

IS A HUSBAND CRIMINALLY LIABLE FOR RAPING HIS WIFE? A COMPARATIVE ANALYSIS

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ABSTRACT

The common law theory behind a spousal exemption for rape can be attributed to Sir Matthew Hale, who asserted that a husband cannot be guilty of a rape committed by himself upon his lawful wife. The spousal or marital exemption principle implies that by their mutual matrimonial consent and contract the wife had given up her herself unto her husband, which she cannot retract. The marital exemption is thus based on implied consent. But no position or status in law can be stagnant and needs to be changed by the demands and conditions of the time. The common law position in Hale's time no longer represents what is the true position of a wife in present day society. It is therefore the duty of the courts and parliament to take steps to alter it if it can legitimately do so. The Parliament may leave the matter open for the common law to develop the marital rape principle to bring it in tune with the present legal conviction of society and the *boni mores* norms. If this stratagem is to be followed then it will be a certainty that courts is going to be declared that the husband's immunity no longer exists. The time has now arrived when the law should be declared that a rapist remains a rapist subject to the criminal law irrespective of his relationship with his victim. Marital rape is not the creation of a new offence, it is rather the removal of a common and civil law fiction of old-time which has become anachronistic and offensive.

Keywords: Common law, Marital rape, Statutory law, Constitutional developments, Fundamental Rights, Customary law.