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So? He is your Husband! Analysing the possibility of Reconceptualising Rape (Ightisab) as a way to further regulate Marital Rape in Arabic Muslim States: The case study of Egypt

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It has been long established in states where Islam is constitutionally recognised as the governing legal system, that the husband can coerce his wife into sexual intercourse. It is widely accepted in Islam that a wife who refuses to offer her husband sexual gratification has sinned. However, there are situations where the wife's refusal is followed by violence and compulsion to have sexual intercourse. In Muslim states in general, but in Arab states in particular, reported incidents of forced domestic sexual violence are on the increase, which is occasionally followed by reports of the complainant's deteriorating mental health that has occasionally led to suicide. The husband is likely to receive punishment for his act of violence, but not forced sexual intercourse. This has led to fierce debates questioning the traditional position of Islam on (marital) rape and the consistency of its regulation among Muslim/Arab states. This involves the factors preventing its extension to the marital home. The absence of specific reference to rape in the primary sources of Islam (the Quran and Hadith) led to its conceptual formulation after the passing of Prophet Muhammed PBUH. The author argues that the main issue is the early formulation, where rape was (and still) conceptually viewed as a type of fornication (zina), which is inherently non-consensual. This has led to two arguments: firstly, that marriage is consensual and with such consent comes an automatic right to sexual intercourse; and secondly, the fact that rape falls within the remit of fornication (zina) means that it can only occur extra-maritally. Despite attempts to develop this area in some Muslim/Arab countries, the conclusive view rejects treating rape as distinct from fornication (zina), thus, preventing its extension to the marital home. This article critically examines the traditional position of Islam on (marital) rape

to furnish a critical investigation of the possibility of separating rape from fornication (zina) as a viable solution to further protect Muslim wives in the Muslim marital home. This is based on the inherent Islamic principle of the right to volition (haqq al-iradab), which is an essential foundation of every Islamic marriage. This will involve an examination of the contemporary definition and regulation of rape in Muslim/Arab states, Egypt for the purpose of this article, with some recommendations based on the English definition and regulation of rape.

Keywords: *muslim women protection, marital rape, fornication, islam.*

INTRODUCTION: THE RESEARCH PROBLEM

This article debates that the conceptual and legal frameworks of rape (*ightisab*/forced sexual intercourse) in Islam and Muslim/Arab States need to be constructed as a distinct system from fornication (*zina*) and/or brigandry (*hirabah*/waging war against God). This is needed to establish the possibility of extending rape's application to the Muslim/Arabic marital home. The increase in forced sexual intercourse incidents against women in general,¹ but in the Muslim (mainly Arab) marital home in particular, has led to debates questioning the traditional position of Islam on marital rape and the consistency of its regulation among Muslim/Arab states.² Muslim/Arab states follow the understanding of the early Islamic scholars that rape (*ightisab*) can be viewed as a form of fornication (*zina*) or brigandry (*hirabah*) that is only capable of occurring extra-maritally.³ This is a reflection of the majority view among Muslims that marriage in Islam carries a contractual automatic right to sexual intercourse. Therefore, it would be a sin for a Muslim wife to deny her husband sexual intercourse, unless there is a valid reason, such as illness or menstruation. The author does not

¹ 'Addressing Rape As A Human Rights Violation' (*Equality Now*, 3 June 2020)

<https://www.equalitynow.org/news_and_insights/addressing_rape_human_rights_violation/> accessed 04 February 2021

² Egypt: Gang Rape Witnesses Arrested, Smeared' (*Human Rights Watch*, 11 September 2020)

<<https://www.hrw.org/news/2020/09/11/egypt-gang-rape-witnesses-arrested-smeared>> accessed 04 February 2021; 'Facts and Figures: Ending Violence against Women and Girls' (*UN Women, Arab States*)

<<https://arabstates.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>>

accessed 04 February 2021; 'British woman 'arrested in Dubai after reporting rape' (*BBC News*, 17 November 2016)

<<https://www.bbc.com/news/uk-38013351>> accessed 04 February 2021

³ Ulrike Lemmin-Woolfrey, 'Sexual Assault in the UAE: Safety Tips for Women' (*World Nomads*, 7 April 2022)

<<https://www.worldnomads.com/travel-safety/middle-east/united-arab-emirates/sexual-assault-in-uae>>

accessed 03 May 2022

dispute the traditional position but challenges early and contemporary developments, such as in the Hanafi School, that permit a Muslim man to physically force his wife into sexual intercourse as way of exercising his marital rights.⁴This raises a point of debate on marital rights and duties on this matter and the role that mutual 'right to volition' plays in marriage. Legally, in Muslim/Arab states a Muslim wife who complains to the enforcement authorities about forced vaginal intercourse can lead to investigations regarding any physical injuries, but not the intercourse.⁵ However, if the same is committed outside of marriage, it can lead to fornication if consensual, or rape where a threat of harm and/or use of force was evident. Both crimes carry severe punitive punishment, including the death penalty, subject to the personal status of the parties. This article is briefly concerned with the level of punishment for fornication and rape, but primarily with whether there is a clear definition of fornication and rape in the traditional and early sources of Islam. By critically examining key definition/s, the author will be able to debate issues that are preventing rape's extension to the marital home. After examining the traditional positions of Islam on (marital) rape, some of the relevant written records and reports that were collated during the formative period by the Prophet's companions and jurors will be used to examine subsequent developments. This will subsequently lead to an examination of the Egyptian Penal Code to identify possible inconsistencies and to generate debate regarding the need for a uniform legal approach to (marital) rape. Egypt is a host to the highest Sunni Islamic Authorities in the Middle East, Al-Azhar University and Dar Al-Ifta'a, where judicial rulings (*fatwa*) are frequently sought by Arabs/Muslims worldwide. Additionally, the data regarding the high rate of violence against women and health surveys in Egypt are the most comprehensive and easily available. The recommendations section will be based on a brief critical overview of the English regulation of (marital) rape, a country that experienced similar issues and only recently extended rape to the marital home.⁶

⁴ M. Cherif Bassiouni, 'School of Thoughts in Islam' (*MEI@75*, 24 January 2012)

<<https://www.mei.edu/publications/schools-thought-islam>> accessed 05 March 2021

⁵ Hayley Gleeson & Julia Baird, 'I'm not his property': Abused Muslim women denied right to divorce' (*ABC*, 18 April 2018) <<https://www.abc.net.au/news/2018-04-18/abused-muslim-women-denied-right-to-divorce/9632772?nw=0&r=HtmlFragment>> accessed 31 October 2021

⁶ *R v R* [1991] UKHL 12

LITERATURE REVIEW

Marital rape is academically underexplored primarily due to the reluctance among Muslims (academics and jurists) not to contravene already established Islamic and/or cultural principles and/or due to the common agreement among the majority opinion that rape is only capable of occurring extra-maritally. For example, reflecting the majority view, Muhammed Susila states that it would be difficult to imagine the husband being accused of raping his wife who is religiously obliged/contracted to satisfy his sexual needs, and vice versa.⁷In Susila's views, it is better if the man [willingly] sacrifices his sexual needs by considering the religious principle of 'promoting good and forbidding evil', however, he can still demand sexual gratifications if he wishes.⁸In the opinion of the author, this does not directly address physical violence considering the increasing rate of marital violence, but also directly undermines the importance of morality in Islam which emphasises the importance of compassion and mercy between spouses in the marital relationship:

*"And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between your compassion and mercy."*⁹

Additionally, the majority view regarding the permissibility of coercion seems to ignore the fact that marriage in Islam (*nikah*) is fundamentally based on mutual self-volition (mutual consent) and, thus, contrary to the teachings of the Prophet PBUH. It was reported that the Prophet PBUH invalidated a marriage in which a man forced his daughter into. Additionally, the Prophet stated that:

"A widow may not be married until she has been consulted, and a virgin may not be married until her consent has been sought."

Conversely, Muslim Women rights activists and scholars such as Reda Eldanbouki, Ahmed El-Sabag, and HinaAzam argue that the early developments in this area were not based on any

⁷ Muhammed Susila, 'Islamic Perspective on Marital Rape' (2013) 20 (2) JMH, 329
<<https://journal.umy.ac.id/index.php/jmh/article/view/271>> accessed 05 May 2022

⁸ *Ibid*

⁹ The Qur'an, Chapter 30, Verse 21

clear guidance from the primary sacred sources of Islam, the Qur'an and Hadith, and that marital rape is a sinful act.¹⁰In Azam's views, there is a clear confusion caused by treating rape as a variant of fornication, which is preventing its extension to the marital home. Azam's findings are significant to this article especially when discussing the ambiguities associated with the manner in which Muslim scholars and jurors defined and regulated rape that this article will be utilised to assess the failure of its extension to the marital home. The only two limitations are the complexity of sources used to provide a full chain of transmission that link to the tradition of the Prophet and the limited access to case law that would help provide a more critical analysis of the legal constituent of rape.

AIM, STRUCTURE, AND METHODOLOGY

This article aims to provide a novel contribution by generating a debate that can lead to further research. The first part will critically examine the significance of the 'right to volition' and the position of the traditional sources of Islam (the Qur'an and Hadith) and the key developments that followed from the passing of the Prophet PBUH on the meaning of fornication and rape, and the issues preventing its extension to the marital home. This will help to address the conceptual overlap and the threats associated with treating rape as a category of fornication (including the four witnesses requirements); including the issues associated with treating rape as a type of Brigandry as a way to avoid the four witnesses requirement. This will lead to an examination of the Egyptian Penal code's use of the Islamic early definition of rape and the issues this has generated. Consequently, a brief critical assessment of the definition and regulation of rape under English law, in comparison with the legal framework of (marital) rape in Egypt, will lead to possible recommendations that would hopefully provide a platform for further regional development and research. Pursuant to these aims, this article will be based on the legal and comparative analysis approach of the early sources of Islam and its principles, and their comparison to the regulation of marital rape in Egypt and England. The legal analysis approach will be of particular importance when the author briefly examines the

¹⁰ Hina Azam, 'Rape as a Variant of Fornication (Zina) in Islamic Law: An Examination of the Early Legal Reports' (2012) 28 *Journal of Law and Religion*, <https://www.academia.edu/1626358/Rape_as_a_Variant_of_Fornication_Zin%C4%81_in_Islamic_Law_draft> accessed 03 May 2022

language of the traditional texts of Islam and the subsequent written sources of Islamic scholars. Although the Qur'an does not directly mention rape, it provides a general account of the prohibition and punishment of fornication. The traditions of the Prophet PBUH on the other hand complement the Qur'an by offering some explanations regarding the regulation of fornication in Islam, including forced extramarital fornication. This will lead to a brief critical overview of the regulation of rape in Egypt and England as previously mentioned.

On the other hand, to recommend an acceptable solution to the contemporary Islamic legal framework on the meaning of rape and its extension to the marital home, a comparative analysis approach is essential. This involves a comparative analysis between the early meaning and requirements of rape in Islam, in comparison to its regulation in Egypt and England. This will assist the author to hopefully generate debate and inspire change to marital rape regulation in the Muslim/Arab conjugal home; to hopefully offer women higher marital protection against sexual violence.¹¹ Any recommendations will be based on the view that through *ijtihad* (independent legal reasoning)¹² that early Islamic scholars utilised to offer necessary solutions to emerging concerns that the Qur'an and hadith were silent or unclear about, similar to the issue of marital rape today. Therefore, the exertion of mental energy to propose possible solutions can be justified on these grounds. Although the author is not a qualified Islamic jurist (*mujtahid*),¹³ this novel contribution can at least be used to generate debate and lead to further research, and, hopefully, be considered by a qualified Islamic/Arab jurist to further develop this area. Additionally, *ijtihad* is a primary tool to refute secular presumptions that Islam is an incomparable,¹⁴ immutable, and inflexible theological system.¹⁵

¹¹ Mark Van Hoecke, 'Methodology of Comparative Legal Research' (*Boom Juridisch Tijdschriften*, 12 April 2015) <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>> accessed 09 December 2021

¹² Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 (1) *International Journal of Middle East Studies* <<https://www.jstor.org/stable/162939>> accessed 09 December 2021

¹³ Tariq Ramadan, 'The Conditions (Shurut) of Ijtihad' (*Tariq Ramadan*, 11 February 2016) <<https://tariqramadan.com/english/the-conditions-shurut-of-ijtihad/>> accessed 20 December 2021

¹⁴ Abu Amina Elias, 'Lessons from the journey of Mu'adh ibn Jabal to Yemen' (*Faith in Allah*, 22 January 2014) <<https://abuaminaelias.com/lessons-from-the-journey-of-muadh-ibn-jabal-to-yemen/>> accessed 20 December 2021

¹⁵ Markus Dressler & Arvind Mandair, *Secularism and Religion-Making* (1st edition, Oxford University Press 2011) 5

PART I

THE 'RIGHT TO SELF-EVOLUTION

Generally, the prohibition of coercion in the Qur'an appears to endorse women's right to self-volition. Islam emerged and combated the tradition of sex slaves that were dominant then:

*"Do not force your maids to harlotry if they desire chastity, in order that you may gain in the goods of this life."*¹⁶

The importance of a non-coercive approach to other aspects such as marriage or apostasy further bolsters the importance of the right to self-volition in Islam:

*"O believers, it is not permissible to you to inherit women against their wills."*¹⁷ **And,**

*"Except those who are coerced (to commit apostasy) while their hearts are firm in the faith."*¹⁸

In a matrimonial context, from the moment marriage is proposed, the Islamic underpinning principle of self-volition entitles the female to accept or reject the marriage proposal, which would otherwise render it invalid. The companion of the Prophet Abu Hurairah reported the Prophet (PBUH) stating that:

"A woman who has been previously married should not be married until her express consent is sought nor should a virgin be married without her (express or implied (through silence)) consent."

In addition to the importance of consent, the foundation of marriage in Islam is also fundamentally underpinned by merciful and compassionate treatment:

*"O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through whom you ask one another, and the wombs. Indeed, Allah is ever, over you, an Observer."*¹⁹

¹⁶ The Qur'an, Chapter 24, verse 33

¹⁷ The Qur'an, Chapter 4, verse 19

¹⁸ The Qur'an, Chapter 16, verse 106

¹⁹ The Quran, Chapter 4, Verse 1

The Qur'an further enunciates that the merciful and compassionate treatment extends to the sexual relationship between the man and his wife:

*"Your wives are as a tilth unto you; so approach your tilth when or how ye will, but do some good act for your souls beforehand, and fear Allah."*²⁰

This was further reinforced by the Prophet PBUH when he observed that:

"One of the signs of unkindness is a man who engages in a sexual act with his wife without humour and kisses. No one should directly fall on his wife as one buffalo does to another".²¹

Based on the above evidence, it can be argued that a man who forces his wife into sexual intercourse, with or without excuse, contravenes the founding compassion and mercy principles that Allah and the Prophet approach to women's right to self-volition. Furthermore, considering the physical and mental well-being of the wife who is subjected to such derogatory treatment and violence, has been reported to often lead to destroying the matrimonial home and invariably to the victim's severe mental deterioration, murder, or sometimes suicide.²² The author agrees that there is a religious sin for a wife to refuse sex without a valid excuse, but for one to argue that it is acceptable in Islam for a man to use his sexual gratifications to justify sexual violence against his wife's will while disregarding her mental and physical wellbeing, is immoral, should be criminalised and, based on the above evidence, non-Islamic. All Schools of Jurisprudence are silent about this (except the Hanafi School that explicitly permits forced sexual intercourse) which in the view of Ali, such silence implies that consent is automatic and, therefore, irrelevant to discuss. According to Azam, Classical and formative Islam treated marital rape that causes severe tearing as an injury that entitled the wife to damages.²³ These risks further support the need to criminalise

²⁰ The Qur'an, Chapter 2, Verse 223

²¹ 'Does marital rape exist in Islam?' (*Dar Al-Ifta Al-Missriyyah*) <<https://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=6033>> accessed 04 April 2022

²² Dalia Ghanem, Covid-19 has exacerbated Algeria's femicide problem' (*The Africa Report*, 19 March 2021) <<https://www.theafricareport.com/73396/covid-19-has-exacerbated-algerias-femicide-problem/>> accessed 04 March 2021

²³ Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (Cambridge University Press 2015)

marital rape for being contrary to the merciful, compassionate, and moral principles of Islam that undermine the importance of the matrimonial right to self-volition/consent. However, to debate the possibility of criminalising marital rape by creating an independent rape framework, firstly, critically analysing the general position of rape in Islam is needed. This includes the assessment of rape as a type of fornication and brigandry and the issues that each represents.

RAPE AS A CATEGORY OF FORNICATION (ZINA) OR BRIGANDRY (HIRABAH)

With the absence of a specific definition for fornication in the Qur'an and Hadith, the establishment of *zina* during the classical period of Islam required the confession of the accused or the concurrent eyewitness testimony of four adult males of sound memory and mind that penetration occurred.²⁴ Towards the end of the formative period of Islam, any established definition of fornication (*consensual or otherwise*) was inspired by general sexual intercourse verses in the Qur'an.²⁵ Although there is no explicit mention in the Qur'an of the meaning of fornication, there is an account of what is considered permissible sexual intercourse, accompanied by a general description of sexual activities that fall outside of such permissibility:

*"And those who protect their private parts except their spouses or those whom their right hands possess, such are without blame."*²⁶

And,

*"Nor come nigh to fornication (Zina): For it is a fahishah (a shameful conduct) and an evil road."*²⁷

The reference to spouses infers that any extramarital sexual intercourse is considered fornication and that permissible sexual intercourse is reserved for the parties of the marriage

²⁴ The Qur'an, Chapter 5, verse 15

²⁵ Hina Azam (n 23) 447

²⁶ The Qur'an, Chapter 23, verses 5-7

²⁷ The Qur'an, Chapter 17, verse 32

agreement. Based on these verses, the previously discussed notion of ‘automatic consent’ can be argued to be impliedly found.

Similarly, in the context of rape, neither the Qur’an nor the Hadith specifically provided any definition for rape. However, after the passing of the Prophet PBUH, the Prophet’s Successors (*Caliphs*) dealt with allegations of extramarital forced sexual intercourse in the same manner as fornication, while, in the context of marital forced sexual intercourse, awarding monetary compensation if the forced intercourse resulted in serious sexual injury (perineal tearing).²⁸ However, subsequent Islamic scholars, through the doctrine of ‘independent legal reasoning (*ijtihad*)’, developed a framework that dealt specifically with extramarital rape. Islamic scholars defined rape as:

“A forced penile sexual penetration by a man of a woman’s [vagina] who is not his wife.”

The key elements that can be immediately identified from this definition are that, despite such development, the juristic approach requires a penile penetration of a specific orifice (the vagina of a female) and who is not the perpetrator’s wife. This raises key points of discussion that the offence does not apply to male victims, the penetration does not apply to orifices other than the vagina and the offence can only occur extramaritally. Therefore, generally, when early Islamic jurists attempted to investigate an allegation of forced fornication, they often commence their inquiry by establishing the genders of the parties, their marital status, and the presence of four witnesses or a confession. Therefore, As noted by Azam, the formative era of Islam established that any extramarital vaginal sexual intercourse is a variant of fornication, regardless of whether it was consensual or through force/violence,²⁹ supported by early Islamic legal reports that any non-consensual extramarital intercourse (forced fornication) is a grievous sin that crosses to the criminal category of God’s boundaries (*hudud*).

Therefore, viewing rape as a category of fornication means that both offences can only occur extramaritally, while the lack of consent is what distinguishes both offences. However, besides consent, treating rape as a form of fornication requires the same standard of proof (four male

²⁸ Hina Azam (n 23) 61-133

²⁹ *Ibid*, 446

witnesses or the perpetrator's confession) and could generate the same level of punishment (flogging, or lapidation) that has blurred the line between rape and fornication.³⁰ An additional concern of such a position is that, if a female victim fails to present the highly burdensome four witnesses to the penetration or secure the perpetrator's confession, she is likely to be convicted of fornication and receive the prescribed punishment of flogging or lapidation, subject to her personal status.³¹

As a way of reducing the four witnesses' requirement to two or a confession, an alternative interpretation that views extramarital forced sexual intercourse as *hirabah* has been widely used. In Arabic linguistics, *hirabah* is derived from the word *harb*, (which means piracy, brigandry, or warfare) which allows an individual to bring a claim for a physical attack against another person. Although the Qur'an only, generally, alludes to what *hirabah* is, the early books of Islamic jurisprudence, expanded on what it ought to include. In Fiqh Al-Sunnah, *hirabah* was defined as:

"A single person or group of people causing public disruption, killing, forcibly taking property or money, attacking women (including rape), killing cattle, or disrupting agriculture."

Despite the absence of specific mention of rape, Islamic scholars, through *ijtihad*,³² conceded that it falls within Chapter 5, Verse 33 of the Qur'an:

"Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption."³³

It must be noted here that, although extramarital forced sexual intercourse can lead to severe punishment if it is regarded as brigandry or fornication, the nature of punishment is not the focus of this article but the conceptual approach that is preventing its separation from these concepts.

³⁰ M. Cherif Bassiouni (n 4)

³¹ Chris McGreal, 'Unwed mother given 100 lashes in Nigeria' (*The Guardian*, 23 January 2001) <<https://www.theguardian.com/world/2001/jan/23/chrismcgreal>> accessed 13 April 2022

³² Wael B. Hallaq (n 12)

³³ The Qur'an Chapter 5, Verse 33

While *hirabah* reduces the four witnesses requirement to two, it certainly creates significant concerns. Firstly, it undermines the need for a clear conceptual and legal definition of rape and can be argued to disparage the victims and their right to make an accusation without the fear of being prosecuted. Secondly, while relying on *hirabah* to complain about rape may prevent the risk of fornication accusation, if the victim fails to furnish sufficient evidence to the attack allegations (two eyewitnesses to the penetration), she is likely to be convicted of slander (*qathf*) and face the possibility of flogging and/or imprisonment.³⁴ Therefore, considering the advancement in technology, establishing a separate framework for rape that provides less stringent evidence such as medical evidence of penetration and cross-examination of the perpetrator's intention is needed because even if marital rape extends to the marital home, it would be impossible for the wife to have any eyewitnesses to forced intercourse that is likely to occur within the confines of the bedroom.

With the Islamic view in mind, a useful step would be to provide a brief critical analysis of the Egyptian implementation of (and development of) the classical position that would help identify the need for further development.

PART II

MARITAL RAPE IN EGYPT

According to a 2018 survey conducted by the Women's Centre for Guidance and Legal Awareness in Egypt, out of 56% of domestic abuse cases, 10% of married women have at some stage experienced marital rape. Despite the high figure, the Centre believes that this is an underrepresentation of the actual scale due to the victims' fear of their husbands' retaliation and the negative social perception they would receive.³⁵ According to the Centre's Director, Reda Eldanbouki, the figure is on the increase. When the Centre requested a specific answer about the position of forced marital intercourse, scholar within Al-Azhar University Ahmed El-Sabag, while referring to the mercy and compassionate verses cited above, stated that marital rape is a sin in Islam, a step that was supported by Dar Al-Ifta'a (the House of Islamic

³⁴ The Qur'an, Al-Qur'an, Chapter 24, Verse(s) 4-5

³⁵ Does marital rape exist in Islam? (n 21)

judgments) in Egypt.³⁶Conversely, while the Egyptian National Strategy for Combating Violence against Women recognised sexual domestic violence against women as a stumbling political, economic and social block, it failed to criminalise marital rape. Therefore, marital rape does not exist in Egypt.

Article 267³⁷ of the Egyptian Penal Code states:

“Whoever has intercourse with a female without her consent shall be punished by death sentence or life sentence. The offender shall be punished by death sentence if the victim is below complete eighteen calendar years old or if the offender is one of the victim’s ancestors or if he is one of those responsible for raising or observing her or if he has power over her or if he is a hired servant of the victim or of any of the foregoing or if the crime is perpetrated by several offenders.”

This definition reflects the Islamic understanding of rape that only applies to women other than the wife and only applies to the vagina. Article 269³⁸ allows the wife to bring criminal charges for indecency (not rape), even if consensual, where the husband penetrates an orifice other than the vagina. This seems to contravene the World Health Organisation’s (WHO) definition of rape, an organisation that Egypt is a party.³⁹Additionally, Egypt is a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and falls under the UN Human Rights Training and Documentation Centre for South-West Asia and the Arab Region. In a statement addressed to Egypt, Michelle Bachelet, UN High Commissioner for Human Rights cited CEDAW while emphasising the urgency of protecting Egyptian wives against marital sexual violence, whom he described to have been profoundly harmed by such practices.⁴⁰Therefore, the Commissioner requested that Egypt criminalises marital rape.

³⁶ Nehal Samir, ‘Hiding in plain sight: Marital rape still not criminalised in Egypt’ (*Daily News*, 14 January 2021) <<https://dailynewsegypt.com/2021/01/14/hiding-in-plain-sight-marital-rape-still-not-criminalised-in-egypt/>> accessed 27 April 2022

³⁷ Egyptian Penal Code, 1937, art.267

³⁸ Egyptian Penal Code, 1937, art.269

³⁹ ‘Violence against women’ (*World Health Organisation*, 9 March 2021) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> accessed 28 April 2022

⁴⁰ Convention on the Elimination of All Forms of Discrimination Against Women, 1979, art.2

In terms of the standard of proof of rape, the Egyptian Penal Code requires that, firstly, the perpetrator committed the act of vaginal penetration without the consent of the victim (the *actus reus*).

Full penetration has to occur although ejaculation is irrelevant. The lack of consent can be established through physical or material coercion, including deceit or loss of consciousness. Secondly, the perpetrator intended to commit rape while knowing that consent was not given (the *mens rea*). The burden of proof falls on the victim to demonstrate using forensic evidence (within 72 hours of the alleged rape occurring) that she resisted, because verbally alleging that she did not consent is insufficient, unless eyewitnesses are present, or a confession is made by the perpetrator, issues that can be addressed by examining the English Model of rape. Although this article does not intend to engage in a detailed analysis of rape under English law, it aims to provide a recommendations section that is based on an overview of how the issues identified above are addressed in English law.

THE ENGLISH LAW ON (MARITAL) RAPE

150 years before its criminalisation in 1991, the prevalent position of marital rape in England was influenced by Sir Matthew Hale's statement:

*"But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract"*⁴¹

Sir Hale's statement clearly resembled the problematic definition adopted in early Islam and by Muslim/ Arab States today, which is based on automatic consent that prevents its extension to the marital home. However, the landmark decision of *R v R*,⁴² criminalised marital rape under English law, regardless of the social status of the parties, married or unmarried, cohabiting or not, "rape is rape". It is important to firstly, critically examine rape in English

⁴¹ *R v R* [1991] 4 All ER 481

⁴² *Ibid*

law, followed by assessing key changes that can contribute towards its reconceptualisation and extension to the Muslim/Arab marital home.

S1 of the Sexual Offences Act 2003 (SOA hereafter), defines rape as “where person A penetrated the vagina, anus or mouth of person B with his penis.”⁴³ Extending the conduct to include the anus and mouth is a direct result of the justification provided by the Home Office in the ‘Setting the Boundaries’ report 2000. The SOA adds that the lack of consent on B’s part and the lack of reasonable belief on A’s part are essential.⁴⁴ This is not to be confused with incidents where proving the lack of consent is not a requirement, especially when dealing with minors or where rape is found to be automatic (as will be explained below).⁴⁵ S2 expounds that courts are required to consider all circumstances when determining A’s reasonable belief; including any steps A has taken to determine that B has consented to the sexual activity by virtue of s1(1)(a).⁴⁶ Among the number of principal changes the SOA made,⁴⁷ it extended the scope of the *men's rea* to include the defendant’s reasonable belief that the alleged victim consented, overruling the genuine and honest belief test emphasised in *DPP v Morgan* that was argued to set a high evidential threshold.⁴⁸

In comparison with the Egyptian definition of rape, S1 of the SOA and the decision of *R v R* extend rape to the marital home and to orifices other than the vagina. Additionally, rather than leaving the matter to be proved by explicit evidence, as will be illustrated below, a thorough assessment of the perpetrator’s mental awareness of the victim’s consent and how consent is established, play a major part. The next section will provide a brief critical overview of the requirements of rape under English criminal law.

⁴³ Sexual Offences Act, 2003, s 1 (1)(a)

⁴⁴ Sexual Offences Act, 2003, s 1 (1) (b) and (c)

⁴⁵ Sexual Offences Act, 2003, Chapter 6

⁴⁶ Sexual Offences Act, 2003, s 2

⁴⁷ Sexual Offences Act, 1956, s 1(2)

⁴⁸ *DPP v Morgan* [1976] AC 182 (HL)

THE REQUIREMENTS OF RAPE UNDER ENGLISH CRIMINAL LAW

Similar to the Egyptian criminal requirements, rape in English law requires the presence of two elements, the *actus reus*, and the *mens rea*. The *actus reus* is the occurrence of the criminal act, while the *mens rea* is the perpetrator's criminal intent. S1(1) SOA 2003 provides that Rape is where:

(1) A person (A) commits an offence if:

(a) A intentionally penetrates the vagina, anus, or mouth of B with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Step c is to be determined by having regard to all the circumstances, including any steps A has taken to ascertain whether B consented.

1. The *actus reus*

The guilty act under English law consists of establishing penetration and lack of consent.

- **Penetration**

Similar to the Egyptian requirement, the SOA states that penetration requires the use of a penis, whether natural or surgically constructed.⁴⁹ According to the SOA, penetration is a "continuing act from entry to withdrawal."⁵⁰ Similar to the Egyptian model, this seems to affirm that rape occurs regardless of whether ejaculation is reached as was stated in *R v Schaub*.⁵¹ In addition, the wide approach of the Act to defining 'the vagina' renders the vulva (the outer of the vagina) part of the vagina,⁵² thus, arguably, making any slight penetration

⁴⁹ Sexual Offenses Act, 2003, s 79(3)

⁵⁰ Sexual Offenses Act, 2003, s 79(2)

⁵¹ *R v Schaub* [1994] Crim LR 531. See also *Kaitamaki v The Queen* [1985] AC 147; See also *R v Leaver* [2006] EWCA Crim 2988

⁵² Sexual Offenses Act, 2003, s 79(9)

sufficient, regardless of whether the hymen was perforated or not,⁵³ whereas, under Egyptian criminal law, full penetration is essential. Under English law, although the complainant might expressly consent to the penetration, once this is withdrawn, penetration must stop in a reasonable time, the length of which is determined by the jury,⁵⁴ an issue Egyptian law does not address. Therefore, under the English rape definition, any penetration of the vagina, anus, or mouth satisfied the *actus reus*,⁵⁵ whereas, under Egyptian and Islamic law, only vaginal penetration would constitute rape, where the penetration of other orifices, including in marital relationships or where the victim is a male, is considered an act of indecency instead. In addition to establishing penetration, the guilty act requires the presence of the lack of consent.

- **Lack of consent**

The statutory definition of consent

Lack of consent is the main element of rape; without it, penile penetration would be viewed as an “explicit expression of intimacy” rather than criminal.⁵⁶ This part is largely similar to the Egyptian lack of consent, especially where consent is negated through physical and/or mental coercion, unconsciousness, and/or deceit. However, establishing a lack of consent under Egyptian law is heavily based on the complainant’s ability to produce evidence of harm or, similar to the traditional position of Islam, through witnesses or confession. A more structured approach can be found under Section(s) 74, 75, and 76 of the SOA, which define consent based on a different set of circumstances. Whether a hierarchical approach was the intention of the drafters, this area is better approached in a reversed order: the applicability of s76, the applicability of s75, or, if neither applies, the applicability of s74. When alluding to ss76 and 75, they are better understood by virtue of two presumptions, evidential and conclusive.

⁵³ *R v Hughes* (1841) 9 C & P 752; See also *R v Lines* (1844) 1 C & K 393

⁵⁴ Sexual Offences Act, 2003, s 79(2)

⁵⁵ Michael Jefferson, *Criminal Law* (12th ed. 2015) 492

⁵⁶ David Ormerod, *Smith and Hogan Criminal Law* (13th ed. 2013) 743

S76 SOA 2003 – Conclusive presumptions.

For this section to apply, the accused has to perform an act under s77,⁵⁷ while one of the circumstances under s76(2) occurred, then it would be automatically presumed that the complainant conclusively did not consent and that the accused did not believe that consent was given.⁵⁸ Tadros expounded that penetration alone suffices without proving consent, rendering this presumption irrebuttable.⁵⁹The inclusion of deception (as to the nature of the act)⁶⁰ and inducement (through impersonation/fraud)⁶¹ into s76 can be used to justify the seriousness of the test which ignored the need for consent.⁶²It must be noted that the actions of the accused must be intentional, regardless of whether the complainant formed his/her own mistaken belief as to the nature accused’s conduct; regardless of whether the accused had known of the complainant’s mistaken belief.⁶³

S75 SOA 2003 – Evidential presumptions.

In situations where there is no evidence that s 76 is applicable, s 75 is then examined. Similar to the operation of s 76, an act from s 77 is required, in addition to one of the circumstances under s 75(2),⁶⁴where the defendant knew that one of the circumstances existed.⁶⁵Unlike S76, the accused can rebut the lack of consent by providing sufficient evidence that he reasonably believed that the complainant consented.⁶⁶ Again, this can be countered by sufficient evidence that the accused reasonably believe that there was no consent.⁶⁷ It must, however, be noted that the circumstances listed under s 75(2)(a)-(f) are not strict pre-requisites for establishing lack of consent, but presumptions upon which consent and belief can be construed. S75 should

⁵⁷ Sexual Offences Act, 2003, s 77

⁵⁸ Sexual Offences Act, 2003, s 76(2)

⁵⁹ Victor Tadros, ‘Rape Without Consent’ (2006) 26 (3) Oxford Journal of Legal Studies, 515–543
<<https://www.jstor.org/stable/3877007>> accessed 04 May 2022

⁶⁰ *R v Flattery* (1887) 2 QBD 410; See also, *R v Williams* [1923] 1 KB 340; See also, *R v Linekar* [1995] 3 All ER 69

⁶¹ Sexual Offences Act, 2003, s 76(2) (a); See also, *R v Elbekkay* [1995] Crim LR 163

⁶² David Ormerod (n 56) 730-731

⁶³ Rebecca Williams, ‘Deception, Mistake and Vitiating of the Victim’s Consent’ (2008) 124 Law Quarterly Review, 132

⁶⁴ Sexual Offences Act, 2003, s 75(2) (a)

⁶⁵ *R v Saik* [2006] UKHL 18

⁶⁶ David Ormerod (n 56) 726

⁶⁷ *Ibid*

not be relied on if there was clear evidence of consent,⁶⁸ which then becomes a matter to be resolved by reference to s 74 instead.

S 74 SOA 2003

S74 requires the presence of freedom, capacity, and choice of the complainant for the evident consent to be valid. First, the prosecution must consider whether the complainant had the freedom and capacity to make the choice to engage in the alleged sexual activity.⁶⁹ The greater the pressure the less freedom the complainant had. However, as stated by Ormerod, whether this applies to non-physical pressure, such as employment dismissal, is another difficulty.⁷⁰ Second, the prosecution will question whether the complainant, at the time of the sexual activity, was free from any constraints.⁷¹ The use of the word choice in determining consent presumes the presence of options available to the complainant, and their freedom to select one.⁷² However, although there might have been freedom and choice, the prosecution still needs to determine that the complainant had the capacity to engage in the alleged sexual activity. Despite ambiguities associated with defining capacity, "it is regarded as integral to the concept of choice,"⁷³ which is directly related to the mental capability of the victim when choosing to perform a certain sexual activity.

In *R v Cooper*,⁷⁴ the House of Lords enunciated that a lack of capacity that is out of irrational fear is not the same as a lack of capacity to choose. Therefore, understanding the nature of the information received by the complainant and being able to use the information to make a balanced choice are now both important in determining the presence of the defendant's guilty act.⁷⁵ Once the *actus reus* is established, the court then attempts to establish the *men's rea*.

⁶⁸ *R v White* [2010] EWCA Crim 1929

⁶⁹ Sexual Offences Act, 2003

⁷⁰ David Ormerod (n 56) 720

⁷¹ *R v McFall* [1994] Crim LR 226

⁷² Victor Tadros (n 59); See also *R v Konzani* [2005] EWCA Crim 706; See also *R v B* [2006] EWCA Crim 2945; See also, *R (on the application of F) v DPP* [2013] EWHC 945

⁷³ *R v Bree* [2007] EWCA Crim 256, para 25

⁷⁴ *R v Cooper* [2009] 1 WLR 42, at para 24

⁷⁵ *R v Bree* [2007] EWCA Crim 256, para 25

- **The *men rea***

Under s1(1) SOA 2003, the establishment of the *mens rea* requires the prosecution to prove A's intentional penetration of B's vagina, anus, or mouth; and A lacked a reasonable belief that B consented. Following constant development, the applicable test today comprises elements of subjectivity (A's true belief) and objectivity (the jury's reasonable belief whether A's belief was reasonable).

INTENTIONAL PENETRATION

Proving that sexual penetration was [intentional] requires that the defendant intentionally (based on his reasonable belief) penetrates an orifice other than the one B consented to. If the defendant unintentionally does so, there would not be rape.⁷⁶

Reasonable belief in consent, by having regard to all the circumstances, including any steps A has taken

Deciding the reasonableness of the suspect's belief will depend on assessing all surrounding circumstances including the age and mental status of the complainant. Under the SOA 2003, a suspect can defend his position by stating the steps he took to convince himself that the complainant consented to the sexual activity at the alleged time.⁷⁷In addition to the defendant's attestation that they subjectively believed that the complainant had consented, they need to objectively convince the jury that a reasonable person would have held the same belief. The use of 'all circumstances' allows the jury to consider the "mental capacity or other factors that might have affected A's ability to understand the nature of his conduct."

FINDINGS AND RECOMMENDATIONS: CONCLUDING REMARKS

Based on the above discussion, it can be argued that the failure to extend rape to the marital home in Muslim/Arab states is a direct result of the non-mention of rape in the Qur'an and hadith, which led to its conceptualisation shortly after the passing of the Prophet PBUH. The

⁷⁶ *R v K* [2008] EWCA Crim 397; See also, *R v Heard* [2007] EWCA crim 125; See also, *R v Grewal* [2010] EWCA Crim 2448

⁷⁷ *R v Bahadour* [2005] EWCA Crim 396

early concept of rape that only applies to extramarital, vaginal, and sexual intercourse, is the concept that has formed the legal foundation of rape in Muslim/Arab states today. The treatment of rape as a form of fornication/brigandry and their witnesses' requirements has rendered establishing rape as an independent concept more challenging, preventing its extension to the marital home. From the brief examination of rape in Egypt, some milestone efforts can be identified, such as including deceit and loss of conciseness when regulating rape, the support from the religious authorities to criminalise marital rape, the presence of the *actus reus*, and the *mens rea*, the legal definition for penetration and the irrelevance of ejaculation for rape to occur.

However, the issues that require addressing are that; the legal definition of rape does not extend to the marital relationship, it does not extend to parts other than the vagina, it only applies to female victims, and full penetration is required because it is unclear how the vagina is defined, and, finally, that the burden of proof falls on the victim to demonstrate that rape has occurred. Even if marital rape extends to the marital home, it would still be unclear how a wife could prove a lack of consent due to the explicit evidence requirement. Conceptually, the general adopted the definition in Islamic law needs to while stressing the underpinning principles of mercy and compassion as essential for a coherent family structure, remove the words "except his wife" to include both genders while adding the words "anus and mouth".

Legally, based on the English model, the author proposes the following recommendations:

- The discussed Egyptian Penal Code needs to add the husband to the list of guardians when defining rape. In terms of evidential requirements, a clearer approach to the *actus reus and mens rea* is needed. Penetration needs to extend to other orifices while negating full penetration by extending the meaning of 'vagina' to include the vulva.
- The lack of consent is a strong aspect of the Egyptian model, but the fact that the burden of proof is left to the victim to establish, suggests that a clearer assessment of the freedom, choice, and capacity of the victim would shift some of the burdens onto the accused, especially where consent is somehow given. Situations, where intentional

penetration is accompanied by force, coercion, or deceit, are adequately addressed under Egyptian law.

- In terms of the *men's rea*, a clearer approach would be to depart from a fully subjective approach that only considers the mental capacity of the accused and what they really believed, toward a test that adds an objective burden on the accused to convince a reasonable person that they would have held similar belief to the accused if they were in their situation.