

**POSITION PAPER ON
THE PROPOSED AMENDMENTS TO THE PENAL CODE
SUBMITTED BY
THE ASSOCIATION OF WOMEN FOR ACTION AND RESEARCH
(AWARE)
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AWARE is proud to submit its position paper and feedback on the proposed amendments to the Penal Code.

AWARE applauds the government for taking the bold step to incorporate many changes into the Penal Code that protect the human rights of both its citizens and non-citizens. In particular, AWARE commends the government for enacting ss.376B to 376D, prohibiting the prostitution of minors within Singapore and overseas. AWARE had submitted a position paper to the government on this issue in September 2006.

AWARE's detailed feedback on s.375 on rape, s377A on outrages on decency and s.141 on unlawful assembly is as follows.

s. 375 - Rape

The Consultation Paper on the Proposed Penal Code Amendments issued by the Ministry of Home Affairs states that, "Given the changed status of women and the evolving nature of the marital relationship", the marital immunity for rape be withdrawn in three circumstances: (a) there was a decree of judicial separation in force; (b) the wife had obtained an injunction restraining her husband from having sexual intercourse with her; or (c) the wife had obtained a protection order or expedited order under the Women's Charter.

It is worrying that the three circumstances are so very narrow despite the changed status of women. The proposed amendments still sends out the message that a husband cannot be considered to have raped his wife even if he knew that she did not consent, even if he exerted extreme violence to complete the sexual intercourse. In such circumstances, he would be found guilty of physical abuse, but not rape.

The government, lawyers, academics and other commentators had advanced several arguments against the complete abolition of the marital rape exemption. We will examine the usual arguments against criminalizing marital rape.

1. The "conjugal rights" argument

The idea that men enjoy "conjugal rights" of sexual relations can be traced back to 1736.

'But the husband cannot be guilty of rape committed by himself upon his lawful wife, for their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.' (Sir Matthew Hale, 1736 History of the Pleas of the Crown)

Apparently the principle stated had no judicial precedent and it did not form part of the salient judgment in the case, and was questioned by other judges in the 19th century. However, to date, Singapore still retains the law made as a result of a throwaway remark by a judge from the 18th century England.

The Women's Charter passed in 1961 sought to dispel the notion of women as property and took great pains to enact provisions to highlight a women's individuality and independence from her husband. Therefore, justifications based on a man's conjugal rights are outdated and obsolete.

Further, most women and many men in Singapore would not agree that a man has the right to demand sex from his wife at any time.

While this may not be the intention of the lawmakers, the proposed amendments lifting the marital immunity only in a very narrow set of circumstances would suggest that the Parliament of Singapore still believes that a man has every right to demand sex from his wife whenever and wherever he feels like it, and worse, in the absence of clear violence, that the wife has absolute no recourse should she not consent.

2. Criminal law should not invade the sanctity of marriage

This argument has been many times in many circumstances, twenty years ago, with regards to domestic violence. Ten years ago, Parliament took the bold step of allowing the police into marriages where there is domestic violence. Will today's Parliament allow the police in where there is forced sexual intercourse?

Marriage is based on mutual love, consideration, respect and trust. In a marriage where the husband demands sexual relations whenever he so wishes, whatever the wishes of his wife, strips away the foundations of marriage.

It is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.

Renown marriage counselor Anthony Yeo has said that it is usually the act of rape that causes the marriage to break down, not any subsequent action taken by the wife.

Therefore, the husband, by his violent abuse of power in demanding sex from his wife at any cost, has already violated the sanctity of marriage, opening the doors for law enforcement and scrutiny.

3. Rape is violence, not sex

During the Parliamentary debates on whether marital rape should be included within the definition of domestic violence, it was said that family relations are highly emotional personal matters, and that our “Asian sensitivity” prevents us from scrutinizing the sexual relationship between couples.

However, by criminalizing marital rape, we are not asking for a scrutiny into a couple’s sexual relations.

Sex is fine, but rape and sexual assault are not and they must be criminalized. The important distinction involves consent, as against coercion, violence or threats of violence.

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.”

Throughout the eighties and beyond, girls were continually warned in schools to be alert for sexual predators, and given the message that rape was the worst possible violation against a woman. It is truly ironic that these same girls, now adult women, are told that they have to subject themselves to this most humiliating of assaults by none other than their husbands.

4. Marital rape is not as serious as other forms of rape

It is suggested that marital rape is not a serious crime since the victim does not suffer as much as a non-marital rape victim. In a study by the All Women Action Society (AWAM) in Malaysia, they found that 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.

Significant evidence suggests that marital rape can be the most traumatic form of rape, more traumatic than rape by strangers, because of a sense of betrayal, violation of trust, and the occurrence in the purportedly “safe” and intimate home environment. Studies report that victims of spousal rape tended to suffer far more severe and long-term trauma and psychological consequences as compared to women raped by strangers. 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.

In Singapore, Anthony Yeo has said that in cases where the husband forces himself onto his wife, the wife suffers from emotional and mental distress leading to post traumatic stress syndrome. A woman in such condition would be less able to care for her children. If she becomes pregnant as a result of the rape, it is as yet unknown the extent of the impact on the child born of the rape. In addition, the extreme adverse psychological impact on children who witness violence at home is well documented.

5. Marital rape is uncommon

A survey conducted by the UK group Women Against Rape in 1985, whose findings have been confirmed in other surveys since, showed that one in seven wives had been raped by their husbands. This means that 14% of married women have been raped by their husbands at least once.

There is no reason to believe that the figures in Singapore will be vastly different. Therefore, taking 14% of the numbers of married women in the population census 2000, 98,000 women have been raped by their husbands in their lifetimes.

In Malaysia, 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.

In 1998, sexual violence occurred in 6.5% of all the spouse violence cases handled by Harmony House. Harmony House is Hong Kong's largest program for battered women and the first to develop an abuser intervention program. It was found that the assault was invariably associated with other types of non-sexual bodily or psychological violence. It took the form of forced sexual intercourse, genital injury, or other forced sexual behavior. The victims were predominantly female (96.08%) and mostly between age 30 and 40 (41.7%).

Until Singapore conducts sufficient research into this area to have its own statistics, the data from other countries provide an indication as to the kinds of numbers we are looking at. These numbers are not insignificant by any reckoning.

6. Problem of proving a marital rape case

Despite concerns about enforcement and evidence, the proposed amendments will criminalize prostitution of minors outside Singapore and organizers of child sex tours. Therefore, such concerns should not prevent the repeal of the marital rape exemption.

Even though convictions may be rare due to the difficulty in proving lack of consent, this is not a valid reason for failing to criminalize marital rape. Other crimes, such as incest, and acquaintance rape also present potentially difficult prosecutions, yet these are still considered crimes. The difficulty of proof has never been a proper criterion for deciding what behavior should be officially censured by society. Certainly the public policy of protecting a woman from the violent crime of rape by any person, especially her husband, is outweighed by the argument that it may be difficult to prove lack of consent.

7. Increase in false rape accusations

Every penal offence is capable of being abused and, in practice, hundreds of police reports are made which do not culminate in anyone being charged. And certainly, amongst these cases, a handful of them may be frivolous or an abuse of process. However, that does not mean that we remove these offences from the Penal Code.

Our criminal justice system is designed to handle fabricated claims. There is no legitimate reason to suggest that courts could not expose false accusations of marital rape as skillfully as they expose falsehoods of other alleged crimes.

In relation to rape cases, there are already built in mechanisms to prevent abuse of process as it is standard procedure for rape complainants to go through a lie detector tests.

Studies have also shown that criminalizing marital rape has not resulted in a large increase in police reports, prosecutions, and convictions for marital rape. 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 criminalizing rape would open the floodgates. In reality the criminalization of marital rape would serve to emphasize 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.

If the marital rape exemption is given on the basis that the exemption exists to prevent women from abusing the system, then an undesirable message will be conveyed i.e. “wives should not be protected from marital rape because they cannot be trusted not to abuse the system”

More statistics from the UK group Women Against Rape: 1 in 12 women who have experienced rape actually report it; and three in four married women who had been raped had been prevented from leaving by lack of money and/or housing. Again, there is no reason to believe that the situation in Singapore will be dramatically different, and hence, these are not numbers that will prompt concerns that false accusations will increase.

8. Other remedies exist

It has been suggested that other remedies are available, such as the domestic violence provisions in the Women’s Charter. However, marital rape was not included within the definition of abuse. Not all women who are raped by their husbands are physically assaulted or battered. If marital rape is not a crime, then these women do not have a prosecutorial remedy. Furthermore, rape penalties are more severe than penalties for domestic violence or causing hurt; grouping marital rape together with assault will not sufficiently deter men from raping their wives.

Academics and Parliamentarians have suggested that marital counseling is a better alternative than criminalizing marital rape. In a marriage where the husband wields enough physical, financial and emotional power and such little regard to the feelings of his wife to force sex onto his wife, there is little likelihood that he will consent to attend counseling. As quoted earlier in this position paper, three out of four women in the UK who are raped by their husbands do not leave due to lack of money. In such situations, counseling is an even more remote possibility.

Divorce is often offered as an alternative remedy when a woman is raped by her husband. While true, this remedy shifts the burden to the woman. It makes more sense to suggest that if a man is dissatisfied with his sexual marital relationship, he should seek a divorce instead of raping his wife. Hence, the New Jersey Supreme Court in USA held that “if her repeated refusals are a ‘breach’ of marriage ‘contract,’ his remedy is in a matrimonial court, not in violent or forceful self-help.” Even if the wife were to divorce the husband, he would be free to remarry, and to force himself onto his new wife.

Current law in other countries

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 criminalization 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.

Hong Kong

The 2002 Statute Law (Miscellaneous Provisions) Bill criminalizes marital rape. In 2003 the legislature passed an amendment to the Crimes Ordinance expressly clarifying that the term "unlawful sexual intercourse" could be applied both outside and inside the bounds of marriage.

The Justice Department had also taken steps to remind the Police, Social Welfare Department, non-governmental organizations (NGOs) involved in welfare services and women groups that a man who rapes his wife is liable to be convicted for rape.

Philippines

The Anti-Rape Law of 1997 does not distinguish between spouses and other persons, and the definition includes sex with a woman who is deprived of reason or otherwise unconscious. The death penalty may be imposed if the offender knows that he is infected with HIV/AIDS or other STIs and the virus is transmitted to the victim, or if he knows that the victim was pregnant at the time of the rape.

Constitutional rights and CEDAW

S.12(1) of our Constitution states that all persons are equal before the law and entitled to the equal protection of the law. With the marital exemption to rape, married women are being discriminated against and do not receive equal protection under the law, as compared with their unmarried sisters.

The state has a duty to protect the weakest and most vulnerable members of society, and Singapore has shown itself to be able to do this most admirably by introducing new legislation to protect minors, both in Singapore and elsewhere, against prostitution. It would not be in the spirit of the current amendments not to extend protection to the women who need it most.

Singapore is also a signatory to the United Nations Convention on the Elimination of all forms of Discrimination Against Women, and is obliged to enact legislation that do not result in de facto discrimination, as the marital exemption does. The United Declaration on the Elimination of Violence Against Women (1993) also declared marital rape to be a form of violence against women to be eliminated by all states.

Anomalies in s375 and 376

The interaction between s.375 and s376 produces anomalous results:

s.376 prohibits:

- a man from penetrating with his penis, the anus or mouth of another person without their consent (subsection (1)(a));
- a person from penetrating with any part of his/her body (other than the penis) or with anything else, the vagina or anus of another person if that other person did not consent to it (subsection (2)(a));
- a person from causing another person to penetrate her vagina or anus with a part of his body (other than the penis) or anything else without his consent (subsection (2)(c))

whether or not the persons are married.

Hence:

- A man who penetrates his wife's vagina with his finger or with an object;
- A man who penetrates his wife's mouth or anus with his penis, finger or an object; and
- A woman who forces her husband to penetrate her anus or vagina with his finger or an object

would all be guilty of an offence under s.376 but not:

- a man who penetrates his wife's vagina with his penis; or
- a woman who forces her husband to penetrate her vagina with his penis.

It appears that s.376 was drafted with the noble intention of protecting spouses from unreasonable sexual demands from their spouses (eg. Penetration of vagina/anus with a broomstick), and we submit that Parliament should adopt the same attitude towards s.375 and lift the marital exemption in entirety.

Child brides

Another area of anomaly seems to be the ability of child brides to give valid consent.

s.375(4) requires that the wife be at least 13 years of age to be capable of consenting to sexual relations with her husband that involves penetration of her vagina by his penis.

s.376(3) and (6), however, seem to permit a child under 14 years old to consent to her husband's penetration of her vagina or anus with any part of his body other than his penis or with any object.

Remedies

We take the view that the recommendations put forth by lawyers, academics and other commentators, such as counseling etc still have a place as remedial measures

for both the spouses. Through calling for marital rape to be criminalized, we do not seek to demonize the perpetrator nor stigmatize either party. Hence public education to de-stigmatize is vital, as is counseling for the parties involved, including children and extended families.

Recommendations

AWARE strongly urges Parliament to take the bold and timely step to do away with the marital rape exemption. The men and women we spoke to abhor the marital exemption to rape and would support its immediate abolition.

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. 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.

s377A – Outrages on decency

We urge the government to repeal s377A in its entirety and we endorse the position of the Free Community Church/ Safe Haven on this issue.

In addition, we make the following points:

1. It is a legacy of our British colonial past - these laws were first put in place by the colonial government of India and then imported into the Malaysian criminal code, and inherited by Singapore. In no way do they reflect any "traditional" Chinese, Malay or Indian values. Britain itself long ago repealed its own laws criminalizing sex between men (England & Wales in 1967, Scotland 1980, Northern Ireland 1982). Singapore is its own country now, and should reexamine this outdated bit of legal history.
2. Religious approbation is no reason for criminalization - even the Catholic Church has said that it is not in favor of criminalization of sodomy, although it maintains that sex acts between men are morally wrong. In any case, Singapore is supposed to be a religiously neutral state, and to treat citizens equally regardless of religion. Many religions also think that sex outside of marriage is morally wrong, but Singapore should not (and does not) criminalize that.
3. The government has also said that most segments of society are not yet ready for gay sex to be decriminalized. However, most segments of society were also vehemently against the construction of casinos or integrated resorts within Singapore.
4. International community - Singapore is a modern, democratic city and nation, and should join the growing international consensus among democratic nations that sodomy laws are outdated and an unwarranted intrusion into citizens' sexual lives.
5. Singapore's own Constitution guarantees equality for its citizens. Leaving 377A in place would be gender discrimination (certain acts illegal for men that are not illegal for women), as well as discrimination based on sexual orientation. It would make a whole category of people into criminals for acting on preferences that do not directly harm anyone.
6. It is difficult to enforce and a waste of resources - police should be spending time on more important things than enforcing anti-gay sex laws. These laws also encourage practices such as entrapment.
7. Criminal law about sex should focus on consent
8. Legalization means better access to communities of men who have sex with men for public health officials - right now some people may be afraid to admit to their health providers that they are gay for fear of criminal penalties. This

may prevent them from getting information about how to protect themselves from STIs. This is a public health concern. Similar public health concerns were raised in the context of prostitution, and Singapore has legalized that, with good results.

9. The government has said that although it will not repeat s.377A, it will also not actively enforce it. However, this situation makes a mockery of legal process. Parliament makes laws that the executive arm – the government – enforces. By taking this stance, the government can be seen to thwarting the intention of the Parliament. Such administrative anomalies do not reflect well on Singapore as a democratic country taking its place in the international community.

Recommendation

AWARE urges the government to repeal s.377A in its entirety.

s.141 – Unlawful assembly

With the broadening of the definition of unlawful assembly to include the planning of the commission of any offence, we would like Parliament to clarify that the planning of civil society activities for which the relevant licences or permits are not subsequently granted do not fall within the definition of unlawful assembly. As the government has said that it would like to encourage active citizenry and a more open society, this provision could potentially have the opposite effect. AWARE recommends that Parliament clarifies its intentions for this section by giving illustrations of civil society activities that would not constitute unlawful assemblies.