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The Law of "Domestic Rape": Harmonisation Between Shariah and Malaysian Penal Code
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.
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.

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

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. Dowdell, 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."


Section 1294(b) 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. in R. v. N [1987] 2 NZLR 268, the accused and his wife married in 1983 and experienced difficulties with their relationship, leading him 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 accused put on a bathing suit and shirt to supervise the children in the paddling 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 and forced her to the bathroom. 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 consensual heterosexual 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.
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 (fasakih). Another exemption is that if a man forces a woman to have sexual intercourse with him whom he had divorced irrevocably

Similarly in R. v. D (1953) 3 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, 1965 the legislature has drawn no distinction in principle between sexual violation in marriage and outside marriage. See also R. v. L (1952) 174 CLR, 375; R. v. C (1961) 3 A Crim. R. 146; R. v. McKinnon (1962) VR 53.

Ibn Ishaq, Al Fath al Waad Bayn Al Kitab wa Al Sunna, Dar ul Manar, Cairo, 1996, 67. Similarly, Sir Matthew Hale, in his work Historia Piscatorum Civium published posthumously in 1739 stated that the husband cannot be guilty of the rape of his wife by himself upon his lawful wife, for by their mutual reciprocal consent and contract, the wife hath given herself in this kind unto her husband and at his disposal.


Ibid.

Ibid.


Ibid. 2770.
(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 values 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

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Professor Tanville Williams submitted that it is unsatisfactory that a wife should be so largely deprived 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) NLJ 205.

See Holy Quran, chapter 5: 89.

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C. R. v. Clarke (1984) 2 All ER 448, the defendant was charged with raping a lady who was attacked by a man with a knife after an argument ended with a sexual assault upon her occasions after her death. Similarly in R. v. Miller (1934) 2 All ER 529, Lord Justice Lestor stated that there might be circumstances in which a woman is entitled to refuse sexual intercourse that is dangerous to her health. See also R. v. Popkin (1974) 1 Hogg, E20, and Lord Stowell stated that the husband has a right to the person of his wife but not if her health is endangered.

C. R. v. Clarke (1984) 2 All ER 448, the defendant was charged with raping a lady with a knife 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 defendant obtained a separation order from the court on the ground of his wife’s persistent cruelty, which had the effect that the wife was no longer bound to cohabit with the defendant, and the defendant and the property of the wife were thereafter protected by the order. The wife had done nothing, such as voluntarily assuming 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. Bryan 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 (1934) 2 All ER 529, R. v. Sheen (1977) 1 CR App. R. 22, R. v. Sharpe (1960) Crown C.R. No. 198, R. v. Roberts (1936) Crime L.R. 188.
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 conubial 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 conubial obligation which may entitle the other spouse to withdraw from cohabitation.

The 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 conubial 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 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