LETSHOLATHEBE VS THE STATE: TOWARDS THE ABOLITION OF SPOUSAL EXEMPTION IN BOTSWANA?

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Although many countries do not have laws against marital rape, there is an international movement led by feminist pressure groups that is assiduously and steadily gaining credence in advancing the view that the doctrine of marital exemption is unjust and has no place in a modern society. In response to this surging movement, numerous states around the world have taken legislative and judicial initiatives aimed at the abolition of marital immunity. The present article presents a critical analysis of the Botswana case of *Letsholathebe v The State*, where Kirby J stated that the doctrine of marital exemption is offensive to modern thinking as it no longer represents the position of the wife in latter-day society and that it needs to be abolished. This article shares Justice Kirby's sentiments that the doctrine of spousal exemption is anachronistic but argues that the legislature must lead the way ahead of courts in abolishing it to avoid the problem of retroactive application of criminal law. The central claim of this article is that the marital exemption doctrine is an antiquated legal doctrine that sits ill with all notions of human dignity and liberties of women. The article finally proffers suggestions on how Botswana should go about in achieving this desideratum.

1. Introduction

For numerous years husbands throughout the world were granted marital immunity.[1] It was not until the latter half

[1] Throughout This Article, The Terms 'Marital Exemption,' 'Marital Immunity,' 'Spousal Exemption,' AND 'spousal immunity' shall be variously used to mean one and the same thing.

of the twentieth century that marital rape was considered a legal aberration.[2] Prior to this period it was thought unthinkable that a man could rape his wife. The fact of the impossibility of a husband to rape his wife was predicated on at least three premises: the implied consent theory, the unities of person theory and the property theory. The most popular theory among the three is the implied consent theory which is modelled on principles of the law of contract.[3] This theory has been crisply articulated by Sir Matthew Hale in the following terms,

> the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract.[4]

In Hale's view, by virtue of marriage contract, the wife irrevocably consents to sex. Slight exceptions to Hale's doctrine are only permissible in a case where 'ordinary relations in a marriage are suspended'.[5] This is instanced in a case where the husband and the wife are in a separation.[6] Despite that Hale's view was stated without precedent, it became the Common Law of England until recently, in October 1991 when marital exemption was abolished in England by the House of Lords in *R v R*.[7] Hale did not invent the marital exempt principle, he

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2 F Theresa, 'Criminalising Marital Rape: a comparison of judicial and legislative approaches', Vanderbilt Journal of Transitional Law 1.

3 *Ibid.*

4 M Hale, The history of the pleas of the crown 629 (S. Emlyn ed. 1778), at 629.

5 See *R v Clark* (1949) 2 All ER 448 at 449 where an English court held that a separation order has the effect of revoking a wife's implied consent to sex and that upon its issue, a husband can be found guilty of rape.

6 *Ibid.*

7 [1991] 2 All ER at p. 264

subscribed to it as it has been accepted throughout history in the common law world.[8]

On the other hand, the unities of persons theory objectifies the woman because it does not recognise her as a person capable of being raped. It is based on the principle of uni-personality.[9] That is, it postulates that when two people marry, they become one – the husband, thus making it impossible both linguistically and practically for the husband to rape himself. It creates a legal fiction that a man cannot rape his wife, as in so doing he will be raping himself. In terms of this theory, during marriage, the personal being of a woman is suspended and incorporated into that of the man.[10] This theory also finds validity and legitimacy in the Bible. For instance, Ephesians 5:31 states that 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh.'[11] Related to this theory is the property theory which holds that upon marriage, a woman becomes the property of her husband.[12] The rationale for this theory has been explained as being to 'inspire and perpetuate marital harmony.'[13] When viewed through the lens of this theory, marital rape can never be an offence since all manner of sexual intercourse between a man and his wife is simply viewed as the husband's appropriate use of his property.[14]

In addition to the above justifications, modern theorists have advanced secondary rationales that seek to explain

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8 S A Adamo 'The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries (2012) 4(3) American University International Law Review 558.

9 M J Anderson, note, Lawful wife, unlawful sex-examining the effect of the criminalization of marital rape in England and the republic of Ireland (1998) 27 GA journal of international and comparative law 139.

10 Adamo at 560.

11 T Nelson The Holy Bible: New King James Version (1970).

12 Anderson at 146-147.

13 Anderson at 147.

14 *See* Freeman, *'But If You Can't Rape Your Wife Who(m) Can You Rape? The Marital Rape Exemption Re-examined,* 15 FAM. L.Q. 1, 9 (1981).

the impracticability and undesirability of criminalising marital rape. The first class of these secondary reasons can be conveniently described as 'evidentiary' in form and character. Adherents of the evidentiary rationale argue that in a marriage, sexual intercourse is repetitive, and thus it will be difficult to prove that one act of sexual intercourse among many was without the consent of the wife.[15] The other secondary rationale that has been set forth is that a vengeful wife can cry rape to blackmail an innocent husband to secure a more favourable divorce settlement.[16] Another argument advanced by proponents of the 'evidentiary' rationale is that criminalising marital rape would heighten or accentuate discord in the family and make reconciliation between spouses impossible.[17] Lastly, it is argued by others that allowing a wife to stake a claim of rape against her husband would allow the state to intrude into the privacy of the marriage through the devise of criminal law – an arrangement that should not be permitted.[18] This line of argument is in *tandem* with the views expressed by Justice Kennedy of the US Supreme Court in *Lawrence v Texas* when he stated that, '[i]n our tradition the State is not omnipresent in the home.'[19] While many other arguments have been marshalled against criminalising marital rape, the above are widely and predominantly referenced with frequency. Together, these theories created a false doctrinal outlook that marital rape was impossible to commit or that even if we acknowledge the possibility of committing it, proof of it having occurred would create a legal conundrum. On the basis of these rationales, as far back as the mid-twentieth century, no country viewed marital rape as an offence.[20] However as the

[15] Adamo at 561.
[16] *Ibid.*
[17] *Ibid.*
[18] Anderson at 148.
[19] See also *Lawrence v Texas* US, (2003) 570.
[20] Theresa at 56.

women's movement for gender parity steadfastly pervaded all structural aspects of the law and society, the validity of the marital exemption doctrine was severely contested if not doubted in many countries in the globe. While the majority of countries still retain laws that guarantee the marital exemption doctrine, numerous others have abolished it. In Botswana, flickers of the abolition of this doctrine can be found in the High Court decision of *Letsholathebe v The State (*the *Letsholathebe* case)[21] per Kirby J. In this case, the court stated that the doctrine of spousal exempt was 'totally unacceptable, and an historic aberration'.[22] We turn to briefly discuss this case.

2. A brief excursus on the *Letsholathebe* case

The facts of this case are fairly straight and forward. One would have ordinarily not thought that the judge would proceed to deal with the marital exemption in this case because it is not a typical marital rape case where the husband is accused to have raped his wife. In that case, the appellant then a 22 year old boy was charged with rape of a 15 year old school girl. He was convicted by the magistrate and sentenced to 12 years in prison. In convicting the accused, the magistrate court placed reliance on the fact that appellant and the complainant were not married, and held that this rendered sexual intercourse between them unlawful.[23] The learned magistrate reasoned that any such sexual intercourse would of course be unlawful unless it is sanctioned by marriage between the parties.'[24] The learned magistrate added: '[of importance here however, is that the parties say nothing about marriage and from their evidence it is made amply clear that they were not married,

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[21] 2008 (3) BLR 1 (HC).

[22] *Letsholathebe* case, p. 4.

[23] *Ibid.* page 3

[24] Quoted in *Lestsholathebe* case, Ibid.

and I so find. The sexual intercourse of 2 January 2002 between them was therefore unlawful, and I still so find.'[25]

In other words, the learned magistrate perceived the law to be that there cannot be spousal rape in terms of the criminal law of Botswana. The High Court trenchantly criticised the legal expositions of the learned magistrate and described them as 'surprising' and 'incorrect'. The following are the comments of the High Court on the reasoning of the magistrate:

> This is a surprising statement of the law, and in my view an incorrect one, in modern society, where not every couple chooses marriage. State counsel explained it as a reference to the rule that marital rape is not unlawful. This, he submitted was why the offence of rape was constituted by 'unlawful carnal knowledge of the complainant without her consent' (my emphasis). Virtually all sexual offences in the Penal Code (Cap 08:01) involving rape, incest, defilement and indecent assault, preface either the words 'carnal knowledge' or the words 'indecent assault' with the word 'unlawful'. These offences may be rendered unlawful in a number of ways or in a number of cases, such as having carnal knowledge of infants, or imbeciles, or of close relatives, or by fraud.
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> It may be that historically, since our Penal Code was based upon the English criminal law, the use of the word 'unlawful' in addition to the words 'without her consent' in the offence of rape may have been intended to embrace as well the old notion that there can be no rape within marriage, but certainly that is not, in my judgment, the case today.
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> Rape is a most serious, humiliating and invasive assault against a person, whether male or female, and to

[25] *Ibid.*

> suggest that it should be permitted if the perpetrator is a spouse, is, in my view, totally C unacceptable, and an historic aberration. By s 217 of the Criminal Procedure and Evidence Act (Cap 08:02):
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> "(1) The wife or husband of an accused person is competent and compellable to give evidence for the prosecution without the consent of the accused person where such person is prosecuted for any offence against the person of either of them..."
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> Just as assault or murder are offences against the person, so is rape, and the section is a strong indicator that marital rape is an indictable offence, although it may in some cases be difficult to prove. I would respectfully endorse the findings of Lord Lane CJ in R v R [1991] 2 All ER 257 (HL) at p 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, and since it no longer represented the position of a wife in modern day society it should no longer be applied. Instead the principle to be applied was that a rapist remained a rapist irrespective of his relationship with his victim. This case dealt at length with the meaning of the word 'unlawful' and the history of that rule and it finally buried the fiction of the marital exemption. It is not necessary to comment upon it further, since this case is not one between spouses, but suffice it to say that the magistrate misdirected himself in giving weight to the fact that the appellant and the complainant were not married when assessing the unlawfulness of the appellant's actions.

3. Comments on the *Letsholathebe* case

It is quite apparent from the reading of the case that the above comments by the High Court were made *obiter*. This is so because the statement by the judge is based on the facts

which were not before the court for decision.[26] In other words, the question of marital exemption was not arising from the case before court because the complainant and the appellant were not married. One other issue that makes the statement of the judge *obiter* and less authoritative is the fact that the court did not have the benefit of a full argument on the issue before stating its opinion. Clearly, the question as to the judicial abolition of the marital exemption doctrine is by no measure a minor one. It has far-reaching social and legal implications. At a social level, it requires moral adjustments on sexuality on the part of husbands towards their wives. On the legal front, it has the effect of altering the existing common law as presently obtaining in Botswana. Thus, before a court makes such a fundamental law-changing decision, such as would be required the abolition of the marital exempt doctrine, it is very apt that the presiding officer must have had a benefit of argument on the point. It is also important to enquire whether or not the Court's views as captured above are in line with the laws of Botswana governing rape. The relevant provision is section 141 of the Penal Code. It states:

> 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 purposes of sexual gratification, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such other 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.

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[26] See CM Fombad & EK Quansah *The Botswana Legal System* (2006) Pula Press, at p. 74.

Three words are critical in the above provision. They are 'unlawful carnal knowledge'. What is their interpretational significance? To answer this question, a few preliminary observations are apposite to provide a proper background and context for discussion. In 1976, the British Parliament passed the Sexual Offences (Amendment) Act which had the effect of stalling the erosion of the marital exempt doctrine. The Act codified the common law of rape and included the words 'unlawful sexual intercourse with a woman' within its definition of rape.[27] Because the Act did not define the word 'unlawful', rape continued to be understood in common law terms and the word 'unlawful' was defined to mean 'outside of marriage'.[28] Under this definition marital rape was perfectly legal and marital immunity persisted unabated. For purposes of this discussion, the meaning of 'unlawful carnal knowledge' as used in the Penal Code of Botswana shall be treated as being substantively similarly to the meaning annexed by the courts of England to the phrase 'unlawful sexual intercourse' as it appears in the aforesaid Sexual Offenses (Amendment) Act of 1976. Thus it is important to analyse how the courts of England dealt with this phrase to shed light on how the courts of Botswana should approach or unpack the phrase 'unlawful carnal knowledge' as used in the Penal Code of Botswana, should the need arise in future. Reliance on authorities from England is important for the chief reason that the criminal law of Botswana is based on English criminal law.

Both the English Sexual Offenses (Amendment) Act of 1976 and the Botswana Penal Code do not define the phrases 'unlawful sexual intercourse' and 'unlawful carnal knowledge' as used in their definitions for rape. In the English case of *R v Steele*[29] the court took the view that in the absence of

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[27] See section 1(1) thereof.

[28] P Rook and R Ward, Rook and Ward on sexual offences (1997) Sweet and Maxwell, at p. 51.

[29] R. v. Steele, 65 Crim. App. 22 (C.A. 1976).

the definition of 'unlawful sexual intercourse' in the Sexual Offenses (Amendment) Act, rape continued to be defined under the common law and was thus construed to mean 'outside of marriage.' In terms of this definition, marital rape would not be illegal and marital immunity would thus continue to exist. How then did the English Courts abolish the notorious doctrine of marital exemption?

4. How the courts of England killed the marital exemption rule

The abolition of the marital exemption in England has a long and chequered history. As indicated above, as far back as 1736 Sir Matthew Hale argued that at marriage under the Common Law, the wife irrevocably gives up her body to her husband and irrevocably consents to sexual intercourse, thus making it an illogicality for her to claim that she could be raped by her husband. Hale's view was accepted as the position of the common law for centuries. This is evidenced by the first edition of Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822), where the learned author simply states that: 'A husband also cannot be guilty of a rape upon his wife.'[30] In 1899, in *R v Clarence*,[31] Justice Field, filed a minority opinion deviating from Hale's logic and stated that the husband's marital immunity was not absolute and that there are instances where a husband could be found guilty of marital rape. Given the conservativeness and patriarchal nature of the English society at the time, Justice Field's view went without notice and the law remained unchanged for the intervening 150 years!

Although the correctness of Hale's marital immunity principle was doubted by Lord Field in *R v Clarence* as far

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30 Archbold *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822) at p. 259 .

31 (1888) 22 QBD. 23, at 57.

back as 1888, it was not until 1949 that Byrne J held in *R v Clarke*[32] that the doctrine was not absolute and that it can be trumped in deserving cases such as where the spouses have been living apart. The facts in the *Clarke* case are briefly as follows. After being in marriage for slightly over a decade, the wife obtained a judicial separation order which contained a clause that stated that she was no longer bound to live with her husband.[33] Within two weeks after obtaining the order, the husband had non-consensual coition with his wife. At trial, the husband pleaded marital immunity. In relation to the defence of marital immunity, Justice Byrne stated that as a general rule, a husband cannot be guilty of raping his wife but that he may nonetheless be found guilty where the wife had been awarded a legal order for separation since such order revoked her consent to sexual intercourse.[34] This decision was clearly departing from Matthew Hale's view that the wife's consent to sex in marriage is irrevocable. But even Byrne J had to appreciate that:

> [a]s a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them.[35]

However, in *R v Miller*,[36] Judge Lynskey held that Hale's view of marital exemption was correct at law and that the husband had no case to answer, although she had prior to the 'wrongful' sexual intercourse petitioned the court for

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[32] *R. v. Clarke*, [1949] 2 All E.R. 448 (Leeds Assizes).
[33] *Ibid* 449.
[34] *Id.* at 448-49.
[35] *Ibid* 450.
[36] *R. v. Miller*, [1954] 2 Q.B. 282 (Winchester Assizes).

divorce, which court had not reached decree nisi stage.[37] However, Justice Lynskey proceeded to not only affirm that a separation order revokes prior consent but also that all the previous judicial pronouncements about the immutability of marital immunity were mere *dicta* without more.[38] The *Miller* case was followed by the decision of Justice Park in *R v O'Brien*[39] in 1974 in which the court widened the contours of the legal separation doctrine by holding that a decree nisi for separation terminates marriage and concurrently revokes the prior consent to sexual intercourse tendered by the wife at marriage.[40] A comment is warranted here: it is trite that a decree *nisi* for divorce is not absolute. By holding that a decree *nisi* for separation revokes consent of the wife to coitus, Justice Park actually lowered the threshold of criminal liability arising from marital rape. Around the same time, Lord Lane ruled in *R v Steele* (above) that a restraining order against the husband from molesting his wife had the effect of revoking her consent to sexual intercourse, but that merely seeking a protective order left the wives consent to sex intact.[41] As the last decade of the twentieth century drew to close, it became apparent that the doctrine of marital exemption was becoming indefensible by the day. Thus in 1989 the Scottish courts, per Lord Justice-General Emslie, ruled in *S v HM Advocate General*[42] that the whole notion of marital exemption within rape was misconceived.

Relying on the decision in *S v HM Advocate General*, among others, in 1991, the Supreme Court of England delivered its ruling in the case of *R v R*, above. The facts of this case can be summarised as follows. The parties contracted marriage in 1984 and separated in 1989, at which time the wife moved in

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37 *Ibid.* at 292.

38 *Ibid* at 293.

39 *R. v. O'Brien*, [1974] 3 All E.R. 663 (Crown Ct. Bristol).

40 *Ibid.* at 665.

41 *Ibid.* at 25.

42 1989 S.L.T. 469

with her parents, taking along the child of the marriage. Two days later, the husband called the wife and informed her that he was going to file divorce proceedings against her. A few weeks later, the husband broke into his wife's living house and forced or attempted to force his wife to sex. The question before court was whether the husband was guilty of raping his wife. The husband's defence was anchored on the statement by Hale that a husband cannot rape his wife and thus that his actions cannot be unlawful. Justice Owen rejected Hale's perception of the law as having been made at a time in history when 'marriage was indissoluble'.[43] After painstakingly analysing precedents in this area, Justice Owen delivered himself thus:

> I accept that it is not for me to make the law. However, it is for me to state the common law as I believe it to be. If that requires me to indicate a set of circumstances which have not so far been considered as sufficient to negative consent as in fact so doing, then I must do so. I cannot believe that it is a part of the common law of this country that when there has been a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that does not amount to a revocation of that implicit consent. In those circumstances, it seems to me that there is ample here ... [that] would enable the prosecution to prove a charge of rape or attempted rape against this husband.[44]

The Court of Appeal added that the doctrine of marital exemption was antediluvian and starkly harsh and thus ought to be abolished. The question therefore was on the means or

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[43] *R v R* 748.

[44] As shall be shown anon, the husband appealed Justice Owen's decision to the House of Lords and it is the decision of the House of Lords that put the final nail on the coffin of marital exemption.

logic of attaining that *desideratum*. According to Lord Lane who penned the decision of the court:

> The ... radical solution is said to disregard the statutory provisions of the Act of 1976 and, even if it does not do that, it is said that it goes beyond the legitimate bounds of judge-made law and trespasses on the province of Parliament. In other words the abolition of a rule of such long standing, despite its emasculation by later decisions, is a task for the legislature and not the courts ... Ever since the decision of Byrne J in *R v Clarke*, courts have been paying lip service to the Hale proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. 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 restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour ... It seems to us that where the common law rule no longer even remotely 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.[45]

The Court of Appeal was however constrained by the doctrine of *stare decisis*. It was not available to it to say Hale's proposition was wrong in his perception of the Common Law. They cleverly found a way of by-passing the *stare decisis* hurdle. Rather than ruling that Sir Hale was in error in his proposition, they wittily decided that Sir Hale's proposition was never law and therefore, 'it can never have been other

[45] *R v R* 264

than a fiction, and fiction is a poor basis for the criminal law.'[46] That was how the court dealt with the position at common law, but the Sexual Offences Act remained, with marital exemption boldly ingrained in it. On the statutory position, the court remarked:

> ... in the end [it] comes down to consideration of the word 'unlawful' in the Act of 1976 ... The only realistic explanations seem to us to be that the draftsman either intended to leave the matter open for the common law to develop in that way ... or, perhaps more likely, that no satisfactory meaning at all can be ascribed to the word and that it is indeed surplusage. In either event, we do not consider that we are inhibited by the Act of 1976 from declaring that the husband's immunity as expounded by Hale no longer exists. We take the view that 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.[47]

Despite that this judgment departs from Hale's concept of irrevocable consent to sex by the wife, it indirectly endorses Hale's view that the wife implicitly consents to sex with her husband during the currency of the marriage. It has been observed that what made Justice Owen deviate from Hale's proposition of the law in this regard was the amount of violence that was deployed by the husband to force his wife to sex and not necessarily that he perceived Hale's view of marital immunity to be wrong *per se*. This argument becomes potent when one considers the statement by Justice Owen when he says he

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[46] *Ibid* at 270.

[47] *Ibid* at 273.

> found] it hard ... to believe that it ever was common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse.[48]

Thus, in that way, rather than abolishing the principle of marital exemption, Judge Owen sliced out another exemption to the principle, albeit a major one. The Supreme Court decision in *R v R* was followed by two conflicting decisions of courts of first instance. The first was *R v C (Rape: Marital Exemption)*[49] in 1991 where Justice Simon Brown radically declared that Hale's proposition was no longer representative of the law. He opined that:

> Were it not for the deeply unsatisfactory consequences of reaching any other conclusion upon the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late 20th century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape.[50]

Before the ink in Justice Simon Brown's judgment could dry, still in 1991, the case of *R v J (Rape: Marital Exemption)*[51] was brought to court. It dealt with the interpretation of section 1(1) of the Sexual Offences (Amendment) Act 1976 which provided that:

> For the purposes of section 1 of the Sexual Offences Act 1956 a man commits rape if – (a) he has *unlawful* sexual intercourse with a woman who at the time of the intercourse does not consent to it...

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48 *Ibid* at 753.

49 [1991] 1All ER 755

50 *Ibid.*

51 [1991] 1 All ER 759.

The argument for the accused was that the Act provided a definition for rape and that the only sensible meaning that could be annexed to the word 'unlawful' is 'illicit' – effectively meaning outside the purview or domain of matrimony. This meant that the legislature had now codified the doctrine of marital exemption. Rougier J not only accepted this view, but went further and sought to prevent further future attempts at whittling down Hale's marital immunity proposition. He said:

> Once Parliament has transferred the offence from the realm of common law to that of statute and, as I believe, had defined the common law position as it stood at the time of the passing of the Act, then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallised as at the making of the Act and only Parliament can alter it.[52]

Meanwhile the Court of Appeal decision in *R v R* was appealed to the House of Lords and before the Appeal was heard, the English Law Commission completed the Report on marital rape – 'Rape Within Marriage.'[53] The Commission stated in this Report that as a general rule a husband cannot be convicted for raping his wife but that this rule is subject to exceptions.[54] These exceptions were derived from decisions of courts. In terms of the Commission, the husband would lose his immunity:

(a) where there exists an order of the court proving that the wife is not bound to cohabit with her husband. (*R v Clarke* [1949] 33 Criminal Appeal Reports 216);

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[52] *Ibid* 767.

[53] Law commission, rape within marriage, (Working paper no 116) 1990.

[54] *Ibid* at para 5.1.

(b) where the court has granted the wife a decree nisi for judicial separation or a decree *nisi* for divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (*R v O'Brien* [1974] 3 All England Law Reports 663);
(c) where a court has issued an interdict against the husband, restraining him from molesting the wife or where the husband given an undertaking to the court that he will desist from molesting her (*R v Steele* [1976] 65 Criminal Appeal Reports 22);
(d) in terms of the decision in *R v Roberts* ([1986] Criminal Law Reports 188), where a non-molestation order has been issued in favour of the wife, her deemed consent to sexual intercourse does not automatically revive upon the lapse of time.
(e) in *R v Miller* (1954] 2 Queen's Bench Division 282) Mr Justice Lynskey, remarked, obiter, that a wife's consent to sexual intercourse would be annulled by an agreement between the parties to separate, especially where such agreement contains a non-molestation clause;
(f) in *R v Steele*, Lord Justice Geoffrey Lane stated, *obiter*, that a separation agreement containing a non-cohabitation clause would have a similar effect.

In the end the Report recommended that

> the present marital immunity be abolished in all cases' since it was out of sync with the legal values governing modern marriages which seek to make spouses equal partners.[55]

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[55] *Ibid* at para 5.2.

In October 1991, the House of Lords delivered their seminal and ground-breaking opinion in *R v R*,[56] wherein the learned Law Lords unanimously adopted the reasoning and decision of the court *a quo* (Court of Appeal) and held that marital exemption had no place in modern society. The House of Lords concurred to the decision of the Court of Appeal that Hale's proposition has always been fiction that infiltrated the common law. The court further held that *R v R* only served to revert the common law to its true and correct position. As for the interpretation of the English Offences Act of 1976, the court took the view that the inclusion of the word 'unlawful' in its section 1(1) was mere 'surplusage.' The English Parliament acquiesced to the enduring urge by courts to abolish the doctrine of spousal exempt, and the word 'unlawful' was removed from the definition of rape under the Criminal Justice and Public Order Act of 1994: effectively and statutorily criminalising marital rape. Thus the doctrine of marital exempt was dead and buried: perhaps not so in lived reality. By the time law-makers criminalised marital rape in England, many countries had already legislatively prohibited it. These include: Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, the Soviet Union, Poland, and Czechoslovakia.[57] As at the time of writing this article, in Africa marital rape had been criminalised in only three countries: Zimbabwe, Angola and Democratic Republic of Congo.[58] The decision in *R v R* is extremely important to Botswana for at least three chief ways:

It was handed down by the most respected and superior court in the common law jurisdiction: The House of Lords

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[56] [1966] A.C. 591.

[57] See the list of the countries that criminalise marital rape at: http: // www. conservapedia. com/Marital_rapehttp://www.conservapedia.com/ Marital_rape (accessed 26 June 2013).

[58] See the Website for Women for Peace 'Africa: Women Body Lobbies foe Law on Marital Rape' (2012) http://www.peacewomen.org/news_article. php?id=5554&type=news (accessed 24 June 2013).

and thus the decision is highly persuasive and cannot be arbitrarily ignored. Second, the court extensively dealt with the common law of England, which is also the common law of Botswana. Third and more importantly, the court considered a criminal statute: the Sexual Offences (Amendment) Act of 1976, whose provisions dealing with rape are in *pari materia* with equivalent provisions under the Penal Code of Botswana. To this end, the courts of Botswana do not need to re-invent the wheel and deal with the Common Law position since the House of Lords has already held that the common law rule of marital exemption was a legal fiction that had infiltrated the common law. This effectively means that at common law, marital exemption is and was never unknown and that rape is rape whether in or outside marriage.

However, it will be rather simplistic and mechanical for Courts of Botswana, indeed as Kirby J sought to do in the *Letsholathebe* case, to simply hold that the word 'unlawful' as used in section 141 of the Penal Code of Botswana is 'surplusage' thereby making marital rape an offence. It is submitted that it would be inadvisable for a judge to simply expunge the word 'unlawful' in section 141 of the Penal Code by way of interpretation. This would amount to the creation of a new and retroactive criminal liability, thus offending the venerable criminal law principle that there must be no crime or punishment save in accordance with fixed, predetermined law. This principle is expressed in the Latin maxim: *nullum crimen sine, nulla poena sine lege.*[59] The legal significance of the word 'unlawful' in section 141 of Botswana's Penal Code presents the Gordian Knot as it did in England. What is its import? Does it perpetuate the common law position as perceived by Sir Hale or it is simply superfluous as the House of Lords believed in *R v R*? Clearly, in the light of this

[59] For a comprehensive discussion on this principle see A Mokhtar nullum crimen sine, nulla poena sine lege: Aspects and Prospects *Statute (2005) 26 1 Statute Law Review* 41- 55.

ambiguity, a Botswana court cannot say to a marital rape accused person:

> you should have known that the word "unlawful" as used by the lawgiver in section 141 of the Penal Code is surplusage. You therefore ought to have known that the marital exemption doctrine is not part of our law.

This will be an extremely dangerous and austere approach which will work to undermine the criminal principles of due notice and lenity which principles are hallowed by long standing judicial tradition. The lack of preciseness in section 141 can also be gleaned from the words of Judge Kirby in the *Letsholathebe* case when he said:

> the use of the word "unlawful" in addition to the words 'without her consent' in the offence of rape *may* have been intended to embrace as well the old notion that there can be no rape within marriage, but certainly that is not, in my judgment, the case today[60] [emphasis mine].

The judge's use of the word 'may' shows that he is also not clear in his mind about the legal significance of the word 'unlawful' as used in section 141. If the court, which is presumed to be the fountain of legal knowledge, is not clear on the significance of the word 'unlawful', an ordinary man in the street will, *a fortiori*, be clueless on the position of the law in this regard so as to conduct himself in manner consistent with the dictates of the law. It should be remembered that the proposition by the House of Lords in *R v R* that the word 'unlawful' as used in the English Sexual Offences Act was 'surplusage' was not enunciated in *vacuo*. The court took into consideration the sustained and arduous evolution of rape

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[60] Letsholathebe case p .4.

law in England and related developments between the time of Hale's codification of the principle of marital exempt in 1736 to the time of the decision in *R v R* in 1990, and concluded that it no longer lies in the mouth of a reasonable man to say that marital rape is permissible or legal. In this connection, the court delivered itself thus:

> There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.[61]

The above sentiments expressed by the court are clearly contextual. They were uttered within the context and setting of England and no other place. In the *dictum* above, the judge talks of various exceptions carved out by courts of England and the 'evident evolution' of the law in that country which when taken together would serve as advance notice to a subject that the spousal exempt rule has been abolished in England. In Botswana, no case has ever come before courts directly dealing with the marital exempt doctrine. There is also no 'evident evolution' respecting marital rape law that the House of Lords talked about in *R v R* in Botswana. These observations negative the principle of advance notice and lenity as argued above. It is trite law that '... a criminal defendant [must] be given notice of the precise consequences that accompany

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[61] *R v R* at p. 43.

his criminal activity.'[62] Further, if Parliament of Botswana had intended to abolish marital rape, it would have done so in an explicit language that admits of no interpretational ambiguities.

It may also be argued that to read abolition of marital exemption in section 141 of the Penal Code, when the said section is silent on the matter is to go overboard. This broad interpretation goes against the basic rule of interpretation of criminal statutes, namely that criminal statutes are supposed to be interpreted strictly against the state.[63] It has been argued that the interpretation of criminal statutes is constrained by 'fair notice and separation of powers that would appear to make lenity a more appropriate approach than dynamism.'[64] Unsurprisingly therefore, Eskridge's theory of dynamic and organic interpretation of statutes is limited to regulatory statutes and civil cases and does not foray into the domain of criminal law.[65] The basic rule is that laws that seek to limit the full reach of liberties of individuals, such as criminal statutes, must be interpreted restrictively.[66] Relatedly, as pointed out above, a provision in a criminal statute must be comprehensively formulated to enable a person to regulate their conduct. In other words, subjects must know what is legal and what is illegal, what is permissible and what is

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62 Criminal Law. Statutory Interpretation. Ninth Circuit Holds That 18 U.S.C. §924(C)(I)(A)Defines a Single Firearm Offense. United States v. Arreola, 446 F.3d 926 (9th Cir.), superseded on denial of reh'g and reh'g en banc, 467 F.3d 1153 (9th Cir. 2006), cert. denied, 127 S. Ct.3002 121(2) (2007) Harvard Law Review 675.

63 See *United States v. Halseth*, 342 U.S. 277 (1952); State v. Hansen, 55 N.W.2d 923 (Iowa 1952); State v. Waite, 156 Kan. 143, 131 P.2d 708 (1942); Wanzer v. State, 97A.2d 914 (Md. 1953).

64 L M Solan 'Should criminal statutes be interpreted dynamically' (2002) Brooklyn Law Review 1.

65 *Ibid.*

66 See Marumo J in *Otlhomile v. The State* 2002 (2) BLR 295 (HC) at p. 305. See also *Petrus and Another v. The State* [1984] B.L.R. 14, CA) *R v Milne and Erleigh* 1951 (1) S.A. 791 (A.D.) at p. 823B-D.

impermissible under the law in order to conduct themselves in line with the script of law. This is to say, a provision in a criminal statute must be plain beyond reasonable question.[67] In this connection, Justice Clark of the Supreme Court of the US has stated that:

> [a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation.[68]

Where a criminal statute is not couched with definitiveness and doubts arise as to its true import, such doubts must benefit the accused person. The rule in this regard is elementary and it is this: '[w]here there is ambiguity in a criminal statute, doubts are resolved in favour of the defendant'.[69] There can be no debate that section 141 of the Penal Code as presently cast creates ambiguities on the question as to whether a husband can be found guilty of raping his wife or not and these ambiguities must operate in favour of the accused in a marital rape case.

Thus, if Kirby J in the *Letsholathebe* case wanted to be understood as making the Penal Code to be read as a complete reversal, thereby creating a new offence of marital rape, then the judge was in error. He would have forayed into law-making - a prohibited territory for him, especially legislating in a criminal law domain, where the result would retroactive application of criminal law. He certainly would have gone 'beyond the legitimate bounds of judge-made law.'[70]

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67 Q Johnstone An Evaluation of the Rules of Statutory Interpretation(1954) Kansas Law Review 13.

68 Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

69 *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (quoting with approval the decsion in United States v. Bass, 404 U.S. 336, 348 (197 1).

70 R v R [2] 1991] 2 All ER at p. 264

It is impermissible for courts of law to fundamentally alter the constituent elements of an offence to the prejudice of an accused person.[71] In this connection, the European Human Rights Court stated in *C.R v United Kingdom*[72] that:

> [T]he law must be adequately accessible--an individual must have an indication of the legal rules applicable in a given case--and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of criminal law.[73]

In the case of *Public Prosecutor v Manogaran*,[74] the Court of Appeal of Singapore correctly stated that a reversal of interpretation that truly creates a new criminal liability is prohibited by the principle of legality.[75] Reversal of interpretation undermines the principle of non-retroactivity of criminal law. However, common law courts are at large to adapt and modify the common law to reflect society's changing circumstances. In the premises, it is submitted that the law on marital rape in Botswana is unsettled and thus cannot found criminal liability. Judge Kirby's opinions in the *Letsholathebe* case amount to more than *dicta*. It is therefore important that Parliament of Botswana must step to the plate and clarify the position by expressly abolishing marital exemption in a clear and unambiguous language in the manner that the British Parliament did through the Public Order Act of 1994.

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71 Ser A (1995) European Court of Human Rights 335.

72 *Ibid* at 390.

73 *Ibid*.

74 [1997] 2 L.R.C. 288 (Ct. of App. of Singapore).

75 *Ibid*.

5. Public reactions on and the significance of abolition of marital rape in England and Botswana

At a general level, views are widely divided over the question whether to abolish marital exempt or not. Even in England, people had mixed reactions to the House of Lords' decision in *R v R* despite that the law in that country had constantly evolved over time towards the direction of abolition. Theresa writes that of the many people who were opposed to the elimination of spousal exemption were women.[76] For instance she recites the views of Barbra Amiel, a columnist for the London Times when the latter wrote:

> I do not know of a single successful case in those countries that allow charges of marital rape. Juries see how ludicrous it is to be faced with husbands and wives living together who had lovely sexual intercourse on Monday, an OK time on Tuesday, but on Wednesday the husband raped the wife. Sexual intercourse can be a moment of ecstasy or a nightmare of utter humiliation, depending on such intangibles as mood, timing and one's subjective appreciation of the partner's characteristics. The law cannot protect us from intercourse that is simply inconvenient, untimely or a weapon within a marriage.

Some scholars have also criticised the abolition of the marital exempt doctrine. For instance, Richard White argued in the aftermath of the decision in *R v R* that to permit women to press charges of rape against their husbands will work to destabilise family life.[77] In his view, the question is not whether 'a wife should ... be permitted to put her own interests before those of her family,' but rather what would be the effect of the abolition of marital exemption on family life.[78]

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[76] Quoted in Theresa, p. 16.

[77] R White, Marital Rape (1990) 140 New Law Journal 1727.

[78] *Ibid.*

He asked rhetorically:

> [g]iven the alleged reluctance of many women to consent to intercourse without some degree of persuasion, what would be the effect on the attitude of men of the threat of rape?[79]

Williams weighed in with an even more trenchant criticism against the abolition of marital exemption principle.[80] While conceding that rape laws within the context of marriage needed some modifications, he argued that the 'charge of rape [was too] powerful (and even self-destructive) a weapon to be placed in the wife's hands.'[81] In Williams's view, marital rape was best dealt with under the regime of assault laws.[82] He also argued that cohabitation must be the determining factor on whether a man was liable to be prosecuted for rape. He argued that if a husband was cohabiting with the wife, then he must be exempted from prosecution for rape, but that if they were not cohabiting, then the husband is subject to the full might of rape laws.[83] Williams also objected to the use of the term 'rape' to describe non-consensual sexual intercourse within marriage because in his view, it stigmatises the accused husband and opens doors to sentences that are harsher than reasonably necessary to be meted against a convicted husband.[84]

In other quarters, the abolition of marital immunity was received with much fanfare and zeal. For instance Claire Glasman, spokeswoman for Women Against Rape, had this to say about the abolition:

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79 *Ibid* 1728.

80 G Williams 'The problem of rape' (1991)141 New Law Journal 205.

81 *Ibid* at 206

82 *Ibid.*

83 *Ibid.* at 247.

84 *Ibid.*

> This is a fantastic day for women everywhere. The law lords have finally nailed a legal lie which has somehow survived for nearly three centuries. This is really a step towards making it clear legally that women have the right to say 'no' to sex, even if they are married. It overturns 250 years of legal sexual slavery based not on a court case but on an 18th century judge's decision that a husband could not rape his wife.[85]

The then British Home Office Minister, John Pattern also commended the abolition of marital immunity arguing that rape is rape regardless of the relationship between the rapist and the victim.[86]

Views on the subject are equally divided in Botswana between conservatives and reformists. A gender activist and sociology lecturer in Botswana, Dr Onalenna Selolwane holds the view that marital rape must be viewed as criminal just like any other form of rape that occurs outside marriage.[87] She is reported to have argued at a Botswana Police Service (BPS) national symposium on the development of an effective law enforcement response to violence against women and children, that as a husband '...you have no right to beat your wife and force sexual intercourse with her.' adding '... where violence is used, it is unlawful.' She rhetorically asked: 'What happened to a woman's free will? Is it chained; added weight and dunked in the village well when she gets married?'[88] *Ditshwanelo*, a local Human Rights Organisation (NGO), has also argued in favour of abolition of marital exemption, pointing out that, 'consent must be given voluntarily, even in the case where the people are married to each other...' and that 'marital rape' should be specifically written into the laws

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85 Quoted in Theresa at 18.

86 Quoted in Theresa at 19.

87 T Kala Spousal rape, the debate re-born, Mmegi Newspaper. Available at: www.mmegi.bw/index.php?sid=6&aid=1284&dir=2012/JuneMonday25 (accessed 21 June 2013).

88 *Ibid.*

of Botswana.'[89] Other local Organisations such as Botswana Network on Ethics, Law and AIDS (Bonela), Women Against Rape (WAR) and *Emang Basadi* are all backing the cause for the criminalisation of marital rape.[90]

However, like Professor Williams referred to above, Kgomotso Jongman, a family welfare officer, shuns the notion of marital rape and prefers to view it as abuse.[91] In his view:

> I would say there is abuse in marriage - abuse in different forms - sexual exploitation - where someone doesn't feel like engaging in sexual intercourse and they are forced.[92]

He adds that giving this abuse a criminal label like rape would not solve the problem. A deacon at a local church in Gaborone, World Prayer Centre, Mmoloki John is utterly dismissive of the whole concept of marital rape. In his own view:

> [t]he woman will be playing a dirty game because biblically how do you explain that a man has raped his own wife?' adding '[i]t's a new phenomenon - there has never been such a thing in the past.[93]

President of Tati Town Customary court, gender activist and wife to retired High Court Judge, Justice John Mosojane is also reported to have stated at a gender violence workshop in Francistown that there is nothing such as marital rape, arguing that if the woman cannot acquiesce to the husband's

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89 Ditshwanelo statement on marital rape (2003). Available at: http://www.ditshwanelo.org.bw/aug18pres.html.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

sex demands, then she must approach courts of law for divorce.[94]

Despite the conflict in public opinion, the elimination of marital exemption doctrine is long overdue. Its abolition will underline the important fact that women have separate and exclusive legal existence and rights independent from their husbands'. Marital rape violates the woman's right to body integrity, self-determination, freedom and the harm is not alleviated or assuaged by the fact that marriage exists between the parties or that the harm occurred in the comfort of the marriage bed.[95] Thus, the abolition of marital exemption doctrine will give life and meaning to the profound affirmations of human rights of women contained in numerous international instruments such as the Convention on the Elimination of All forms of Discrimination Against Women,[96] African Charter on Human and Peoples' Rights[97] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[98] among others. It is submitted that the abolition of marital exemption doctrine is a vital step towards the achievement of gender equality as envisaged by the many international human rights instruments referred to above. As Mutua rightfully argues,

> '[h]uman rights is today the single, paramount virtue to which vice pays homage, that governments today do not feel free to preach what they may persist in practicing.'

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94 L Mooketsi Botswana: 'Give It Up,' Says Mosojane, 'That's Rape,' Cries WAR (2009) available at: http://allafrica.com/stories/200903301724.html (accessed 24 June 2013).

95 Adamo at 555.

96 Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 and came into force on 03 September 1981.

97 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

98 Adopted in Maputo in July 2003 and entered into force in November 2005.

In other words, international human rights law is real, effective, and an obligatory regime of global civilisation today.[99]

6. Conclusion

The views of Kirby J in the *Letsholathebe* case on criminalisation of marital rape, though *obiter*, signal a fundamental judicial awakening to notions of women's rights in the country. As indicated above, rape is morally abominable and legally repugnant whether committed within the framework of marriage or outside matrimony. As Magdeline Madibela, Head of the Gender Unit at the secretariat of the Southern African Development Community (SADC), puts it,

> [n]on-consensual sex and where the perpetrator is the victim's spouse. As such it is a form of domestic violence and or sexual abuse.[100]

Rape despoils women of their dignity and self-worth. Worse, marital rape is more traumatic than rape committed by a stranger.[101] It demeans and objectifies women and portrays them as man's chattels of sex. It renders the notion of gender equality nugatory. Spousal exemption to rape denies married women timely protection of the law since they must wait for the divorce process to run and complete before securing relief, during which time they remain exposed to danger.[102] Finkelhor and Yllo correctly argue that married women are

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[99] Makau Matua, Book Review, 95 AM. J. INT'L L. 255, 255 (2001) (quoting L. Henkin, the age of rights, at ix-x (1990). Contra J. S Watson, Theory And Reality In The International Protection of Human Rights (1991).

[100] R Kedikilwe 'when a man rapes his wife' Sunday Standard Newspaper available at: www.sundaystandard.info/print_article.php?NewsID=13154 (accessed 24 June 2013).

[101] D. Russell, Rape In Marriage 198 (1982).

[102] Adamo 559.

more exposed to the danger of marital rape when the parties are estranged because during this period the husband senses anger and resentment.[103] During estrangement, the husband is likely to retaliate against his wife through forced sex and the wife will have no legal remedy against him until the divorce is final.[104]

Thus, in order to give meaning and expand the reach of human rights of women, it is important to abolish repugnant practices that undermine their basic dignity such as marital rape. It must be acknowledged that even if a man is married to a woman, it does not mean that he has untrammelled sexual rights over her. Marital rape expresses the power and dominance of men and the subjugation of women in marital set-ups. Sir Hale's marital immutability doctrine reflects societal ethos and values of the ancient times it was enunciated and has no applicability in modern times. As Lord Kinkel argues in *R v R*, since the enunciation of Hale's proposition in 1736, 'the status of women, and particularly of married women, has changed' ... 'in the light of changing social, economic and cultural developments.'[105] It is within this context and spirit that the views of Kirby J in the *Letsholathebe* case are received. It is thus keenly hoped that with time these views will be crystallised in the jurisprudence of the country and codified in relevant statutes by the legislature. In concluding, it is important to emphasize, as pointed out above, that in Botswana, the abolition of spousal exemption to rape cannot be left to courts of law. Leaving it to courts may create the problem of reversal interpretation of the penal statutes thereby creating a new criminal liability. It is thus more desirable for the legislature to step to the plate and pass a law that clearly outlaws marital exemption. This law will teach the Botswana society that marital rape is not the husband's sexual privilege

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[103] D. Finkelhor & K. Yllo, License to rape: sexual abuse of wives (1985)141.
[104] Ibid.
[105] *R v R* p. 770.

but a dehumanising, unjust and criminal act. The common law rule of spousal exemption, if it ever was a good law, no longer applies today. Purely on grounds of principle, marital exemption is no longer defensible.