MARITAL RAPE - REMOVING THE HUSBAND'S LEGAL IMMUNITY

This article attempts to set out the law relating to marital rape, a specific and little discussed form of violence against women. The historic basis and the contemporary arguments in favour of the spousal immunity will also be examined. Ultimately, however, it will be suggested that the immunity, archaic and inconsistent as it is with the status of women today, ought to be abolished or at least substantially modified.

I. INTRODUCTION

THIS article deals with a specific form of marital violence which appears to have been largely ignored by authors of literature on violence against women. As the law stands, men who rape their wives appear to be immune from prosecution under the Singapore Penal Code (the "Code").[1] This is also largely the case in England and many other countries. In this article, the author will explore the historic basis of the spousal exclusion as well as its development under the common law. In particular, the applicability to Singapore of rules similar to those recognized at common law will be discussed in the context of section 375 of the Code. The author will also examine the contemporary arguments in support of the husband's immunity but will suggest that the marital rape exemption be removed or at least substantially modified.

II. ORIGINS OF THE HUSBAND'S IMMUNITY

The origin of the marital rape exemption rule is generally attributed to Sir Matthew Hale. Writing extra-judicially, it was stated by him that: "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract."[2] No authority was cited for this proposition and indeed it is doubtful if any existed. In fact, in *R* v. *Audley, Earl of Castelhaven's Case,*[3] Lord Audley was convicted of rape upon his wife for holding her by force while one of his servants had carnal knowledge of her against her will. As Freeman points out,[4] what is remarkable about this case is that there was no argu-

1 Cap. 224, 1985 (Rev. Ed.).
2 1 Hale, *Pleas of the Crown,* at p. 629.
3 (1631) 3 State Tr. 401 (H.L.), 123 E.R. 1140.
4 Freeman, "Doing his Best to Sustain the Sanctity of Marriage" in *Marital Violence,* (Johnson ed. 1985), p. 130.

ment to the effect that if a husband himself raped his wife he was not to be convicted, *a fortiori* it could not be rape if he personally did not penetrate her. Surely some such argument would have been advanced if the true common law position was that a husband could not be guilty of the rape of his wife. Hale was certainly aware of this case. Of it he wrote:[5] "tho in marriage she hath given up her body to her husband, she is not to be by him prostituted to another." It is submitted that this explanation is inadequate. Hale's statement does not explain why a husband in the position of Lord Audley should be convicted of rape; he could be convicted of some other offence while the actual perpetrator could be convicted of rape. Indeed this happened in the case of *R* v. *Cogan*,[6] a case very similar to *Audley,* although in *Cogan,* the actual perpetrator was acquitted on the ground that he mistakenly believed the wife was consenting.

III. THE HUSBAND'S IMMUNITY AT COMMON LAW

Despite the dearth of authority, it was not until 1888 that Hale's doctrine was judicially considered in the English case of *R* v. *Clarence.*[1] Still later came the first recorded prosecution of a husband for the rape of his wife in the 1949 decision of *R* v. *Clarke*[8]

In *Clarence,* the accused was charged with unlawfully and maliciously inflicting grievous bodily harm upon his wife and with an assault upon her occasioning actual bodily harm. The accused had consensual sexual intercourse with his wife when he was suffering from gonorrhoea. He knew of his condition but she did not and she would not have consented had she known. Clarence was convicted but his conviction was overturned on appeal. The majority of the judges were of the view that there was no unlawful act occasioning grievous bodily harm and that consent negatived what would otherwise have been an assault. Accordingly, all the statements made concerning the spousal exclusion must be regarded as *obiter.* The six judges in *Clarence's* case who *did* pronounce on the marital rape exemption rule were divided in their views. Wills J. who delivered the first judgement said: "If intercourse under the circumstances now in question constitute[s] an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority."[9]

Field J. who was equally opposed to Sir Matthew Hale's proposition had this to say:

> The authority of Hale C.J. on such a matter is undoubtedly as high as any can be, but no authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which,

5 See above, note 2.
6 [1975] 2 All E.R. 1059.
7 (1888) 22 Q.B.D. 23.
8 [1949] 2 All E.R. 448.
9 See above, note 7, at p. 33.

> if the husband imposes it by violence, he might be held guilty of a crime. Suppose a wife for reasons of health refused to consent to intercourse, and the husband induced a third person to assist him while he forcibly perpetrated the act, would any one say that the matrimonial consent would render this no crime? And there is the great authority of Lord Stowel [10] for saying that the husband has no right to the person of his wife if her health is endangered . . . [.] [11]

The judgements of Smith and Stephen JJ. were more ambivalent. The former took the view that at marriage, the wife consents to the husband exercising the marital right, and until such consent is revoked, a husband exercising such a right cannot be said to have assaulted his wife.[12] It should immediately be noted that Smith J. does not state, nor can he be taken to imply, that rape as between married persons is impossible. In fact, the interesting thing about his judgement is the implication that a wife might revoke her consent to the husband's exercise of the marital right although he left open the circumstances by which this might be done. Stephen J. on his part was content merely to make the observation that while he had said in the first edition of his Digest of the Criminal Law that a husband might in certain circumstances be indicted for rape on his wife, that statement was withdrawn in the latest edition of the Digest.[13]

Hawkins J. and Pollock B. were clearly on the side of Sir Matthew Hale. Hawkins J. held that the sexual communion between husband and wife "is by virtue of the *irrevocable* privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons."[14] Pollock B. took the view that: "[t]he husband's connection with his wife is not only lawful but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent."[15]

It is instructive to note that both judges were of the view that, at marriage, the wife's consent to sexual relations was irrevocable. One thing, accordingly, is clear from *Clarence* — the diversity of views among the judges who pronounced on the marital rape exemption rule was a clear reflection of the absence of judicial precedent for Hale's proposition. While this does not prevent the rule from ultimately being accepted as representing the common law, it does show that the legal basis for it is not as substantial as is generally assumed to be.

In *Clarke,* Byrne J. accepted Hale's proposition of the law as generally correct. No authority was cited but it is clear the judge relied on the dicta of Hawkins J. in *Clarence.* In *Clarke,* the wife had obtained a separation order containing the usual clause providing that she was no longer bound

[10] *Popkin v. Popkin* (1794) 1 Hagg. Eccl., note to *Durant* v. *Durant,* at p. 765.
[11] See above, note 7, at p. 58.
[12] *Ibid.,* at p. 37.
[13] *Ibid*., at p. 46.
[14] *Ibid*., at p. 53.
[15] *Ibid*., at pp. 63-64.

to cohabit with the accused. On an indictment of the accused for the rape of his wife his counsel moved to quash the charge on the ground that it disclosed no offence known to the law. Although accepting the spousal exclusion as a general principle, Byrne J. held that an indictment would lie in that case as the separation order had the effect of revoking the wife's consent to marital intercourse.[16]

The only direct authority on the marital rape exemption rule is *R* v. *Miller*.[17] The wife had left the husband in 1952 but did not apply for a separation order or an order for judicial separation. Neither was there any separation agreement between the parties. In 1953, she presented a petition for divorce on the ground of adultery. Later in the year, before the petition was to be heard, the husband had intercourse with her against her will. He was alleged to have used force and was accordingly charged with rape and with assault occasioning actual bodily harm. Lynskey J., after an examination of the authorities, came to the conclusion that Hale's proposition of the law was correct. Accordingly, he held that the husband had no case to answer on the charge of rape.

> It is not until a decree nisi, or possibly, a decree absolute, has been pronounced that the marriage and its obligations can be said to have been terminated . . . [.] The petition might be rejected, and in that event the marriage would still be subsisting and consent to marital intercourse, as given in the marriage contract, would still be unrevoked. Therefore, I must apply the law as it stands, there being no evidence which enables me to say that the wife's implied consent to marital intercourse has been revoked by an act of the parties or by an act of the courts. The result is that, as the law implies consent to what took place so far as intercourse is concerned (but only so far as intercourse is concerned), the defendant cannot be guilty of the crime of rape . . . [.][18]

Lynskey J. indicated that his decision would have been different had there been an agreement to separate, particularly if it contained a non-molestation clause as that, in his view, would also have revoked the wife's consent.

Thus, despite the dearth of authority on the matter, Hale's statement of the law appears to have prevailed and is generally accepted nowadays to represent the common law.[19] This, in the author's view, is regrettable and indeed, according to Smith and Hogan,[20] the basis for the general rule stated by Hale is plainly fictitious — the wife may in fact have withdrawn her consent and the civil law recognizes that she may do this in certain circumstances. She is not bound to submit to inordinate or unreasonable demands by her husband[21] and may refuse intercourse because

[16] See above, note 8, at p. 449.
[17] [1954] 2 All E.R. 529.
[18] *Ibid*., at p. 533. See, however, above, note 4, at p. 132.
[19] See Smith and Hogan, *Criminal Law* (6th ed. 1988), p. 431; 15th Report of the Criminal Law Revision Committee *(Sexual Offences),* Cmnd. 9213 (1984), paras. 2.55-2.58.
[20] *Ibid.*
[21] Bromley, *Family Law* (7th ed. 1987), p. 109.

her husband has been guilty of a matrimonial offence which she does not wish to condone, or because he is suffering from a venereal disease.[22] Certainly most people today would undoubtedly find Hale's view repugnant and this is reflected in judicial attempts to limit the scope of the common law rule. Therefore, while *Clarke* and *Miller* endorse Hale's doctrine as a general proposition, both also create exceptions to it.[23] In *R* v. *O'Brien*[24] it was held that a decree *nisi* revokes a wife's implied consent to intercourse and a husband commits the offence of rape if thereafter he has sexual intercourse with her without her consent. Further decisions limiting the scope of the common law rule are *R* v. *Steele*[25] and *R* v. *Roberts*.[26] In *Steele,* the Court of Appeal stated:

> A separation agreement with a non-cohabitation clause, a decree of divorce, a decree of judicial separation, a separation order in the justice's court containing a non-cohabitation clause and an injunction restraining the husband from molesting the wife or having sexual intercourse with her are all obvious cases in which the wife's consent would be successfully revoked. On the other hand, the mere filing of a petition for divorce would clearly not be enough, the mere issue of proceedings leading to a magistrates' separation order or the mere issue of proceedings as a preliminary to apply for an *ex parte* injunction to restrain the husband would not be enough but the granting of an injunction to restrain the husband would be enough because the court is making an order wholly inconsistent with the wife's consent and an order, breach of which would or might result in the husband being punished by imprisonment.[27]

The Court of Appeal then went on to hold that an undertaking given by the husband to the court not to molest the wife is in fact equivalent to the granting of an injunction. The effect is to eliminate the wife's matrimonial consent to intercourse. Accordingly, a husband who is in breach of such an undertaking could be found guilty of rape if the other ingredients of the offence are established.

In *Roberts,* the appellant was convicted of raping his wife. The appellant and his wife had entered into a formal deed of separation; it did not, however, contain a non-cohabitation clause or a non-molestation clause. On appeal, the Court of Appeal stated that the question was whether the parties had by agreement between themselves, or the Court, by an order or something equivalent to an order, made clear that the wife's consent to sexual intercourse with her husband, implicit in the marriage contract, no longer existed. Examples were: separation agreement or order with a non-

[22] *Foster* v. *Foster* [1921] P. 438.

[23] See the judgement of Lane L.J. in *R* v. *Steele* (1976) 65 Cr. App. Rep. 22, at pp.24-25. The learned Lord Justice may, however, have stated the law far too widely when he said: "As a general principle, there is no doubt that a husband cannot be guilty of the rape of his wife." As the author has endeavoured to show, the position at common law is far from clear, *Miller* being the only decision directly on point. In fact, in *R v. Reid* [1972] 2 All E.R. 1350, at p. 1352, another Court of Appeal bench had left open the question whether *Miller* was a decision that would be upheld today.

[24] [1974] 3 All E.R. 663.

[25] See above, note 23.

[26] [1986] Crim L.R. 188.

[27] See above, note 23, at p. 25.

cohabitation clause; decree of divorce; decree of judicial separation; injunction restraining molestation. Accordingly, the lack of a molestation clause in the deed of separation, on the facts of the case, did not operate to revive the consent which had been terminated. Thus although the wife still cannot unilaterally revoke her consent to marital relations, it appears that consent may be effectively revoked by a simple agreement between husband and wife.[28]

Ultimately, therefore, the common law position is that a wife's consent at marriage to sexual relations can be revoked under certain specified circumstances. Although such a limitation to Hale's proposition is to be welcomed, this does, unfortunately, leave the law in a somewhat anomalous and unsatisfactory state. Once it is recognized that a wife's consent to intercourse is not irrevocable, instead of merely carving out exceptions to the marital rape exemption rule, the judges ought to have addressed the real question, which is whether the wife has, on the facts, withdrawn such consent to marital relations. This would, of course, deprive the common law rule of much significance. It is unfortunate, therefore, that the judges have largely chosen to accept Hale's doctrine as a general proposition rather than subject it to fresh examination.

At any rate, a husband would be guilty of assault if he uses force to compel his wife to have intercourse with him. In *Miller,* Lynskey J. held that a husband is not entitled to use force or violence for the purpose of exercising his right to marital intercourse. If he does so, he may make himself liable under the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case may constitute.[29] Again, although this is to be welcomed, it is logically insupportable. If the wife has given an implied consent to intercourse which is treated as irrevocable except in certain limited circumstances, the consent should be a defence to any charge of assault if the husband has only used reasonable force to achieve his aims. Surely the consent must extend to acts reasonably necessary to bring about what has been consented to. Indeed, in the sad case of G v. G,[30] Lord Dunedin had said, "it is … permissible to wish that some gentle violence had been employed."[31]

While a husband cannot be guilty of the rape of his wife, he may be convicted of abetting another to do so. In *R* v. *Cogan*,[32] the Court of Appeal held that a husband who abets another to have sexual intercourse with his wife knowing that she does not consent, may be found guilty of abetting rape, even though the other man is acquitted of rape on the ground that he mistakenly believed that the woman was consenting.

The effect of the marital rape exemption rule may well be further mitigated by developing Lord Stowell's view in *Popkin* v. *Popkin*[33] that 'the husband has a right to the person of his wife but not if her health is endangered." Although *Popkin* arises out of a divorce case where cruelty

[28] See the commentary to the report, above, note 26, at p. 189.
[29] See above, note 17, at pp. 533-534.
[30] [1924] A.C. 349.
[31] *Ibid*., at p. 357.
[32] [1975] 2 All E.R. 1059.
[33] See above, note 10; *cf. Foster v. Foster,* above, note 22.

was alleged under the old concept of the 'matrimonial offence', it is submitted that Lord Stowell's view might be extended to make a husband guilty of the rape of his wife if he, knowing that he might endanger her health, has intercourse with her against her will.[34] Obviously, a wife should be entitled to withdraw her implied consent to intercourse given at marriage in situations where her health would be endangered as a result of it. As Hawkins J. put it: "I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power, nay, even to the death, if necessary, the sexual embraces of a husband suffering from such contagious disorder."[35] Accordingly, if a husband has no right to the person of his wife in these circumstances, and such a wife would be justified in resisting her husband's sexual advances, any attempt by the husband to force himself upon his wife against her will must surely constitute the offence of rape.

IV. THE SEXUAL OFFENCES (AMENDMENT) ACT 1976

Section 1 (1) of the Act of 1976 provides that for the purposes of the law of rape in England and Wales, a man commits rape if he has *unlawful* sexual intercourse with a woman who at the time of the intercourse does not consent to it; and at the time he knows that she does not consent to the intercourse or is reckless as to whether she consents to it. Because "unlawful sexual intercourse" usually means outside the bond of marriage,[36] Smith and Hogan have argued that not only has the statutory formulation of the offence of rape in the Act of 1976 confirmed the generally accepted view of the common law, it may also have had the effect of reversing *Clarke* and *Byrne* by making it impossible for a husband to rape his wife in any circumstances. Smith and Hogan, however, go on to conclude that this "was certainly not Parliament's intention and the section should not be so interpreted."[37] This, it is submitted, is the better view. It is certainly unlikely that the English Parliament intended, without using clear words to that effect, to abolish the limitations to a controversial rule already long considered archaic by many. *Roberts,* in fact, proceeds on the basis that the limitations to the marital rape exemption rule still represent the law and so does the Criminal Law Revision Committee in its report on Sexual Offences.[38] Accordingly, a husband would be acting unlawfully if he has intercourse with his wife against her will in the circumstances mentioned above, *e.g.* where, as in *Clarke,* the wife had obtained a separation order. In this respect the Act of 1976 has not instituted any change in the law.

V. THE POSITION UNDER THE SINGAPORE PENAL CODE

The offence of rape is defined in section 375 of the Code which provides that a man is said to commit rape who, *except in the case hereinafter*

[34] *Cf.* Bromley, *Family Law,* above, note 21.
[35] See above, note 7, at p. 51.
[36] *Cf. R* v. *Chapman* [1958] 3 All E.R. 143.
[37] See above, note 19, at p. 431; *cf.* Bromley, *Family Law,* above, note 21, at p. 111.
[38] See above, note 19, at para. 2.57.

excepted, has intercourse with a woman in circumstances falling under any of five descriptions listed in the section, *e.g.* if intercourse is against her will, or without her consent, or with her consent, when her consent has been obtained by putting her in fear of death or hurt. The exception to section 375 (the "exception") then states as follows: "Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape."

The generally accepted view is that the exception enshrines the marital rape exemption rule. For example, the authors of a leading Indian text-book, commenting on the exception to section 375 of the Indian Penal Code (which is in *pari materia* with section 375 of the Code), state: "A man cannot be guilty of rape on his own wife... on account of the matrimonial consent which she has given which she cannot retract. But he has no right to enjoy her person without regard to the question of safety to her."[39]

In the Indian case of *Queen-Empress* v. *Huree Mohun Mythee*[40] Wilson J., in his summing up to the jury, took the view that:

> ... in the case of married females ... the law of rape does not apply as between husband and wife after the age of ten years. But it by no means follows that because the law of rape does not apply as between husband and wife . .. that the law regards a wife as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law . . . [.] Thus you will see that the real practical difference between the case of wives under ten years of age and the case of wives over ten years of age is that, in the case of wives under ten years of age, there is a ... hard-and-fast rule as to what constitutes criminality in the husband; if he has sexual intercourse he is guilty of rape. But in cases of wives over ten years of age, you have to consider, on the one hand, not only the question of age, but questions of physical condition, and on the other, questions of motive, questions of intention, questions of knowledge, questions of rashness, questions of negligence, and questions of consequences...[.] We have simply... to say whether, having regard to the physical condition of the particular girl with whom sexual intercourse was had, and to the intention, the knowledge, the degree of rashness or of negligence, with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the criminal law.[41]

If the same reasoning is applied to the Code, a husband cannot be guilty of rape if the wife is above the age-limit specified in the exception. A husband would, of course, be guilty of any other offence which the facts of the case may constitute. A husband would also be guilty of abetment if he assists another in the rape of his wife as abetment under the Code is a separate offence altogether. The offence of abetment would be made out even if the person abetted is incapable of committing an offence, or does not have any guilty intention or knowledge.[42]

[39] Ratanlal and Dhirajlal, *Law of Crimes* (23rd ed. 1987), Vol. 2, at p. 1406; *cf.* Gour, *Penal Law of India* (10th ed. 1982), Vol. 4, p. 3239.
[40] (1890) 18 Cal. 49.
[41] *Ibid.,* at pp. 62-63.
[42] S. 108 of the Code.

The question remains, however, whether the Code will recognize limitations to the exception similar to those applicable to the marital rape exemption rule at common law. In Canada, the position used to be that, by section 143 of the Criminal Code,[43] the marital exception to the crime of rape renders it automatically legal when it occurs between spouses.[44] The section provided as follows:[45]

> A male person commits rape when he has sexual intercourse with a female person *who is not his wife,* (a) without her consent, or (b) with her consent if the consent (i) is extorted by threats or fear of bodily harm, (ii) is obtained by personating her husband, or (iii) is obtained by false and fraudulent representations as to the nature and quality of the act. (Emphasis supplied).

Although section 143 is slightly more explicit than the exception to section 375 of the Code, it is submitted that a proper interpretation of the exception also admits of no limitations similar to those recognized at common law. This is certainly the only reasonable interpretation of the exception as a husband is expressly excluded from the ambit of section 375 even if he has intercourse with his wife under any of the five descriptions listed in the section.

Indeed, over and above the question of construction, it might also be said that some historical support for this interpretation exists. The Code came into existence in 1871 and, like many of the other criminal codes which exist in countries that were formerly part of the English empire, is modelled on the Indian Penal Code. Although the Code is not a codification of English Law, the exception almost certainly had its roots in Hale who saw the spousal immunity as an absolute one. Accordingly, the Code, and more specifically the exception, came into existence at a time when no qualification to Hale's statement of the law was recognized, and the exception is probably a reflection of such an understanding of the law, however flawed such an understanding might have been.[46] In Singapore, therefore, under no circumstances would a husband be guilty of the rape of his wife so long as she is not under thirteen years of age. The only possible exception might be where the court has granted a decree *nisi* of divorce although even this is doubtful.

In *Sivakolunthu Kumarasamy* v. *Shanmugam Nagaiah & Anor.*,[47] the appellant (the wife) filed a petition for divorce and was granted a decree *nisi* in 1982. The appellant then sought a division of a piece of property which she and her husband owned as joint tenants, as a result of which the High Court made a settlement order for the sale of the said property

[43] R.S.C. 1970, Chapter C-34.

[44] See McFadyen, "Inter-Spousal Rape: The Need For Law Reform" in *Family Violence,* (Eekelaar and Katz ed. 1978), p. 193. The author states that under s. 143, Canadian jurisprudence did not admit the same qualifications to the marital rape exemption rule as those recognized by the English courts and, accordingly, it would seem that a rape charge between a husband and a wife would not lie until such time as a decree absolute of divorce was obtained.

[45] The section was repealed in 1980-81-82, c. 125, s. 6.

[46] See the author's comments above, especially at note 23.

[47] [1986] 2 M.L.J. 181, [1988] 1 M.L.J. 341, C.A.

and the division of the proceeds of the sale between the parties equally. Before the order could be implemented, however, the husband passed away on 15 October 1983. On 29 November 1984, the husband's administrators brought an action claiming, *inter alia,* the implementation of the settlement order. This was resisted by the appellant who sought a variation of the order. Chua J. in the High Court gave judgement for the administrators and the Court of Appeal, presided over by Lai J., dismissed the appellant's appeal. While the author agrees with the result reached by the courts, it must, with respect, be said that much of the reasoning is doubtful. What is interesting about the judgement for the purposes of this article is that the Court of Appeal, after citing Lord Wright in *Fender* v. *St. John-Mildmay*,[48] went on to state that: "[t]he grant of a decree *nisi* is a recognition by the court that the marriage is at an end. When such a decree is pronounced, there is, as Lord Wright said, no longer any matrimonial home, no *consortium vitae* and no right on either side to conjugal rights."[49]

If the grant of a decree *nisi* puts an end to *consortium vitae,* it must either be that the decree has the effect of terminating the wife's consent to marital intercourse or, that the Court has made it clear by an order that the wife's implied consent no longer exists. Accordingly, a husband will be guilty of rape if he has intercourse with his wife against her will. This is certainly the position in England. Section 375 of the Code, however, proceeds on the basis that the matrimonial consent given by the wife is irrevocable by virtue only of the *marriage relationship.* Therefore, until the marriage is dissolved, the wife's consent to marital relations subsists, at least for the purposes of section 375. Thus, whatever might be the practical effect of the Court of Appeal's statement in *Sivakolunthu,* it is submitted that it can have no effect whatsoever on the law of rape in Singapore.

That a husband can under no circumstances whatsoever be guilty of the rape of his wife is, in the author's view both unsatisfactory and regrettable. Urgent reform is called for and it is to this that the article now turns.

VI. The Case for Criminalizing Marital Rape[50]

To be fair to Hale, while he might indeed have been a pious misogynist,[51] it must be noted that he was writing at a time when marriage was regarded as a lifelong institution. Until the passing of the Matrimonial Causes Act of 1857, no court in England had the power to grant a decree of divorce terminating a valid marriage. The common law also had the curious effect of altering the wife's status at marriage. She became no longer *a feme sole* but a *feme covert* and her legal personality was, for many purposes, regarded as being fused with that of her husband. This doctrine of the unity of husband and wife is clearly expressed by Blackstone, who said:

[48] [1938] A.C. 1, at pp. 45-46.
[49] [1988] 1 M.L.J. 341, at p. 345.
[50] A good summary of the arguments for and against criminalizing marital rape is contained in the 15th Report of the Criminal Law Revision Committee, above, note 19, at paras. 2.64-2.78.
[51] See Geis, "Lord Hale, Witches, And Rape" (1978) 5 *British Journal of Law and Society,* at p. 26.

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert, femina vim co-operta;* is said to be *covert-baron,* or under the protection and influence of her husband, her *baron,* or lord; and her condition during marriage is called her *coverture*.[52]

The doctrine undoubtedly had its roots in the Bible,[53] but in time, based on what most likely was an improper development in the understanding of Scripture,[54] it had the effect of relegating the wife to a subordinate status in the marriage relationship. As Oliver J. pointed out after a survey of medieval commentators and authorities: "It looks therefore rather as if the strictly biblical notion of husband and wife as one flesh and thus one person had by this time *[i.e.* 1663] become confused with, if not overtaken by, the equally fictitious concept of a predominating masculine will."[55]

Linked to the doctrine of the unity of husband and wife was the concept of the wife as a mere chattel, as part of her husband's property, with the resulting implication that forced sexual intercourse was really little more than a man making use of his own property. However, whatever might have been said for these ideas in Hale's time, they are clearly out of place today where marriage is generally regarded as a union of equals. According to Lord Denning M.R.:

> Nowadays, both in law and in fact, husband and wife are two persons, not one . . . [.] The severance in all respects is so complete that I would say that the doctrine of unity and its ramifications should be discarded altogether, except in so far as it is retained by judicial decision or by Act of Parliament.[56]

In Singapore, the Women's Charter[57] has largely restored the wife's status to that of *a feme sole.* The Charter, among other things, abolished the rule which made the wife's domicile dependent on that of her husband, restored the wife's capacity to acquire, hold and dispose of property, and restored her right to sue or be sued in her own name. More significant,

52 *Bl. Comm.* Book 1, p. 442.

53 *Genesis* 2:24, 3:16; *Matthew* 19:5; *Mark* 10:7; 1 *Corinthians* 7:10-11; *Ephesians* 5:31; also see Oliver J.'s judgement in *Midland Bank Trust Co Ltd* v. *Green (No 3)* [1979] 2 All E.R. 193, especially pp. 206-208.

54 The biblical references are probably best understood in the light of *Ephesians* 5:32-33. The true implication of the unity of husband and wife, rather than being the justification for subordinating the wife, in reality expresses the sacred nature of marriage; and furthermore, if the husband and wife are truly to be one flesh, then obviously the husband must love his wife as he loves his own flesh, *i.e.* himself; *cf. Jerome Biblical Commentary* (Brown, Fitzmeyer, Murphy, ed. 1968).

55 See above, note 53, at p. 208.

56 *Midland Bank Trust Co Ltd* v. *Green* (No. 3) [1981] 3 All E.R. 744, C.A., at p. 748; also see Sir George Baker's judgement (at p. 751) where he said: "We now know that husband and wife in the eyes of the law and in fact are equal."

57 Cap. 353, 1985 (Rev. Ed.).

however, is section 45, an important statement of principle which provides as follows:

(1) Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.
(2) The husband and the wife shall have the right separately to engage in any trade or profession or in social activities.
(3) The wife shall have the right to use her own surname and name separately.
(4) The husband and the wife shall have equal rights in the running of the matrimonial household.

It is clear, therefore, that the doctrine of the unity of husband and wife and its consequences have been so eroded today that the marital rape immunity exists as an anomaly in the law. The rule can no longer be justified purely on historical grounds and other arguments must be considered.

A commonly raised argument stresses the inappropriateness of the criminal law intervening in the marital relationship. According to the American Law Institute:

> The problem with abandoning the immunity in many such situations is that the law of rape, if applied to spouses, would thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship . . . [.] [I]t is a risky business for the law to intervene by threatening criminal sanctions. Retaining the spousal exclusion avoids this unwarranted intrusion of the penal law into the life of the family.[58]

Proponents of this view stress that the intrusion of the criminal law in such circumstances would destroy the unity of the family, hamper any attempts at reconciliation, promote marital disharmony, and ultimately lead to divorce. Certainly it must be conceded that it is unpleasant for the law to be involved in family disputes. On their part also, the police are understandably reluctant to become involved. The short answer to this argument, however, is that the criminal law is already involved in the life of the family. Except for the offence of rape, a husband can be charged with a whole host of other offences if he abuses his wife, *e.g.* assault, causing hurt or grievous hurt, *etc.* This same argument against extending the offence of rape to the husband can equally be applied to those offences as well. Yet no one argues that the husband should be spared the consequences of the criminal law in these circumstances to save the marriage. In this respect the criminal law ought to operate consistently. If we allow the prosecution of a husband for the assault of his wife even though this will have an adverse effect on the marriage, there is no reason why he should not equally be prosecuted for rape. Furthermore, as Finkelhor and Yllo point out,[59] the criminal law is not in the business of saving marriages. The criminal law, for better or worse, takes to task people who

[58] Model Penal Code and Commentaries, 1980, Part II, ss. 210.0 to 213.6, at p. 345.
[59] *License To Rape: Sexual Abuse of Wives* (1985), p. 179.

commit crimes, and the family chips fall where they will. Indeed it is difficult to resist the inference drawn by both authors that the "panic some people have about prosecuting a wife rapist boils down to their view of it as a crime not worth breaking up a marriage for."

Another argument against the abolition of the marital rape exemption rule is that the wife already has sufficient alternative remedies in both family and criminal law. Again, according to the American Law Institute:

> Here the law already authorizes a penalty for assault. If the actor causes serious bodily injury, the punishment is quite severe. The issue is whether the still more drastic sanctions of rape should apply . . . [.] The gravity of the crime of forcible rape derives not merely from its violent character but also from its achievement of a particularly degrading kind of unwanted intimacy. Where the attacker stands in an ongoing relation of sexual intimacy, that evil, as distinct from the force used to compel submission, may well be thought to be qualitatively different.[60]

With respect, the fact that the wife has alternative remedies begs the question. So too has every other female victim of rape. Nor do the alternative remedies in criminal law adequately provide for instances in which the wife has consented, but where her consent has been obtained by threats on the part of her husband putting her in fear of death or hurt. That rape exists as a separate offence shows society's recognition of it as a qualitatively different one from assault or causing hurt. In Singapore this is reflected in the extent of punishment that a person guilty of rape may be liable for. Such an offender may be punished with life imprisonment, or with imprisonment for a term which may extend to ten years, and he is also liable to a fine or caning.[61] This compares with imprisonment for a term which may extend to three months, or with a fine which may extend to five hundred dollars, or with both, for the offence of assault,[62] and with imprisonment for a term which may extend to one year, or with a fine which may extend to one thousand dollars, or with both, for the offence of voluntarily causing hurt.[63]

Rape, in other words, is simply not the same as assault or voluntarily causing hurt and this argument simply ignores the rationale of rape laws. Such laws exist to protect a woman's sexual integrity, autonomy, and freedom of choice. They also recognize that victims of rape may suffer from consequences different from those associated with other crimes of violence. Apart from facing the prospect of an unwanted child, a victim of rape may also suffer severe and long-term emotional and psychological scars. In addition, rape can also have adverse effects on a woman's future ability to enjoy sexual relations. Certainly the intimate character of the husband-wife relationship may be thought to diminish the degree and nature of harm involved in the sexual assault. This alone, however, cannot be an adequate defence of the immunity. Married couples are not the only

60 See above, note 58, at pp. 345-346.
61 S. 376 of the Code.
62 S. 352 of the Code.
63 S. 323 of the Code.

ones who enjoy an ongoing relationship of sexual intimacy. Yet the immunity has no application outside marriage. The effect of this is that a man who has a long-standing, permanent relationship with a woman can be convicted of rape while a husband who sexually assaults his wife on their first night of marriage cannot. Certainly the author concedes that if the immunity were removed, a convicted husband would be unlikely to receive as severe a sentence as other rapists. Be that as it may, the law would, on the other hand, be stating quite unequivocally that rape, whether or not by a husband, is a serious offence, and thus deserving of the attention of the criminal law. This would at least have some effect on deterrence.

A third argument in defence of the immunity is based on the difficulties of proving marital rape. There are unlikely to be any witnesses and the parties are likely to have had consensual intercourse many times before. By the same token, however, it must then be equally difficult to prove lack of consent in all cases of rape where the victim and accused have had a long-standing sexual relationship. Yet, it has never been suggested that prosecutions for rape should not take place in these circumstances. At any rate, it is curious that questions of evidence should wholly dictate the substantive law. Difficulties of proof do not appear to be an adequate basis on which to decide what behaviour should be condemned by society. Still these observations are largely made *in vacuo.* In America, several states have abolished the husband's immunity and statistics indicate that the difficulty-of-proof argument is exaggerated. In Oregon, three out of the four prosecutions brought before July 1982 resulted in conviction.[64] In California, out of 28 cases that went on for prosecution between January 1980 to December 1981, 25 resulted in conviction, mostly on the charge of marital rape.[65]

A fourth justification for retaining the marital rape immunity is that without it, husbands would be at the mercy of vindictive wives who might raise false allegations of rape against them. The floodgates would be opened and the courts would simply be inundated with a flood of such cases. Again these fears appear exaggerated. Sweden abolished the marital rape exemption many years ago. Geis, after an examination of the Swedish system, concluded:

> The Swedish experience provides a particularly persuasive response to the dire forebodings about the consequences of marital rape laws. It indicates that in the dozen years the Swedish law has been in force there have been no serious problems with it … Swedish statistical information indicates that the law has been used only very infrequently for complaints of rape by wives against their husbands . . . I would argue that the Swedish data support several different themes. To begin with, it seems most unlikely that removal of the marital rape exemption will place intolerable burdens on the police, the courts, or marriage itself.[66]

64 See above, note 59, at p. 176.

65 *Ibid.*, at pp. 226-228.

66 (1978) *6 Adelaide Law Review,* at p. 302; *cf.* the 15th Report of the Criminal Law Revision Committee, above, note 19, at para. 2.61, where the Report states that on the information before the Committee, there have, so far, been very few prosecutions in three states in Australia which have amended their laws on marital rape.

The above argument is also untenable for another reason. If fear of false allegations were a valid reason for not criminalizing certain actions, the existence of the entire criminal law would be in doubt. Indeed it must also be said that if a wife really wished to blackmail her husband, there already exist easier ways to do so. As mentioned earlier, there is a whole host of offences a wife can allege against her husband. There is no evidence that wives are doing this on a large scale, much less vindictively. And if a wife should intend to do so *(i.e.* to blackmail her husband), she would be wise to allege some other offence. The inherent difficulties involved in establishing rape, the stigma, and the trauma of being cross-examined on intimate details, would surely make false allegations a most daunting exercise.

A final argument against the abolition of the marital rape immunity is that a wife might change her mind after accusing her husband of rape and become reconciled with him. This would waste valuable time and effort on the part of the police. Certainly if this were the case, sympathy could be felt for the police who find after all their work that the wife refuses to testify against her husband. However, this argument could apply equally to other offences as well, but has never been held to do so. Furthermore, the criminal law does not exist solely to secure the maximum number of convictions. The criminal law, proceeding as it does from the society of which it is an integral part, is also an expression of that society's values. At the same time, the criminal law in turn exercises a powerful and positive function in educating people as to the standards of behaviour which society expects of them, and the moral blameworthiness of certain acts. Accordingly, the spousal exclusion should be abolished because in the words of the minority of the Criminal Law Revision Committee: "[i]f the extension of the law of rape to all married couples brought about a reassessment of sexual rights and duties in marriage, the law would, in the opinion of these Members, have performed an educative function."[67]

In Singapore, the Women's Charter has done much to bring about a re-assessment of the reciprocal rights and duties inherent in the married state. Removing the marital rape immunity would only be a logical step on a path already long trodden. As McFadyen puts it,[68] "criminalizing interspousal sexual assault will symbolically affirm the equality of women in marriage." The point ultimately is a very simple one. The law either condones marital rape or it does not. There can be no middle ground.

VII. LAW REFORM

It is submitted that the case for criminalizing marital rape is unanswerable. Many jurisdictions have done so and it is hoped that Singapore will eventually follow suit. The position in Singapore, as has been pointed out, is particularly unsatisfactory, precluding any possibility whatsoever of a husband being charged for the rape of his wife. In this regard, Malaysia is somewhat more progressive. By section 7 of the Penal Code (Amend-

67 See above, note 19, at para. 2.72.
68 See above, note 44, at p. 197.

ment) Act 1989 (Act A727), section 375 of the Malaysian Penal Code (F.M.S. Cap. 45) has been replaced by a new section 375 which exception provides as follows: "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." For the purposes of this article, what is significant is that the new section 375 then goes on to state in Explanation 1 that: "A woman – (a) living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or (b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section." This leaves the position in Malaysia very similar to, although narrower than, the position under the common law as it is clear at least that Explanation 1 would not apply in cases where there is an agreement between husband and wife although *Roberts* indicates that such an agreement may effectively revoke the wife's consent to marital relations.

It is the author's submission that, going beyond the amendments in Malaysia and the common law position, the Code should at least be amended to extend the offence of rape to all cases where husband and wife are no longer cohabiting, whether or not there is a court order or an agreement between the parties. This was one proposition which united all the members of the Criminal Law Revision Committee in its 15th Report. The Committee, however, pointed out the difficulties of achieving a satisfactory definition but nevertheless recommended that an attempt be made to find a workable formula.[69]

Some examples of law reform in the area of marital rape can also be seen in Australia. The South Australian Criminal Law Consolidation Act Amendment Act 1976 provides that a person will only be guilty of rape on his spouse if the offence was accompanied by (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse, (b) an act of gross indecency, or threat of such an act, against the spouse, (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act, or (d) threat of the commission of a criminal act against any person[70]. In Western Australia, the husband's immunity has been lifted in cases where "he is separated from her and they are not residing in the same residence."[71] In Victoria, the Crimes (Sexual Offences) Act 1980, amending section 62 (2) of the principal legislation, enacted that: "Where a married person is living separately and apart from his spouse the existence of the marriage shall not constitute, or raise any presumption of, consent by one to an act of sexual penetration with the other … by the other."

Another alternative is to follow the approach adopted in Sweden and distinguish between rape by a stranger and rape by a husband. Rape by a stranger would carry a prison term of no less than two and no more than ten years. Husbands, falling outside this category were vulnerable only to prosecution for sexual assault which would carry a sentence of not more than four years' imprisonment. Accordingly, the maximum punishment

69 See above, note 19, at para. 2.85.
70 S. 12, Criminal Law Consolidation Act Amendment Act 1976.
71 S. 2, Criminal Code Amendment Act (No. 3) 1976.

for a husband who has raped his wife will be less than the maximum which a stranger may be liable for.[72] It is certainly clear that some limited reform at least is called for in Singapore[73] and examples can be drawn from other jurisdictions. In view of the preceding arguments, however, it is submitted that as a matter of principle, the entire abolition of an archaic rule would be the most satisfactory solution.[74]

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[72] See Geis, above, note 66, at pp. 297-298.

[73] Useful reference might also be made to the reports and proceedings of the Workshop-cum-Exhibition on Violence Against Women (1985; Kuala Lumpur) and the Forum on "Stop Violence Against Women" (1987; Singapore).

[74] It appears that the law in Scotland has moved in this direction. According to a report in *The Sunday Times* (19 March, 1989), "British judges have ruled that a husband can stand trial for the alleged rape of his wife, even though they are living together. In a historic judgment, Scotland's Appeal Court upheld an earlier High Court judgment by Lord Mayfield that although in the past it was not a crime for a man to rape his wife, times had changed and so had the status of women." Unfortunately, the author has thus far been unable to obtain a copy of the judgment.

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