



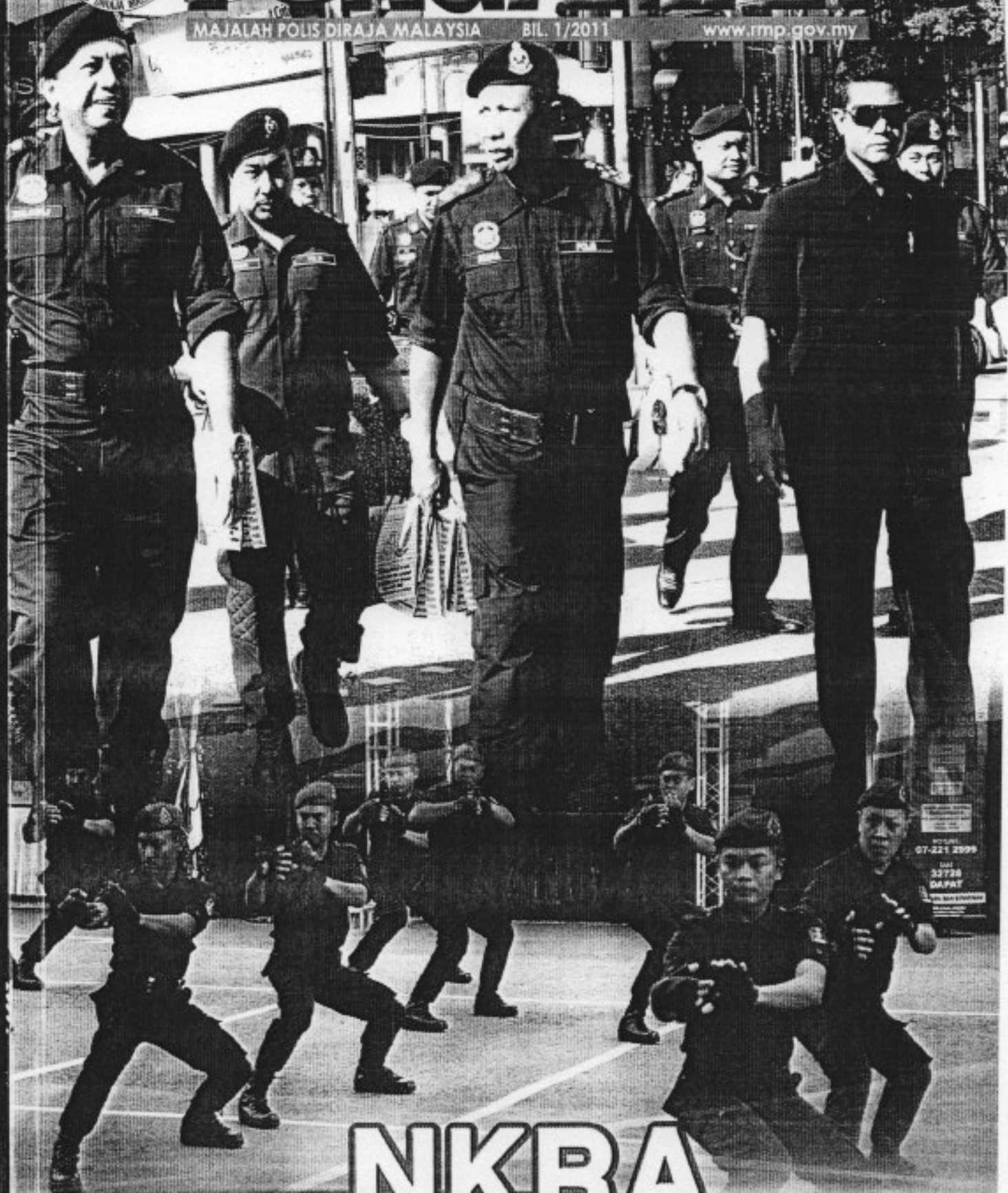
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www.pnmb.com.my
email: carvise@pnmb.com.my
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The Law of "Domestic Rape": Harmonisation Between Shariah and Malaysian Penal Code

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(HINGGA 5^{HR} JANUARI 2010)

By:
DR MOHAMAD ISMAIL BIN MOHAMAD YUNUS
Senior Lecturer of Law
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

Synopsis

Under the definition of rape that is generally used by the courts, rape is "an act of non consensual sexual intercourse by a man with a woman other than his wife". Under this commonly accepted definition it is not legally possible for a husband to rape his own wife. The husband cannot be liable as the principal offender based on the idea that consent to marriage is also consent to sexual intercourse which cannot be revoked while the marriage subsist. This paper will examine the law relating to marital rape according to Islamic law, Malaysian Penal Code and the contemporary arguments in favour and against the spousal immunity viewed by the modern secular legal jurists.

BS



Introduction

"Domestic Rape or Marital rape" is defined as sexual intercourse by the husband against his wife without her express consent. The husband and wife must be legally married and recognized as a married couple, having the same rights and obligations under the law. According to Islamic law, wedlock status is an important element because one can only be charged with committing rape when one forces sexual intercourse

with a woman who is not married to him. If a husband forces his wife to have sexual intercourse, he is not considered to have committed rape because a husband has the right to have sexual intercourse with his wife. The wife cannot withhold her consent in having sex with her husband if she is perfectly healthy. The following traditions of Prophet Muhammad (s.a.w.) state the warning to the wife who declines her husband's need for marital intercourse:

- (a). If a woman spends the night deserting her husband's bed, without a reasonable cause, she is sinful.
- (b). If a man invites his wife to sleep with him and she refuses (without a reasonable cause) to go with him, the Angels will curse her till morning.
- (c). If a woman spends the night deserting her husband's bed (does not sleep with him, then the angels will curse her till she comes back to her husband.

¹ See e.g. *R. v. Clark* [1949] 2 All E.R. 448.

² One of the legal presumptions of marriage is that the wife has given her consent to all sexual relations. It is stated that in the American case of *State v. Dowell*, 11 S.E. 525, the judge while deciding a marital rape case said that "The courts usually do not go behind the domestic curtain and scrutinize too closely every family disturbance, even though amounting to an assault."

³ *Suhazidah Mohd Diah, The Legal and Social Issues of Wife Battering and Marital Rape in Malaysia* (1996) 53.

⁴ Section 128(4) of the New Zealand Crimes Act 1961 provides that a person may be convicted of sexual violation in respect of sexual connection with another person notwithstanding that those persons were married to each other at the time of that sexual connection. See e.g. *R. v. N* [1987] 2 NZLR 268, the accused and his wife married in 1981 and experienced difficulties with their relationship, leading her to seek family and psychiatric counseling. They separated in 1986 but he continued to maintain contact with his wife and the two children of the marriage in her custody, whom he visited every weekend. On the day of the offence the accused took his wife and their two children shopping. On their return to her home the wife put on a bathing suit and shirt to supervise the children in the padding pool. She returned to her bedroom again where the accused followed her and asked about getting together again. When she did not respond he produced a knife from behind his back. Over her protests he pushed her on to the bed, removed her clothes and threatened her again with the knife when she screamed. He then raped her. The accused pleaded guilty to the charge of sexual violation by rape. The accused appealed against the sentence.

The Court of Appeal held that in cases of sexual violation by rape no separate regime of sentencing is called for simply because the parties are married or have been in a continuing sexual relationship. To do so would deny to a woman in that position the rights over her body, which are accorded to every other woman including the prostitute. The Parliament has made no distinction in the penalties between spousal and other kinds of rape, and the sense of outrage and violation experienced by a woman in that position can be equally as severe.



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However, it is observed that as a general rule it is a duty of the wife to submit to her husband's request for sexual intercourse except in three situations; (i) during her menstruation period (ii) during parturition (nifas) period and (iii) while she is performing her obligatory fasting. If the husband forces his wife to have sexual intercourse in these situations, the husband is considered as committing a sin, but he cannot be charged for committing rape but to some extent he might be charged for abusing his wife. In other words,

this does not mean that the husband can do whatever he wishes to his wife. The husband can only be allowed to act according to the provisions prescribed under the Islamic law. He is not allowed to sexually abuse his wife or to have sexual intercourse with his wife whenever and however he likes.

It is pointed out that the wife can rightfully refuse to have sex with her husband if she is in an advanced stage of pregnancy, for fear that it may cause

harm to her health condition and to the fetus in her womb. Another reason for refusal is that if the wife has the knowledge that her husband had contacted sexually transmitted disease such as Herpes, Gonorrhoea or AIDS, she can rightfully refuse to have sex with him. In fact, if the husband has sexually transmitted diseases, the wife has the right to apply for dissolution of the marriage (fasakh). Another exemption is that if a man forces a woman to have sexual intercourse with him whom he had divorced irrevocably

Siskary in R. v. D [1987] 2 NZLR 272 (CA), the accused had been found guilty by a jury of assault on a female, his wife, and of sexually violating her by having unlawful sexual connection with her. That connection involved the insertion of his fingers in her vagina during a sustained attack on her.

The Court of Appeal noted that there were in this case valid arguments in favour of leniency, but submitted that in section 128B(2) of the Crime Act 1961 the legislature had drawn no distinction between sexual violation inside marriage and outside marriage. The court also observed that since the passing of the Crimes Amendment Act (No 3) 1995 the legislature has drawn no distinction in principle between sexual violation in marriage and outside marriage. See also *R. v. L* [1992] 174 C.L.R. 379; *R. v. C* [1981] 3 A. Crim. R. 146; *R. v. Molinn* [1982] VR. 53.

Ismael, M. Baki, *Al Fiqh al Wadhi Bayn Al Kitab wa Al Sunna*, (Dar al Manar, Cairo, 1990) 67. Siskary & Matthew Hale, in his work *Historia Placitorum Coronae* (published posthumously in 1789) stated that the husband cannot be guilty of the rape 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.

Sahih al-Bukhari, vol. 8 (1987) 93.

Ibid.

Ibid.

Al Sayid, Jalal Al-Din, Al Asbhan wa al Nizari, Dar al-Kitab Al-Arabi, Beirut (1987) 465.

Ibid. 770.

(talaq bain) then it is considered as rape because he is no longer a valid husband to the woman. Thus it is submitted that an ex-husband has no right to the person of his ex-wife. In this circumstance, such woman would be justified in resisting her ex-husband's sexual advances; any attempt by the ex-husband to force himself upon his ex-wife against her will or without her consent surely will commit the offence of rape.

In Malaysia, most societies uphold family value which put the man as the head of the family and the wife is expected to follow the opinions and needs of the man. Sexual intercourse is something very private and personal and the women, who are brought to believe that the husband can have unlimited access to themselves seldom rise the hue and cry if the husband forced themselves in having sexual intercourse. The wife feels it is a personal matter and seeks not to put self-interest above the interest of the husband.

It is stated that even if the husband has the right to have unlimited sex with his wife this does not mean that he can beat her up or assault her to obtain self gratification. Although the Malaysian Penal Code contains provision where it is an offence for a person to assault use criminal force or to cause hurt and grievous hurt. The wife still will have the difficulties to prove the injuries obtained by her due to the abusive nature of her husband. More often if she goes for counseling she is advice to accept the pain and is asked to pray for the best of her husband and hope that he will behave humanly to her in the future.

However, by virtue of Section 375 of the Penal Code, it is provided under the exception that:

"Sexual intercourse by man with his own wife by a marriage which is valid under any written law for the long time being in force or is recognised in the federation as valid; is not rape".

As a general rule, a husband cannot be charged for rape even if he forces himself upon her. Therefore it is observed that Hale's reason for the marital exemption is still applicable in Malaysia. This is quite obvious in cases where married couples are cohabiting at the time of sexual intercourse. A husband cannot be said as raping his wife while both of them are still cohabiting.

Section 375 goes further to explain the position of a wife who lives separately from her husband or in the period of 'iddah (waiting period).

Explanation 1:

A woman (a) living separately from her husband under or a decree of judicial separation or a decree nisi not made absolute or who has obtained an injunction restraining her husband from having sexual intercourse with her shall be deemed not to be his wife for the purpose of this section.

Explanation 2:

A muslim woman living separately from her husband during the period of 'iddah (waiting period), which shall be calculated in accordance with Hukum Syarak (Islamic law), shall be deemed not to be his wife for the purpose of this section.

The effect of both explanations above is that, a husband can be guilty of raping his wife if it can be proved that one of the circumstances mentioned in the explanation is satisfied. The first explanation has the same effect with the decisions of the English cases where a husband can be convicted of raping his wife if they living apart pursuant to the court order. Even though, the divorce has not yet taken place; a husband can be found guilty of raping his wife.

As for a Muslim woman, she is not considered as a man's wife if she lives separately during the waiting period (iddah). Thus, if a husband has a sexual intercourse with his wife during that particular period, and she does not consent, the husband can be charged of raping his wife.

In Malaysia, under the Penal Code, if a man has sexual intercourse with his wife without her consent or against her will, it's not rape unless the man and his wife are divorced or judicially separated. Therefore it is only proper for the wife to make clear the permanency of her withdrawal of consent by some legal act of separation. The law recognises that her assent is revoked if a divorced or judicial separation has occurred. In all these circumstances, the criminal law of rape will apply to the husband because he has either consented to give up his matrimonial rights or to give his wife ground to end the marriage. In this context, it is submitted that the law in Malaysia is similar to English law.

It is concluded that concerning the issue relating to marital rape, both legal systems recognised that marriage is an

. Professor Garvie Williams submitted that it is intolerable that a wife should be so largely stripped of the protection of the criminal law on the occasions when she forbids ordinary marital sex. By the marriage ceremony she accepts a sexual relationship with her husband, but not one that has no limits. See Williams G. 'The Problem of Domestic Rape' (1991) NJL 205.

. See Holy Quran, chapter 5: 89.

. Cp. R. v. Clarence (1889) 22 Q.B.D. 25, the defendant had had sexual intercourse with his wife knowing that he was suffering from 'Gonorrhoea'. The defendant was not charged with rape, but was convicted upon an indictment charging him with 'unlawfully and maliciously inflicting grievous bodily harm upon his wife and with an assault upon her occasioning actual bodily harm'. Similarly in R. v. Miller [1954] 2 All ER 529, Lynskey J. stated that there might be certain circumstances in which a wife is entitled to refuse sexual intercourse that which is dangerous to her health. See also in Popkin v. Popkin (1794) 1 Hagg. Eccl., Lord Stowell vased that the husband has a right to the person of his wife but not if her health is endangered.

. Cp. R. v. Clarke [1949] 2 All ER 448, the defendant was charged at the Leeds Assize with the rape of his wife on 12 March 1949 and with assault occasioning her actual bodily harm on the same date. The defendant and his wife had married in October 1938. On 2 March 1949 the wife obtained a separation order from the justice on the ground of her husband's persistent cruelty, which had the effect that the wife was no longer bound to cohabit with the defendant, and the person and the property of the wife were thereafter protected by the order. The wife had done nothing (such as voluntarily resuming cohabitation) to discharge the order. On a motion to quash the first count of the indictment on the ground that it disclosed no offence known to the law, Byles J. held that by a process of law, namely, the justices' order, the wife's consent to marital intercourse had been revoked, and the husband was not entitled to have intercourse with her without her consent and could be guilty of rape. See also R. v. Miller [1954] 2 All ER 529; R. v. Steele (1977) 65 Cr. App. R. 22; R. v. Sharpe [1990] Crim. L.R. 198; R. v. Roberts [1986] Crim. L.R. 198.

. Cp. R. v. C. and Another, The Independent, 19 October 1990 (Sheffield Crown Court), Simon Brown J. rejected outright Hale's traditional rule saying:

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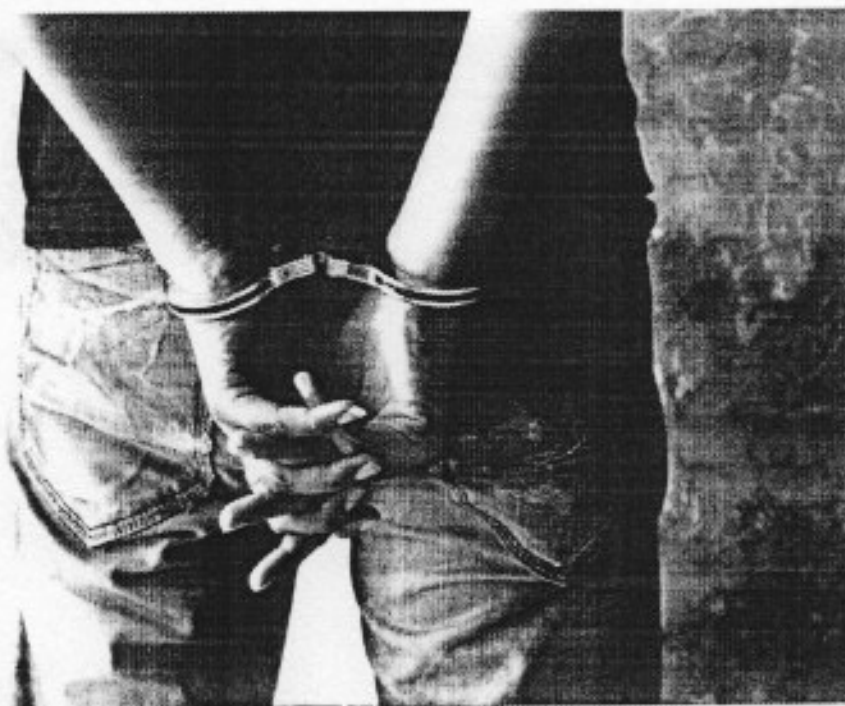
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institution which casts upon a husband an obligation to respect a wife's personal integrity and dignity; it does not give the husband an absolute power to violate her personal integrity and destroy her dignity. It is observed that in marriage each spouse has a mutual right to sexual intercourse provided the right be exercised reasonably, subject to the health of the spouse and the exigencies of family life. It is a right to be exercised by consent. It is a right the exercise of which is intended to foster and maintain matrimonial love, not to be an occasion of abuse and degradation.

However, it is observed that under the modern secular law, a husband can be charged of raping his wife when the sexual intercourse between the parties is against the wife's will or without her consent. Thus, the mutual right of spouses in respect of sexual intercourse has been abolished and

the status of husband and wife no longer entitles them to claim from each other a reasonable sexual expression of their connubial relationship. The condition on which a marriage may continue is said to be the continued agreement of the spouses and, in the context of sexual relations, each spouse is free to consent to or refuse intercourse on any occasion without reference to the right of the other spouse. Such an argument eliminates the difference between the status of husband and wife bound by mutual obligations to consent to sexual intercourse when it is reasonable to do so and the relationship of a man and a woman who, not being bound by those obligations, are free to give effect to their individual desires of the moment in deciding whether to engage in sexual intercourse or not.

On the other hand, according to Islamic law, marital status is an important

element because a person can only be charged with committing rape when he forces sexual intercourse with a woman who is not his wife.

Thus if a husband forces his wife to have sexual intercourse with him, he is not considered to have committed rape because a husband has the right to have sexual intercourse with his wife. In other words, the wife cannot withhold her consent in having sex with her husband. However, this does not mean that the husband can do whatever he wishes to his wife although it is the duty of the wife to submit to her husband's request for sexual intercourse. As mentioned earlier, there are three situations as exceptions where the wife has the rights to refuse from having sex with her husband; (a) during her menstruation period, (b) parturition (nifas) period, and during obligatory fasting. If the husband forces his wife to have sexual intercourse in these situations, the husband is considered as committing a sin, but he cannot be charged for committing rape but rather a charge for abusing his wife.

Thus it is submitted that the obligation of a spouse to consent to sexual intercourse depends on the circumstances: when it is reasonable to consent, there is a connubial obligation to do so. But what is reasonable depends on the state of health of the spouse and it varies from marriage to marriage, from time to time, from one set of circumstances to another. The persistence making of unreasonable sexual demands is itself a breach of connubial obligation which may entitle the other spouse to withdraw from cohabitation.

¹The position in law today is, as already declared in Scotland, that there is no marital exemption to law of rape.

²This was, he said, the "only defensible stance" in the late twentieth century. Since the jury went on to acquit the husband of rape, there can be no appeal. Nevertheless, this was a timely entry into the debate, highlighting as it does the burden placed upon juries by an imprecise compromise on the scope of the exemption.

³See *Sarkar*, in *R. v. Stephen W.* (1993) 14 Cr. App. R 651 256, the appellant and his wife had been married for three years and were living together with their daughter. There had been many arguments, which frequently ended with them making matters up and having sexual intercourse. Consensual sexual intercourse took frequently and had last taken place a few days before the offence. A few days before the offence, the appellant and his wife began to sleep apart, although within the same house. On the evening of the offence, the complainant told the appellant that she was about to leave him; there was an argument which ended with him forcibly ejecting her from the house and locking her out. He let her in again when she called the police. Later that evening the appellant indicated that he wanted to make love and when the complainant refused he threatened her with a knife then made her to take off her clothes, ordered her to perform oral sex and proceed with forcible rape on her twice.

⁴The Court of Appeal referred to the case of *R. v. R.*, unreported, 30 July 1990, Leicester Crown Court (UK), where the House of Lords ruled that a husband can be guilty of rape. *See also R. v. M.* [1995] Crim. L.R. 344.

⁵See Shahrizan above note 3, 58.

⁶Ibid.

⁷Explanation to Section 375 of the Malaysian Penal Code.
⁸See Shahrizan above note 3, 57-58.