Singapore Journal of Legal Studies
[2011] 37–60

RELATIVELY CRIMINAL: SPOUSES AND THE CRIMINAL PROCESS

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This article explores the interface between family law and criminal law in the criminal process, in the contexts of the spouse as a witness and the spouse as a victim. It probes the question of whether the criminal law should retain or develop special rules or policies when the marital relationship is potentially affected by the operation of the criminal process, contrasting the decline of spousal 'exceptionalism' in the context of spousal witnesses with the apparent vigour exhibited in the official reluctance to enforce the criminal law in situations of minor spousal violence.

I. THE INTERFACE

In the conceptual universe, the family lawyer and the criminal lawyer seem to live in different worlds. The criminal law is all about retribution, deterrence and strict adherence to legal standards. Family law is more flexible, placing emphasis on tolerance, accommodation and compromise. There is a phrase in Chinese—自己人 (*zi ji ren*, transliterated as 'own people')—which immediately evokes these family values and signals the retreat of all that is strictly official and legal. Reality is always more messy than academics would like it to be, and a fascinating picture emerges when we look at situations in which the two worlds collide. The logic of the criminal law tends to admit of little or no exceptions—crimes in the context of the family are just crimes in a particular context, amongst many possible contexts. Family values seem to pull in the other direction, arguing for different rules and policies when crime has to do with the family. The picture which emerges is a complicated one, in which an uneasy truce exists between both approaches. The purpose of this article is to describe two such 'flashpoints'. The first has to do with the spouse as a witness in criminal proceedings, and the second with the spouse as a victim of crime.

II. THE SPOUSE AS A WITNESS

A. *Competence*

It may sound odd to modern ears, but it was once the law that a spouse could not, under any circumstances, give evidence for or against the accused in a criminal proceeding.

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In the language of evidence scholars, the spouse was not a 'competent' witness. Why was this the case? The reasons are succinctly expressed by Lord Salmon in *Hoskyn v. Metropolitan Police Commissioner*:

> This rule [of incompetence of the spouse] seems to me to underline the supreme importance attached by the common law to the special status of marriage and to the unity supposed to exist between husband and wife. It also no doubt recognised the natural repugnance of the public at the prospect of a wife giving evidence against her husband.[1]

Thus, the need to prevent marital discord and the "supreme importance" of the "special status of marriage"—family values—succeeded in carving out an exception to the usual priority of access to relevant testimony for the purposes of a criminal trial.

A word is perhaps necessary concerning the historically important doctrine of unity that is '*supposed* to exist' between spouses—a concept which apparently inspired spousal exceptionalism in this area of the law. This doctrine is no longer seriously defended today in Singapore or elsewhere. The *Women's Charter*[2] abounds with provisions which expressly deny such a principle.[3] At best, the utility of this 'fiction of unity', as described appropriately and inimitably by the redoubtable Glanville Williams from as early as 1947, is as follows:

> [I]t ought to be used only to bolster up a decision arrived at on other grounds, and it is not in itself a satisfactory basis of decision.[4]

If that is so, then it is to those "other grounds" which we should direct our energies.

The story of what has happened since is a clear example of the kind of untidy form the law takes on when it tries to pay homage to the conflicting demands of the criminal process and family values. The early developments are ably recounted in the Straits Settlements decision of *R v. Osman bin Mamat*:

> Section 3 of Indian Act XV of 1852,[5] *did not allow husband and wife to give evidence for or against each other* in a criminal proceeding, and section 20 Indian Act II of 1855, made their evidence admissible in a civil case only. These were amended by section 28 of Ordinance XX of 1870, by which the wife or husband may be called as a witness by the accused. This was the state of the written law when Ordinance III [(the Evidence Ordinance, now Act)] of 1893 was passed…. It is evident that by the English written law, the wife or husband could not give evidence against one another; but upon this has been ingrafted the exception that in cases of violence by the husband against the wife she is a competent witness against him. This was swept away by section 2 of the Evidence Ordinance and section 120, I regret to say, is too clear, and by that section the wife cannot give

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1 [1979] 1 A.C. 474 at 495 [*Hoskyn*].

2 Cap. 353, 2009 Rev. Ed. Sing. [*Women's Charter*].

3 In particular, section 46, which gives the wife the right "separately to engage in any trade or profession or in social activities" and "the right to use her own surname and name separately", and section 51, which pronounces a married woman "capable of acquiring, holding and disposing of, any property", "capable of suing … in her own name" and "entitled to all remedies and redress for all purposes".

4 (1947) 10 Mod. L. Rev. 16 at 31.

5 Indian Acts were applicable because the Straits Settlements were governed as part of the Bengal Presidency from 1830-1867.

> evidence against her husband… The law on the case seems to be in a deplorable condition, and the sooner it is remedied the better.[6]

From a position of wholesale incompetence, represented by the 1852 legislation, the spouse gradually became competent, first in civil proceedings in 1855, and then in criminal proceedings in 1870, if called by the accused (to testify in his or her favour). It would appear that prior to the enactment of the Evidence Ordinance of 1893, the courts also recognised the English common law exception of the competence of the spouse where she is the victim of violence by the accused. That exception was apparently removed, or more likely, overlooked, in the 1893 Ordinance, resulting in the law being left in what the court felt to be a "deplorable condition". The Legislature responded in a manner described by a note to this decision:

> N.B.—Section 120 of the Evidence Ordinance 1893 has, since the above decision was given, been so amended by The Evidence Ordinance Amendment Ordinance 1895, (Ordinance No. XII of 1895) that a married woman may be now called as a witness *against* her husband. Feb. 1st 1896.[7]

Thus the legislators decided to remedy the situation—not by restoring the common law spousal violence exception, but by rendering the spouse an entirely competent witness in criminal proceedings. That amendment, now section 122(2) of the *Evidence Act*,[8] is still the law in Singapore:

> In criminal proceedings against any person, the husband or wife of such person respectively shall be a competent witness.

The gradual but certain abrogation of the rule of spousal incompetence does look like a complete rout of family values 'exceptionalism'[9] in favour of the logic of the criminal law. Lord Wilberforce's trinity of reasons—identity, discord and repugnance—seem to have fallen by the wayside without much fanfare. Spouses are no longer to be regarded as a single identity, potential for discord is no longer a reason to deny potentially valuable testimony to the court, and repugnance is no longer thought to be a sufficient reason to make an exception.

B. *Compellability*

The spouse in Singapore has been a fully competent witness since the 1895 amendment to the Evidence Ordinance[10] and is therefore at liberty to testify for or against the accused in a criminal proceeding; but can the spouse be *compelled* to do so against his or her will? Notwithstanding the absence of any explicit guidance in the *Evidence Act*, the Straits Settlements decision of *Ghouse bin Haji Kader Mustan v. R* came down clearly on the side of compellability:

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6 [1895] S.S.L.R. 16 (emphasis added).

7 *Ibid*. (emphasis added).

8 Cap. 97, 1997 Rev. Ed. Sing. [*Evidence Act*].

9 I do not use the word in a derogatory fashion, but only to capture the idea or attitude that exceptions ought to be made to the regular criminal process to advance what are felt to be overriding social policies.

10 Primary legislation was called an 'Ordinance' before independent Singapore, and an 'Act' thereafter.

> If a witness in this Colony is 'competent' and has been summoned he is bound to give evidence, and to answer all relevant questions. There is no class of witness who can be called a 'compellable witness'.[11]

The spouse is to be like any other witness—compellability follows competence. This was affirmed by the Court of Appeal in *Lim Lye Hock v. PP*:

> Under s 122 [of the *Evidence Act*], a husband or wife is competent to testify as a witness in any proceedings against his or her spouse. The Act does not differentiate a spouse from any other witness; *the spouse is in the same position as any other witness* … An accused, however, stands in a different and special position. Although the accused is competent to give evidence, he "shall not be compellable to do so".[12]

Thus, the accused is the only competent witness who is not compellable at his or her trial—this is achieved through an express exception in the legislation.[13] The relative brevity of the discussion in these two cases belies the real choice that the court had to make. The set of family oriented values which undergirded the original rule of incompetence might yet support a rule of non-compellability for the spouse witness. The English common law, for example, has shifted from non-compellability, to compellability, and then back to non-compellability—the latest move made by the House of Lords in *Hoskyn* (passages from which were cited earlier as an expression of reasons why spousal witnesses ought to stand in a different position).[14] *Hoskyn* was itself partially overturned by statute, and the spouse rendered compellable where the prosecution is for an act of violence against that spouse or for violence or sexual offences against any person under 16 years of age.[15] The law in the different states of Australia yields an entire spectrum of positions, ranging from blanket compellability, to compellability only under specified circumstances (as is the current position in the United Kingdom), to compellability at the discretion of the court.[16] Any sort of limited compellability would, to that extent, place family values in priority to the criminal process.

It is a pity that both *Ghouse* and *Lim* said nothing of the policy choices involved, and that *Lim* did not even mention *Hoskyn*. Rather more illuminating is the Malaysian decision in *PP v. Abdul Majid*,[17] decided almost contemporaneously with *Lim*. The Malaysian court demonstrated a keen awareness of the prevarication of the English courts, ultimately aligning itself with the dissenting judges in *Hoskyn*, and in particular with this pronouncement of the Court of Appeal in *Hoskyn*:

> It must be borne in mind that the court of trial … is not dealing merely with *a domestic dispute* between husband and wife, but it is *investigating a crime*. It is in the interests of the state and members of the public that where that is the case,

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11 [1941] S.S.L.R. 10 [*Ghouse*].

12 [1994] 3 S.L.R.(R.) 649 at para. 28 [*Lim*].

13 *Evidence Act*, *supra* note 8, s. 122(3).

14 *Supra* note 1.

15 *Police and Criminal Evidence Act* (U.K.), 1984, c. 60, s. 80.

16 Wendy Harris, "Spousal Competence and Compellability in Criminal Trials in the 21st Century" (2003) 3 QUT Law and Justice Journal, online: Queensland University of Technology <http://www.law.qut.edu.au/ljj/editions/v3n2/harris_full.jsp>.

17 [1994] 3 M.L.J. 457 [*Abdul Majid*].

> evidence of that crime should be freely available to the court which is trying the crime.[18]

It could, of course, be pointed out that there was one potentially significant difference between the common law and the *Evidence Act*: spousal competence under the *Evidence Act* is general, while at common law competence was limited to essentially cases of spousal violence.[19] The greater erosion in Singapore (and Malaysia) of the idea that spouse witnesses are different, as represented by the general competence of the spouse, could have been used as a means to distinguish the *Hoskyn* position of competence without compellability. Be that as it may, the choice which the Malaysian court made was clear: where the testimony of a spouse might throw light on a criminal prosecution, the requirements of investigating and trying a crime override any concern that marital relations might be affected, at least where compellability is concerned.

As with competence, so with compellability, we see a clear movement away from family values 'exceptionalism' in favour of the dictates of the criminal process.

C. *Privilege*

So the spouse is competent and can be compelled to testify in criminal proceedings. That, however, is not the end of the story. There is a final layer of law where family values might yet emerge—that of evidential privilege. A witness who is competent and compellable may resist questions of a particular nature. In the language of evidence lawyers, there are privileges against disclosure to be respected. The most famous of these is probably legal professional privilege, whereby communications and documents related to legal advice continue to be resistant to compulsory disclosure in court.[20] As far as the spouse witness is concerned, we need only be concerned with two related but distinct privileges—the mysterious privilege against spousal incrimination, and the marital communication privilege.

1. *Spousal Incrimination Privilege*

We are likely to be familiar with the privilege against self-incrimination—that bundle of rights which entitles the accused in a criminal proceeding not to do anything to assist in his or her own prosecution. It is the basis of the peculiar position of the accused in Singapore as the only competent witness who is not compellable.[21] But is there a corresponding privilege against spousal incrimination: does a spouse have

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[18] Cited by the House of Lords in *Hoskyn*, *supra* note 1 at 500; and in *Abdul Majid*, *supra* note 17.

[19] Although this common law position has given way to general competence under the *Police and Criminal Evidence Act*, *supra* note 15, which produced the current law in the United Kingdom that the spouse is generally competent, yet only compellable where the prosecution is for violence against the spouse and for violence or a sexual offence against a minor.

[20] *Evidence Act*, *supra* note 8, ss. 128, 131.

[21] The privilege against self-incrimination is too complex a subject to talk about at any length here. It is still in existence in some aspects of criminal procedure, but has suffered a severe blow with the 1976 amendment to the *Criminal Procedure Code* (Cap. 68, 1985 Rev. Ed. Sing.) which permits adverse inferences from silence when the suspect is questioned at the police station, and if he or she decides not to give evidence at trial. It is wounded, but still alive. See Michael Hor, "The Privilege Against Self-Incrimination and Fairness to the Accused" [1993] Sing. J.L.S. 35.

the right to resist questions on the stand, the answers to which would incriminate his or her marital partner, whether or not he or she is the accused?

It appears that the existence of such a privilege was controversial in the common law—the cases apparently conflated the question of privilege with that of competence and compellability.[22] The *Evidence Act* was originally silent on this privilege. In 1976, however, Parliament enacted some of the recommendations of the UK Criminal Law Revision Committee's *Eleventh Report*,[23] which assumed that it did exist and recommended the substantial abrogation of the privilege. By the same set of amendments, Parliament had, in accordance with the *Eleventh Report*, done away with the privilege against self-incrimination of the accused where he or she decides to testify. The primary right gone, the possible secondary privilege of the spouse had to go too. The present position is now expressed in a provision introduced in 1976—section 134 of the *Evidence Act*. There is an unfortunate degree of technicality involved, a situation perhaps reflective of the compromises struck. While both the privileges against self and spousal incrimination are now considerably attenuated, they still exist—not so much as a privilege, but as a limited immunity. Thus, although *the ordinary witness* does not have a privilege to refuse to answer questions which would self-incriminate, if he or she is compelled to answer them the answers can only be used in perjury proceedings and not as a basis for criminal proceedings against the witness. The privilege survives in the form of immunity from prosecution.

The position of *the accused* is more complicated. The accused does not have the privilege of refusing to answer questions which "tend to prove the commission by him of the offence charged". Where the answers would tend to incriminate him with respect to some other offence, he or she still cannot refuse to answer—but where the answer is compelled, he or she is entitled to immunity from proceedings with respect to that other offence. Similarly, and this is where a small concession is given to the marital relationship, where the answers would tend to incriminate the spouse, the accused must still answer, but the spouse enjoys an immunity. If however, the accused is asked questions which do not bear directly on the commission of the offence charged, but which are allowed because they are "relevant solely or mainly to … credibility", it appears that the privilege to refuse to answer on the grounds of self-incrimination survives.[24]

The position of the *spouse witness* corresponds to that of the accused. The spouse cannot refuse to answer questions which would tend to prove the commission of the offence charged. But where the answers would tend to incriminate the accused of some other offence, the spouse can be compelled to answer, but the accused enjoys an immunity from proceedings for that other offence. Similarly, the privilege against spousal incrimination survives with respect to questions which are relevant solely or mainly in relation to credibility—the spouse may refuse to answer on the grounds of incrimination of the marital partner.

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[22] See David Lusty, "Is There a Common Law Privilege Against Spouse-Incrimination?" [2004] U.N.S.W.L.J. 1, online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/journals/UNSWLJ/2004/1.html>.

[23] U.K., Criminal Law Revision Committee, *Eleventh Report: Evidence (General)* (London: Her Majesty's Stationery Office, 1972), Draft Bill, clause 15(3).

[24] Subject to a situation where the accused has 'lowered his shield', by for example, adducing evidence of good character which is not directly relevant to the charge: see *Evidence Act*, *supra* note 8, s. 56.

To sum up, the privilege against spousal incrimination survives in these situations. First, when the accused is compelled to answer a question which would incriminate his or her spouse, an immunity in favour of the spouse attaches to the compelled answer. Secondly, when the spouse witness is compelled to answer a question which would incriminate her accused marital partner of some other offence not being tried, again an immunity in favour of the accused arises. Thirdly, when the question is relevant solely or mainly to credibility, the spouse witness may refuse to answer questions which would incriminate the accused of some other offence.

A fascinating fourth possibility is the situation where the witness is testifying in a trial *where the accused is not the spouse*, but where the answer to a question asked would tend to incriminate the witness' spouse of any offence. Can the witness refuse to answer on the ground of spousal incrimination, or if not, does the spouse enjoy an immunity from proceedings? Section 134 of the *Evidence Act*, so precise in other respects, gives us no guidance here. We are thrown into the maelstrom of what the courts should do with privileges which are not mentioned in the *Evidence Act*. Suffice to say that our courts have on different occasions taken diametrically opposed paths—either frowning upon incorporating privileges which do not have express statutory backing, or looking favourably at creating or extending privileges far beyond the words of any statute.[25]

We take away from this regrettably involved discussion these observations. The waters of the privilege against spousal incrimination are rather muddier than those of competence and compellability. While the spouse is now clearly both competent and compellable, once he or she is on the witness stand the privilege against spousal incrimination still exists, albeit in a severely attenuated form. Nonetheless, in most situations, and certainly in the most important situation where the spouse testifies against the accused and has information which would be damning to the accused, the spouse is like any other witness and must answer. One might have thought that there could be no clearer affirmation of the transcendence of the criminal law over family values.

2. *Marital Communication Privilege*

Yet the picture changes completely when we look at the companion marital communication privilege in section 124 of the *Evidence Act*:

> No person who is or has been married shall be compelled to disclose any *communication made to him during marriage* by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication

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[25] The attitude of the courts towards potential privileges not mentioned in the *Evidence Act* (or any other statute) has not been consistent, to say the least. The decision in *PP v. Knight Glenn Jeyasingam* [1999] 1 S.L.R.(R.) 1165 to 'create' a plea negotiation privilege was disapproved of in *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239 [*Phyllis Tan*], although the similarly unexpressed 'litigation privilege' was adopted without much fuss in *Skandinaviska Enskilda Banken AB* (*Publ*), *Singapore Branch v. Asia Pacific Breweries* (*Singapore*) *Pte Ltd and other appeals* [2007] 2 S.L.R.(R.) 367 [*Skandinaviska*]. Both judges who decided *Skandinaviska* also sat in *Phyllis Tan.* Much seems to depend on whether the court considers the privilege in question to be desirable. Alternatively, the court may resolve the matter historically—the 1976 amendments presuppose the existence of a general privilege against spousal incrimination, which was changed only in so far as the 1976 amendments prescribed, leaving the privilege intact in all other situations.

> unless the person who made it or his representative in interest consents, except in *suits between married persons* or proceedings in which one married person is prosecuted for any *crime committed against the other*. (emphasis added).

Emboldened by the apparent legislative attitude demonstrated by the repeal of spousal incrimination privilege in 1976, the prosecution has argued, and not without reason, that surely the marital communication privilege ought to go as well. This was firmly rejected by the Court of Appeal in *Lim*:

> Our draftsman in drafting the amendments to s 134 of our Evidence Act [concerning the privilege against self and spousal incrimination] adopted the recommendations of the [Eleventh Report of the UK Criminal Law Revision] Committee … The draftsman, however, *did not adopt* the Committee's recommendation [to abolish] the privilege against disclosure of marital communication, and accordingly did not make an appropriate amendment to s 124. In other words, he did not intend to abrogate the privilege against disclosure of marital communications.[26]

The Court of Appeal was undoubtedly correct as a matter of law—if the Legislature adopts only one of two recommendations, repealing the spousal incrimination privilege and leaving the marital communication privilege intact, the intent must be to do away with one but not the other. Yet one has to have considerable sympathy with the implicit basis of the prosecution's argument—that if that was what was intended, then the 1976 amendment was inconsistent in principle and policy. Technically, there is clearly a distinction between protecting spouses from being forced to incriminate one another, and protecting them from being compelled to divulge what was told to them in the course of the marriage. For example, a spouse may be compelled to disclose information damning to the other, but that information need not be the subject of marital communications. However, both privileges must stem from the same policy—that of preserving marital relations.[27] So a spouse who has been told by the other that he or she has committed a crime cannot be compelled to disclose the confession, but another who steals a look at the personal diary of the other spouse in which he or she confesses to a crime can. There is neither rhyme nor reason for this distinction—compulsion in both situations is just as likely to be detrimental to marital relations. We do not know if anyone in the legislative process of 1976 thought this through, but the result is a 'one all' in the contest between the criminal process and the need to make exceptions for the family.

The consequences can be messy. Where the testimony sought is clearly covered by the words of the marital communication privilege, there is nothing left to do but to apply the statute and confer a privilege against testimony. But experience in the law of privilege shows that situations will arise which do not fall clearly within the words of the section. For example, does the privilege survive the death of the spouse? The Singapore court has not had the occasion to rule on this, but if the matter should come before it, it is apparently at liberty to say that the 'representative in interest',

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[26] *Supra* note 12 (emphasis added).

[27] We leave aside the two other reasons in *Hoskyn*, *supra* note 1—unity of personality which is essentially merely historical (see note 2 and text accompanying note 3) and repugnance, which surely ought to be of similar intensity whether we are concerned with spousal incrimination or divulging marital communication.

whoever that may mean in this context, now has the privilege; or that the privilege is now absolute because the possessor can no longer lift it; or that the privilege lapses because there is no longer a living spouse to protect. Our pragmatic senses tell us that how the court decides is likely to depend on how strongly the court wishes to protect the privilege—and it is here that the legislative ambivalence caused by the schizophrenic amendment of 1976 causes difficulties. Should the court take the cue from the abolition of the spousal incrimination privilege, or from the preservation of the marital communication privilege?

In reported decisions, the courts have never been placed in a situation where to uphold the privilege would be to perpetrate an obvious injustice. Twice it has come close. In *Lim*,[28] the accused had confessed to his wife that he killed another, contradicting his defence in court. The trial court had admitted the testimony of the wife over the objections of the accused through his counsel. The appellate court ruled the testimony inadmissible because it had breached the marital communication privilege. Fortunately, the court was able to find "ample evidence to sustain the conviction" after "casting aside the evidence of the … wife".[29] More dramatic was *PP v. Tan Tiew Guay and anor*,[30] where the husband and wife were both arrested for trafficking in heroin when they descended together in a lift, with the wife holding the bag containing the heroin. The husband's defence was that the wife was the one trafficking in heroin and that he was entirely innocent—after all, she was the one caught red-handed with the heroin. The wife sought to defend herself by testifying that the heroin belonged to the husband and that he had asked her to carry the bag for him. She needed to divulge marital communication "in order to exculpate herself". Yet the privilege forbade such a course unless the husband agreed, which he did not. The trial judge was clearly disconcerted that the privilege should have such an apparently unjust effect in this context—upholding the privilege had the potential not only of acquitting the guilty husband, but also of convicting the innocent wife, and of a mandatory capital offence at that. Fortunately, yet again, the court was able to reach the right result without the forbidden testimony. On the basis of other (admissible) evidence, the court convicted the husband and acquitted the wife of the capital offence of trafficking in heroin. Nonetheless, the trial judge was so shaken by the full logic of the privilege that he was moved to make this suggestion:

> In the unusual circumstances of this case, I am doubtful whether the court is entitled to consider [the husband's] refusal to consent to his wife's divulging evidence of their conversations, and take that refusal into account as one of the adverse factors against him … Therefore, to his undeserved benefit, the conclusion in law that I will draw from his refusal is that there was nothing in the conversations that could assist him in his defence. However, I would have preferred the broader interpretation that *the court may at its discretion draw inferences including adverse inferences* when a spouse refuses to give his consent in such cases…[31]

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28 *Supra* note 12.
29 *Lim*, *supra* note 12 at para. 51.
30 [2000] SGHC 256 [*Tan Tiew Guay*].
31 *Ibid*., at para. 12 (emphasis added).

Is the court entitled to draw an adverse inference from a spouse exercising his or her marital communication privilege? Different privileges have different rules—the exercise of the privilege against self-incrimination, at least at two points in the criminal process, does indeed attract adverse inferences.[32] On the other hand, it has never been suggested that the exercise of legal professional privilege entitles the court to do likewise. It is tempting to explain this difference by the favour which the law looks upon either privilege—the privilege against self-incrimination is clearly in decline, and legal professional privilege is in clear ascendency.[33] Which path ought the marital communication privilege follow? Again, with the ambivalence of policy and principle embodied in the 1976 amendments, it is not at all clear which way the court ought to go.

The privilege does have two exceptions—in civil suits between the spouses themselves, and where a spouse is being prosecuted for a crime committed against the other. Perhaps the *Tan Tiew Guay* dilemma can be resolved by carving out yet another exception—where the spouses are jointly accused and one needs to breach the privilege in order to mount a defence. But where can the line be convincingly drawn—what if the co-accused is not the spouse, but is in the same dire need for the spouse witness to disclose marital communication in order to prove his innocence? The law as it stands makes the exception only for spouses who are victims, signalling a policy of being very solicitous of the interests of the victim spouse. It is to the situation of the victim spouse that we now turn, and yet again we see contrary signs.

III. The Spouse as a Victim

A. *Marital Rape*

If the marital communication privilege must itself give way where the spouse is a victim of a criminal offence, then one might have thought that the full force of the criminal law should be visited upon the spouse who would commit a crime against the other. That is indeed the position, except for one, and only one, offence: rape. The reasons for preserving spousal exceptionalism in the form of a substantive immunity to rape must have been particularly strong. The legislative decision to retain it went against both domestic pressure and international censure. Powerful arguments were advanced for abolishing the immunity in several speeches in Parliament in the course of debating the *Penal Code (Amendment) Bill* in 2007.[34] In that year, Singapore's

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[32] *Criminal Procedure Code 2010* (Act15 of 2010) [*CPC 2010*]. On being charged for an offence under s. 261 and on being called to make his or her defence (s. 291(3))—but this was achieved by legislation. The position, were it not for express statutory provision, is strangely unclear. One view is that making the accused pay the price of an adverse inference is a breach of the privilege, another is that adverse inferences do not compel the accused to speak, but are only an inducement to do so. One might have thought that to confer a privilege only to slap adverse inferences on its exercise does not make much sense, but the latter view has the endorsement of the Privy Council in a Singapore decision (*Haw Tua Tau and others v. PP* [1981-1982] S.L.R.(R.) 133).

[33] Although, one might question whether it is desirable for the court to view either the privilege against self-incrimination so poorly or the legal professional privilege so favourably.

[34] Sing., *Parliamentary Debates*, vol. 83, cols. 2145-2462 (22-23 October 2007), particularly the speeches of NMPs Eunice Olsen and Siew Kum Hong, and MPs Indranee Rajah and Charles Chong. I engaged in an earlier and more extended discussion in Michael Hor, "The Penal Code Amendment of 2007:

periodic report to the Committee set up under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") came under scrutiny and in its "Concluding Comment", the Committee expressed concern about the "reluctance of [Singapore] to criminalise marital rape" and requested Singapore to change its mind about preserving the exception[35]—the CEDAW Committee was clearly unimpressed by Singapore's reasons for retaining it. More significantly, the delegation's response to the Committee's concern sounded half-hearted:

> There was absolute marital immunity for men to have non-consensual sex, *which was not ideal*, and Singapore was *moving to abolish that practice* in a calibrated manner.[36]

It was more in the nature of an apology than a justification—we can and should do better, but be patient, we are getting there.[37]

So why was the immunity retained? There were two articulated reasons. One had to do with the purported danger of "a vindictive wife who may have actually agreed to sex, perhaps reluctantly, but cries 'foul' later."[38] This rather unconvincing attempt at justification is easily disposed of. The existence of any crime of non-consent creates the same danger of vindictive people crying foul later, and there is no reason why the marital context makes that danger more serious, or serious enough to do away with the crime altogether. The criminal process has, we hope, the resources to deal with false accusations—there is no reason to believe that the dynamics are substantially different in the context of marital rape. There also appears to have been a subsidiary concern that a husband might act under a mistaken belief that his wife is consenting to sex.[39] The current law seems to be that a mistaken believe in itself is not a defence, but has to be based on reasonable grounds in order to exculpate.[40] If there is something wrong with the law on the *mens rea* of rape, the answer is to change it, and not to create an exception for husbands. This ground fails on all imaginable counts and can be safely put aside.

Lessons in Love" in Terence Chong, ed., *Management of Success: Singapore Revisited* (Singapore: Institute of Southeast Asian Studies, 2010) at 335.

35 CEDAW/C/SR.803, CEDAW/C/SR.804, online: Netherlands Institute of Human Rights (SIM) <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/fe005fcb50d8277cc12569d5003e4aaa/bfef6df353499fcdc125734700318279?OpenDocument> at paras. 27-28.

36 CEDAW, Chamber A, 803rd and 804th Meeting, online: United Nations <http://www.un.org/News/Press/docs/2007/wom1647.doc.htm>.

37 Singapore civil society organisations continue to press for abolition—the most recent attempt is found in a representation to the United Nations Commission for Human Rights in its first ever periodic review of Singapore: Universal Periodic Review – Singapore Joint Submission of COSINGO (Coalition of Singapore NGOs), online: Association of Women for Action and Research <http://www.aware.org.sg/wp-content/uploads/Universal-Periodic-Review-Singapore.COSINGO.FINAL_.30Oct10.pdf> at para. 28.

38 Speech of the Senior Minister of State for Home Affairs, Sing., *Parliamentary Debates*, vol. 83, col. 2175 (22 October 2007) (Associate Professor Ho Peng Kee).

39 Speech of the Senior Minister of State for Home Affairs, Sing., *Parliamentary Debates*, vol. 83, col. 2354 (23 October 2007) (Associate Professor Ho Peng Kee):

> I have explained yesterday how, in the context of a marriage, there can be second-guessing between man and wife. Because we are so close to each other, sometimes, our intentions are not clear and, sometimes, we may not state clearly what is in our heart. That can be dangerous, for example, in the case of marital rape.

40 *PP v. Teo Eng Chan and others* [1987] S.L.R.(R.) 567.

The second reason is more interesting and touches the heart of the potential for the needs of the criminal law to clash with the values of family law. It was expressed in this fashion:

> [T]his aspect of criminal law should take its cue from family law which exhorts husband and wife to act with mutual respect and consideration for one another… Abolishing marital immunity altogether will likely change the complexion of marriage drastically with negative impact on the marital relationship between husband and wife.[41]

There is little reason to think that anything "drastic" will happen if we remove the husband's immunity. Indeed, it appears that it is tolerable at present only because it is so narrow. It is peculiar to the offence of rape, and no other offence—even closely-related ones like the use of criminal force to outrage modesty, and closely-associated ones like causing hurt and criminal intimidation. The criminal law already has a formidable presence in the troubled matrimonial home and bedroom, except for the tiny corner of rape *simpliciter*. If we fear that the criminalisation of marital rape will turn the tone of marital relations from cooperation to contest, there is reason to believe that it is already too late. The strength of the case for immunity must surely have suffered further blows with the creation of a number of exceptions to the immunity in 2008, even as the decision was taken to retain it. Essentially, the new exceptions lift the immunity once formal steps have been taken to signify a deterioration in the marriage—for example, judicial separation, court injunction against sex, personal protection order, and where they are "living apart", the mere filing of a protection order.[42] This is not to say that the remaining immunity is no longer practically significant. It is; the wife must still take those formal steps, and if she does not, the husband may still force sex upon her if she does not put up a struggle. Nonetheless, the notion that retaining the remaining immunity is necessary to preserve the "complexion of marriage" has clearly become more and more difficult to sustain.

The survival of the immunity, I suggest, rests not on fears of false allegations, nor on actual detriment to the institution of marriage, but on the sensibilities[43] of those who simply cannot conceive of a husband being charged, tried and punished for the rape of his wife. Analogous sensibilities once supported the old position that a spouse cannot be allowed to testify against the other, or at least cannot be compelled to do so.[44] Those rules have now gone and the institution of marriage is apparently none the worse for it. What are we to do with an instinctive repugnance against the idea that a husband can ever rape his wife, apart from simply ignoring it? What the Legislature did was to recognise it, but to confine it to a small compass. There were other alternatives—it could have taken the cue from the creation of a new offence of sexual assault by penetration[45] to craft an independent offence of, say, non-consensual sex during marriage, with or without the same punishment

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41 *Supra* note 38.

42 *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.), s. 375(4) [*Penal Code*].

43 I take the term from David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990), which contrasts 'mentalities', as in how we *think* about things; and 'sensibilities', as in how we *feel* about things.

44 Lord Wilberforce's "repugnance": see *Hoskyn*, *supra* note 1.

45 *Penal Code*, *supra* note 42, s. 376. Thus sexual penetration by a man of another man would be punishable under this new offence, and not as rape—but the punishment structure is identical.

structure[46] as rape and sexual penetration. That might have been a halfway house between abolition and retention. The husband would then not be held guilty of "rape" but of some other less emotively-named offence.

There is one other set of sensibilities which surprisingly did not get an airing in the Parliamentary Debates of 2007—that of the Islamic community. It appears that there is considerable debate in the international Islamic community about this very issue. The orthodox position is apparently expressed by the Assembly of Muslim Jurists of America:

> For a wife to abandon the bed of her husband without excuse is haram. It is one of the major sins … *As for the issue of forcing a wife to have sex, if she refuses, this would not be called rape, even though it goes against natural instincts and destroys love and mercy*, and there is a great sin upon the wife who refuses.[47]

When Singapore's Islamic Religious Council was faced with the same question, it issued this enigmatic reply:

> Sex is a natural urge and desire. Islam allows sexual intercourse only between married spouses. Fornication and adultery are forbidden in Islam. Since according to Islam there is no other permissible way for sexual desire to be fulfilled except between the spouses, *they must be considerate to each other*.[48]

The Council chose to sidestep the question—we know what spouses ought to do, but what is the consequence of spouses not doing what they are supposed to do? Clearly the decision not to answer was not inadvertent but a manifestation of a difficult question which the Council found prudent to avoid. Nonetheless, the sensibility that a man can never rape his wife must have had, and perhaps continues to have, a considerable following.

Yet it is difficult not to see the marital immunity for rape as vestigial—it is likely to stay as it is, fade even more, or disappear altogether. Whatever its future may be, it is not going to increase. The exception created for spouses, and more particularly here for husbands, will in all likelihood go the way of the now historical exception for spouse witnesses. The one feature which does remain—the marital communication privilege, is, as we have seen, inoperative when the victim of the crime is the spouse.

B. *Spousal Violence*

1. *Personal Protection Orders*

When we turn to violence towards spouses in general, we see a different kind of exceptionalism, and one which is very much in ascendance. Exceptions are not

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[46] It would be a vexed question whether the punishment ought or ought not to be reduced if the assailant is the husband of the victim.

[47] "Is there a such thing as Marital Rape?" (30 May 2007), online: Assembly of Muslim Jurists of America <http://www.amjaonline.com/en_f_details.php?fid=2982> (emphasis added).

[48] Online: Islam Online <http://webcache.googleusercontent.com/search?q=cache:pKNyRMWBow8J:mdarik.islamonline.net/servlet/Satellite%3Fcid%3D1138109420695%26counsel%3Dfatwa%26pagename%3DIslamOnline-Mobile%252FWapCounselDetailE+%22Sex+is+a+natural+urge+and+desire.+Islam+allows+sexual+intercourse+only+between+married+spouses.+%22&cd=1&hl=en&ct=clnk&gl=sg&source=www.google.com.sg> (emphasis added).

made to substantively exempt the family from the criminal process,[49] but on the contrary, to give the usual measures an extra bite. Its centrepiece is the Personal Protection Order ("PPO")[50] which seems to have been sneaked into the *Women's Charter* almost as an afterthought in the 1980 amendment,[51] with neither fanfare nor debate. There was no discussion at all in the Parliamentary proceedings. Yet, from that point, it took off.

What do PPOs do? The normal criminal processes are predominantly retrospective—looking back at criminal conduct already committed. No doubt there are a few prospective provisions in the *Criminal Procedure Code*, conveniently organised under the heading "Prevention of Offences".[52] Most of the provisions deal with a quaint institution called "security for keeping the peace"[53]—those against whom there is sufficient evidence of being high-risk, as far as committing prospective crimes is concerned, may be made to provide security, which would be forfeited if he or she misbehaves within a period of two years or less, as the court may order. The hope is that the prospective criminal will be deterred from acting on his criminal ambition for fear of losing the security put up. Another provision gives power to and imposes a duty on the police to use all lawful means, including the removal of the prospective criminal, to "prevent the commission" of an offence where reasonable suspicion exists that an offence may be committed.[54] It would appear that prior to 1980, this was all that was needed to deal with spousal or any other kind of violence, or any other prospective offence.

These provisions continue to be available in cases of spousal violence, but the institution of the PPO provides an additional recourse—the victim may apply to the court for a PPO "restraining the person against whom the order is made from using family violence against a family member", or more seriously, an exclusion order from the matrimonial home.[55] A breach of the order amounts to an offence punishable by up to six months imprisonment and a $2000 fine, or on a subsequent conviction, 12 months and a $5000 fine.[56] This, of course, is in addition to whatever criminal consequences flowing from such a breach. So where a PPO is breached, the offender is guilty of two offences—voluntarily causing hurt under the *Penal Code*, and breach of a PPO under the *Women's Charter*. The only concern of the court adjudicating a breach is whether or not there has been a breach of the order. So for example, where there is an exclusion order in force, a breach is *ipso facto* an offence, regardless of whether or not he or she had breached the order in order to harm or intimidate. This device is similar to that which is found under the *Maintenance*

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49 At least not in the substantive law, as is the case for the marital immunity in rape. The *de facto* policy of meagre enforcement is discussed below.

50 The regime is now found in Part VII of the *Women's Charter*, *supra* note 2, which also provides for expedited orders and domestic exclusion orders. The beneficiaries of this dispensation are a relatively broadly defined class of "family members": *Women's Charter*, *supra* note 2, s. 64. The discussion here focuses on the PPO in cases of spousal violence.

51 The initiative came in the *Report of the Select Committee*, Parl. 1 of 1980 on the *Women's Charter (Amendment) Bill*, No. 23 of 1979 which was passed on 25 February 1980.

52 *CPC 2010*, *supra* note 32, Part V.

53 *Ibid*., ss. 41-45.

54 *Ibid*., s. 53.

55 *Women's Charter*, *supra* note 2, ss. 65(1), 65(5)(a), respectively.

56 *Ibid*., s. 65(8).

of Religious Harmony Act[57]—the Minister issues a restraining order on a religious leader on suspicion of potential to cause ill-will between religious groups to prevent him or her from addressing the members of his or her congregation. If that person were to breach the order, it is a criminal offence regardless of whether he or she had intended or was likely to cause ill-will. It is what scholars have called 'prior restraint'.[58]

The PPO regime appears to have been universally supported. It enjoyed a significant expansion in the 1996 amendments[59]—the definition of "family" and "family violence" was extended, specified third parties were allowed to apply, counselling orders were introduced, and satisfaction of the court on the civil "balance of probabilities" was enacted. Indeed, the Legislature had to resist suggestions to broaden it even further.[60]

The concept of "family violence", the basis on which PPOs are granted, has the theoretical potential to outflank the criminal law itself. There are 4 limbs to its definition,[61] three of which cause no particular problems because they are co-extensive with the criminal law, namely causing hurt, wrongful confinement and wrongful restraint. The fourth is this:

> [C]ausing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member.[62]

The problem is that "continual harassment" with intent to "cause anguish" is not, in itself, a criminal offence. There is, however, the offence of "criminal intimidation" in the *Penal Code*, which requires a threat of "injury" to person, reputation or property,[63] and "injury" is defined as harm "illegally caused" to body, mind and reputation.[64] Therefore criminal intimidation does not encompass (threatened) injuries which are not "illegally caused"; *i.e*. those which are criminal or tortious by some other independent ground. Is the "continual harassment" limb to be interpreted broadly, encompassing conduct which is not criminal or tortious? Some of the ground might also be covered by the offence of harassment in the *Miscellaneous Offences (Public Order and Nuisance) Act*, but as the name of that statute suggests, it does not operate in purely private circumstances.[65] It might be too early to predict,

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57 Cap 167A, 2001 Rev. Ed. Sing.

58 Or if one prefers, an injunction with criminal consequences.

59 See the speech of the Minister for Community Development, Sing., *Parliamentary Debates*, vol. 66, col. 534 (27 August 1996) (Mr Abdullah Tarmugi) sponsoring of the *Women's Charter (Amendment) Bill*, No. 5 of 1996, and the *Report of the Select Committee*, Parl. 3 of 1996. The momentum for change seemed to have gathered as a result of the rejection of the *Family Violence Bill*, No. 36 of 1995 [*Family Violence Bill*], sponsored by NMP Kanwaljit Soin, a few months before.

60 Notably, the proposal by the Association of Women for Action and Research in their submission to the Select Committee on 23 May 1996, appended to the Report, to include the ground of compelled sexual acts or conduct, which is discussed below.

61 *Women's Charter*, *supra* note 2, s. 64.

62 *Ibid*., s. 64, definition of "family violence", sub-section (d).

63 *Penal Code*, *supra* note 42, s. 503.

64 *Ibid*., s. 43.

65 Cap. 184, 1997 Rev. Ed. Sing., ss. 13A, 13B. These offences require "threatening, abusive or insulting words or behaviour", but there is a special defence if it is done in a dwelling-house and there is no reason to believe that anyone outside the dwelling house would see or hear it. This is likely to render the provision inoperative in most spousal situations.

but the newly-minted tort of harassment,[66] if suitably developed, might well become co-extensive with the concept of harassment for the purposes of a PPO. Criminal intimidation in the *Penal Code* would then make a threat of any conduct which amounts to harassment in tort a criminal offence as well.

What is the position of conduct which, apart from the spousal immunity, would be marital rape? Can the conduct of a husband insisting on non-consensual sex amount to "continual harassment" for the purposes of a PPO? This matter did indeed arise in Parliament in the course of the 1996 amendments to the *Women's Charter*. There was a suggestion to include a "sexual act or conduct" limb to the grounds on which a PPO may be obtained. This was the Minister's enigmatic reply:

> Where there is sexual misconduct between a married couple and if they feel it is worthwhile to keep the marriage intact … [s]eeking a court order may only precipitate separation and break-up. But the Committee is also of the view that *forced sex between estranged couples* … should be seen in a more serious light … [W]here the victim prefers to seek a protection order against such misconduct and not seek a criminal remedy, the Committee is of the view that the definition of "family violence" in the Bill, which includes "causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member", is *sufficiently wide to accommodate such complaints*.[67]

The proposal was rejected on grounds similar to those which underpin marital immunity to rape—the possibility of a PPO may precipitate destruction of the marriage. But the interesting proposition was that "forced sex between estranged couples" would be grounds for a PPO. It is not clear if "estranged couples" is meant to dovetail with the circumstances under which the marital immunity for rape is lifted. Semantically, a couple can be estranged without falling within one of the exceptions, all of which require the victim to have taken a formal step to signify the withdrawal of consent. There is some evidence that non-consensual sex *simpliciter* might qualify as "harassment" which triggers the PPO regime. The Minister-of-State had this to say in the course of the marital rape debate of the 2007 *Penal Code* amendments:

> We have widened the circumstances for withdrawing marital immunity considerably in view of the consultation feedback … [W]e have responded in a way that now makes it much easier for the abused wife to seek protection. Because *all it takes for her to do is to file a PPO*.[68]

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[66] There is one authority, albeit prominent, that such a tort exists in Singapore—*Malcomson Nicholas Hugh Bertram and another v. Mehta Naresh* Kumar [2001] 3 S.L.R.(R.) 379—which offers this working definition, at para. 31:

> [A] course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person.

Spousal tort immunity, it should be noted, has been abolished in Singapore, along the lines of the *Law Reform (Husband and Wife) Act 1962*, (U.K.), 1962, c. 48, except for a residual judicial discretion to stay an action if "no substantial benefit would accrue to either party from the continuation of the proceedings": see *Women's Charter*, *supra* note 2, s. 58. There does not appear to be any precedent in Singapore of how this discretion is to be exercised.

[67] *Supra* note 59 (emphasis added).

[68] *Supra* note 38.

So when do spouses become "estranged" so that non-consensual sex becomes a valid ground for a PPO? The statute itself contains no such concept. A possible resolution is that non-consensual sex is a potential basis for a PPO, but only if it is "continual harassment"—just one such incident will not do. Unlike wife battery, for example, there must be a pattern for purely sexual conduct. If this is correct, then the dividing line is not between estranged and non-estranged spouses, but between isolated incidents and "continual harassment". In short, the wife who is the victim of non-consensual sex must wait until such conduct reaches such a frequency that it can be described as "continual harassment".[69] She can then apply for a PPO. The marital rape immunity is then lifted. Still, some might well think that requiring the wife to wait for forced sex to be "continual" is too high a price to pay for the claimed benefits of the husband's immunity.

Two kinds of questions flow from the existence of the PPO regime. The first has to do with whether or not the PPO regime is indeed desirable—has it worked? It is patently clear from the Parliamentary material that everyone who has ever expressed a view believes it to have been effective in dealing with family violence. But what evidence do we have of this faith? There were no PPOs before 1980—is there evidence that family violence was not being adequately dealt with by the usual processes of the criminal law? Do we have any reason to think that, without the PPO, our law enforcement agencies will not be able to handle family violence just as well? Serious studies are few, if any. In an apparent study done by the Subordinate Courts in 2001,[70] it appeared that 81.1% of complainants agreed that they felt safer after the issue of a PPO—and that was held up to be evidence of its effectiveness. If this is meant to be a rigorous study, it fails because the comparison is not between the PPO regime and nothing, but between the PPO and a regularly functioning criminal process. The question is not whether people feel safer after obtaining a PPO *in vacuo*, but whether they are safer, or at least feel so, in comparison to the normal criminal process alone.[71] As we shall see, it is likely that the existence of the PPO regime has distorted the way in which the regular criminal justice process works in cases of family violence. The police, realising that there is the avenue of the PPO, shrink from deciding whether or not to proceed on

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[69] It is a nice question how many previous occurrences will entitle the conduct to be described as "continual". Again, mixed signals from the Legislature—preserving the marital immunity, but creating exceptions—casts the onus on the court to figure out what sort of attitude it should take in the face of interpretational uncertainty. Immunity 'sympathisers' might well require a lengthy series of such incidents; immunity 'antagonists' are likely to say that two, or even one, such occurrence will do.

[70] "Protecting Families from Violence: The Singapore Experience", online: Ministry of Community Development, Youth and Sports <http://app1.mcys.gov.sg/ResearchRoom/ResearchStatistics/ProtectingFamiliesfromViolence.aspx>.

[71] I was unable to find any significant study on whether or not the PPO actually made spousal victims safer, in the sense that the PPO deterred the aggressor spouse who would have otherwise assaulted the victim again. Such studies are not easy to design: Carolyn N. Ko, "Civil Restraining Orders for Domestic Violence: The Unresolved Question of 'Efficacy'" [2002] 11 S. Cal. Interdisciplinary L.J. 361. It is perhaps the case that even if victims are not in fact any safer, there is merit in a scheme which provides psychological comfort to the victim. The problem remains, however, that the crucial comparison is with the normal operation of the criminal process (without the current parsimony in enforcement), and not with a situation where the state does nothing at all. The volume of literature from outside of Singapore, especially from the United States, is enormous—see the engaging debate in Eve S. Buzawa & Carl G. Buzawa, eds., *Do Arrests and Restraining Orders Work?* (California: Sage Publications, 1996).

complaints, leaving the victim to choose whether or not to file for a PPO. If victims are actually asked to compare the PPO (plus non-proactive enforcement by the police) and proactive enforcement (but without the PPO), some might well feel safer with the normal criminal process, either because there is no requirement of applying for any order to stop the spouse or because the still considerable might and aura of the police will be brought to bear on the offending spouse in the course of a criminal investigation.

The other line of inquiry proceeds on the assumption that the PPO system has significant advantages over the regular criminal process. If indeed the PPO has worked so well for domestic situations, why not extend it to all situations? One can imagine a general PPO regime—where if the court is satisfied on a balance of probabilities that any criminal violence (or any non-victimless crime for that matter) is likely to be visited upon anyone, the person in fear may apply for a PPO against his potential assailant. In practice, however, one does not normally know beforehand that one will be a victim unless the assailant happens to be someone in a more or less close relationship with the victim. But there is no reason why PPOs will not be equally beneficial for victims who have some sort of history with the people who would commit acts of violence against them. One can think of employers and employees, neighbours, school mates, unconventional families, and the like.[72]

Put simply, if PPOs are the boon that they are held up to be, then why is it that victims of violence in so many other similar contexts have no recourse to them and have to be content with the regular criminal justice process?

2. *Enforcement Discretion*

In counterpoint to the runaway success of the PPO is a marked official reticence in some other aspects of criminal justice policy. Two of the most prominent examples were showcased in the Parliamentary debates on NMP Kanwaljit Soin's significant but derailed *Family Violence Bill* of 1995.[73] A major issue was the nature of police enforcement policy in cases of family violence which did not amount to causing "grievous hurt"—a *Penal Code* term distinguishing hurt which is "grievous" or serious (for example, fractures and dismemberment) and hurt which is simple.[74] The *CPC* provides for different procedures where the hurt is grievous and where the hurt is simple.

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[72] The kinds of relationships which qualify for the PPO have been expanding. From spouses and children in 1980, to parents, parents-in-law, siblings and other relatives, and even to "incapacitated persons" whom the court considered to be family members in 1996. Crucially, the wording of the *Women's Charter*, *supra* note 2, does not appear to cover people who are living together and in relationships which are just as intense, but who are not married or related to each other (unless one of them is incapacitated).

[73] Sing., *Parliamentary Debates*, vol. 65, col. 94 (1 November 1995).

[74] *Penal Code*, *supra* note 42, s. 319, defines "hurt" as "bodily pain, disease or infirmity", and s. 320 lists the situations where hurt becomes "grievous". Notably the 2007 amendments added limb (i):

> [P]enetration of the vagina or anus, as the case may be, of a person without that person's consent, which causes severe bodily pain.

It would appear that a husband who forces intercourse on his wife would now be guilty of the arrestable offence of voluntarily causing grievous hurt, if "severe bodily pain" is caused.

The offence of voluntarily causing grievous hurt is an "arrestable offence".[75] Upon a reasonable complaint of such an offence, the police "must" investigate and apprehend the suspect, subject to a discretion not to proceed if the case is "not of a serious nature" or if there are "insufficient grounds" to do so.[76] Where an arrestable offence is reported, full powers of police investigation are triggered,[77] including the power to arrest the suspect without a court warrant.

But if simple hurt is caused, the procedure for a "non-arrestable offence" is followed.[78] The police may, in their discretion, commence an investigation. The first difference is subtle—in both arrestable and non-arrestable cases, the police have ultimately a discretion whether or not to investigate, but the presumption in arrestable cases is that they ought to be investigated unless there is some good reason not to. The presumption is reversed, or at least does not exist, for non-arrestable offences—there seems to be no pressure either way and the police may investigate, ask the complainant to go to a Magistrate to initiate a private prosecution, or refer the case to mediation. The second distinction is in the triggering of investigative and arrest powers. They arise automatically for arrestable offences, but must be authorised by the Public Prosecutor or a Magistrate for non-arrestable offences. For simple hurt, the police have to take steps to obtain either Prosecutorial approval or a court order. It seems to be a common misconception that in cases of simple hurt, the police are powerless to act—it is not that the police cannot act, but that it is more inconvenient for them to do so.

In the course of the debate on the *Family Violence Bill*, the Minister for Home Affairs revealed some interesting enforcement statistics:

> In 1994, Police took prosecution action in *14 cases of voluntarily causing hurt out of the 3,625 cases of domestic violence* reported. In *seven of these 14 cases, the victims later decided not to proceed* against the accused in court. The prosecution had to respect their wishes in order not to worsen the situation at home. But you can imagine that *a great deal of resources was wasted* in these cases when the complainants later decided not to go ahead in bringing the culprits to court.[79]

It appears that the discretion to investigate a non-arrestable case of family violence is exercised most infrequently—14 out of 3625 works out to 0.3%. There are two possible reasons for this. The first is that the tight-fisted enforcement policy for family violence is simply a manifestation of the general policy towards non-arrestable crimes, or perhaps towards the voluntary causing of hurt in general, whether domestic or otherwise. If that is the situation, then what the critics are unhappy about is not so much that the enforcement policy is biased against domestic violence, but that the police are not willing to make an exception for it. The other explanation is that the low enforcement rate is peculiar to family violence—and here the critics are on firmer ground when they say that the police are not being as serious with family violence as they are with other kinds of violence. We need a few more figures to

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75 *CPC 2010*, *supra* note 32, First Schedule, prescribes whether or not an offence is "arrestable". The term used before the 2010 amendments to the *CPC* was "seizable".

76 *Ibid*., s. 17.

77 For example, the power to summon and question witnesses and suspects.

78 *CPC 2010*, *supra* note 32, s. 16.

79 *Supra* note 73 at col. 117 (emphasis added).

determine which of these two alternatives provides the real reason. But we have some evidence that the second theory might well be true. The Minister for Home Affairs had also this to say:

> So the Police does take action even on simple hurt cases when the situation justifies. But the Police does not warn or prosecute every case as a matter of routine *because family disputes are by nature complex*. They involve emotions and relationships among people in the same family. It is very difficult, if not impossible, for a Police officer to establish which party is right or wrong when he arrives at the scene. Indeed, in a family dispute situation, both parties may each have varying degrees of fault.[80]

The Minister seemed to imply that family situations are special and especially complex, requiring more caution in deciding to investigate than in other situations of minor violence. The reasons given are a little odd. Surely, cases where the attribution of criminal responsibility is unclear cannot be exceptional, and the police must have established protocols on what to do when it is not clear who is more at fault. Doubt is not a reason not to commence an investigation, and indeed only an investigation will resolve the doubt. It is also said that the high rate of attrition of domestic violence complaints—7 out of 14—shows that it would be waste of time and resources for the police to change their enforcement policy. This assumes that in the 7 cases which were ultimately not proceeded with, the decision to investigate was futile. It is not difficult to think of scenarios where this assumption is incorrect. The decision to investigate would likely have put the fear of God in the offending spouse, or at least have seriously inconvenienced him or her. This may well have resulted in a cessation of violence, thus resolving the problem without pursuing the prosecution to its conclusion. Far from resource wasting, this not unimaginable turn of events happily stops the violence without the extra cost of punishing the perpetrator formally.

Should the enforcement policy be changed? This could be done administratively, or by making domestic violence offences arrestable. A slightly more elaborate proposal to step up police enforcement was made in the *Family Violence Bill* of 1995,[81] which would have automatically conferred arrest and investigative powers on the police in all family violence situations, thus making family violence in effect an arrestable offence. The Bill would have gone further and made the commencement of investigations compulsory, while preserving a restricted discretion not to prosecute if the suspect is prepared to undergo counselling.[82] This was firmly rejected, with the Minister for Home Affairs asking rhetorically:

> Do we want another separate piece of legislation that calls on the Police to intrude into the family's living room, bedroom, or kitchen to deal with a family dispute whenever one is reported?[83]

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80 *Ibid*. at col. 118 (emphasis added).

81 *Family Violence Bill*, *supra* note 59, ss. 13, 14.

82 The diminution of prosecutorial discretion might well have run into constitutional problems because the *Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 35(8) appears to vest prosecutorial discretion in the Attorney-General, without qualification.

83 *Supra* note 73 at col. 116.

I think nobody really wants the police to march in "whenever" family violence is reported[84]—the question is how often we want it to happen. By any measure, 0.3% sounds rather low and it is probably safe to think that the enforcement rate can be so low only because the bulk of work is being done by the PPO regime. But does the PPO regime deal with non-arrestable family violence better than, or at least as well as, a normal police investigation?

We need to know the difference between police enforcement of crimes and the PPO regime. Here, opinions will differ depending on what we take to be victim and aggressor psychology. The police enforcement route requires no more than a complaint to the police, or more technically a "first information report".[85] The PPO regime requires the victim to go to court and apply for the order. Clearly the first option is easier, but ideally the process should be neither too easy (which means it might be used unnecessarily or wrongly) nor too difficult (in the sense that a legitimate victim would be deterred from using it). Perhaps this requires further study on victim psychology—are there legitimate victims who would make a police complaint but who would not file for a PPO? Conceivably, there could be victims who would behave like this. From the viewpoint of the aggressor, would he or she be sufficiently deterred by a PPO, or would subjecting him or her to a police investigation provide more optimal deterrence? Again, we cannot be certain, but conceivably, being the subject of a police investigation does seem to have the potential to strike greater fear than being served with a PPO, and some aggressors would be deterred by one and not the other.

We then need to deal with the perennial concern that invocation of the law might exacerbate already strained matrimonial relations. If we are so concerned, then we need to ask if intrusion *via* a PPO would be better or worse than intrusion caused by a police investigation. Here we tread on the field of the psychology of relationships—which is more likely to make the situation worse? A police investigation is likely to be more intrusive, but we do not know whether the intrusion will sour marital relations, or improve them—it is conceivable that the greater shock of a police investigation will have a greater potential to knock some sense into the aggressor.

Ultimately, we need to bear in mind that a great many other victims of violence do not have recourse to the PPO regime—this includes situations where the aggressor and the victim are not mere strangers and in which their relationship can be equally if not more complex than the marital one.[86] We seem to have accepted that the normal threat of police investigation is the best way to deal with violence in these situations, and we must ask why we now lose faith in it just because it is spousal violence.

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[84] Although the *Family Violence Bill*, *supra* note 59, does seem to have this result, one suspects that it could have been drafted in that way as a bargaining position.

[85] *CPC 2010*, *supra* note 32, s. 14, provides that the investigative function of the police is to be triggered "when information is first received at a police station".

[86] One thinks of couples who choose not to marry, who cannot marry (perhaps because one party is already married to another), or who are not allowed to marry because they are of the same sex. It might well be that these liaisons are apparently not to be viewed with the same degree of solicitude as a marriage, but that should surely not be a reason to deny adequate protection to a victim of unlawful violence, whatever the status of the relationship between the aggressor and the victim might be. There is again much that has been written—see, in an Asian context, an argument that same sex couples ought to be similarly protected in Hong Kong in Puja Kapai, "The Same Difference: Protecting Same Sex Couples Under the Domestic Violence Ordinance" [2009] 4 Asian Journal of Comparative Law 237.

3. *The Putative Family Violence Offence and Legislation*

The debate in the *Family Violence Bill* in 1995 threw up a second proposal—that of a specific statute to deal with family violence, along with a specialised offence of family violence and modified procedures to enforce it. Why was the existing criminal process inadequate? In the words of Dr Soin:

> Inappropriate legislation was being utilised—presently the *Penal Code* is applied in family violence cases where the injuries consist of broken bones and dislocations. In legal parlance, these are referred to as seizable [now "arrestable"] cases. *The Penal Code addresses the issue of violence between strangers* and therefore is not suited for the sensitivity and complexities of abusive family relationships.[87]

The supporters of the Bill and the Government, which voted it down, were actually in accord with respect to one thing—that family violence is special. Where they diverged was what was to be done about it. The Government was in favour of the regular criminal process, in which police enforcement discretion is used to proceed in only the most serious of non-arrestable cases, leaving the vast majority of others to the 'self-help' PPO regime. The *Family Violence Bill*, on the other hand, would channel most, if not all, cases into a special criminal process—the police must investigate, but will possess the discretion to suspend prosecution if the aggressor behaves himself and perhaps submits himself or herself to counselling.

The phenomenon of specialised legislation and specialised crime is, of course, not unknown in Singapore or elsewhere. Examples abound—the *Misuse of Drugs Act*,[88] the *Kidnapping Act*[89] and the *Prevention of Corruption Act*.[90] There are usually two aspects to such measures—the substantive and the symbolic. Substantively, they put in place some features which are not normally present in the criminal process—for example, presumptions in the *MDA*, the discretionary death penalty in the *Kidnapping Act*, and extraterritoriality in the *Prevention of Corruption Act*.[91] The justification for these departures is that there is a special problem and they are necessary to deal with this particular kind of crime. Symbolically, they are a signal that the government is serious about enforcement. Much as we may applaud our law enforcement agencies for successfully dealing with drugs, kidnapping and corruption, there is scant evidence that any of these deviations from the regular criminal process were actually needed. The vast majority of drug convictions would have been obtained anyway without presumptions.[92] There is every likelihood that kidnapping would have dipped to almost non-existent levels even without the threat of the death penalty.[93] The extraterritoriality of corruption offences has so rarely been

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87 *Supra* note 73 at col. 98 (emphasis added).

88 Cap. 185, 2008 Rev. Ed. Sing. [*MDA*].

89 Cap. 151, 1999 Rev. Ed. Sing.

90 Cap. 241, 1993 Rev. Ed. Sing.

91 *Supra* note 88, ss. 17, 18; *supra* note 89, s. 3 and *ibid*., s. 37 respectively.

92 A perusal of the judgments issued in drug cases will show that there is normally ample admissible evidence to justify a conviction.

93 The juxtaposition of kidnapping offences which attract only a discretionary death penalty but which have all but disappeared from the criminological landscape, and drug offences, which continue to be

used that few are now even aware of its existence.[94] One is tempted to suspect that it is more about perception management than about actual assistance in the criminal process—it enables the government to be seen to be doing something special and the public to see that something special is being done.

When we focus on offences of violence, we see the Legislature sometimes enacting special legislation, and sometimes not. Predictably, one kind of violence which has moved the Legislature to enact something special was violence against domestic maids—a sensitive issue with the potential to create an international incident with maid-sending nations. In 1998, the *Penal Code* was amended to increase the maximum penalty for violence against maids to one and a half times the maximum for regular offences of violence.[95] For example, voluntarily causing hurt went up from 2 years and $5000 to 3 years and $7500. Again, it is difficult to believe that this made any real substantive difference to the deterrence of maid violence.[96] The Legislature was however not inclined to do so for another kind of violence—road rage. There is no special road rage statute or provision and the usual criminal processes were somehow sufficient, relying on the usual prosecutorial discretion to tighten up enforcement and judicial discretion to perhaps increase benchmark sentences.

So family violence went the way of road rage, without the fanfare of special offences or legislation. Much, if not all, of what the *Family Violence Bill* wanted to do in terms of substantive criminal law, can in fact be done under the existing regular criminal process. There was no suggestion that the proposed offence of family violence would cover anything but conduct which is already criminal under the *Penal Code*. Nor is there any reason to think that the *Penal Code* was designed only or primarily for violence between strangers. It is not entirely clear why the Government did not opt for special legislation, if only for its theatrical value.[97] Perhaps this was because it was still ambivalent about enforcement in the marital context, and unlike the strong 'zero-tolerance' attitude that prevails with respect to the other specialised crimes,[98] it was in the context of marital violence, uncertain as to just what the enactment of specialised legislation was to be theatrical about.

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a problem although the death penalty is mandatory, does seem to throw considerable doubt on any simplistic notion of the deterrent effect of the death penalty.

94 The only reported decision seems to have been *PP v. Taw Cheng Kong* [1998] 2 S.L.R.(R.) 489. See also the District Court decision in *PP v. Ang Seng Thor* [2010] SGDC 454, where an extraterritorial charge seemed to have been tacked onto a domestic one.

95 *Penal Code*, *supra* note 42, s. 73. See also the recently inserted provisions on enhanced penalties for "racially or religiously aggravated offences": s. 74.

96 Rare is the evil employer who would countenance hurting a domestic servant if the maximum punishment is 2 years imprisonment, but who would not do so if it is 3 years imprisonment. Furthermore, these are only maximum penalties—actual 'going-rates' are likely to be nowhere near these figures.

97 I do not use the word 'theatrical' in any necessarily pejorative manner. Symbols and perceptions are important. There has also been a powerful feminist argument that the criminal justice system ought to be employed for domestic violence even though it does not result in immediate utility gains, because the sustained effort of denouncing patriarchal structures that encourage domestic violence will have long-terms effects in reducing its occurrence: see Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford; New York: Oxford University Press, 2009). The danger is tokenism—an actual belief that special laws will 'do the trick'.

98 *I.e*. drugs, kidnapping, corruption, and maid abuse.

IV. The Future of Marital Exceptionalism in the Criminal Process

The theme of this article has been the extent to which the criminal process is willing to make exceptions for the marital relationship. A complex picture emerges. On the one hand, the once total incompetence and non-compellability of the spouse, together with the privilege against spousal incrimination, have all but disappeared. On the other hand, the marital communication privilege is apparently in full force. The future is likely to see either the preservation of the status quo or the disappearance of the marital communication privilege. The spousal incrimination privilege, the more important privilege as far as the preservation of marital harmony is concerned, is gone and highly unlikely to return, and with it the strongest reason for the marital communication privilege. It simply does not make much sense to say that a spouse can testify and damn the other (with non-marital communication testimony), but cannot disclose marital communication, even if the other spouse is not harmed thereby, and even if the spouse who is prevented from testifying is harmed by the non-disclosure.

The marital immunity for rape has been retained, but only just—and the walls seem to be closing in on it, with the creation of more and more exceptions to the exception. Again, the future is likely to see either the preservation of the status quo—because the exception has become so small that it is no longer of much practical significance—or further diminution, with perhaps the creation of more exceptions, if not complete abolition. Its existence hangs on a thin thread of conservative sensibilities which in time will wear thin enough to break.

The manner in which the criminal justice system deals with marital violence presents an altogether different picture. Although the spousal victim exception to the marital communication privilege might have led the law to resist all attempts to exempt marital violence from the normal process of the law, this has not happened. The Government has clearly rejected all proposals to treat marital violence either more seriously, or even on par with other kinds of violence. It has opted instead for a very parsimonious enforcement policy with respect to cases where no serious injury has been caused, and relied instead on the quasi-civil regime of the PPO which requires the victim to take self-help measures. This apparent privatisation of law enforcement seems to rest on some psychological assumptions which are untested; primarily the belief that the normal criminal process will do more harm than good—that spouses will be led down the path of contention and harden their hearts against reconciliation. It is not easy to predict what will happen in the future—will we as a society continue to view marriage in such 'romantic' and idealistic terms, and therefore hold back the tide of criminal law in order to give the relationship maximum space to heal? Or will we begin to see marriage in a more hard-headed and pragmatic way—a crime is a crime and the law must be fair to spouses who are victims of violence, and if relations have come to such a pass, no amount of mollycoddling by the criminal process will come to much good.