

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

Dr. Nico, P. Swartz

University of Botswana, Faculty of Social Sciences, Dept of Law.
B.Proc., LL.B., LL.M. (Cum Laude), LL.D., B.A. (Honores) (Latin), M.A. (Latin).
&

Odirile, O. Itumeleng, Annah, M. Danga, Kagiso Tshwene & Kediretse Mothabatau
University of Botswana, Faculty of Social Sciences, Dept of Law

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 The common law position in Hale's time no longer represents what is the true position of a wife in present day society.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.

INTRODUCTION

For a long time there was no hope for married women regarding rape. The law recognised other forms of rape, except for marital rape. Consent was an irrevocable part of a marriage contract. It means a husband could not be found guilty of raping his wife by reason of consent in marriage. The legal basis of consent by the woman, gave men power to legally force their wives to have sex with them, whenever they wished, with impunity. The legal status (of marriage) alluded to the idea that marital relations are a private matter and should be dealt with at home. It is under this legal phenomenon of old-fashioned common and civil law dictate that cultural and social norms viewed it fit to seal the fate of women, in that, once married, women were offered very little protection, legal or otherwise from their sexually abusive husbands.

METHODOLOGY

The study opted for a theoretical research. The author generates his research from a clear database which he draws on. The data is based on a thin and impressionistic account of events. The research demonstrates knowledge of the latest research-based literature on the topic and the writings are universal. This paper presents a strong and relevant theoretical framework within which the inquiry is located.

LITERATURE REVIEW

The literature used in this paper is straddled between the three areas of law: the civil law, common law and customary law. All these three laws will each give an account on its views about the exemption of marital rape or the criminalisation thereof. The Constitution of Botswana and some international law instruments have also been utilised in order to render the exemption of marital rape principle anachronistic and out-dated.

RESULTS

The study has achieved its aim by stressing that the exemption of marital rape is not a feasible result in modern day judicature. This steers or direct the idea that marital rape needs to be criminalised and enshrined in the statute books of a country as a most serious, humiliating and invasive assault against a person, whether male or female. Courts across the globe need to adopt the principle that a rapist remains a rapist irrespective of his relationship with his victim.

DISCUSSION

Historical Evolution of the Issue of Marital Rape

South Africa

The continental civil law family as typified by Roman-Dutch law is specifically tailored for marital rape exemption from time memorial to this day. An exposition of the principle of marital rape will be contrived. Damhouder (1650) writes that a man cannot be guilty of raping his wife, because he has “full right to the person of his wife with whom he has consummated a marriage.”¹ Moorman (1764) share the view of Damhouder and states that when a man rapes his wife, he is not punishable at both civil law or Canon law. He concluded by saying the man has full right over the person of his wife.²

Huber’s (1686) contention serves as an epitome for the views of Damhouder and Moorman. He states that husbands have, in the first place, such authority over their wives as is given by the laws of nature, of God and of all nations that, wives must be subject to their husbands in all things which do not clearly conflict with honour and virtue. Since no power in the world can be effective without compulsion, the husband must possess certain means of compulsion in case the

¹ Damhouder, J. *Pracktycke in Crimineele Sake* (N.p.: 1650) 95.16.

² Moorman, J. *Verhandeling over de Misdaden en der Selver Straffen* (N.p.: 1764) C88.

wife refuses to bow to his sway in reasonable matters.³ The South African law has been influenced and moulded by both Roman-Dutch civil law and English common law.

The law of rape in marriage was reconsidered by the South African courts in 1992-1993 initially with some vicissitudes. Until then, it was held that a husband was legally entitled to rape his wife. In his judgment in *S v Ncanywa* 212 B and C, Judge Heath says: “The fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law and offends against the *boni mores* of any civilised society. The absence of consent to sexual intercourse cannot and should not be ignored. The husband and wife have in modern society become equal partners with full dominion over their own bodies. To withhold consent to sexual intercourse, unilaterally may be contrary to marital obligation...[But] the marital obligation does not, however, entitles the husband to take the law into his own hands by having intercourse with his wife against her will.”

In *S v Ncanywa* (*supra*) the defendant appealed on the conviction of a marital rape charge in February 1993. His conviction was subsequently overturned by the Ciskei Appellate Division on the basis that a husband cannot be held criminally liable for raping his wife, even though they were no longer living together. The three Judges of Appeal held that although English law had by that time rejected the marital rape exemption (*R v R* (*infra*) in 1991-1992) as anachronistic and inconsistent with modern society’s morals, it was nevertheless, still part of South African law then. One of the reasons for this conclusion was that explicit Roman-Dutch civil authority existed to the effect that a man may legally rape his wife. The South African courts were straddled in two camps on the issue of marital rape: to abolish the marital rape exemption principle or to criminalise marital rape. This notion also actuates the courts’ alliance with either the civil law tradition (Roman-Dutch law) or to adhere to the English common law norm. It was however not a simple choice to make. The courts acknowledged that the reasons for the abolition of the rule in England were valid, but held that the rule was different in Roman-Dutch law.

The South African courts need to contrive a stratagem to rescue itself out of the quagmire underpinned by the iniquity of the marital rape exemption principle. In so doing the courts attacked the legal language in which marital rape exemption was couched. Instead of now being of full-fledged legal status, marital exemption is currently debase to a common-law fiction that a woman irrevocably consents at the time of marriage to all future intercourse with her husband. This fiction, which was contractually directed, could nevertheless be rejected by the courts and hence as immoral.

With this impetus provided by the courts, the South African legislature passed the *Prevention of Family Violence Act*, in 1993, which criminalised marital rape. The law stated, then, that notwithstanding anything to the contrary contained in any law or in any law or in the common law, a husband may be convicted of the rape of his wife. By making this move, South Africa became one of the first countries within Africa to have criminalised marital rape. The criminalisation of marital rape means that it (marital rape) is now incorporated into the offence of rape, which is presently governed by the *Criminal Law (Sexual Offences and Related Matters)*

³ Huber, U. De Heedendaegse Rechtsgeleertheit (The Jurisprudence of My Time). Durban, Butterworths, 1686) 1.10.1.

Amendment Act, No. 32 of 2007. The Act together with the renditions of South African case law confirm the country's legal status on marital rape by stating that it is not a valid defence for an accused person to contend that a marital or other relationship exists or existed between him or her and the complainant. The Act also improved the definition of rape so that "penetration" now includes "into or beyond the genital organs, anus, or mouth of another person" using the "genital organs [or] any other part of the body of one person or, any object, including any part of the body of an animal."

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* has also engendered that the controversial "cautionary rule" be abolished. The cautionary rule had allowed a judge the freedom to apply caution to the credibility of a rape survivor, particularly when her testimony was not corroborated. Section 60 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* now states that notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before the court, with caution, on account of the nature of the offence. Section 59 of the same Act also attempts to protect survivors stating that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only from the length of any delay between the alleged commission of such offence and the reporting thereof. This means that victims cannot be treated differently for not reporting an incident immediately. South Africa has progressed over the years, such that marital rape had been criminalised for over 14 years. Its *Criminal Law (Sentencing) Amendment Act 2007* had been penal-beating in that minimum sentencing guidelines for rape has been offered along with a prohibition for reasons justifying a lesser sentence. Section 3(Aa) states that when imposing a sentence in respect of the offence of rape, the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person's cultural or religious beliefs about rape or (iv) any relationship between the accused person and the complainant prior to the offence being committed.

It is worth noting that in comparison to some of its neighbouring countries, South Africa is also setting a good example in eliminating discriminatory laws and promoting equality for women throughout its legal framework. In terms of marital rape, South Africa is one of the few SADC countries to have criminalised it.

A South African case, *S v Mvamvu* [2004] highlighted the problem of *bogadi/lobola* which hinges upon customary law. In the case the accused (respondent) was convicted of multiple rape of his customary law wife. The accused was born at Qumbu in the Transkei, where he lived according to the traditions, customs and beliefs of his tribe. In 1995, he entered into a customary marriage with the complainant whom he had known from childhood. In April 1999, their marriage disintegrated which resulted in the complainant (wife) leaving the accused to stay with her brother. She assumed that the marriage had ended. The accused's uncle had given her permission to remove her traditional wedding attire. The accused, on the other hand, regarded the marriage still as extant, because the *lobola* he had paid, in respect of the complainant, had not been returned by her family.

On Wednesday 12 May 1999, the accused and the complainant attended the Magistrate's Court at Knysna for the hearing of a child maintenance complaint and a domestic violence dispute. At the conclusion of the hearing a domestic violence interdict was issued against the accused. Upon their return to their respective places of residence, the accused persuaded the complainant to travel with him in the same taxi. When she reached her destination, he tried to prevent her from disembarking and begged her to return to his home. She refused and proceeded to alight from the taxi. He also disembarked. When she ran away soon after alighting, he pursued her and caught up with her near a neighbour's house. He began to drag her away and a scuffle ensued. As he was trying to pull her towards him she clung on to a pole supporting the neighbour's boundary fence. Her resistance came to naught as the pole gave in and was ripped out of the ground. She then broke away from him and ran into the neighbour's house, but he followed and again accosted her. The accused ultimately had his way and took her to his home by force. He kept her there against her will from Wednesday 12 May until Friday 15 May 1999. During that period he raped her on six occasions. The complainant managed to escape on Friday 15 May after the accused had left the house for a while.

The second incident occurred on 29 May 1999. The accused visited the complainant at her brother's house. He asked to speak to her but the complainant's brother was only prepared to allow him to do so if this took place in the house. Shortly after the complainant's brother had left the house (to fetch his uncle to help him to deal with the accused, who was armed with a knife), the accused forcibly removed the complainant and dragged her into the bush to a place near an abandoned abattoir where he raped her twice. On this occasion he assaulted her by hitting her twice on her thigh with a stick.

As mentioned earlier, the accused believed that he and the complainant were still married at the time of the incidents. The accused honestly believed that he had some "right" to conjugal benefits. His actions though unacceptable in law, might well be explicable given his background. His actions were shaped and moulded by the norms, beliefs and customary practices by which he lived his life. The accused wanted to subjugate the complainant to his will and to persuade her to return to him – a consequence of male chauvinism associated with traditional practices.

The accused was sentenced to 10 years' imprisonment each in respect of two counts of raping his wife and 3 years' imprisonment on the count of abduction and 3 months imprisonment on account of assault.

These developments in the area of marital rape – from impunity until its criminalisation in South Africa, Botswana wanted to follow suit. The journey, however, is all but smooth.

Botswana

Botswana inherited its legal system from the colonial era. Apart from its own customary law, two colonial legal traditions, the Roman-Dutch and English Common law, operate in some form of tenuous co-existence. With regard to English Common law, it has been established that since the High Commissioners for Botswana during the British colonial rule had their seats at the same place as the seat of the British Cape Colony, most of the legislation enacted in the form of

“Proclamations” and designed for the Cape Colony, were simply extended to Botswana. In terms of Roman-Dutch law, it is a truism that it was the common law of the Cape Colony – it automatically became the common law of the then Bechuanaland Protectorate and it has since continued to be so until today. The foundations of the Botswana legal system are therefore steeped in the Roman-Dutch law, but the English Common law is increasingly playing an important role.

The current judicial trend suggests that the choice of legal principles and rules to be applied in a given case is dictated more by the functional ability of the particular principles and rules to satisfy the needs of justice and fairness than the purity of their ancestry or their affinity to either English or Roman-Dutch law.⁴

VIOLENCE

Domestic Violence Act (No. 10 of 2008)

Gender inequality in Botswana and elsewhere is characterised by unequal power relations between women and men. One of the key manifestations of these unequal power relations is violence. Most violence against women in Botswana is domestic and the perpetrators are usually consensual partners. Most cases of domestic violence seem to revolve around the maintenance of men’s economic and social control of women.

Domestic violence is an escalating social problem in Botswana and has devastating effects on the victim and other family members as well. The processes of social and economic change that have occurred in Botswana over time have led to increased conflicts between women and men. Many of the conflicts are due to perceived threats to male power by women’s increased autonomy.⁵

Gender inequality regards patriarchy as the primary basis for women’s subordination. Gender divisions of labour place men in positions of power and authority over women. Violence against women stems from culturally-based patriarchal practices that produce and perpetuate unequal power relations between women and men.⁶

On being married a woman came under the authority of her husband. This suggests that women were considered as minors who could be subjected to disciplinary measures by their husbands. This factor made women more vulnerable to abuse and violence from their husbands. A married woman’s story of violence at the hands of her husband reads as follows: “I have been married for ten years and for the last six years I have lived in an abusive situation...I work as a teacher in a Community Junior Secondary School and my husband often keeps me from doing my job. He follows me to school and insults me in front of teachers and students...He complains that marking scripts during exam time keeps me from attending him. As a result he has made it difficult for me to meet my deadlines – and I’ve almost had to resign...He will pick any excuse

⁴ Fombad, C. 2008. Botswana. Kluwer Law International. Alphen aan den Rijn. The Netherlands, pp. 18-21.

⁵ Mookodi, G. The Dynamics of Domestic Violence Against Women in Botswana. Pula: Botswana Journal of African Studies, vol. 18(2004), no. 1: 55-64: 55.

⁶ Mookodi, G. The Dynamics of Domestic Violence Against Women in Botswana. Pula: Botswana Journal of African Studies, vol. 18(2004), no. 1: 55-64: 56.

to start a quarrel, which always ends with him beating me. He has beaten me with his fists, with kicks and with a sjambok. He has raped me several times...Once of those rapes happened after he had beaten me. He pushed me down, ripped off my pants and raped me, despite my protests.”⁷

Cultural double standards that promote promiscuity among men but denounce infidelity among women also promote violence against women. These double standards are particularly strong among married couples as payment of bride-wealth is regarded as justification for male control and violence.

Many victims of domestic violence do not report the abuse. They fear losing economic support and mistrust the customary courts and the police. Marital rape and domestic violence are often not treated as a crime. Reflections of the reluctance of police to address cases of violence are portrayed: “In January he assaulted me once again and I reported the matter to the police. This was not the first time: he had been warned many times by the police not to hit me again. But each time the police had not taken any serious action, saying it was a family matter that should be resolved in the home.”⁸

State laws are inadequate in the face of contemporary problems between men and women, which engender violent conflict. The *Botswana Penal Code* (Chapter 08:01) does not specifically define and prescribe punishment for domestic or family violence. Thus women are not afforded sufficient protection from domestic violence by the existing laws, as cases of domestic violence are treated under the general law of assault rather than by specific laws on violence against women.⁹

As a result violence against women remains highly prevalent. Although the *Domestic Violence Act (No. 10 of 2008)* criminalised many forms of violence against women, under customary law and common rural practices, men are perceived to have the right to “chastise” their wives. It alludes thereto that marital rape is not criminalised. As a consequence post exposure prophylaxis (PEP) is not provided to married women who have been raped by their spouses. The *Domestic Violence Act* empowers police officers to remove survivors of domestic violence from their residences, but does not provide for the creation of shelters for victims of violence.¹⁰

As indicated, Botswana has a dual legal system under which customary law is applied alongside common law. While there have been several reforms of discriminatory provisions under the common law, customary law remains particularly prejudicial to women’s rights, perpetuating unequal power relations between men and women.¹¹

⁷⁷ Mookodi, G. The Dynamics of Domestic Violence Against Women in Botswana. Pula: Botswana Journal of African Studies, vol. 18(2004), no. 1: 55-64: 61.

⁸⁸ Mookodi, G. The Dynamics of Domestic Violence Against Women in Botswana. Pula: Botswana Journal of African Studies, vol. 18(2004), no. 1: 55-64: 62.

⁹ Mookodi, G. The Dynamics of Domestic Violence Against Women in Botswana. Pula: Botswana Journal of African Studies, vol. 18(2004), no. 1: 55-64: 63.

¹⁰ AFRICA FOR WOMEN’S RIGHTS. RATIFY & RESPECT. BOTSWANA.

www.africa4womensrights.org/public/Dossier-of-claims/BotswanaENG.pdf (accessed 16/3/2015).

¹¹ Ditshwanelo. The Botswana Centre for Human Rights. Press statement on the landmark customary inheritance law decision. By FIDH, Wednesday, 17 October 2012.

Botswana Police Service found that most women find it difficult to report domestic violence, because in some instances, the perpetrator had been in the same room as the victim at the time of reporting. Police officers have negative attitudes towards the person reporting, and there are not enough female officers on staff to attend to these types of calls.

The *Domestic Violence Act* is to provide protection to survivors of domestic violence. The Act defines domestic violence as “any controlling or abusive behaviour that harms the health or safety of the applicant” and lists the types of abuse such as physical, sexual and emotional. The law in Botswana in general prohibits rape, but does not recognise marital rape as a crime. As the *Domestic Violence Act* of Botswana does not consider marital rape as a crime, it therefore fails to protect women. The *Domestic Violence Act* is ineffective since women, especially poor women in Botswana, experience limited access to legal aid. The cost of legal proceedings is the main obstacle for women wanting to access justice.¹²

The *Domestic Violence Act* does not consider marital rape a crime and that it therefore fails to protect women.¹³

Customary law

In many rural villages within Botswana, customary law, for example, take precedence over national law, resulting in discriminatory behaviour.¹⁴

Like in the case of South Africa, one of the prime examples linked to marital rape is the customary practice of *bogadi/lobolo*. *Bogadi* is paid by the husband or his family to his new wife’s family. The husband believes that the wife has become his property. Such a practice can make a woman vulnerable to domestic violence, decreasing her ability to resist or flee abusive situations, while her husband may use it as justification for this abuse as per South African case law of *S v Mvamvu (supra)*.

The Penal Code (Amendment) Act (No. 5 of 1998)

The *Penal Code (Amendment) Act* no. 5 of 1998 of Botswana suggests that there cannot be rape in marriage. The Botswana stand against marital rape has been inherited from Roman-Dutch law via South Africa. The Roman-Dutch law dictates that spouses, by marrying each other,

www.africa4womensrights.org/tag/Botswana. (Accessed 16/3/2015).

¹² UNHCR. The UN Refugee Agency. Botswana. Domestic violence including, legislation, state protection, recourse and services available to victims (2007-February 2011).

www.refworld.org/docid/4dbe8bc52.html (Accessed 16/3/2015).

¹³ UNHCR: The UN Refugee Agency. Botswana: Domestic violence including legislation, state protection, recourse and services available to victims (2007-February 2011); www.refworld.org/docid/4dbe8bc52.html Accessed 16/3/2015.

¹⁴ Botswana has a dual legal system under which customary law is applied alongside common law. While there have been several reforms of discriminatory provisions under the common law, customary law remains particularly prejudicial to women’s rights, perpetuating unequal power relations between men and women and strengthening stereotypes on the role of women in society. [Ditshwanelo – the Botswana Centre for Human Rights: Press statement on the landmark customary inheritance law decision – By FIDH, Wednesday 17 October 2012. www.africa4womensrights.org/tag/Botswana, accessed 16/3/2015].

permanently agree to have sexual intercourse with each other. This is the position taken by the magistrate in Botswana. In corroboration to the Roman-Dutch aphorism, marital rape in Botswana has been linked to the notion of “marital power”, which renders a woman a minor in law.

Botswana only defines marital rape outside of the marriage context, despite the fact that a large percentage of married women in the country have been raped by their husbands. In the *Penal Code* of Botswana, only a definition of rape and not marital rape *per se* is noted: For example, rape is defined in Botswana as any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purpose of sexual gratification, or who causes the penetration of another person’s sexual organ into his or her person, without the consent of such person, or with such person’s consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretences as to the nature of the act, or, in the case of a married person, by personating that person’s spouse, is guilty of the offence termed rape. Section 141 of the *Penal Code* was amended by the *Penal Code (Amendment) Act No. 5 of 1998*. This amendment made it possible for both sexes to commit rape and/ or be raped. This section, as amended, suggests that there cannot be rape in marriage under Botswana law. The only reference to marital rape is the mentioning that rape may also be committed by someone pretending to be a husband or wife (spouse) of the person who is raped.

The Constitution of Botswana and International law instruments

In spite of the exemption of marital rape provisions, the *Constitution of Botswana* provides in Section 3 for the protection by the law of all persons in Botswana, regardless of sex. In addition to these constitutional protections, Botswana also ratified the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and the *African Charter on Human and People’s Rights (ACHPR)*. Article 1 of *CEDAW* provides for the removal of any discrimination against women on the basis of sex, irrespective of their marital status. Article 2 of the *African Charter on Human and People’s Rights* provides for non-discrimination on the basis of sex. On 11 July 2003, the *African Union* adopted the *Protocol on the Rights of Women in Africa*, a supplementary protocol to the *African Charter on Human and People’s Rights*. These legal instruments call for an end to all forms of violence against women, including sexual violence in the light of marital rape. The legal instruments denote that violence against women shall be understood to encompass marital rape. A marital rape definition can be contrived by the legislature of the country to mean any unwanted sexual acts by a spouse or ex-spouse, committed without consent and/ or against a person’s will obtained by force, or threat of force, intimidation, or when a person is unable to consent.

Marital rape laws, which do not take into consideration these factors and take away the requirement for free consent from women, are in violation of these human rights standards and the provisions of the Botswana Constitution.¹⁵

¹⁵ Copyright@2007 Ditshwanelo, 18 August 2003, Gaborone. Press statement on “Marital Rape.”

It is clear that the constitutional provisions and caveats of these international instruments have engendered an aberration of Botswana's stand on marital rape, and a possible modification or addition of the *Penal Code's* provisions on (marital) rape in the future.

An aberration of the provisions of the *Penal Code* and *Domestic Violence Act*

Under the influence of the abovementioned international law instruments (*The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* and *The African Charter on Human and People's Rights*) and the constitutional provisions in Section 3, concerned had been expressed over the withdrawal of an alleged case of rape (unreported) by Broadhurst Magistrate Mogotsi that a husband can never rape his wife. In this case the husband and wife were living physically apart from each other. The wife had fled the marital home because of abuse. The husband abducted the wife and forced her to have sex with him without her consent. The question which this case raises is whether sex within marriage requires consent or whether marriage creates perpetual consent between husband and wife.

Botswana law has inherited the idea of marital exemption from Roman-Dutch law that by marrying each other, the spouses permanently agree to have sexual intercourse with each other.¹⁶ This is the position of Magistrate Mogotsi.

A certain legal ferment aroused about the marital rape exemption, despite the country's customary law's retention of the principle. This turbulence spurred on a test case on marital rape in Botswana by the *SADC Gender Protocol*. It is stated that on 2 December Magistrate Malambane issued an order interdicting a man from physically, verbally, sexually and emotionally abusing his wife for 6 years. In her affidavit in terms of Section 7(2) of the *Domestic Violence Act* (2008) the mother of three girls, seeking refuge at a Women's Shelter, said that trouble started after she became pregnant in 2006. She stated that they decided to go for an HIV test together, where the husband was diagnosed as HIV positive, while she tested negative. She said following the turn of events, her husband's behaviour towards her changed dramatically. He started demanding to have unprotected sexual intercourse. She tried to make him understand that this was not a good idea and that they had been advised by doctors that they should at all times use protection as this was crucial for their own health and well-being. She explained to her husband that his constant demand to have unprotected sex with her would put

¹⁶ Charles Fombad. 2008. Botswana: International Encyclopaedia of Laws. Kluwer Law International. The Netherlands: 18. Botswana inherited its legal system from the colonial era. It combined elements of two distinct European legal traditions namely, the Roman-Dutch and the English common law. The Roman-Dutch law, which was the common law of the Cape Colony, automatically became the common law of the then Bechuanaland Protectorate. It has since continued to be so until today. And since the High Commissioners for Botswana during the British colonial rule had their seats at the same place as the seat of the British Cape Colony, most of the legislation enacted in the form of proclamations and designed for the Cape Colony, were simply extended to Botswana. In fact, by 1895, Botswana was effectively administered from the Cape Colony until 1909 when its administration passed on to the newly created Union of South Africa. On 10 June 1891, the High Commissioner acting under an 1891 British Order in Council, issued the General Administration Proclamation, Section 19 of which read: "Subject to the foregoing provisions of this Proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances will permit, be the same as the law for the time being in force in the colony of the Cape of Good Hope: Provided that no Act passed after this date by the parliament of the colony of Good Hope shall be deemed to apply to the said territory.

her at risk of contracting the HIV virus. But, he started abusing her physically, sexually and verbally.¹⁷ The husband was given until December 2010 to give reasons why the order should not be made final. The test case has actuated the courts of Botswana to change their perception about marital rape in the country. The pendulum has swung against the judgment of the unreported case (*supra*) of Magistrate Mogotsi.

The pendulum has positioned itself firmly (for abolition of exemption of marital rape) under the Botswana case law *Letsholathebe v The State* 2008 BLR 1 HC, in which, the appellant appealed against his conviction and sentence for rape. The appellant claimed that intercourse between himself and the complainant had been consensual. The magistrate found the appellant nevertheless guilty and sentenced him to 12 years' imprisonment. The sentence was confirmed on appeal by the High Court. The judge ruled that rape is a most serious, humiliating and invasive assault against a person, whether male or female, and to suggest that it should be permitted if the perpetrator is a spouse, is unacceptable. The judge also endorsed the findings of Lord Lane CJ in *R v R* [1991] 2 All E.R. 257 (H.L.) at page 266, where he held that the rule that a husband could not be guilty of raping his wife was an anachronistic and offensive common law fiction. The judge states further that the exemption principle no longer represents the wife in modern day society. As a result, the court also adopted the principle that a rapist remains a rapist irrespective of his relationship with his victim. This case law buried the fiction of the marital rape exemption.

The South African legal parlance on marital rape is clear. Botswana has still a way to go. As per the gist of this study, it is evident that Botswana statutory law regime (Domestic Violence Act, Penal Code and Customary law) are still maintaining the idea of marital rape exemption in law. There have been significant developments of the common law perception of marital rape in Botswana. The Constitution and international law instruments want to relinquish the marital rape exemption principle. The case of *Letsholathebe v The State* (*supra*) bolsters such a view. It is up to the Botswana Parliament to bring oppositional statutory law in tune with the demands of the Constitution and these enlightened international law instruments, which show due respect for the dignity of all people. The Constitution of a country is the highest law of that country and all other laws which are in contradiction to the constitution is to be regarded as invalid.

With this premise the study wants to highlight that Botswana might shows inclination towards the purport and spirit of its constitution by criminalising marital rape and afford a proper place of the crime under statute laws (Penal Code, Domestic Violence Act and Customary Law Act). The *Letsholathebe* case, the constitutional provisions and the international legal instruments purport to be inducements for the fact that the exemption principle is to be abolished so that a husband can be held liable for raping his wife.

It is also the aim of this study to forge a comparative analysis with European, American and Far East jurisdictions on the issue of marital rape.

¹⁷ Southern Africa Gender Protocol Alliance. Botswana: Marital Rape case breaks new ground. www.genderlinks.org.za/article/botswana-marital-rape-case-breaks-new-ground-2011-10-07 Accessed 16/3/2015.

ENGLISH AND OTHER COMMON LAW JURISDICTIONS

Hale's proposition

The English law jurisdiction on marital rape had been for more than 150 years operated under the common law principle of Judge Hale. It was Hale who professed the law that a husband cannot rape his wife legally and is therefore to be exempted from such a crime.

Marital rape is one of the most prevalent enduring types of rape and last as long as the marriage persists. The wife can never, from a legal point of view, withdraw the original consent and her husband can therefore never be guilty of raping her. By marriage, a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of her health or how she happens to be feeling at the time.¹⁸

Many common law countries still sustain the (mis)belief that a husband is incapable of raping his wife, due to the presumption of a wife's absolute, irrevocable consent to any sexual acts during the course of marriage. These countries' laws provide a husband with immunity from persecution for marital rape simply because of his status as husband.¹⁹

For over 150 years of the publication of Hale's book, "History of the Pleas of the Crown" in 1736 no reported case appeared in which judicial consideration was given to his proposition. It means that the proposition was an accurate statement of the common law of England. The common law, however, is capable of evolving in the light of changing social, economic and cultural developments. And Hale's proposition reflected the state of affairs at the time it was enunciated. His proposition now invokes in every reasonable person the conception that it is unacceptable and outmoded.²⁰

The theory propounded by Hale that on marriage a wife gave her body to her husband was accepted in *Popkin v Popkin* (1794) 1 Hag.Ecc. 765n, as stated by Lord Stowell at page 767: "The husband has a right to the person of his wife..." These concepts of the relationship between husband and wife appear to have persisted for a long time and may help to explain why Hale's statement that a husband could not be guilty of rape on his wife was accepted as an enduring principle of the common law.

Hale's proposition was also followed by East (1803) for the first time and thereafter by Archbold in 1822. The first edition of Archbold, *Pleading and Evidence in Criminal Cases* (1822) at page 259 stated: "A husband also cannot be guilty of a rape upon his wife." In *Reg v Clarence* (1888) 22 Q.B.D. 23, Willis J said: "...as between married persons rape is impossible..." Hale's proposition for exemption for marital rape was successfully invoked in *Rex v Clarke* [1949] 2 All E.R. 448, *Reg. v Miller* [1954] 2 Q.B. 282 and *Reg. v J* [1991] 1 All E.R. 759. In *Rex v Clarke* a husband was charged with rape upon his wife in circumstances where justices had made an order providing that the wife should no longer be bound to cohabit with the husband. Judge Byrne accepted Hale's proposition as generally sound, but said that the position was that the wife, by

¹⁸ *R v R*, 484a.

¹⁹ Adamo, S.A. 2012. The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries. American University International Law Review, vol. 3, Issue 4, Article 9, pp. 555-589: 555.

²⁰ *R v R* [1992] 1 A.C. 599, House of Lords: 616.

process of law, namely by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. According to Byrne J the husband was not entitled to have intercourse with her without her consent. In *Reg. v Miller* the husband was charged with the rape of his wife after she had left him and filed a petition for divorce. He was also charged with assault upon her occasioning actual bodily harm. Lynskey J quashed the charge of rape but refused to quash that of assault. He proceeded on the basis that Hale's proposition was correct. Lynskey also mentioned that *Rex v Clarke* had been rightly decided. As with regard to *Reg v Jackson* [1891] 1 Q.B. 671, Lynskey also contends that although the husband has a right to marital intercourse, and the wife cannot refuse her consent. If she does have intercourse against her actual will, it is not rape. Nevertheless, he is not entitled to use force or violence in the exercise of that right. If he does so, he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence that facts of the particular case warrant.

Antogonists' to Hale's proposition/ or a digression to his rule

It is noted that there is nothing in the words of the early textbook writers, Glanvill, Bracton or Dalton and Coke's Institutes which supports Hale's theory of marital exemption. It is speculated that if Hale was a well-known principle, why come there be so few authorities cited in support of it, taking into account the time span of 150 years' hegemony of the rule.

It was only in the last century that a wife had been able to retract her consent by means of divorce or judicial separation. Because of this development, the whole rationale of Hales statement or proposition of the law seemed to fall to the ground.

Over the years the judges have created more and more exceptions to the rule of Hale. These exceptions are: her death, or if the marriage was avoided by a private Act of Parliament, a separation order (see *Rex v Clarke* [1949] 2 All E.R. 448), a decree nisi (see *Reg v O'Brien* (Edward) [1974] 3 All E.R. 663), an undertaking (see *Reg v Steele* (1976) 65 Cr.App.R. 22), a deed of separation (see *Reg v Roberts* [1986] Crim.L.R. 188), or a family protection order (see *Reg v S* (unreported), 15 January 1991). If none of these factors exist, the appellant's immunity is not lost by what happened between his wife and himself. But, he should accordingly not be tried for or convicted of rape.

Ever since the decision of Byrne J in *Rex v Clarke* [1949] 2 All E.R. 448, courts have been paying lip service to the Hale proposition, while at the same time increasing the number of exceptions. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes. There comes a time when the changes are so great that it is no longer enough to create further exceptions. The idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections, is no longer acceptable.²¹ Hale's proposition (implied consent theory) which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. In *Reg v O'Brien* (Edward) [1974] 3 All E.R. 663, Park J held that a decree *nisi* effectively terminated a marriage and

²¹ *S v H.M. Advocate*, 1989 S.L.T. 469.

revoked the wife's implied consent to marital intercourse so that subsequent intercourse by the husband without her consent constituted rape. When Simon Brown J in the Crown Court was asked to rule upon a similar question in *Reg v C* [1991] 1 All E.R. 755, he examined the pro's and con's of the various suggested solutions to the problem and came to the conclusion that Hale's proposition was no longer the law. Brown has this to say at page 758: "...certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is... that there is no marital exemption to the law of rape..."

In the landmark case of *R v R*, House of Lords, the appellant married his wife on 11 August 1984. On 11 November 1987 the parties has separated for a period of about two weeks before becoming reconciled. On 21 October 1989, as a result of further matrimonial difficulties, the wife left the matrimonial home and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and left a letter for the appellant in which she informed him that she intended to petition for divorce. The appellant had on 23 October spoken to his wife by telephone indicating that it was his intention also to initiate divorce proceedings.

On the evening of 12 November 1989, while the wife's parents were out, the appellant forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her. That assault was the subject of count two. On 3 May 1990 a decree *nisi* of divorce was made absolute. The question which the judge had to decide was whether in those circumstances, despite her refusal to consent to sexual intercourse, the wife must be deemed by the fact of marriage to have consented. Another question tantamount to the previous one, is, what in law will suffice to revoke that consent which the wife gives to sexual intercourse. In this case, the judge answer the last question by stating that there must be an agreement of the parties – in order for the wife to revoke her consent. From the husband's action in telephoning her and saying that he intended to see about a divorce and thereby accede to what she was doing – this is sufficient to indicate that there was an implied agreement to a separation and to a withdrawal of that consent to sexual intercourse. The withdrawal of either party from cohabitation also is sufficient for that consent to be revoked. These renditions in *R v R* would enable the prosecution to prove a charge of rape against the husband.

Also in *R v R*, at page 609, it has been stated that Hale's proposition is based on a fiction which is inconsistent with the proper relationship between husband and wife today. Lord Emslie says in *S v H.M. Advocate*, 1989 S.L.T., 469, that, it is repugnant and illogical in that it permits a husband to be punished for treating his wife with violence in the course of rape but not for the rape itself which is an aggravated and vicious form of violence.

Where the common law rule no longer represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant Parliamentary enactment.²² The Parliament may leave the matter open for the common law to develop it by declaring that the husband's immunity as expounded by Hale no longer exists. The time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law irrespective of his relationship with his victim. This is not the

²² *R v R*, House of Lords: 610.

creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive.

The English jurisdiction is likely to relinquish Hale's proposition and adopt the South African view on the abolition of exemption of marital rape. Botswana will most certainly follow suit.

MARITAL RAPE LAWS IN THE USA

In the United States, each state treats the marital rape exemption differently. The laws vary from a complete exemption to elimination of marital exemption. Eight states do not provide a spousal exemption if the parties are separated under court order. Four states will not exempt the husband from rape charges if the parties are living apart and one spouse files a petition for divorce, annulment, separation, or separate maintenance. Seven states claim no exemption if the parties are living apart or if one spouse has initiated legal proceedings. Thirteen states do not allow an exemption if the parties are living apart. Twenty states have a partial or limited exemption. From a holistic picture, it seems that only fourteen states have totally abolished the marital rape exemption. The other states indicate that they adjust their marital rape laws, but refuse to go all the way and attached themselves to the common law rationales.²³

The *Model Penal Code (Proposed Official Draft 1962)* provides a limited approach to marital rape. It states that married men are immune from rape prosecution. It further stipulates that legal separation revokes such immunity. It simply means that a legally recognised marriage is not a prerequisite for a husband to rape his wife.²⁴

Changes still need to occur in the United States. Every state, not just fourteen states, must totally repeal spousal exemptions to their rape laws.

NEW ZEALAND

The *New Zealand Rape Law Reform (No. 2) Act of 1985 (Rape Reform Act)* abolished spousal immunity in rape cases. But, the husband and wife are required to live in separate residences at the time of the intercourse for the husband to be guilty of rape.²⁵

In *R v N (an accused)*, 2 *N.Z.L.R.* 268 (C.A. 1987), the court imposed upon the appellant's husband a three years' prison term for raping his wife at knife point. At the time of the rape the husband was separated from his wife. This decision illustrates how a statute that abolishes the spousal exemption clause comes to the aid of married woman in need of protection and justice. Without the benefit of the *Rape Law Reform Act*, the successful prosecution of the violent man, who happened to be the victim's husband, would not have occurred.

CANADA

Like New Zealand, Canada rejects the marital rape exemption through statutory abolition. Canada's *Criminal Code* defined rape to include the usual spousal exemption. Before statutory

²³ Adamo, The Injustice of Marital Rape Exemption, 562-566.

²⁴ Adamo, The Injustice of Marital Rape Exemption, 563.

²⁵ Adamo, The Injustice of Marital Rape Exemption, 568.

abolition, a man could not rape his wife. As of 1983 there were no reported incidences where a man was married to a woman at the time of the sexual act. Therefore, the only way to abolish the scope of exemption was through statutory amendment. In 1983, the Parliament of Canada amended the *Criminal Code* to abolish the exemption of marital rape.²⁶

It is evident from the gist of this study that the USA, Canada and New Zealand have reformed their rape laws by declaring rape illegal. They had revamped their old statutes to extend the modern mores of women into the law. The statutory reforms of these countries have their share of traditional common law based critics proclaiming the law should not invade the home. Yet, legislatures making new laws acts for marital reform send out a message that societies hold married women to be human beings, with the right of consent equal to all other women.

CONCLUSION

A clear case for the criminalisation of marital rape has been made out in the study. This research stresses that Botswana has already made the move towards the abolition of the exemption clause of the common law rule in marital rape. The United States needs to bring its position with regarding to the overall criminalisation of marital rape in tune with modern day practices which view the exemption clause as anachronistic and offensive towards women. Courts across the globe need to adopt the principle that a rapist remains a rapist irrespective of his relationship with his victim. This study therefore buries the fiction of the marital rape exemption.

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