

MARITAL RAPE

Brief developed by GBV Committee dated [26 Jan 2017]

Adopted on 7th March 2017

What is marital rape: Marital rape refers to con-consensual sex within marriage, in which the perpetrator is the survivor's spouse.

The law in Malaysia: In Malaysia, the term 'marital rape' is not recognised, or punishable by the law. Section 375 of the Penal Code which criminalises rape, sets out the exception for marital rape as follows:

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.

The problem with our current laws: The exception in Section 375 of the Penal Code is particularly problematic because it means that legally, a husband cannot be punished for raping his wife as long as the marriage is a valid and subsisting one. This exception originated from an archaic English common law concept in which a wife, upon entering the contract of marriage, is deemed to have given herself to her husband and is treated as the husband's property.

Why we use the term 'marital rape': The term 'marital rape' is one which AWAM and women's groups, such as the Joint Action Group for Gender Equality (JAG) have been using in Malaysia. There is a politics to the use of the word, linked in particular, to the unequal power dynamics in between women and men in marriage. Wives in domestic violence situations experience several forms of cruelty, including being 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.¹ 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.

What is the law in other countries/internationally: As of 2006, at least 104 countries have enacted laws that criminalise rape within marriage, or repealed exceptions to marital rape, or have laws that do not distinguish between rape within marriage and rape outside marriage.² Rape within marriage is recognised in the United Nations CEDAW Committee

¹ 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.

² According to the [United Nations Secretary General in-depth study on all forms of violence against women \(2006\), \(on page 89\)](#), marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 do not exempt marital rape from general rape provisions. Marital rape is not a prosecutable offence in at least 53 States. Four States criminalize marital rape only when the spouses are judicially separated. Four States are considering legislation that would allow marital rape to be prosecuted. Document accessible at: <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomestudydoc.pdf> (as of 26 Jan 2017)

General Recommendation 19, and the CEDAW Committee has in fact, requested that the Malaysian government enact legislation criminalising rape within marriage in 2006, defining such rape on the basis of lack of consent of the wife.³

Archaic notions related to rape: In the context of Malaysia, another issue of concern is that the term 'rape' is limited to sexual violence of a particular kind, i.e. penile penetration into the vagina. This is a narrow understanding, which does not take into account different forms of sexual violence, as well as the fact that men and transgender persons also face sexual violence.

Women face different forms of sexual violence at home and in public spaces. However, there is an emphasis on marital rape and rape in particular, which seems to create a hierarchy of sexual violence which invisibilises other forms of sexual violence that women face. The dominant societal perception is that rape, as a form of sexual violence, is much worse than other forms of sexual violence. It is linked to archaic notions of a woman's purity and the lineage of children.

AWAM's stand:

1. AWAM believes in women's right to sexual contentment and pleasure. This includes women's ability to negotiate whether or not to have sex, with whom, as well as the frequency, choice of protection, and types of acts of sex they would like to engage with. When women are not able to act with agency in such matters, it is a violation of their human rights.
2. AWAM will continue to advocate for the recognition that any form of sexual violence, including sexual violence within marriage, is unacceptable. We believe there is a need to broaden the definition of rape, and to raise awareness that sexual violence of any kind is unacceptable, regardless of who commits the violence or who suffers/survives it.
3. For AWAM, all forms of sexual violence, whether within or outside of marriage, is abhorrent, regardless of gender. Any activity of a sexual nature must take into account the level of comfort of all parties involved and should be met with consent.

³ Paragraph 22 of the 2006 Concluding Comments by the Committee on the Elimination of Discrimination Against Women to Malaysia.