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PENAL CODE (AMENDMENT) ACT 2007: RAPE WITHIN MARRIAGE

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I. INTRODUCTION

The former section 375 of the Singaporean *Penal Code*[1] contained an exception which stated that "sexual intercourse by a man with his own wife … is not rape". This has been commonly interpreted to mean that it was not possible to convict a husband of the offence of rape on his wife under any circumstances so long as they remain legally married.[2] The only qualification to the blanket immunity for husbands is that the wife must not be under 13 years of age.[3] For example, one commentator

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1 Cap 224, 1985 Rev. Ed. Sing [*Penal Code*]. The *Penal Code* was most recently amended by the *Penal Code (Amendment) Act*, No. 51 of 2007, which came into effect on 1 February 2008.

2 The offence of rape in Singapore is gender specific in that it can only be committed by a man on a woman. The new s. 375 of the *Penal Code* provides:

> Any man who penetrates the vagina of a woman with his penis … (a) without her consent … shall be guilty of an offence.

The possibility of "male rape" is covered by the offence of "sexual assault by penetration" in the new s. 376 of the *Penal Code*. Under the new s. 377C(b) and (c) of the *Penal Code*, sex reassignment procedures (or what is popularly known as "sex change operations") are recognised to effectively change the sex of a person for the purposes of the sexual offences in ss. 375 to 377B of the *Penal Code*.

3 The age limit was originally set at 10 years when the *Penal Code* was first enacted as Ordinance No. 4 of 1871 when Singapore was part of the Straits Settlements. It was subsequently raised to 12 years by the *Penal Code (Amendment) Ordinance 1891* (S.S.), Ordinance No. 16 of 1891 and later to 13 years by the *Penal Code (Amendment) Ordinance 1926* (S.S.), Ordinance No. 32 of 1926. The age limit of 13 years for conjugal relations with a wife is contrary to Singapore's general law in two ways: (1) the age of consent for sexual relations is set at 16 years by s. 376A of the *Penal Code*; and (2) the minimum age for marriage is 18 years for non-Muslim marriages (*Women's Charter* (Cap. 353, 1997 Rev. Ed. Sing.), s. 9 [*Women's Charter*] and also for Muslim marriages in general unless "special circumstances" apply (*Administration of Muslim Law Act* (Cap. 3, 1999 Rev. Ed. Sing.), s. 96(4), (5) [*Administration of Muslim Law Act*]). The low age limit for rape therefore only serves to protect men who are married under a foreign law which allows brides as young as 13 years-old. The age limit of 13 years is still retained in the new s. 375(4) of the *Penal Code*. It is hoped that Singapore will raise the age limit in rape from 13 years to at least 16 years (or better yet, 18 years) as soon as possible to keep the law on rape consistent with the other branches of law. The United Nations General Assembly had, as long ago as 1965, recommended that Member States set a minimum age of marriage at 15 years, unless it is dispensed with "for serious reasons, in the interests of the intending spouses", see *Recommendation on Consent to Marriage, Minimum Age for*

wrote:

> In Singapore … 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.[4]

This law was unfortunate in that it granted a wider scope of immunity than necessary even considering the conditions under which the provision was first drafted.

In order to understand the origins of this law, a brief diversion is needed. Most discussions on the marital rape exemption make reference to the rule and its rationale stated by Hale more than 270 years ago 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 up herself in this kind unto her husband, which she cannot retract.[5]

However, instead of being vilified as a misogynist, it has been argued that Hale's view was in fact a liberal one in restricting the rape immunity to wives only. Concubines were spared from the rule and they could therefore withdraw their consent to sex and be protected by the criminal law.[6] It was also pointed out that rape was a capital felony in Hale's time which would have been too harsh for husbands in most cases. Whether Hale's view can be considered liberal or not in his day, commentators have pointed out that to perpetuate the blanket immunity for husbands in the 20th or the 21st century is nothing short of "appalling",[7] "regrettable",[8] and "Neanderthal-like behaviour".[9]

Were the drafters of the *Penal Code* correct to adopt a blanket immunity for husbands in marital rape? Even in the 18th and 19th centuries, there have been statements in English[10] and Indian[11] case law which opined that a wife's consent to intercourse may be qualified on the basis that it may affect her health. Hence, a husband is not shielded from the criminal law if his insistence on sexual intercourse may lead to him endangering his wife's health. A 19th century English case also

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Marriage and Registration of Marriages, GA Res. 2018 (XX), UN GAOR, 20th Sess., UN Doc A/60141 (1965) 36.

4 Tan Cheng Han, "Marital Rape—Removing the Husband's Legal Immunity" (1989) 31 Mal. L.R. 112 at 120.

5 Sir Matthew Hale, *History of the Pleas of the Crown* (London, 1736) vol. I, 629 which was posthumously published sixty years after his death. However, Hale was probably not the first to hold this opinion, see J.L. Barton, "The Story of Marital Rape" (1992) 108 L.Q.R. 260. There is of course an obligation to consummate a marriage—wilful refusal to do so is a ground on which a marriage is voidable (see *Women's Charter*, s. 106(b))—but this does not mean that consummation can be obtained without consent.

6 David Lanham, "Hale—Misogyny and Rape" (1983) 7 Crim. L.J. 148; Helen Fenwick, "Marital Rights or Partial Immunity" (1992) 142 New L.J. 831. Lanham, *ibid.* at 151, also points out that Hale was of the opinion that a husband was not entitled to use moderate force to chastise his wife but only admonition and confinement to the house, which was an opinion ahead of his time.

7 Leong Wai Kum, "Other ways to punish violence" *The Straits Times* (27 November 2006).

8 Tan, *supra* note 4 at 121.

9 Sing., *Parliamentary Debates*, vol. 83, col. 2354 at 2412 (23 October 2007) (Mr. Charles Chong).

10 *Popkin v. Popkin* (1794) 1 Hagg. Ecc. 765 at 771, 162 E.R. 745 at 747; *R v. Clarence* [1888] 22 Q.B.D. 23 *per* Wills J. (at 33), Field J. (at 57), Hawkins J. (at 51) and Smith J. (at 37).

11 *Queen-Empress v. Hurree Mohun Mythee* (1890) 18 Cal 49. The exception found in s. 375 of the *Indian Penal Code* (Act 45 of 1860) is in substance the same as our former s. 375 of the *Penal Code*. For a slightly more modern case, see *Emperor v. Shahu Meharab* A.I.R. 1917 Sind 42(1).

rejected the idea that a husband could exercise complete dominion over the person of his wife by detaining his wife in order to have her fulfill her "marital obligation".[12] It is therefore unfortunate that Hale's statement was accepted as an accurate description of the common law as it stood at the time,[13] which eventually found its way into the Singaporean *Penal Code*.

The Singapore Parliament finally decided in 2007 to replace the blanket marital rape exemption with a limited one. This did not please those who wanted the exemption to be abolished altogether. Of the nine Members of Parliament who spoke on the marital rape exemption during the second reading of the *Penal Code (Amendment) Bill*,[14] six were not in support of the amendment because it did not go far enough in their view.[15] The Senior Minister of State for Law, Associate Professor Ho Peng Kee, concluded the debate on this topic with a plea:

> We want to do something [to protect wives who have been sexually abused], but what we are suggesting is something practical and workable that will still keep the institution of marriage intact. I may not convince you that this is a better way. But I say, let us give it a try. … We will monitor what we are doing and, if necessary, fine-tune our proposals.[16]

The aim of this note is not to examine whether the marital rape exemption, be it in the blanket or limited versions, can be justified on public policy, constitutional or practical grounds.[17] It will instead examine if the new provisions are indeed clearly thought out once this choice has been made to partially retain the marital rape exemption.[18] It is argued that there are criminal law and family law considerations which have not been adequately thought through in the new provisions.

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[12] *R v. Jackson* [1891] 1 Q.B. 673. See also *R v. Reid* [1973] 1 Q.B. 299 at 303 where Cairns L.J. said: "The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete …".

[13] Lord Lane C.J. in *R v. R (rape: marital exemption)*, [1992] 1 A.C. 599 at 604 also opined that Hale's statement was "an accurate expression of the common law as it then stood". The marital rape exemption was finally abolished in England by the House of Lords in 1992: *R v. R*, *ibid*.

[14] 1st Sess., 11th Parl., 2007 (Bill No. 38/2007).

[15] Comprising 2 NMPs (Mr. Siew Kum Hong and Ms. Eunice Olsen) and 4 MPs (Ms. Indranee Rajah, Mdm. Cynthia Phua, Mdm. Ho Geok Choo and Mr. Charles Chong). The other 3 MPs who supported the amendment were Dr. Teo Ho Pin, Mr. Hri Kumar Nair, and Ms. Ellen Lee. Dr. Teo's and Ms. Lee's support were rather ambivalent.

[16] Sing., *Parliamentary Debates*, vol. 83, col. 2412 at 2428 (23 October 2007).

[17] My view is that the marital rape exemption should be abolished completely (see Chan Wing Cheong, "Lift Marriage Veil on Rape" *Today* (14 November 2006)), but the view of the Government is that "[a]bolishing marital immunity altogether will likely change the complexion of marriage drastically with negative impact on the marital relationship between husband and wife": Sing., *Parliamentary Debates*, vol. 83, col. 2175 at 2193 (22 October 2007) (Assoc. Prof. Ho Peng Kee).

[18] In moving the second reading of the *Penal Code (Amendment) Bill* in Parliament, Assoc. Prof. Ho Peng Kee credited Professors Leong Wai Kum and Debbie Ong along with the Law Society, the Subordinate Courts and the Singapore Academy of Law for helping to improve "the drafting of the exemptions; in particular expanding the circumstances under which the wife's consent to the husband's conjugal rights may be deemed withdrawn": see Sing., *Parliamentary Debates*, vol. 83 col. 2175 at 2192 (22 October 2007). Sadly, Professors Leong and Ong's proposal to allow the marital rape exemption to be lifted if the parties were simply living apart by choice was not adopted. It is also unknown how the concept of nullity proceedings came to be introduced into the final version of s. 375(4) of the *Penal Code*. It was not found in the proposal made by Professors Leong and Ong.

II. The New Law

The new section 375(4) of the Singaporean *Penal Code* allows the marital rape exemption to be lifted even if the marital relationship between the parties has not been terminated yet. It provides that:

> No man shall be guilty of [rape] against his wife, who is not under 13 years of age, except where at the time of the offence—
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> (a) his wife was living apart from him—
> (i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;[19]
> (ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;
> (iii) under a judgment or decree of judicial separation;[20] or
> (iv) under a written separation agreement;[21]
>
> (b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;
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> (c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;
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> (d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or
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> (e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (*d*), and such proceedings have not been terminated or concluded.[22]

The very limited scope of the marital rape exemption should be acknowledged. First, the exemption from the law of rape is lifted completely in the situations described in the sub-section. Thus, a wife who is living apart from her husband and has commenced proceedings for divorce is given the same protections under the criminal law that any other woman would receive. If her husband has non-consensual sexual intercourse with her during this time, he will be liable for the offence of rape and is subject to the same sentencing norms.[23] A husband will not be automatically

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[19] This encapsulates the English common law position stated in *R v. O'Brien* [1974] 3 All E.R. 663.

[20] This encapsulates the English common law position stated in *R v. Clarke* (1949) 33 Cr. App. Rep. 216.

[21] This was suggested in *R v. Miller* [1954] 2 Q.B. 282 at 290, *per* Lynskey J.

[22] The offence of "sexual penetration of a minor under 16" under s. 376A of the *Penal Code* contains an exact mirror of these provisions in s. 376A(5). Hence, a wife who is under 16 years old but is nevertheless married to her husband (in all likelihood the marriage would be one contracted in a foreign jurisdiction) would only be protected if the non-consensual sex occurs in certain circumstances such as when the wife was living apart from her husband and proceedings have commenced for divorce. The ensuing discussion on s. 375(4) of the *Penal Code* is applicable to s. 376A(5) of the *Penal Code* as well. It should be noted that the blanket marital exemption survives in two situations: ss. 376B(3) ("commercial sex with minor under 18") and 376F(4) ("procurement of sexual activity with person with mental disability") of the *Penal Code*. Can it be right for the law to send the message that husbands may take sexual advantage of their mentally disabled wives or for husbands to pay for sex with their under-18 year-old wives?

[23] This is unlike the view expressed in England that rape by a husband is less traumatic than rape by a stranger: Glenville Williams, "The Problem of Domestic Rape" (1991) 141 New L.J. 205 and "Rape is Rape" (1992) 142 New L.J. 11; Philip Rumney, "When Rape Isn't Rape: Court of Appeal Sentencing

subjected to a lower (or higher) sentencing scale than stranger-rapists merely on the basis of his status. Confirmation of this view can be seen from *PP v. Mohammed Liton Mohammed Syeed Mallik*,[24] a case which involved *inter alia* rape committed by a man who had been sexually intimate with the victim both before and after the offence. The Singaporean Court of Appeal in that case commented that:

> … to treat *all* prior relationships as being of mitigating value in cases of rape would be wrong. … It is a myth that there is *always* less "violation" in such cases as compared to "stranger" rapes. Rape in such circumstances is not *always* less grave. …
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> … just as it would be wrong to treat the prior relationship between the parties as *always* being a mitigating factor, it would be *equally wrong* to treat this factor as *always* being an aggravating one. … the effect of any prior relationship between the parties will *depend on all the circumstances of the case*.[25]

Secondly, the scope of the marital rape exemption only applies to vaginal intercourse. There is no such corresponding exemption for any other forms of non-consensual penetration, such as anal or oral intercourse, and non-consensual penetration of the vagina by any part of the husband's body other than his penis or by an object.[26] Hence, a wife receives the same protection from the criminal law from nearly all forms of sexual violation just like her unmarried counterpart.

Thirdly, the immunity does not extend to a husband who abets others to rape his wife.[27] Fourthly, the present scope of protection given to married women is greater than what was first proposed in the Government's *Penal Code (Amendment) Bill*[28] put forward for public consultation in 2006. In that version, the marital rape exemption would be lifted where:

(a) the wife was at the time of the offence living separately from him under a judgment of judicial separation or an interim judgment of divorce not made final;
(b) at the time of the offence, there was in force an injunction restraining him from having sexual intercourse with his wife; or
(c) at the time of the offence, there was in force a protection order under section 65 or an expedited order under section 66 of the *Women's Charter* made against him pursuant to an application by his wife.

The new law differs from the original amendment proposals in that the words "living separately" in the latter were eventually replaced with the concept of "living apart". This has important implications because the latter term has an accepted

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Practice in Cases of Marital and Relationship Rape" (1999) 19 Oxford J. Legal Stud. 243; *R v. Arthur John Berry* (1988) 10 Cr. App. Rep. (S) 13.

[24] [2008] 1 S.L.R. 601 (C.A.).

[25] *Ibid*. at paras. 115 (emphasis in the original).

[26] S. 376 of the *Penal Code*.

[27] The leading common law cases on this are *Lord Audley's case* (1631) 3 St. Tr. 401 and *Cogan and Leake* [1976] Q.B. 217. Ratanlal & Dhirajlal, *Law of Crimes*, 26th ed. (New Delhi: Bharat Law House, 2007) at 2074 cites the Indian case of *Tatya Tukaram Khabali* (1930) Cr. App. Nos. 19 and 20 of 1930 (unreported) for the same proposition under the *Indian Penal Code*.

[28] Online: <http://app.reach.gov.sg/olcp/asp/ocp/ocp01d1.asp?id=3683>.

meaning in divorce law in that it is possible for couples to "live apart" even though they may be still living under the same roof provided they carry on separate households.[29]

Another change made to the new provision is that a wife who lives apart from her husband under an interim judgment of nullity (or a *decree nisi* of nullity under the old terminology) will also be fully protected from non-consensual sexual intercourse with her husband. The implications of this addition will be explored below.

It can be seen that the marital rape exemption is also lifted under the new law in the case of a wife who lives apart from her husband in the following new circumstances: under a written separation agreement; where proceedings for divorce, nullity or judicial separation have commenced and such proceedings have not been terminated or concluded; and where proceedings have been commenced for a protection order or expedited order under the *Women's Charter* and such proceedings have not been terminated or concluded.

Accordingly, there is no need for a wife to live separately from her husband and to have obtained an interim judgment of divorce, a protection order or expedited order before she is protected from rape by her husband. Under the new law, the marital rape exemption is lifted where the wife lives separately from her husband and has only *commenced* proceedings for divorce, judicial separation, nullity, a protection order or expedited order. There is truly very little left of the marital immunity since the criminal law is allowed to intervene into the marital relationship even though there is no assurance in any of these situations that the appropriate order may be made by a court.

Finally, it should be noted that the marital rape exemption is lifted under the new law not just by the initiation of the court proceedings such as divorce or protection order proceedings, but also by the mutual consent of the parties in the form of a written separation agreement if the wife is also living apart from her husband at the time. It is unclear what form the separation agreement must take other than it being written. It is submitted that in order not to unduly limit the protection given to wives, the agreement need not be in any particular legal format so long as the parties unequivocally record in writing their mutual intention to separate.[30] This suggestion follows on from the concern expressed in Parliament that husbands must be adequately informed of a change in their marital relationship:

> Our calibrated approach affords the necessary protection to women whose marriages are, in practical terms, on the verge of a breakdown or have broken down, and who have clearly signaled that they are withdrawing their implicit consent to conjugal relations, so that their husbands are forewarned that marital immunity has been lifted. There is certainty and no second-guessing …[31]

It is submitted that a written separation agreement—in whatever form—between the parties should be a clear enough message to husbands that their wives' consent cannot be taken for granted.

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[29] S. 95(8) of the *Women's Charter*.

[30] This is probably the limit of what is possible under the new law. However, the twin hurdles of: (1) a mutual agreement to separate and (2) the agreement to be in a written form may be too demanding as demonstrated by the case of *PP v. N* [1999] 4 S.L.R. 619 (see *infra* notes 39 to 44 and accompanying text).

[31] Sing., *Parliamentary Debates*, vol. 83, col. 2175 at 2192 (22 October 2007) (Assoc. Prof. Ho Peng Kee).

III. Problems in the New Law

By all accounts, the new law is a vast improvement upon the former section 375 of the *Penal Code*. However, there is nevertheless scope for improvement in terms of its coverage and clarity.

A. *Living Apart*

It unfortunately still remains the law that a wife is not given the full protection of the criminal law from unwanted sexual intercourse unlike her unmarried counterpart. The marital rape exemption applies in its full vigour in two situations. First, if a wife is still living with her husband and she has not yet initiated any legal proceedings such as for divorce or a protection order. Just saying "no" to the sexual demands of her husband is not enough to lift the marital rape exemption. This unfairly discriminates against those wives who may not be able to live apart from their husbands for financial or emotional reasons. In the words of one Nominated Member of Parliament, Mr. Siew Kum Hong, "… if a woman has the wherewithal to leave, then we will protect her from rape, but not if she is completely dependent on her husband. That … cannot be right".[32]

Secondly, our past experience in dealing with family violence show there may be various reasons which hinder married women from initiating divorce or protection order proceedings. In a study of family violence cases filed in the Family Court in 1997, it was found that 90.4 percent of persons seeking a protection order were assaulted more than once before they sought protection[33] and 40 percent expressed a sense of helplessness in not knowing who or where to turn to for help.[34] Furthermore, 63 percent felt fear for their lives or their children's lives; 29 percent had high levels of anxiety; 23 percent were confused and had disconnected thoughts; 17 percent had low self esteem; and 11 percent had suicidal tendencies.[35]

One response is that if there are obstacles in getting the message across to married women that they have choices and that there is help available to them instead of continuing to live with the family violence, then more resources should be put into educating and empowering them.[36] The solution is not to skew the criminal law by allowing intervention into a marital relationship if no steps have been taken to signal

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[32] Sing., *Parliamentary Debates*, vol. 83, col. 2175 at 2246-2247 (22 October 2007).

[33] Subordinate Courts Research Bulletin, *A Profile of Family Violence* (Issue No. 13, August 1998). 23.2 percent were assaulted twice; 24.5 percent were assaulted 3 times; 21.8 percent were assaulted 4 times; and 20.9 percent were assaulted 5 or more times. These results were confirmed by a later study which found that only 11 percent of cases did not have any history of past violence when they applied for a protection order: Subordinate Courts Research Bulletin, *Faces of Family Violence* (Issue No. 38, December 2004). In another study, it was reported that about three-quarters of applicants suffered physical and non-physical forms of abuse for more than a year (with more than 20 percent having suffered for more than 10 years) before seeking a protection order: Subordinate Courts Research Bulletin, *Study of the Effectiveness of Protection Orders* (Issue No. 28, December 2001).

[34] Subordinate Courts Research Bulletin, *A Profile of Family Violence*, *ibid*.

[35] *Ibid*.

[36] Sing., *Parliamentary Debates*, vol. 83, col. 2175 at 2194-2195 (22 October 2007) (Assoc. Prof. Ho Peng Kee).

a deterioration in the relationship. On the other hand, there can be no dispute that despite all the resources, programmes and awareness campaigns over the last ten years or more, the limited studies available show that there are still a fair number of married women who suffer family violence repeatedly before coming forward, if at all.[37] Requiring married women to take an additional legal step of applying for a protection order or divorce before the full protection of the criminal law is granted to them may be a step that some just cannot manage despite the help that is given. In the words of another Member of Parliament, Ms. Ellen Lee, "[m]arried women, of all classes [and not just those with knowledge and access to legal processes], should be able to say 'no' to unwanted sexual contact, just like their unmarried counterparts".[38]

The shortcoming of the new law is aptly demonstrated by the case of *PP v. N*[39] which was decided under the old law. In that case, the wife moved to her parents' home a year after the parties married because of the frequent quarrels between them. During a telephone conversation when the husband was away on overseas military training, the wife suggested they get a divorce. This upset the husband greatly and he threatened to kill her if she dared to leave him. She became very frightened as he had been violent towards her previously. When the husband returned to Singapore two weeks later, he asked to meet her and promised a peaceful talk. They met at the void deck of an apartment block but quarreled again. He dragged her into his car and drove back to their matrimonial home. He ordered her into the bedroom, stripped her of her clothes, tied her hands with a bath towel and gagged her. He then had sex with her against her will. He also demanded that she wear a blouse he had bought for her. She resisted and he slapped her across the face.

Following the wife's report to the police, the husband could not be charged with rape as he was still married to her. He was instead charged with voluntarily causing hurt for slapping the wife; wrongful confinement by tying her up in the bedroom; and criminal intimidation by threatening to kill her. Three other charges were also taken into consideration for sentencing purposes. He pleaded guilty and was fined a total of $4,000 by the trial judge. On appeal by the Public Prosecutor against the sentence, Yong Pung How C.J. slapped on an additional 18 months' imprisonment. The learned Chief Justice remarked that "[a]n offence committed against one's spouse should not be treated any less seriously than an offence committed against a complete stranger",[40] "non-consensual sexual intercourse with the wife is still an act of violence which ought to have been regarded as an aggravating character",[41] and that a relevant consideration in sentencing was that his motive in restraining his wife was to compel her to submit to his sexual desires.[42] In spite of these comments, his Honour's hands were nevertheless tied by the sentencing maximum for the minor offences that the husband was charged with. Sadly, the new law will not have resulted in the husband being charged with rape either. The wife was living apart from her husband and was only thinking about getting a divorce at the time; hence, no legal

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[37] *Supra* note 33.
[38] Sing., *Parliamentary Debates*, vol. 83, col. 2354 at 2358 (23 October 2007).
[39] *Supra* note 30.
[40] *Ibid.* at para. 18.
[41] *Ibid.* at para. 17.
[42] *Ibid.* at para. 17.

proceedings had been initiated yet. There was also no written separation agreement between them to live separately at the time.

It is suggested that for wives who have physically separated from their husbands, it should be clear that any conjugal "rights" that husbands have (or think that they have) are forfeited. Physical separation is a clear indication that the marriage is no longer a "going concern" and is in all likelihood a step towards subsequent divorce based on separation.[43] Unwanted sexual advances from a husband during this time are as unwelcome and should be considered as equally reprehensible as those from a complete stranger.[44]

B. *Exemptions for Other Sexual Acts*

If a husband is given exemption—albeit partial exemption—from the criminal law of rape such as when the parties are still living together and no legal proceedings have been initiated yet, should the exemption also apply for other sexual acts (such as oral and anal sex, stroking of the breasts or touching of the vagina) committed by a husband on his wife which are preliminary to sexual intercourse between them?

One possible argument is that the marital rape exemption only applies to vaginal intercourse. Marriage is consummated by vaginal intercourse which is the object of the wife's "matrimonial consent and contract" as put by Hale.[45] A refusal to other sexual acts is not a refusal to consummation; hence a husband has no right to demand these other sexual acts if his wife refuses to comply. In the English case of *R v. Kowalski*,[46] a husband had forced his wife at knifepoint to perform fellatio on him and then to have sexual intercourse with him. The issue before the Court of Appeal was whether the act of fellatio could comprise the offence of indecent assault. The court held that as fellatio is not a practice to which parties give their consent by their marriage, actual consent to such an act must exist if the particular incident is not to be considered an indecent assault.

However, it could be argued that if the other sexual acts are preliminary to vaginal intercourse,[47] then it is illogical and unjust to criminalise these other sexual acts but not the actual act of sexual intercourse by a husband on his unwilling wife. The greater must include the lesser.[48] In the English case of *R v. Caswell*,[49] a husband forced his wife to perform oral sex on him and thereafter forced her to have sexual intercourse with him against her will. It was held that the husband cannot be liable

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[43] S. 95(3)(d) of the *Women's Charter*.

[44] Couples who wish to reconcile are of course free to do so (and indeed, are encouraged to do so). This suggestion only means that there must be actual consent on the part of the wife to have sexual intercourse with her separated husband, failing which it will be a case of rape.

[45] *Supra* note 5.

[46] (1988) 86 Cr. App. Rep. 339 [*Kowalski*].

[47] A similar approach was utilised with respect to the offence of "carnal intercourse against the order of nature" in the now deleted s. 377 of the *Penal Code* such that oral sex when indulged on its own is an offence but not when it is part and parcel of the "natural sexual intercourse" between the parties: see *PP v. Kwan Kwong Weng* [1997] 1 S.L.R. 697 at para. 32; *PP v. Tan Kuan Meng* [1996] SGHC 16.

[48] In the same vein, it would be illogical and unjust to allow a husband to be convicted of attempted rape of his wife if he cannot be liable for rape of his wife.

[49] [1984] Crim. L.R. 111 [*Caswell*]. Professor Smith in his comment to *R v. Kowalski* [1988] Crim. L.R. 124 at 125 was also of the view that "the rule of immunity, while it survives, should extend to charges of indecent assault where the acts alleged are part and parcel of the act of intercourse."

for indecent assault for forcing the wife to perform oral sex. Since the law implied her consent to the act of sexual intercourse, a lesser sexual act cannot be indecent or repugnant to her. Furthermore, the court opined that if consent is limited to the act of sexual intercourse alone, any other act that is preliminary to or during intercourse would be capable of being an indecent assault. The court was of the opinion that it would not be practicable to draw such a line between what is "acceptable" and what is "indecent".

In the context of the Singaporean *Penal Code*, acts such as stroking of the breasts and touching of the vagina could potentially be an offence under section 354 of the *Penal Code* ("assault or use of criminal force to a person with intent to outrage modesty") if the wife does not consent to such acts being committed by her husband. "Modesty" is not a word that is defined in the *Penal Cod*e, and it is submitted that the local courts, like the English court in *Caswell*, may find it hard to lay down a rule as to what can and cannot amount to an "outrage of modesty" in the context of sexual acts between married couples who have been sexually intimate.[50] Hence, a local court may very well decide that it is not an offence to stroke a wife's breasts even if she does not consent to it if this is the part of the foreplay indulged in by the husband leading up to sexual intercourse.

However, it should be noted that the Singapore Parliament has chosen to explicitly criminalise acts of oral and anal intercourse committed without consent of the victim in the 2007 amendments to the *Penal Code*.[51] This includes a husband using his finger or anything else to penetrate his wife's vagina or anus. No exemption to criminal liability is given for this offence on the basis of the marital relationship of the parties. A husband in a situation like *Kowalski* and *Caswell* can therefore be convicted of the offence of "sexual assault by penetration" under the Singaporean *Penal Code*. There was no explanation given in Parliament as to why the marital rape immunity did not extend to these non-consensual acts.

The above discussion shows how convoluted the law can become in deciding what a husband can or cannot do sexually to his non-consenting wife. It is submitted that a much clearer solution is for the marital rape exemption to be abolished completely such that a husband will not have any shield to rely on.

C. *Nullity*

Under the new law, an interim judgment of nullity[52] will also remove a husband's marital immunity for rape. This implicitly assumes that without the changes to the law, the marital rape exemption would apply to those in void and voidable marriages. Hence, under the new law, once the "wife" either obtains an interim judgment of nullity or lives apart from her husband and commences proceedings for nullity, she will not have the marital rape immunity to contend with.

Regarding the implications of the new law with respect to voidable marriages, it is arguable that, until the amendments were made to the *Penal Code*, the marital rape

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[50] See Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2007) at para. 12.73.

[51] See the new s. 376 of the *Penal Code* ("sexual assault by penetration").

[52] Also known as a *decree nisi* of nullity under the old terminology.

immunity extended to voidable marriages.[53] After all, section 110(2) of the *Women's Charter* provides that:

> A judgment of nullity granted … on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the judgment has been made final, and the marriage shall, notwithstanding the judgment, be treated as if it had existed up to that time.

Hence, until the final judgment of nullity[54] is granted, the parties are still considered husband and wife. The new law makes a drastic break from our understanding of voidable marriages by removing the marital rape exemption from the date the proceedings for nullity have been initiated provided that the wife lives apart from her husband.

In the case of a void marriage, it could be argued that the marital rape exemption should not apply since there is an absence of a marital relationship between the parties.[55] The "husband" in such a case cannot claim any matrimonial privileges and should therefore be liable for rape.[56] However, we may have some sympathy for such "husbands" if they did not know that the marriage was void. Take for example a man, A, who "marries" a woman, B, who, unknown to him, is already validly married to another man. If A forces himself upon B, he could be liable for rape under the old law, but his behaviour lacks the moral blameworthiness required for criminal offences so long as the concept of marital rape immunity is retained.[57]

Under the new law, a "husband" in a void marriage is arguably covered by the marital rape exemption—unless the wife is living apart from him *and* has either obtained an interim judgment of nullity or commenced proceedings for nullity.[58] Although this will benefit the unknowing "husband" above, it would unduly benefit a "husband" who knew that the marriage was void. Hale had warned of this more than two-and-half centuries ago in his example of a man who forced a woman to

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[53] The common law appears to have accepted that the marital rape exemption applies to a case of a voidable marriage: see the discussion of *Isabel Butler v. William Pull* by Hale, *supra* note 5 at 629 and Lanham, *supra* note 6 at 155.

[54] Or decree absolute of nullity under the old terminology.

[55] Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at 46 explains what is a void marriage in the following way: "A void marriage is a … term that conveys the relative absence of a marital relationship between the two persons who attempted to form a marriage".

[56] See *R v. Mane* [1948] 1 S. Afr. L.R. 196, a case from South Africa, where the court held it to be rape where a "husband" had forced sexual intercourse with his "wife" even though he knew that she was unwilling to marry him and that the bride's consent was required for the marriage to be valid. Lack of consent only makes a marriage voidable and not void under Singapore law: s. 106(c) of the *Women's Charter*.

[57] One possible defence is on the basis of a mistake under s. 79 of the *Penal Code*. However, even if the "husband" had believed on reasonable grounds that the marriage is valid, the defence would not be made out since it will be a mistake of law, not of fact.

[58] There is some overlap between these situations where a "wife" can complain of rape and s. 493 of the *Penal Code* which provides that:

> Every man, who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or to have sexual intercourse with him in that belief, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

But s. 493 of the *Penal Code* relates to consent to the "marriage" obtained by fraud and not to consent to sexual intercourse *per se*.

marry him and had forcible intercourse with her. The "marriage", once declared void *ab initio* should, according to Hale, not be an impediment to the prosecution:

> … it is all one as if it had never been, and the relation be a legal fiction and *intenta ad unum*, yet in this case the marriage and carnal knowledge being one intire act of force, and consecutive one upon another, in the real effect of that first force, it shall remain punishable as if there had been no marriage at all …[59]

Hale would probably have been surprised not just by the longevity of the legal fiction that on marriage a wife confers on her husband the right to have sexual intercourse with her whenever he chooses, but also the complexities that the partial retention of this legal fiction has created in Singapore.

D. *Protection Order*

If the above analysis is correct that a "wife" in a void marriage can complain of being raped by her husband in certain circumstances (such as when she is living apart from him under an interim judgment of nullity), it is illogical that she may not ask for the less severe remedy of a protection order in the same circumstances. Protection orders are presently only granted to "family members" such as a "spouse or former spouse".[60] With reference to the husband's marital rape exemption, this is lifted where the wife has obtained a protection order or expedited order against him even though they may still be living together; or she is living apart from him and proceedings have commenced for a protection order or expedited order against him.

How easy is it for a wife who had been "raped" before by her husband to obtain a protection order? A review of the report of the 1996 Select Committee on the *Women's Charter (Amendment) Bill* is needed to answer this question.[61] At the time when amendments to the *Women's Charter* were discussed in 1996, calls had been made to expand the proposed definition of "family violence" to include non-consensual sexual acts. The Select Committee opined that sexual misconduct between a married couple is difficult to ascertain and that counselling on a voluntary basis would be more appropriate if they wished to keep the marriage intact.[62] In the case of forced sex between estranged couples, prosecution under the *Penal Code* would be proper.[63] However, the Select Committee also inconsistently pointed out that if a protection order is insisted on, it was of the view that sexual misconduct between a married couple could fall within the last limb of the definition of family violence: "causing continual harassment with intent to cause … anguish to a family member".[64] Despite

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[59] Hale, *supra* note 5 at 629. As mentioned earlier, *supra* note 56, lack of consent under Singapore law only makes a marriage voidable. Hale himself was not precise in his use of the terms "void *ab initio*" and "voidable" marriages—both had been used in the same passage.

[60] S. 64 of the *Women's Charter*. A woman in a void marriage cannot be considered a "spouse or former spouse".

[61] Sing., Parliament, "Report of the Select Committee on the Women's Charter (Amendment) Bill [Bill No. 5/96]" No. 3 (1996).

[62] *Ibid*. at para. 5.3.6.

[63] This ignored the blanket marital rape immunity in existence at the time under the *Penal Code*.

[64] Section 64 of the *Women's Charter*. See Chan Wing Cheong, "Latest Improvements to the Women's Charter" [1996] Sing. J.L.S. 553 at 563-564.

this half-hearted gesture, the overall message given is that a protection order should not and would not be granted for non-consensual sexual acts between couples.[65]

Even if the Select Committee's suggestion is taken up, a wife will have to show that her husband is causing her continual harassment by his sexual demands and that he has the intent to cause her anguish by doing so in order to obtain a protection order. It is unclear how repetitive the husband's behaviour will have to be before it is considered "continual". It is also uncertain how sexual intercourse between a married couple could constitute "harassment" since it is still part of Singapore law that a husband has the right to sexual intercourse with his wife irrespective of her wishes (unless that right is qualified by section 375(4) of the *Penal Code*).

Of course if the husband has used other forms of violence to get his way, such as by slapping the wife or tying her hands, it would be simpler to rely on the other definitions of "family violence", for example, causing hurt or wrongful restraint, in order to obtain the protection order.[66] However, it is questioned if the Select Committee's views are defensible in the first place. If instances of rape are recognised to involve an element of violence *per se*,[67] then it should be a simple matter to prove "family violence" on the basis of "hurt". It is also hoped that a protection order will be more readily granted by the court on the basis of forced sex now that the legislature has partially lifted the marital rape exemption for husbands.

E. *Muslim Couples*

Muslims are governed by the same criminal laws as non-Muslims in Singapore.[68] But potential problems arise in Singapore with respect to the intersection between Muslim family law (which runs parallel to the civil law) and the general criminal law. The situation that is relevant here is where a Muslim husband divorces his wife by pronouncing "*talak*" or repudiation against her. This can be done either verbally or in writing so long as the intention to divorce her is clear. A "one *talak*" divorce may be revoked by mutual consent during the period of *iddah*.[69]

There is some ambiguity as to when a "*talak*" divorce takes effect. If it is from the time when the husband utters the "*talak*", then the "wife" will be fully protected under the law of rape from non-consensual sexual intercourse by her husband from that time

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[65] See also Kumaralingam Amirthalingam, "Women's Rights, International Norms, and Domestic Violence: Asian Perspectives" (2005) 27 Hum. Rts. Q. 683 at 692 who cites information on the Family Court's homepage which makes clear that forced sex *per se* without hurt being caused does not come within the definition of family violence. The statements can no longer be found on the Family Court website.

[66] The little empirical evidence that exists in this area suggests that the most common instances (about 40 percent) of marital rape involve only so much force as is necessary to coerce the wife into sexual activity without other accompanying physical violence, David Finkelhor & Kersti Yllo, *License to Rape* (New York: Holt, Rinehart and Winston, 1985).

[67] *Chia Kim Heng Frederick v. PP* [1992] 1 S.L.R. 361. In *PP v. Mohammed Liton Mohammed Syeed Mallik*, *supra* note 24 at para. 92, the Singaporean Court of Appeal said: "Rape by its very nature, is viewed as a violent assault against the person …".

[68] I have not been able to uncover any reported prosecutions under Part IX of the *Administration of Muslim Law Act*, *e.g.*, ss. 134 ("cohabitation outside marriage") and 135 ("enticing unmarried woman from *wali*").

[69] See the *Syariah* Court's website, online: <http://www.syariahcourt.gov.sg>, for more information. The period of *iddah* refers to the period when the wife has to wait for three months before the divorce is final to determine if she is pregnant.

onwards.[70] On the other hand, there is case authority from the Singaporean High Court that a Muslim married woman against whom a "*talak*" has been pronounced is nevertheless treated as a married woman until its validity has been confirmed by the *Syariah* Court.[71] On this view, it can only be a case of rape if any of the situations in section 375(4) of the *Penal Code* are applicable.

The legislative changes made in Malaysia, which also has two systems of family law (one for Muslims and one for non-Muslims) operating in parallel, are instructive. An "explanation" was added to section 375 of the Malaysian *Penal Code*[72] in 1989 which provides:

> A Muslim woman living separately from her husband during the period of '*iddah*, which shall be calculated in accordance with *Hukum Syara*', shall be deemed not to be his wife for the purposes of this section.

The fact that this amendment was made in Malaysia shows that a Muslim woman against whom a "*talak*" has been pronounced would still be considered a married woman for purposes of the criminal law. Perhaps such an amendment is not required in Singapore now if a court can be persuaded that the situation is covered by section 375(4)(b) of the *Penal Code* ("his wife was living apart from him and proceedings have been commenced for divorce … and such proceedings have not been terminated or concluded"). However, it would be ideal if the law can be clarified and a similar amendment made to the Singaporean *Penal Code*.[73] Certainly a Muslim husband in a situation where he has pronounced a "*talak*" upon his wife and the wife has left him should not be able to claim any marital "privileges".

IV. Conclusion

In *PP v. UI*, Justice Choo Han Teck opined that "[r]ape is the unwanted intrusion by one person against the wishes of another. It may be described as a violation that no one should commit and no one should be made to endure."[74]

We do not know what the prevalence of marital rape is in Singapore. The figures from other countries show that between 14 to 28 percent of married women have experienced rape or attempted rape by their husbands.[75] It would also be fair to

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[70] The *Syariah* Court's website, online: <http://app.syariahcourt.gov.sg/syariah/front-end/TypeofDivorce_Talak_ E.aspx>, states: "If a husband utters the word on his wife, the two of them would *automatically be divorced* and the wife would be in a state of *iddah*" (emphasis added).

[71] *Chaytor v. Zaleha bte A Rahman* [2001] 2 S.L.R. 236. This case considered whether such a woman may still be a "married woman" for the purposes of maintenance under s. 69(1) of the *Woman's Charter*. See also s. 102 of the *Administration of Muslim Law Act*.

[72] Act 574, Revised 1997. The amendment was made by the *Penal Code (Amendment) Act 1989* (Act 727).

[73] But the words "living apart" should be used instead of "living separately" as in the Malaysian provision, see *supra* note 29 and accompanying text.

[74] [2007] 4 S.L.R. 270 at para. 8.

[75] In the U.S., Diana E.H. Russell, *Rape in Marriage* (New York: Macmillan, 1982) at 57 found 14 percent of a random sample of female householders had been victims of rape or attempted rape by their husbands or ex-husbands. This is also roughly the percentage reported by married women in the UK: Law Commission, *Rape within Marriage* (Law Comm. No. 205, 1992) at para. 3.17. In the Indian state of Uttar Pradesh, 28 percent of a sample of nearly 7000 married women reported having experienced forced sex within marriage: Narayana, *Family Violence, Sex and Reproductive Health Behaviour Among Men in Uttar Pradesh, India* (unpublished report) cited in Lenore Manderson and Linda Rae Bennett, *Violence Against*

surmise that a number of those who have experienced family violence would have also experienced forced sexual intercourse and that those who have been raped by their husbands would have been raped many times before.[76] We also know that from a low of 1,306 applications for protection orders in 1996 in Singapore, the figure increased to a high of 2,974 applications in 2001. The number of applications for protection orders—which grossly underestimates the prevalence of family violence—has since hovered around 2,600 yearly.[77] These figures suggest that the problem of marital rape in Singapore is something that we should be concerned about.

More must be done for married women in Singapore to ensure that they receive adequate protection from non-consensual sexual intercourse by their husbands. This note has suggested that there are several features of the present marital rape exemption which are unclear or could be improved upon. A fine-tuning of the new provisions is indeed needed, and soon.

Women in Asian Societies (New York: Routledge Curzon, 2003) at 6. In Malaysia, more than 70 wives every year reportedly complain of being raped by their husbands: reported by *The Star* newspaper, cited in "A conjugal crime" *Today* (24 August 2004).

[76] In the case of Malaysia, it was estimated that 52 percent of women who had been subjected to domestic violence had been forced into sex by their husbands and that women who have been raped by their husbands could have been raped 20 times or more before: National Council for Women's Organisations, *NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women* (2005) Annex 4.

[77] *Protecting Families From Violence* (Ministry of Community Development, Youth and Sports, 2007) at 15. Applicants for protection orders are mostly married women, but could also include husbands, parents, siblings and ex-spouses *etc*.