



# Marriage is No Protection for Crime: Criminalising Marital Rape in Malaysia

by

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Abstract

Adam's rib, a stream that joins a river, two flesh made one: these traditional metaphors symbolized both the carnal fusion between spouses and wives' divinely ordained subordination under their husbands. Before the late twentieth century, there were no laws that protected legally wed wives from their husbands compelling them to have heterosexual intercourse. Though customs and courtesies allowed wives to abstain after childbirth, little could be done to redress their husbands' breaching such cultural expectations. Wives could not even criminally prosecute their husbands for violently forcing them into sex. The rapid cultural change and social paradigms have taught women to uphold their freedom and rights, even in a domestic household. Rape had been a capital felony for centuries, but medieval law had classified it as an act of trespass against a baron, not the victim herself, which would make marital rape culturally and legally illogical. In this contemporary society marital rape has

become a great concern over the last few decades, even with a broader historical transformation in which rape was understood as a breach of the liberty of the woman, hence this study will examine the distinctive reasons for marital rape and the extend of legal protection available for the victims under the Penal Code and the Domestic Violence Act 1994.

This focuses on the marital rape within the legal framework in Malaysia, especially in the context of its definition, Section 375 of the Penal Code only provides for offences of rape against a woman and made no mention of a wife. Such absence may not fully safeguard the interests of wives being raped. Hence, it is time for the government to intervene and address these issues arising from the act of marital rape, to protect the interest and safety of any married woman. The findings would give more clarity to the conceptual framework of marital rape in Malaysia thus showing the commitment of the government towards preventing the rampancy of this issue through legal enforcement. Hence, an amendment to the Penal Code is to be proposed.

Keywords: marital rape, domestic, violence

## 1. Introduction

Marital rape is mostly, but not exclusively, experienced by women. It tends to form a vicious cycle of abusive relationships between the couple, perpetuating chronic violence. This also varies based on sociocultural and political ideologies. For example, in the Western culture, the interpretations of the institution of marriage, traditional ways of viewing male and female sexuality, and cultural expectations of relationship dynamics among the husband-wife dyad have led to concerning reluctance of classifying nonconsensual marital sex as a punishable crime. These doctrines started getting challenged in the West between 1960s and 1970s during the “second wave feminism” that focused on gender respect, autonomy, and right to self-determination (concerning all matters of a women’s own physical self and identity). However, marital rape has been overlooked in literature and policies throughout centuries and “marriage” being used as a common exemption/defense in sexual assault cases. This has also led to invalidation of the experiences of marital rape survivors, reduced help-seeking, and persistent trauma.

The concept of ‘equality of men and women in marriage’ has been enshrined in international treaties. Article 12 of the UDHR affirms that “no one shall be subjected to arbitrary interference with his privacy, nor to attacks upon his honor and reputation.” Article 16 (1) of the UDHR declares that “men and women are entitled to equal rights as to marriage and during the marriage.” This recognition has been reaffirmed by Article 23 (4) of the ICCPR. Further, Article 16 (1) (C) of the CEDAW declares that “States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses during the marriage.” In that sense, marital rape is a grave violation of all human rights and fundamental freedoms of the victim. If the law does not provide an adequate legal protection against sex crimes within the marriage, married women are at high risk of re-victimization behind the closed doors of their matrimonial home. Therefore, it provides a solid understanding that both spouses should have equal rights to make decisions about their sexual and reproductive lives without violating human rights and sexual autonomy of each other (Shalev.C, C.1998).

Article 27, Fourth Geneva Convention states, “Women shall be especially protected against any attack on their honor; in particular against rape, enforced prostitution, or any form of indecent assault.” The changeover of narrative of rape from “family or husband’s right” to “a woman’s dignity” only begun in the last half century. The issue of consent has long been neglected in marriages. In some cultures, consent is not even something that an individual can give. The families that arranged the marriage guarantee her permanent consent.” (Yllo KE Torres, 2016) While this has been challenged in various ways, it is still supported by popular media stereotypes and rape myths. One such unsafe proposition is regarding a women’s virginity as a commodity” which is gained or surrendered during marriage. Hence, the husband is deemed to “owning” his wife’s sexuality and therefore cannot be charged as having a nonconsensual sexual encounter or intimacy. Another such cultural stereotype is believing the sole purpose of marriage as procreation which makes sexual intercourse in any form expected (Yllo KE Torres, 2016).

In recent times, the prevalence of gendered violence in general, and marital rape in particular, has led to attempts to document the countries around the world are doing to address and remedy the current problem. It is noteworthy that many nations have criminalized marital rape through diverse ways: judicial decisions, removal of “statutory exemptions,” explicit legislative mention, or creation of a specific offense of marital rape (Hasday JE, 2000). Several legislatures and judiciaries across the globe namely the United Kingdom, Canada, Australia, and other countries proclaimed marital rape exemption as an anomaly. At the end of the 1980s, the Australian jurisdictions had reformed their laws to remove the marital rape exception (Australian

Law Commission 2010). In 1985, New Zealand (New Zealand Rape Reform Act, 1985) unequivocally ended spousal immunity following Canada in 1983 (Criminal Code, 1985). As for the US, treatment of marital rape as an offence differs from state to state (Vasanthi Venkatesh & Melanic Randll, 2017) but New York was the first one to proclaim it unconstitutional (People v Liberta (1984)). Even, the English judiciary with R v. R [1991] 4 A E.R. 481), R v. C [1991] 1 All. E.R. 755) and R v. J [1991] 1 All. E.R. 759), its three crucial cases in 1991, ended the usage of Hale's doctrine. The House of Lords upheld that there was no justification for the exemption to marital rape and pushed Hale's doctrine to ring of antiquity considering it as anachronous.

The concept of equality is salient to all; however, it is seen that domestic violence remains widespread and affects women of all social strata. Harmful and degrading practices, such as dowry-related violence or so-called honor crimes, also continue, without systematic monitoring, punishment, or redress, despite advances in legislation prohibiting them. Other examples of violence in the family are domestic assault (physical, psychological, emotional, financial, or sexual violence), marital rape, femicide or gender-motivated killings (domestic murder, ritual killings or killings of women accused of witchcraft, lynching, as well as gender identity- and sexual orientation related or ethnic or indigenous identity-related killings), child marriage, female genital mutilation, and sex-selective abortion. Other forms of violence against women occur in the community. Examples of such violence can be rape/sexual assault, sexual harassment, violence within institutions, violence against women migrant workers, witchcraft- or sorcery-related violence, or killings. (United Nations, 2014) It is worth noting that marital rape is only one of the many inequalities that women suffer from, and that there is wider spectrum of unjustness towards women globally. However, this paper will focus on the elements of marital rape.

In the landmark English case of R v R, the House of Lords made it clear that the husband can be liable for marital rape. The House of Lords asserted that the position of women has changed over the years, and the principle that revokes the wife consent upon marriage is no longer relevant in the modern world. This precedent is vital as it broke a long-standing law for over 260 years by Sir Matthew Hale, Chief Justice in the 17th century England as he had made a landmark stand for almost 260 years in England on the matter of a husband ability to commit rape towards his wife. He wrote that:

“The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife has given herself unto the husband which she cannot retract.” (RVR 1991 UKHL)

On the strength of Lord Hale’s statement alone, the husband’s immunity was judicially recognized in England and many other countries who based their legal system on English Law. While this is a UK case, it is highly persuasive with Malaysia being a commonwealth jurisdiction. The entrenched principles in the above cases can be used as reasoning/ratio in the Malaysian context.

Historically, English common law did not recognize rape in marriage, relying on a 1736 text: History of the Pleas of the Crown. Malaysia adopted laws from the British, including the exemption to Penal Code Section 375. In 1991, the exemption allowing marital rape was abolished in English law. The House of Lords ruled: “the fiction of implied consent has no useful purpose to serve today in the law of rape” and that the marital rights exemption was a “common law fiction” which had never been a true rule of English law.

In R v R 1991 UKHL the defendant had married his wife in August 1984, the marriage unfortunately did not work, and this had led to the complainant (wife) moving out in October 1989. She had taken their son to live with her parents. In November 1989 (at this point the couple had separated and was not divorced), the defendant (the husband) had broken into her parents’ home and attempted to have sexual intercourse with the complainant who did not consent. The defendant was charged with attempted rape under s1(1) of the Sexual Offences (Amendment) Act 1976 and with assault occasioning actual bodily harm under s 47 Offences Against the Person Act 1861. The defendant appealed on grounds of marital rape exception. Under Common Law, a husband cannot rape his wife as the contract of marriage gave irrevocable consent.

Reference is made to Sir Mathew Hale’s Law that stated,

*“But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.”<sup>1</sup> It further stated that “in marriage [the wife] hath given up her body to her husband,” that he founded the proposition that a husband could not be guilty of rape upon his lawful wife on the grounds that on marriage a wife “gave” up her body to her husband. and (b) that in marriage she gave her irrevocable consent to sexual intercourse. (Sir Mathew Hale, 1736)*

This theory that the wife gave her body to her husband was accepted in matrimonial cases in Ecclesiastical Courts. In *Popkin v. Popkin* Lord Stowell, in a suit by a wife for divorce stated, “The husband has a right to the person of his wife,” though he added the important qualification, “but not if her health is endangered.” (*Popkin v Popkin 1794*) It appears that religious laws of that time had great influence on the decisions of the common law courts, the law that clearly provided that the husband had a right to have intercourse with the wife, unless the wife is not able, i.e., sick. It must be worth noting that this law was passed at a time when the position of women is substantially different compared to the present. The decision that was made by the House of Lords, had upheld the conviction of attempted rape. There was no marital rape exception under English law, and this was a ‘common law fiction’ that existed. The concept of irrevocable consent of a wife to her husband was classed as an unacceptable concept in modern times; each is seen as equal partners in a marriage. The relationship between the parties to rape does not matter; rape is rape. The word ‘unlawful’ that is included in the definition of rape under the Sexual Offences (Amendment) Act 1976 was said to include marital rape. (*R v R 1991 UKHL*).

This issue is initially brought up by liberal feminists who cannot accept that women should always be ‘ready’ for their husbands. Hence the effect of marital rape as proposed by many is more of a private injury rather than a strict liability offence where a man forces himself against his wife’s will during sexual intercourse. The wife will then either suffer both mental or physical hurt as she does not consent or prepare for the sort of intimacy (*Gangoli G, 2011*). Now bear in mind that consent should not be an issue here. The original purpose and beauty of marriage itself is for both men and women to submit into all forms of love and affection including intimate relationship by legal means. The issue of consent among spouses is very subjective and private.

The objective of this paper is to identify the lacuna in the current laws governing marital rape and to establish a mechanism with a workable and feasible intervention in curbing marital rape. Section 375 of the Penal Code defines rape as “a man is said to commit ‘rape’ who, has sexual intercourse with a woman against her will, without her consent, with her consent by putting her in fear of death or hurt, with her consent by way of deception, with her consent that she is unable to understand the nature and consequences of her consent and with or without her consent when she is under 16 years of age.” (S 375 Malaysian Penal Code)

The new section 375A of the Malaysian Penal Code claims that any man in a marriage who causes hurt or fear of death or hurt his wife shall be punished with imprisonment for a term which may extend to 5 years. It is still not regarded as rape.

This means that under the Malaysian Penal Code, that even if a wife rejects sexual demands of her husband, and the sexual act has caused her hurt, pain, distress, and psychological trauma, it is still not considered marital rape. And even with the current amended section, a husband can commit the act of rape on his wife. This study also intends to propose an amendment which should have a holistic approach encompassing the definition of the offence, the rights of the victims and complaint mechanisms. The Act will also encompass rehabilitation of offenders, the role and responsibilities of social media and internet service providers, and alternative punishments to penal sanctions such as binding over, community service and counselling.

By virtue of this country’s legislation for sexual offences, the reality of criminal practice, as well as norms and culture of the Malaysian, marital rape is not recognized here. There is no such thing as rape after marriage in the context of legally married couples in Malaysia. Malaysia does not recognize marital rape because we do not use the term suggested by demanding liberals and international legal instruments.

S.375A of the Penal Code only states that the husband perpetrator shall be punished with imprisonment for a term which may extend to five years. The provision does not provide a minimum level of punishment, which is baffling as the convicted perpetrators may get away with light punishment.

Of course, it is still up for the Malaysian courts to decide by looking at the circumstances and facts of each case involving marital rape. However, the fact still stands that the maximum punishment is only five years in prison.

This provision may be compared to S.375B of the Penal Code which sets out the punishment for committing gang rape. It states that “whoever commits gang rape shall be punished with imprisonment for a term of not less than ten years and not more than thirty years.” It is clearly laid out that the minimum punishment is ten years of imprisonment, and the maximum punishment is thirty years of imprisonment, which will deter future offenders and ensure that justice is served. This proves the point that marital rape is deemed to be a relatively lighter crime as compared to other form of rape such as gang rape, and further begs the question on whether the threat of five-year imprisonment would act as an effective deterrence. In short, since the element of consent is deemed as unimportant in S.375A, Malaysian women do not have any legislation to protect them from unconsented solicitations of sex from their husbands. Therefore, it cannot be said that S.375A provides reasonable protection for married women.

Rape victims experience both short-term and long-term psychological effects. Common emotional and psychological effects of rape include post-traumatic stress disorder (PTSD), depression, sleep disorders, eating disorders, and dissociative identity disorder (DID).

However, marital rape has a longer-lasting and further-reaching impact on women compared to non-marital rape. They will feel that the husbands have betrayed their trust. They will be constantly terrified by the prospect of a repeated attack and feel that their homes are no longer their safe havens. As a result, women will lose faith in their marriages. If there are children involved, the children will be affected by the rocky relationship between their parents in the process of growing up.

Further, the impact of marital rape may be rather exponential since the victims have to face the perpetrators daily. They are also placed in a position where they have to forgo help in order to prevent the marriage from collapsing and thereby inviting stigma from society. Hence, most victims are silenced by the dilemma, and their chances to recover will be crushed before they could even begin.

In Malaysia, there are no specific legislations governing marital rape. However, there has been an amendment to the Penal Code to include S.375A. Thus, a wife who is in the process of a divorce may seek protection under the Penal Code. She can also apply to the Malaysian courts for an injunction to stop her husband from making unwanted sexual advances towards her.

Despite the dim light shed upon the issue by the Malaysian government, the efforts are insufficient. The criminalization of marital rape needs to be implemented and effected immediately.

As marriage is the cornerstone of the society in which we live, marital rape should be a worrying issue as it will contribute to the breakdown of marriage and family relationships which will lead to a barrage of societal issues in Malaysia.

## 2. Problem Statement

In Malaysia, there are no specific legislations governing marital rape. However, there has been an amendment to the Penal Code to include S.375 A. that states “*any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years (UMLR, 2018).*” This provision is criticized as it neither explicitly makes consent a prerequisite to conjugal acts nor does it punish the perpetrator who forces intercourse when consent is not given.(WAO, 2018) There have also been recommendations to remove husbands’ immunity to rape wives or to delete the Exception in Penal Code Section 375 as, S 375 A PC may not be a strong factor as it does not recognize rape. But rather, a husband causing “hurt or fear of hurt or death”. But rape can happen without hurt or fear of hurt – for example through intoxication or other forms of coercion. It is asserted that in Malaysia there is lack of cases reported on marital rape. (Norazlina Bt Abdul Aziz, 2018)

This paper will deal with the above issues, being the laws on marital rape in the UK, its developments, and its application in Malaysia. The authors will explore the principle that is laid down in S 375 of the PC, with reference to relevant cases and authorities.

### Research Questions

1. What are the current legal provisions governing marital rape in Malaysia?
2. How effective are these provisions as compared to other jurisdictions, namely the UK?
3. Should Malaysia criminalize marital rape?

### Research Objectives

1. To analyze the effectiveness of the current legal provisions governing marital rape in Malaysia.
2. To compare of the current provisions with te UK laws to determine the best practices to be adopted as part of the Malaysian legal framework.
3. To evaluate the possibilities of criminalizing marital rape and to propose an amendment to the Penal Code.

### 3. Literature Review

#### 3.1 Legal Provisions Governing Marital Rape in Malaysia.

##### Objective of Section 375A of the Penal Code

The Penal Code defines rape in Section 375, but explicitly exempts husbands (who rape their wives) from the offence. Section 375A of the Penal Code offers some protection, but is inadequate because: A. The punishment in Section 375A (up to 5 years imprisonment) is more lenient compared to rape (up to 20 years). Section 375A does not recognize rape, but rather, a husband causing “hurt or fear of hurt or death”. But rape can happen without hurt or fear of hurt for example through intoxication or other forms of coercion. The exception to Section 375 sends the wrong message that sexual assault within marriage is not serious.

##### Criticisms of Section 375A of the Penal Code

Exception under Section 375 (Rape) A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions: (a) Against her will; (b) Without her consent; ... “Exception – sexual intercourse by a man with his own wife by a marriage which is valid under written law for the time being in force or is recognized in the Federation as valid, is not rape.

This means that under the Malaysian Penal Code, that even if a wife rejects sexual demands of her husband, and the sexual act has caused her hurt, pain, distress, and psychological trauma, it is still not considered marital rape. And even with the current amended section, a husband can commit the act of rape on his wife. (Kasthuri Patto, 2020)

Similarly, the position in India bears some resemblance in terms of partial protection, as Section 375, Exception 2, Indian Penal Code (IPC) is the only law in India which provides some sort of protection to the victims of marital rape. It states that where the husband commits sexual intercourse with his wife who is below the age of 15 years, he can be punished for rape. (Dr. Raj Kumar & Manish Dalal, 2021) But this age of 15 years has been replaced with 18 years by Supreme Court of India through its decision in case of Independent Thought v. Union of India (Independent Thought v Union of India, (2017), 10 SCC 800.) Therefore, at present the law in India is that if a husband commits sexual intercourse with his minor wife, he can be punished for rape, but a major wife has no such remedy (Patel, Krina 2019). So, Indian laws only provide partial protection to the victims of marital rape. There is no blanket protection in India against the evil of marital rape (Loganathan, Sangamithra 2019) this is somewhat reflective of the Malaysian position which only grants a partial remedy.

#### 3.2 Analyzing the Effectiveness of the Current Legal Provisions Governing Marital Rape in Malaysia

For the act of marital rape to be prosecuted, the prosecution must prove that:

- Penetration of the anus, mouth or vagina occurred.
- The act of penetration was intentional.
- The complainant did not consent to the act of penetration.
- The defendant did not believe – within reason – that the complainant had consented to the act.

Despite having a judicial stand recognizing husband’s rape against wife, there still need to be protection outside the court. The wife may need an order restraining her husband from the matrimonial home. Therefore, to tackle such situations several provisions were devised in England in form of the Domestic Violence and Matrimonial Proceedings Act, 1976, the Domestic Proceedings and Magistrate’s Courts Act 1976, the Matrimonial Homes Act, and the Supreme Court Act, 1981 to enable a spouse to apply for injunctive relief from violence. In addition to the injunctive relief, the last thing a battered woman can do is to start the complication of a divorce, under the Matrimonial Causes Act, 1973 by proving that marriage has irretrievably broken down.

Next an injunction restraining the husband from having sexual intercourse with his wife. According to Sec 103 Act 164, the court shall have power during the pendency of any matrimonial proceedings or after the grant of a decree of divorce, judicial

separation, or amendment, to order any person to refrain from forcing his society on his spouse or former spouse and from other acts of molestation.

Marital rape is considered a form of domestic violence and has been illegal since 1992. A woman cannot be charged with marital rape as it requires non-consensual penile penetration, and the offence can be committed outside of marriage by cohabiting partners. Sentences generally range from four to fourteen years' imprisonment, but life sentences can also be given where aggravating factors such as premeditation, weapons or the use of alcohol or drugs to facilitate rape. Marital rape, also known as spousal rape, is a sexual assault under UK law (as outlined in the Sexual Offences Act 2003). The offence occurs when a person commits a sexual act without the consent of their spouse (or ex-spouse) or does so against their will.

The common law has evolved in recognizing marital rape as an offence and any men who breach such an order, can be found guilty under the law which provides for it, but not under section 375 of the Malaysian Penal Code (Shamsuddin Suhor, 1994). As such this research is crucial to highlight the urgency for new laws to tackle this issue which is currently under reported.

### 3.3 Limitations of the Domestic Violence Act 1994

This notion of rape in general was criminalized, as rape laws were originally designed to protect male property interests in women and to protect the 'honor' of the family or social group from defilement by other men. In this way, women were constructed as the private property of their husbands and fathers. In Europe, for example, the father's interest in ensuring a virginal daughter for marriage, as opposed to justice for women victims, was the motivation for laws penalizing rape. (MD Schwartz, 1981) After marriage, the woman became the property of the husband in accordance with common law doctrines such as coverture and the idea that women were chattels. This socially construed legal framework made prosecuting a man for marital rape impossible as he had full legal rights over his own property, which included the body of his wife. (F. Banda, 2016). This notion, however, is an ancient principle that is long considered archaic. In the modern context men and women are considered to be equals, and laws on empowering the status of women have been implemented throughout the previous century. It must also be noted that various treaties and laws have been created to ensure somewhat a par position between the two genders. (ILO,2009)

It is known that In Malaysia, there are no specific legislations governing marital rape. However, there has been an amendment to the Penal Code to include S.375A. S 375 A provides "any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years." This provision is criticized as it neither explicitly makes consent a prerequisite to conjugal acts nor does it punish the perpetrator who forces intercourse when consent is not given (University Malaya Law Review, 2018). There have also been recommendations to remove husbands' immunity to rape wives or to delete the Exception in Penal Code Section 375 as, S 375 A PC may not be a strong factor as it does not recognize rape. But rather, a husband causing "hurt or fear of hurt or death". But rape can happen without hurt or fear of hurt for example through intoxication or other forms of coercion (Women's Aid Organization, 2018). It is asserted that in Malaysia there is lack of cases reported on marital rape. (Norazlina Bt Abdul Aziz, 2015).

There are various sources that provide the need to abolish the exception to S 375 of the Penal Code.

The said exception states:

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

The author explains that the current exception to S 375 under the Malaysian Penal Code is an inherited provision from an era where the UDHR and the recognition of women as human beings to be accorded rights had yet to penetrate the fabric and structure of a male dominated legal world shaped by male dominated bias. From the number of different journals, the element of marital rape is no longer socially acceptable in the modern world. (Usharani Balasingam & Johan Shamsuddin Hj Sabaruddin, 2015)

It is said that there is much injustice to the exception of S 375 of the Penal Code as while there is S 375 A to mitigate, it is seen as a lesser solution as the penalty under S 375 A is much less stringent of a 5-year imprisonment compared to a 20-year imprisonment for rape. It is highlighted that Marital rape is a crime in more than 50 countries, including the United States,

Australia, Nepal, South Africa, and Singapore. In Singapore those found guilty of marital rape are liable to a 20-year sentence and will also be liable to whipping or a fine (The Sun, 2022).

### 3.4 A Comparison with International/ UK Laws on Marital Rape and Its Possible Application in Malaysia Through Best Practices.

Malaysia acceded to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995. Marital rape is recognised in the CEDAW Committee's General Recommendation, states that "[w]ithin family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, [and] other forms of sexual assault." In accordance with the Recommendation, the United Nations CEDAW Committee called for Putrajaya to criminalise marital rape from the year 2006 onwards. However, the Malaysian government has been reluctant and slow in recognising as well as codifying marital rape as a criminal offence (UM Law Review, 2018).

#### Common Law Position on Marital Rape

Malaysia was once the colony of Great Britain and by virtue of section 3 Civil Law Act 1956, the law as applicable in England and Wales on the date specified in the act (7 April 1956), on any instances where there exists a lacuna (uncertainty in our law on a particular issue) can be applied under the domestic laws. The position of marital rape under the common law can be traced as early as the 16<sup>th</sup> century (Norazlina Bt Abdul Aziz. 2018)

The common law theory behind a spousal exemption for rape is most frequently attributed to Sir Matthew Hale who was the Chief Justice of the Court of King's Bench between 1671 and 1676 who asserted in the History of the Pleas of the Crown, (Sir Mathew Hale, 1736)

*"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."* (Sir Mathew Hale, 1736)

The above passage is known in English common law as the husband's 'immunity' from prosecution of rape committed against his wife. The husband's immunity from prosecution of marital rape was widely believed to be a valid legal principle and unchallenged for over 200 years. The principle focused on the contractual terms of the marriage agreement, advocating that the marriage contract presumed irrevocable consent to sexual relations.'

There has been no substantive challenge of Hale's work until *R v Clarke (1949) 2 All ER 448* The issue that was raised in this case was the extent of the exception rule whereby the wife's consent to sexual intercourse could be revoked in certain circumstances. In this case, the wife had already obtained a separation order which stated that she was no longer bound to cohabit with her husband. Hence, she was living separately from the husband after the issuance of the order.

The counsel for the defendant submitted that rape occurring within a subsisting marriage is not an offence at law. It was held that although there was a general proposition of law that a husband cannot be guilty of raping his wife, the separation order issued by the court implied the withdrawal of the wife's consent to marital intercourse. Hence, the husband was found guilty of marital rape.

The reasoning behind this decision was that a husband obtains rights over his wife's body through a lawful marriage, but the consent of the wife to marital intercourse can be revoked via another process of law, such as a court order. An exception to the general principle by Hale CJ was created.

A problem arose in a later case of *R v Miller (1954) 2 QBD 282*. The wife had petitioned for a divorce, but the petition was not yet heard when her husband forced himself upon her. Sadly, as the petition had not been heard and granted by the court, it did not amount to a revocation of the consent to marital intercourse impliedly given by her at the time of the marriage. Therefore, the husband could not be guilty of marital rape.

Another exception to Hale CJ's principle was formed 20 years later in *R v O'Brien (1979) 3 All ER 663* The court held that a decree nisi, which is a provisional decree of divorce that will be made absolute on motion unless cause is shown against it, amounted to the revocation of the wife's consent to marital intercourse. The husband was charged with marital rape.

In *R v C (1991) 1 All ER 755* which was decided in the Sheffield Crown Courts, Justice Simon Brown took the bold approach of adopting the position of the law in Scotland and dismissed the long history of the marital exemption to rape.



In Scotland, the law regarding the issue of marital rape has developed through the landmark decision in *HM Advocate v Duffy* (1983) SLT 7. The current standing is that a husband can be convicted of raping his wife even though there is no legally enforceable agreement or court order relieving them of the obligation to cohabit.

Lord Robertson in *Duffy* said:

“...I can see no logic in justifying such a law by making a differentiation between a man and woman who happen to have gone through a ceremony of marriage and ones who have not; and I do not understand why the mere fact that the marriage bond has never been formally broken should make a difference... To some extent, it might be a question of degree, but I do not think that it can be affirmed as a matter of principle that the law of Scotland today is that a husband in no circumstances can be guilty of the crime of rape upon his wife.”

In essence, the current standing of the common law on marital rape has evolved to dismiss the marital exemption to rape entirely.

After the long period of denial of the rights of wife to frame a charge of rape towards her husband, there is a turning point and a light of hope for women on this matter.

In *R v R*, Britain’s high court ruled that husband might be convicted of raping wife. It therefore overturned the almost 260 years “woman sexual slavery.”

The fact is that the husband and wife parted, the wife complained that the husband was forcing her to have sexual intercourse and left him and stayed with her parents. She told her husband her intention of filing for divorce. There were no legal proceedings taking place; after 22 days of failing the husband broke into her parents’ house and attempted to have sexual intercourse with the wife against her will.

Owen J said:

“Though generally speaking a husband could not in law rape his wife, there is exception where the wife had withdrawn her consent to intercourse, could be made informally and can be implied from her conduct.”

The husband was later convicted on the charged of rape and sentenced 3 years imprisonment on the former and 18 months imprisonment on the latter.

The case of *R vs. R* which was heard in the House of Lords in 1991 changed the law to the extent that it determined that under UK law it was possible for a man to rape his wife. The courts ruled that, even within a marriage, any nonconsensual sexual activity is rape.

### **3.5 Proposal to Reform the Laws on Marital Rape in Malaysia by Criminalizing Marital Rape.**

It is also noted that the exception to S 375 of the Penal Code denies women their autonomy and right to refuse consent, it empowers abusive husbands, and is out of step with global norms. While S 375 offers some protection, it is inadequate. It is also added that the CEDAW committee (Convention on the Elimination of All Forms of Discrimination Against Women) had reviewed Malaysia in 2006 and 2018 and recommended that Malaysia criminalizes marital rape. (Marriage is not a license to rape in Malaysia, (2018)). The (WAO) Women’s Aid Organization have called upon the government to outlaw marital rape and revamp outdated laws. It was further stated that the exception to S 375 PC is outdated and while there is S 375 A PC, it does not carry the same weight, or takes on marital rape to a lesser degree (Hakimie Amerie Hishamuddin FMT, 2020) It is noted that this is an issue throughout many Asian regions, and while many Asia-Pacific countries have introduced domestic violence and harassment laws over the last decade, only 15 out of 39 states in the region have criminalized marital rape (Micheal Taylor Reuters, 2019). It is highlighted that the exception provided for in section 375 is rooted from the patriarchal doctrine that can be traced back to the English Common Law as explained by Chief Justice Matthew Hale in 1736, “a husband cannot be guilty of rape committed by himself against his lawful wife because there their marriage consent and binding the wife to surrender to her husband which cannot be revoked”. In this era of progress, this exception clearly discriminates a married woman and is patriarchal in nature. To further add, while there is S 375 A PC this section is insufficient as the punishment is less severe than rape, which can result in a 20-year prison sentence. (The Malaysian Insight, 2021)

While many of the above sources have advocated for a harsher penalty for this offence, there has also been developments to the negative in which the government was reluctant to make marital rape a crime, due to the fact that it will be difficult to establish this in the courts of law. This thought process seems to make it such that the government tends to view this matter lightly. It is further established that while this matter is underreported, it does not have the effect of being viewed as a minor issue. Marital rape is certainly a serious issue in Malaysia. Statistics by University Sains Malaysia in 2014 estimated that nine of ever-partnered women in Peninsular Malaysia have experienced domestic violence in their lifetime and of this number, 11 percent have also reported “forced sex” as a form of abuse. (Maria Chin Abdullah, Malaysia Kini, 2018)

It is clear from the above sources that there has been much academic thought on making marital rape illegal in Malaysia, many NGO’s have also rallied upon this for years. By such we may establish that there must be some minimal effort on the current administration to make a change.

### 3.6 Relevance to Government Policy

Malaysia acceded to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995. As a signatory to the convention, Malaysia is duty-bound to be much more cognizant of its obligation as a State Party to CEDAW. Hence, any form of discrimination and/or violence against women should not be condoned. The current research addresses the issue of marital rape which is not a crime in Malaysia. Pursuant to section 375A of the Penal Code, it states that any man in a marriage who causes hurt or fear of death or hurt his wife shall be punished with imprisonment for a term which may extend to 5 years. This provision does not address the issue of marital rape. In a parliamentary debate in August 2013, the Prime Minister’s Department stated that the decision not to acknowledge marital rape was because it is against syariah laws and other religious beliefs. However, in the Al-Quran Surah Al Ruum, verse 21 which reads: “As a religion that truly respects women, the husband-and-wife relationship in Islam is built upon the foundations of love and mutual respect,” and “And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought.” Therefore, it is grossly misleading to say that Section 375 is here to stay because of syariah laws and other religious laws (Kasturi, 2020). When marital rape is criminalized, it sends a strong signal that any rape – whether it is within a marriage or not – is fundamentally wrong and unacceptable in any society.

Many social democratic countries have outlawed marital rape. It is remarkable that countries that have seen the perils of war have criminalized marital rape. Countries such as Zimbabwe, Turkey, Cambodia, Nepal, Mauritius, Ghana, Thailand, Rwanda, Sierra Leone, Bosnia and Herzegovina, South Korea, and others have taken a step forward to criminalize marital rape (Kasturi, 2020). Unfortunately, Malaysia does not view marital rape as something critical to be outlawed.

Hence, this research calls for a continued action and reform to the current legal provisions namely the Penal Code and the Domestic Violence Act 1994 to criminalize marital rape. It represents a shared commitment across all levels of government to issues such as prevention, early intervention, responses to victim-survivors and perpetrators, as well as recovery and healing.

## 4. Methodology

The Methodology of this research will be doctrinal. Doctrinal research method has been defined as research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments. Doctrinal research asks what the law is on a particular issue, and it is concerned with analysis of the legal doctrine and how it has been developed and applied. By adopting this method, the researcher would have to closely examine and analyze the legal doctrine, legal framework, and case laws in a logical, systematic, and scientific way. This doctrinal research methodology will be executed by mining information from textbooks, articles or scholarly journals, statues, internet, and case laws (John W Creswell, 2014). The authors shall refer to scholarly journals that provide an insight into the laws, background, and development of the law on marital rape in Malaysia and other Common Law nations. This will allow the authors to explore the ambits of the law on this area and provide a detailed analysis on the subject matter. This doctrinal research can also be construed as socio -legal research. Socio-legal research seeks to facilitate law reforms in the areas of social welfare. (Pradeep M.D, 2019, Vijay M Gawas, 2017) No discipline remains ideal with the growing complexity of modern society. Discipline of law is also not an exception in this regard. Each legal rule is concerned with its application to a factual situation of life, hence gives a way for all the intellectual disciplines to connect with law. This distinct relationship of law with other disciplines compels the researchers to expand their investigation and enquiry beyond law onto the roots of other disciplines also. The impact of any socio-legal research highly depends on the depth of

knowledge possessed by the researchers both in law and allied fields. (Pradeep M.D, 2019) In this regard, it is seen that the element of marital rape is not only limited to the ambits of the law, but social, cultural, and religious perspective will also play a vital role.

## 5. Discussion

It is undeniable that the status of women has greatly improved since the 17th century owing to the efforts of social activists, States, as well as the international community. However, there still exists lacunas in the legal systems leading to increased violence against women. Despite decades of advocacy, international instruments and law reforms, violence against women remains a major social problem. The UN and its agencies have addressed the concerns of women and regarded their protection and prevention of crimes against them as the obligation of the States. Despite various initiative undertaken, marital rape has failed to find a place in the penal codes, as is the current position in Malaysia. One justification is because sexual assaults perpetrated by male inmates including marital rape are regarded as too private in nature and it remained beyond the hold of law.

Apart from criminalizing marital rape, various initiative towards shifting public attitude, public awareness programs and education at grassroot level needs to be undertaken to abolish traces of spousal immunity. Moreover, any type of legal and social support for gender inequality must be abolished through an organized approach towards the issue to combat damaging stereotypes for an equal society. Therefore, adhering to the obligation under international law and guaranteed rights under the constitution, Malaysia must take proactive initiatives to criminalize marital rape overtly and ensure its appropriate implementation.

NGO's such as WAO, Tenaganita and various others are involved in the protection of women and ensures gender equality in Malaysia. These NGO's have spurred on significant change over the years, may it be in the forms of awareness towards sexual rights, employment rights for women and many more. The Malaysian Federal Constitution under Article 8 (1) ensures equality before the law, Article 8(2) provides that there shall be no discrimination against citizens on grounds of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority and others. This provision goes on to show that there are to be no laws that are of double standards in terms of the treatment of men and women. In this case, the act of not criminalizing marital rape is a direct breach of this given provision.

Whilst there are laws protecting women from rape, from other than their husbands are a fundamental right, it is rather unfortunate that similar laws are not available within a marriage. While criminalizing marital rape may/ may not guarantee lower rates of violence against women. But that in no way is an excuse for the State to not carry out its duty of ensuring that women are protected legally from this travesty. The explicit criminalization of marital rape is a critical and major step towards promoting women's rights and safety within marital relationships. The allowing of marital rape seems to affirm the age-old provision that women are subordinate to men and gives men somewhat a leash over their spouses. In conclusion this research paper strives to highlight again and again that the failure to criminalize marital rape is just a way of encouraging violence towards women that is not only legally but socially acceptable (Rithika Panicker & Parav Patel, 2019)

A 2014 University Sains Malaysia study estimated that nine per cent of ever-partnered women in Peninsular Malaysia have experienced domestic violence in their lifetime, while 11 percent, or around 100,000 of these women, have been raped by their intimate partner during their lifetime (USM, 2014). In India, according to the latest National Family Health Survey nearly 1 in 3 Indian women aged 18-49 have suffered some form of spousal abuse, and around 6% have suffered sexual violence (The Times of India 2022). The above statistics are clear evidence that this area is in dire need of reform. One may state that the Malaysian position of marital rape either gives a victim a partial remedy, or no remedy at all. With reference to the above it can be seen that there are changes in this area, albeit slowly but surely. It is vital that there is to be more academic awareness in this area to hopefully spur on further change. The government and NGOs are to play a vital role in fostering a change in this area.

## List of References

### Cases

HM Advocate v Duffy (1983) SLT 7

Popkin v Popkin 1794

R v C (1991) 1 All ER 755

R v Clarke (1949) 2 All ER 448

R v Miller (1954) 2 QBD 282

R v O'Brien (1979) 3 All ER 663

R v R 1991 UKHL

### Books

John W Creswell, Educational Research Planning, Conducting and Evaluating Quantitative and Qualitative Research, Pearson, 2014

### Journals

F Banda, "If You Buy a Cup, Why Would You Not Use It?" Marital Rape: The Acceptable Face of Gender Based Violence: Comment on "Criminalizing Sexual Violence against Women in Intimate Relationships" (2016) 109 AJIL Unbound 321.

Gangoli G. (2011). Controlling women's sexuality: Rape law in India. In Gangoli G., & Westmorland N. (Eds.), *International approaches to rape* (pp. 101–120). Bristol University Press.

M.D Schwartz, 'The Spousal Exemption for Criminal Rape Prosecution' (1982) 7 Vermont Law Review 33; MDA Freeman, 'But If You Can't Rape Your Wife, Whom Can You Rape? The Marital Rape.

Norazlina Bt Abdul Aziz, Marital Rape: A View on Malaysia Law and Common Law, Academic Journal of UITM Johor, 2015.

Usharani Balasingam Johan Shamsuddin Hj Sabaruddin, Section 375 Exception, Explanations and Section 375A Malaysian Penal Code –Legitimizing Rape within Marriage: A Call for Reform Journal of Malaysian and Comparative Law (University of Malaya) <https://ejournal.um.edu.my/index.php/JMCL/article/view/14262>

Exemption Reexamined' (1981) 15 Family Law Quarterly 1.

Pradeep M.D Legal Research- Descriptive Analysis on Doctrinal Methodology International Journal of Management, Technology, and Social Sciences (IJMTS), ISSN: 2581-6012, Vol. 4, No. 2, December 2019,

Rithika Panicker & Parav Patel - A Study Of Marital Rape Laws In Different Countries - International Journal For Legal Developments And Allied Issues Volume 1 Issue 3 [Issn – 2454-1273]

United Nations, Women's Rights are Human Rights, 2014, United Nations Publication, ISBN 978-92-1-154206-6.

### Websites

1. ILO, Women Empowerment 90 Years of ILO in Action see [https://www.ilo.org/wcmsp5/groups/public/---dgreports/gender/documents/publication/wcms\\_105088.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/gender/documents/publication/wcms_105088.pdf)

2. University Malaya Law Review, Marital Rape What You Need to Know, 2018 see <https://www.umlawreview.com/lex-omnibus/marital-rape-what-you-need-to-know#:~:text=%E2%80%9Cany%20man%20who%20during%20the,may%20extend%20to%20five%20years.%E2%80%9D>

3. Women's Aid Organization (WAO) "Marriage is not a license to rape" 2018 <https://wao.org.my/wp-content/uploads/2018/11/WAO-Policy-Brief-2018-1-Marital-Rape.pdf>
4. The Sun, 2022, Fresh Calls to make Marital Rape a crime see <https://www.thesundaily.my/local/fresh-calls-to-make-marital-rape-a-crime-DN8924137>
5. Malaysia Kini, 2018, Marriage is not a license to rape in Malaysia Kini see <https://www.malaysiakini.com/letters/449663>
6. Free Malaysia Today (FMT), 2020 "Make marital rape a criminal offence, Putrajaya told" see <https://www.freemalaysiatoday.com/category/nation/2020/09/29/make-marital-rape-a-criminal-offence-putrajaya-told/>
7. Reuters, 2019 "When is it going to stop?', Malaysia's marital rape victims ask." See <https://www.reuters.com/article/us-malaysia-women-rape-feature-idUSKCN1R21D3>
8. Malaysian Insider, (2021) "Criminalizing Marital Rape in Malaysia" <https://www.themalaysianinsight.com/s/353477>
9. Malaysia Kini, (2018) "Hard to prove or not Marital Rape must be criminalized" see <https://m.malaysiakini.com/news/449669>
10. The Times of India (2022) Nearly 1 in 3 women have suffered spousal sexual, physical v ..see [http://timesofindia.indiatimes.com/articleshow/91491367.cms?from=mdr&utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/91491367.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)
11. WAO, Follow Singapore's example and criminalise marital rape (2019) see <https://wao.org.my/follow-singapores-example-and-criminalise-marital-rape/>
12. USM, 9% Of Women Suffer from Domestic Violence (2014) see <https://news.usm.my/index.php/english-news/1954-9-of-women-suffer-from-domestic-violence>