intercourse"

375A. Any man who during the subsistence of a valid marriage **causes hurt or fear of death or hurt to his wife** or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which **may extend to five years.**"

2. Rape within marriage happens in the context of domestic violence. The law must not empower abusers.

- A 2014 Universiti Sains Malaysia study estimated 9% of ever-partnered women in Peninsular Malaysia have experienced domestic violence in their lifetime. Of this 9%, 11% reported "forced sex" as a form of abuse.¹ This **suggests around 100,000 women in Malaysia have been raped by their intimate partner during their lifetime.**
- **NGO data** shows that sexual abuse is a common form of domestic violence. A third of domestic violence survivors who sought refuge at Women's Aid Organisation (WAO) in 2017 experienced sexual abuse.²

¹ Shuib, R., Ali, S. H., Abdullah, S., Ab Ghani, P., Osman, I., Endut, N., . . . Shahrudin, S. S. (2014). *Executive Report, Summary of Findings: A Country Level Study of Women's Well-being and Domestic Violence Against Women (DVAW) Using WHO Multi-country Questionnaire*. Pulau Pinang: Women's Development Research Centre (KANITA), Universiti Sains Malaysia.

² Women's Aid Organisation. Annual Report 2017. Available at: <https://wao.org.my/annual-report/>

3. Permitting rape in marriage goes against international norms and standards.

- Only 28 countries still have marital rape exemption laws, according to a 2016 World Bank review of 173 countries. This makes Malaysia one of just 16 percent of countries that still has not progressed. **Many countries, including Cambodia, the Philippines, Thailand, and Tunisia, explicitly criminalise** rape within a marriage.
- When the **CEDAW Committee** (an expert United Nations Committee) reviewed Malaysia in 2006 and 2018, the Committee recommended that Malaysia criminalise marital rape.^{3, 4}
- The Exception to Section 375 is a colonial holdover from the British Penal Code. Many countries that inherited British law have repealed this particular section. This includes the United Kingdom itself, and soon it will include Singapore.

Origins of the Exception in Section 375

Historically, English common law did not recognise rape in marriage, relying on a 1736 text: *History of the Pleas of the Crown*. Malaysia adopted laws from the British, including the exemption to Penal Code Section 375.

In 1991, the exemption allowing marital rape was abolished in English law. The House of Lords ruled: "*the fiction of implied consent has no useful purpose to serve today in the law of rape*" and that the marital rights exemption was a "*common law fiction*" which had never been a true rule of English law.⁵

"Is rape in marriage hard to prove?"

The claim that rape is hard to prove is not evidence-based. On the contrary, very few rape cases are false, and rape is underreported.^{6, 7}

Additionally, The ease or difficulty in proving a particular crime factually is not a condition in making the crime an offense in law. Rather, what matters is how wrong or harmful the crime is.

4. To recognise the right of wives not to be raped by their husbands, delete the Exception to Penal Code Section 375.

- We do not need a new offence; simply delete the Exception to Penal Code Section 375.
- We also propose other changes to the Penal Code and Evidence Act 1950 to better protect rape survivors (see below).

SUMMARY OF RECOMMENDATIONS

- Remove husbands' immunity to rape wives:** delete the Exception in Penal Code Section 375.
- Ensure all rape survivors are protected:
 - **Widen the definition of rape** to include rape by objects/other body parts and to include orifices other than the vagina.
 - Make rape laws **gender neutral**.
- Remove biases that diminish survivor's evidence, by amending the **Evidence Act 1950:**
 - Add a new subsection to Section 146A: "*(2) 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 section.*"
 - Remove requirement for **corroboration warnings**, by adding a new section: "*In proceedings in which a person is charged with a sexual offence, the judge is not required by any rule or law or practice to warn that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.*"

³ Paragraph 22, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women : Malaysia*, 31 May 2006, CEDAW/C/MYS/CO/2

⁴ Paragraph 24(b), UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women : Malaysia*, 14 March 2008, CEDAW/C/MYS/CO/3-5

⁵ R v R [1991] UKHL 12

⁶ Lisak et al (2010). *Violence Against Women*, 16(12) 1318-1334.

⁷ Fisher, Cullen and Turner. (2000) "*The Sexual Victimization of College Women*" NIJ report.