

SYMPOSIUM ON
THE INTERNATIONAL LEGAL OBLIGATION TO CRIMINALIZE MARITAL RAPE:

DOES INTERNATIONAL LAW REALLY REQUIRE
THE CRIMINALIZATION OF MARITAL RAPE?

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Nothing can be said in favor of intimate sexual violence,¹ including marital rape, as Randall and Venkatesh, the authors of *Intimate Sexual Violence, Human Rights Obligations and the State*,² make plain. As the New York Court of Appeals held in 1984:

Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. . . . A married woman has the same right to control her body as does an unmarried woman.³

There is something to be said, however, in favor of clearly setting out a legal position before condemning it, in favor of a conservative approach to the wholesale expansion of human rights, and in favor of enabling women, even women in states that do not criminalize marital rape, to set their own priorities. The authors draw on international law to make a passionate case against marital rape, and against domestic laws that fail to recognize it as a crime. Their argument would be more persuasive if their demand for what domestic law must criminalize were clearer, if their international legal analysis were more rigorous and more focused, and if they justified the top-down approach they recommend here, which seems particularly problematic in this context.

The authors' presentation of the problem is dramatic, but less than meticulous. Although I assumed that intimate sexual violence was a serious global problem before I read this article, I'm not sure that I would have been convinced had I assumed otherwise. The World Health Organization report that "nearly one in four women *in some countries* may experience sexual violence," cited in the first paragraph,⁴ for example, leaves me asking: "How many countries? Which countries?" The statement that, "[o]ther research suggests that approximately 40% of *all assaulted women* are forced into sex at one time or another," citing a 1989 article in the

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¹ Unless, perhaps, the parties all consent. See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

² Melanie Randall & Vasanthi Venkatesh, *Criminalizing Sexual Violence against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AJIL UNBOUND 189 (2015).

³ *People v. Liberta*, 474 N.E. 2d 567, 572-73 (N.Y. 1984).

⁴ Randall & Venkatesh, *supra* note 2, at 189.

American Journal of Nursing,⁵ leaves me wondering whether this statistic refers to 40% of assaulted women in the United States twenty-five years ago. In addition, the World Bank study on which they rely is flawed, as the authors recognize. According to the Bank study, for example, the United States does *not* criminalize marital rape.⁶ As the authors note, however, only “certain” states in the United States retain some form of marital exemption.⁷ The Bank study does not reflect the fact that marital rape is a matter of state, rather than federal, law and that the United States has fifty different laws on the subject. The United States is not the only country in which family law is addressed on a local, rather than a national, level. The Bank’s methodology does not take this into account.⁸

What Do the Authors Want?

Are the authors demanding the criminalization of marital rape⁹ or the *explicit* criminalization of marital rape?¹⁰ If it is the former, then it is not as outrageous, as the authors suggest that “more than half the countries of the world do not explicitly criminalize sexual assault in marriage.”¹¹ There are probably even more countries that do not explicitly criminalize *murder* in marriage. Why would they? Murder is a crime regardless of the relationship between the parties. So is rape. *Explicit* criminalization is only necessary if its absence signifies that the behavior in issue is otherwise legal. In fact, according to the same World Bank study cited by the authors, women *can* file criminal complaints against their husbands for sexual assaults, including rape, in the overwhelming majority of states.¹² Nor is there any marital exemption for rape in the overwhelming majority of states.¹³

In addition, the authors demand the inversion of the old, discredited, marital rape exemption, under which the wife’s consent to sexual relations was assumed. As they explain, “given the structural gender inequalities of power in many marital relationships . . . a legal requirement of affirmative consent is arguably the only way that women’s universal rights . . . are meaningfully protected.”¹⁴ Faced with a rape claim, the accused husband would have the burden of proving affirmative consent. The extent to which this would conflict with the presumption of innocence in domestic courts is unclear, but it is certainly inconsistent with widespread state practice. Thus, when the authors claim that “international law requires the criminalization of marital rape,”¹⁵

⁵ *Id.* (emphasis added.) “40% of all assaulted women” in the United States would not be trivial, of course, but it is less alarming than “40% of *all* assaulted women” *globally*, which is the implication in a paragraph setting out the scope of an international problem.

⁶ *World, Business and the Law: Protecting Women*, WORLD BANK GROUP.

⁷ Randall & Venkatesh, *supra* note 2, at 189. The authors do not provide any authority for this proposition.

⁸ *World, Business and the Law: Protecting Women*, WORLD BANK GROUP. The Bank study is also based on some dubious assumptions; e.g., “[i]t is assumed that the woman . . . [r]esides in the main business city of the economy being examined . . . questions below are based on statutory or codified law for civil law systems, and on case law, which for common law systems is law established by judicial decisions in cases that set binding precedents.” These are troubling assumptions, not only in economies where the majority of the women live in rural areas, but in countries, such as the United States, in which multiple, and wide ranging, local legal systems govern most family law. World Bank, *Women, Business and the Law, Data Notes* (2016).

⁹ “International law requires the criminalization of marital rape.” Randall & Venkatesh, *supra* note 2, at 190.

¹⁰ “Yet more than half the countries in the world do not explicitly criminalize sexual assault in marriage.” *Id.* at 189.

¹¹ *Id.*

¹² *World, Business and the Law: Protecting Women*, WORLD BANK GROUP.

¹³ *Id.*

¹⁴ Randall & Venkatesh, *supra* note 2, at 194.

¹⁵ *See id.* at 189-190.

they are presumably not referring to *customary* international law. Nor is it clear that married women, even married women who have been raped, would welcome this new law.¹⁶

What is the Law Now and What is Wrong with It?

To substantiate the proposition that “international human rights law” requires the criminalization of marital rape, the authors set out an impressive range of authorities of varying legal weight, including declarations by UN organs, but I am not persuaded by their argument. First, as Philip Alston noted thirty years ago, while “both the validity and necessity of a dynamic approach to human rights, as well as the expansion, where appropriate, of the list of recognized human rights, cannot reasonably be disputed,”¹⁷ this expansion must be more rigorous than the “haphazard” proclamation of human rights by UN organs, NGOs, and various states. Alston suggests a set of procedural requirements¹⁸ to ensure “first, that the recognition of a new human right is generally accepted as being authoritative (in the sense of giving rise to realistic expectations of compliance by states), and second, that the integrity and standing of the existing body of rights is maintained.”¹⁹ The need for such a procedure is particularly strong where, as here, the right at issue has been consistently opposed by a solid bloc of states.²⁰

Second, and more specifically, I question the imposition of criminal sanctions to further human rights in this context. As Karen Engle has explained, the turn to criminal law to further human rights “reinforces individualization and decontextualization.”²¹ Although Engle refers to international criminal law, her argument is equally compelling here. The prosecution of a husband for rape focuses on an individual rather than the community, culture, or state that may well support or even enable him. Worse, his conviction may leave his wife and family destitute because of the same lack of economic clout that leaves women so vulnerable in the first place.

In addition to these general problems, the authors conflate their arguments. “[V]iolence against women,” including marital rape, they argue, breaches “fundamental rights to life, liberty and security of person, to nondiscrimination and equal protection under the law, and to freedom from torture.”²² No, it doesn’t. The authors cite Paragraph 7 of the Committee on the Elimination of All Forms of Discrimination Against Women’s General Recommendation 19 for this proposition, but Paragraph 6 of that Recommendation states that, “Gender-based violence *may* breach specific provisions of the Convention.”²³ The choice of the word “may” is important; it means that *under some circumstances*, gender-based violence violates specific provisions of the Convention, and under other circumstances, it does not. Similarly, the authors argue that because marital rape may occur in connection with “health consequences harboring right to life implications . . . marital rape violates the right to life.”²⁴ The same argument is made with respect to torture. Both are specious for the same reason; marital rape *may* violate these rights in certain circumstances, but it may not.

¹⁶ See, e.g., Katrin Bennhold, *On Perilous Migrant Trail, Women Often Become Prey to Sexual Abuse*, N.Y. TIMES, (Jan. 3, 2016) (describing the attack by a migrant wife against an asylum shelter manager in Berlin, who called the police when he learned the wife’s husband was beating her. The wife accused the manager of “stealing her husband.”).

¹⁷ Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984).

¹⁸ *Id.* at 619-20.

¹⁹ *Id.* at 620-21.

²⁰ See Randall & Venkatesh, *supra* note 2, at 190.

²¹ See Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1069 (2015) (describing the “turn to international criminal law” by human rights advocates.)

²² See Randall & Venkatesh, *supra* note 2, at 191.

²³ CEDAW, *General Recommendation 19*, UN Doc. A/47/38 (1992).

²⁴ Randall & Venkatesh, *supra* note 2, at 191.

General Recommendations, moreover, are not necessarily binding law; rather, they represent the view of the Committee members as to states parties' obligations.²⁵ Some of these recommendations have arguably become more authoritative over time, especially those issued after the Committee's adoption of the three-step process in 1997,²⁶ but General Recommendation 19 was issued in 1992.

These caveats are particularly significant in view of the extremely broad range of conduct addressed by the authors and their demand that all such conduct be criminalized or explicitly criminalized.²⁷ Marital rape would include all sexual relations to which the woman had not expressly consented,²⁸ including *all* sexual relations in underage marriages, in which the women (or girls) lack the legal capacity to consent. It is not clear whether the authors would take domestic law into account in determining whether a girl was underage or not. If they did, the marriage of a fifteen year-old in Yemen would be legal (as would otherwise consensual sexual relations), while the marriage of a twenty-year old in Niger would not, since, the legal age for marriage in Niger is twenty-one.²⁹

What Do Women Who Live in States Where Marital Rape is Not Explicitly Criminalized Want?

Some women in states where marital rape is not explicitly criminalized would undoubtedly welcome its criminalization. Perhaps, for some, it might assure safety, at least as long as the rapist is locked up. But family lawyers know that many women are ambivalent about the prosecution and incarceration of their spouses. Some depend on their husbands to provide shelter and other necessities for the family. Some love their husbands and do not want them jailed. Some are afraid of what their husbands will do when they get out of jail.

The World Bank study does not include any data regarding the effectiveness of criminalization of marital rape, explicit or otherwise, and the authors do not provide such data. Even domestically, such data does not seem to exist. There have been studies, however, of the effectiveness of mandatory arrest for domestic violence, which might be instructive. Lawrence Sherman and his colleagues published data on U.S. cities in 1992.³⁰ The results were confounding. While mandatory arrest policies indeed deterred domestic violence in some cities, in others cities those policies resulted in increased violence; husbands would return home and beat their wives for reporting them. After puzzling over these results for several years, researchers eventually concluded that in cities where social norms supported such arrests—where a husband was embarrassed, for example, and concerned that his employer would learn of the arrest—mandatory arrest served as a deterrent. Where such norms were *not* in place—where the husband was unemployed or where the community did not trust the police—mandatory arrest was likely to result in a backlash, in the form of further violence against the reporting wife. The point here is simply that it cannot be assumed that explicit criminalization would be constructive in a particular state or culture.

²⁵ *Convention on the Elimination of All Forms of Discrimination against Women: General Recommendations*, UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN.

²⁶ See, e.g., CEDAW, Overview of the current working methods, para. 29, CEDAW/C/2004/1/4/Add.1 (explaining that the first step is an open dialogue between the Committee, NGOs, and specialized agencies. A Committee member then drafts the recommendation, which is discussed at a later meeting (the second step). At a following session (the third step), the revised draft is adopted.)

²⁷ See Randall & Venkatesh, *supra* note 2, at 190.

²⁸ *Id.* at 194.

²⁹ *World, Business and the Law: Protecting Women*, WORLD BANK GROUP.

³⁰ Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY (1992). See also Radha_Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, NBER WORKING PAPER NO. 13186 (2008).

The authors concede that the use of criminal law to combat domestic violence is controversial, for these and other reasons,³¹ but insist that criminalization is nevertheless “of paramount symbolic and practical importance.”³² Where this is the consensus of women in a particular community, they may well be right.

But for many women, legal exit in the form of a divorce might well be preferable, especially if it were accompanied by an award of marital property, maintenance, and child support. They would rather their husbands become ex-husbands than prisoners; they would prefer that their ex-husbands work and support them rather than be jailed.

Conclusion

The authors raise several thought-provoking arguments regarding the human rights implications of marital rape. They set out forceful statements by distinguished jurists deploring marital rape and even some regional instruments that may well reflect the willingness of states parties to impose criminal sanctions in such cases. But treaties, of course, only bind states that are parties to them. Nor do the authors claim that the criminalization of marital rape is a matter of customary international law. Although they twice claim that the state’s obligation to prohibit marital rape is “non-derogable,”³³ they do not claim that it is a *jus cogens* norm. Even if, as set out in note 14, “several jurisdictions” recognize that the opinions of treaty bodies should be given *considerable weight*,³⁴ this does not mean that such opinions constitute international law. In sum, while the authors make a strong case that the criminalization of marital rape could be beneficial, at least for some women, I am not persuaded that international law requires it.

³¹ See Randall & Venkatesh, *supra* note 2, at 195.

³² *Id.*

³³ See *id.* at 191-192.

³⁴ *Id.* at n. 15.