A LEGAL HISTORY OF MARITAL RAPE: THE EROSION OF ANACHRONISM

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I. Introduction

The marital exemption to rape is a common law doctrine that precluded the prosecution of a husband for raping his own wife. This principle was incorporated into our legal system by the exception to Section 375 of the Indian Penal Code, 1860 (hereinafter, the code). The Code, which was drafted by T.B. Macaulay and his fellow commissioners, is, by virtue of Article 372 of the Constitution of India, still operative in our country.[1] The code, like any other criminal code, reflects the then prevailing social and political mores in India and elsewhere. Although, the code is more than about 150 years old, there can be very little doubt that it serves its purpose even today as it did about a 100 years ago.

But then, changes are inevitable and they are bound to happen. The world has witnessed a sea change since 1860 and our country is a not a stranger to the event. The societal notion of marriage and family has changed dramatically over the last twenty years as the public has become increasingly aware of the problems of domestic violence, incest and child abuse.[2] The marital exemption to rape, which is one of such problems, therefore, today needs to be appreciated and understood in the backdrop of the existing political, social, moral and legal ideologies.

II. The History of Spousal Exemption to Rape: Traditional Justifications

As noted above, the marital rape exemption is a vestige of English common law.[3] The exemption is as ancient as the institution of marriage itself.[4] At common law, the doctrine of marital exemption to rape is attributable to Sir Matthew Hale, a former Chief Justice of the Court of King's Bench in

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1 Lord Macaulay, Sir Barnes Peacock, Sir J.W. Colville and several others took the initiative of drafting the Penal Code for India While doing so, they not only drew upon the existing English and Indian laws but also upon Livingstone's Louisiana Code and the Code of Napoleon. The draft code, completed in 1850 was presented to the Legislative Council in 1856 and was passed into law by Act XLV of 1860.

2 See generally DIANA E.H. RUSSELL, RAPE IN MARRIAGE (Indiana University Press, Bloomington, 1990).

3 Martin D. Schwartz, The Spousal Exemption for Criminal Rape Prosecution, 7 VT. L. REV. 33, 33 (1982).

4 See DIANA E.H. RUSSELL supra note 2, at 2-5.

England and a seventeenth century English jurist, who propounded that 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up her self in this kind unto her husband, which she cannot retract.[5]

It is very surprising to note that Sir Matthew Hale did not offer any argument, case law, or legal basis to support his assertion, nor did he acknowledge the existence of somewhat contrary legal authority.[6] While it seems clear that there was ample authority for the fact of marital immunity in rape, the theoretical basis of the immunity does seem to be Hale's own creation.[7] This authority had its origins in the concept of 'conjugal debt' in medieval moral theology and the law of the church. The concept of 'conjugal debt', derived from Biblical statements on marriage, held that 'both husband and wife had a duty to perform sexually at the request of their mate.[8] But, ultimately, as Brooks remarks, there is nothing to indicate that Hale's statement is anything more than his personal view as he cites no other authority not is it a principle of criminal law founded upon any judicial decision.[9] It was a deduction made upon contractual principles and the idea was as novel as it was fallacious.[10]

Other than the theory of implied consent there are two other doctrines that were the foundation of the marital exemption and which the Courts have constantly recognized. The first of these premises rested in the origins of the crime of rape. Rape was originally a property crime rather than a crime against the person. Women were chattel, and men had a property interest in their wives' and daughters' sexuality. Therefore, the original purpose of the rape statues was to protect men's property rather than to protect women

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5 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN (Professional Books Limited, P.R. Glazebrook ed., 1971).

6 Michael D. 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).

7 David Lanham, Hale, Misogyny and Rape, 7 CRIM. L.J. 148, 155 (1983).

8 Elizabeth M. Makowski, The Conjugal Debi and Medieval Canon Law, 3 J. MEDIEVAL HIST. 99 (1977).

9 Richard Brooks, Marital Consent in Rape, (1989) CRIM. L. Rev. 877, 878. However, it is also interesting to note that in 1631, The Earl of Castleham had been convicted in of rape upon his wife when he held her down in order that a servant had intercourse with her. Hale could as well have cited this case as an authority for a husband's liability in a rape upon his wife. Instead, he chose to put forward the opposite assertion where a husband was acting in person. See The Trial of Mervin Lord Audley, Earl of Castleham, for a Rape and Sodomy (1631), 3 A COMPLETE COLLECTION OF STATE TRIALS 401, 414 (T.B. Howell ed., T.C. Hansard, London, 1816).

10 Id

from unwanted intrusions of their bodies.[11] Closely associated to the notion of women as property was the doctrine of unity of persons as advocated by William Blackstone, which deprived women of much of their civil identity.[12] Marriage merged a woman's identity into her husband's and the two were considered as one. The third premise made it physically impossible to commit rape within marriage because a man could not possibly rape himself.[13]

Another traditional justification for marital exemption to rape had its deep roots traceable to the Biblical phrase unlawful carnal knowledge. Any carnal knowledge outside the marriage contract was 'unlawful' and any carnal knowledge within the marriage contract was definition 'lawful.[14] Based on this definition, a man's forced sexual intercourse upon his spouse was permissible. It was these types of societal perceptions that formed the common law which allowed forced sexual intercourse on one's spouse to be lawful.[15]

It was very unfortunate that Matthew Hale's personal and anachronistic views found legislative and judicial recognition in a number of countries. Whether discussing American, Australian, Canadian or Irish laws, husbands were exempt from criminal prosecution for the rape of their wives.[16] The first American Court to recognize the spousal exemption to rape was the Supreme Court of Massachusetts which relied solely upon Hale's statement in recognizing the dictum that marriage to the victim was a defense to the charge of rape.[17] Other than judicial recognition, many provinces in the United States also gave legislative recognition to Lord Hale's statement.[18] In other

11 Emily R. Brown, Changing the Marital Rape Exemption: I Am Chattel (?!): Hear me Roar, 18 AM. J. TRIAL ADVOC. 657, 658-659 (1995).

12 Blackstone says: "By marriage, the husband and wife are one person in law. For this reason, a man cannot grant anything to his wife, or enter into a covenant with her, for the grant would be to suppose her separate existence." See WILLIAM BLACKSTONE. COMMENTARIES ON THE LAWS OF ENGLAND, VOL. 1 339-340 9 Cavendish Publishing Limited, ed. WAYNE MOSSIRON, London, 2001.

13 Lisa Dawgert Waggoner, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, 22 N.M.L. REV. 551, 553 (1992)

14 DIANA E.H. RUSSELL, supra note 2, at 2-5

15 Lisa Dawgert Waggoner, supra note 13, at 554.

16 See Katherine O'Donovan, Consent to Marital Rape: Common Law Oxymoron?, 2 CARDOZO WOMEN'S L.J. 91, 92 (1995).

17 See Commonwealth v. Fogerty. 74 Mass. 489 (1857). This case, however, did not directly involve spousal rape and the Court based on Hale's reasoning only enuciated the common law rule that marriage was a defense to a charge for rape.

18 See for example Airs. Rev. Stat. Ann., $ 13-1406.01, 13-1407 (Arizona); Cal. Penal Code, $$ 262, 264 (California), Idaho Code $ 18-6101-6107 (Idaho), III. Ann. Stat. ch. 38, 12-12 to 12-18 (Illinois), Mich. Comp. Laws Ann. $ 750.520b (Michigan); Tenn. Code Ann. $ 39-13-507 (Tennessee), Tex. Penal Code Ann. $ 22.011 (Texas), Wash Rev. Code Ann. $ 9A.44040 (Washington), W.Va Code $ 61-8B-6 (West Virginia), Wyo. State. $ 6-2-307 (Wyoming).

jurisdictions, such as England,[19] Scotland[20] and the Republic of Ireland,[21] Hale's quotation became the law through centuries of judicial repetition. The erosion of these archaic presumptions occurred as a result of the slow but meaningful expansion of the individual rights of women, which will be noted in the next part.[22]

III. A Changing View:

Attempts around the World to Criminalize Marital Rape

In spite of Hale's statement on the common law, there is evidence to show that the English Courts recognized that a wife could be legally separated from her husband as early as 1721.[23] By 1794, some chinks began to appear in this doctrine and for the first time in Popkin v. Popkin[24] the Ecclesiastical Court of England recognized that the husband has a right to the person of his wife but with the qualification that her health is not endangered, thus setting up the first exception to the marital rape exemption.

This was also the time of the Industrial Revolution in England and elsewhere. The 1800's saw many changes in the social order and a combination of occurrences led to greater power and rights for women.[25] This further paved the way for some degree of financial independence for women, with the result that for the first time, women could financially find a way to leave abusive husbands. Also, the Married Women's Property Acts recognized the right of working women to keep the money that they earned at their own jobs.[26] In the United States some of the first married women's property acts modified the common law regime under which married women had little, or no, fight to contract, own property, or sue by codifying court decision that permitted married women to hold their own property in equitable trusts and

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19 For a discussion on the legal history of marital rape in England, see generally Melisa J. Anderson, Lawful Wife, Unlawful Sex—examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland, 27 GA. J. INTL & COMP.L. 139.

20 See generally Daniel Kelly, The Reassessment of Rape in Marriage, 35 J.L. SOC. SCOTLAND 3 (1990).

21 See generally Melisa J. Anderson, supra note-19

22 Pracher, The Marital Rape Exemption: A Violation of a Woman's Right of Privacy, 11, GOLDEN GATE U.L. REV. 717 (1981)

23 See Rex v. Lister, 93 Eng. Rep. 645 (1721). In this case, the Court set out very specific ground under which a husband had the right to restrain his wife.

24 162 Eng. Rep. 745 (1794).

25 Melisa J. Anderson, supra note 19, at 149.

26 See, MONTAGURE LUSH & WALTER HUSSEY GRIFFITH, THE LAW OF HUSBAND AND WIFE WITHIN THE JURISDICTION OF QUEEN'S BENCH AND CHANCERY DIVISION 111 (Steven & Sons, 2nd edn., London, 1896).

by protecting a wife's real property from her husband's debts.[27] Women's legal status began to change gradually and by the second half of the nineteenth century virtually every state in the United States had enacted a Married Women's Property Act which helped reform the common law status of women by granting them an independent legal identity.[28]

Against this background, it would now be useful to proceed with an appraisal of some legal systems around the world to find out the changes that have been taking place in the law of marital exemption to rape in the recent history.

England

Matthew Hale's proposition that a man cannot be guilty of raping his wife was generally regarded, for more than 150 years, as an accurate statement of the common law of England. This is evident from the fact that for over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to this principle. However, it is also very true that the common law is capable of evolving in the light of changing social, economic and cultural developments.[29]

Thus, it hardly came …… surprise that in Regina v. Clarence,[30] the only significant nineteenth century case where the question of marital rape was directly discussed, the English Courts, doubted for the first time the absolute validity of Hale's assertion. Although the majority in that case still believed that marital rape as a crime did not exist, Justice Wills, in a separate statement, (concurring) stated that he did not believe that 'as between married person's rape is impossible.'[31] Curiously enough, after this judgment there is again no record of the issue being judicially considered again until R v. Clarke[32] in 1949. This case established the first real exception to the exemption in cases where the husband and wife were judicially separated. Five years later,

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27 Richard H. Chused, Late Ninetheenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures, 29, AM. J. LEGAL HIST. 3, 3 (1985).

28 Mississippi passed the first Married Women's Property Act in 1839, and within fifty years every American jurisdiction had adopted some form of the Act. See generally LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 40*-41 (University of New Mexico Press, Albuquerque, 1969).

29 See LORD KEITH in R v. R, (1991) 4 All. E.R. 481, 483.

30 (1886-1890) All. E.R. 133

31 Id. at 139. (Justice Field, in a dissenting opinion held that 'no other authority is cited by him (Hale) for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be guilty of a crime', at 152).

32 (1949) 2 All. E.R. 448.

in R v. Miller[33] Lynskey J. at first instance, held that as the marriage was still subsisting, it was still a good defense to rape based on the reasoning that Hale had never been overruled. He tried to draw a ludicrous distinction between the act of sexual intercourse (where the consent is implied) and the physical force used to achieve it (where the consent is denied). After having referred to R v. Jackson, where it was held that a husband is not entitled to inflict personal chastisement on his wife, he held that although a husband has a right to marital intercourse, and the wife cannot refuse her consent…nevertheless he (husband) is not entitled to use force or violence for the purpose of exercising that right.[35] The next case in line was R v. O'Brien,[36] where Park J. held that a decree nisi effectively terminated the marriage and revoked the wife implied consent to marital intercourse.[37] There was a decision to the similar effect in R v. Steele[38] where Lord Lane, speaking for the Court held that 'a separation agreement with a non-cohabitation clause, a decree of divorce, a decree of judicial separation, a separation order in Justice's court containing a non-cohabitation clause and an injunction restraining the husband from molesting the wife or having sexual intercourse with her are all obvious cases in which the wife's consent would be successfully revoked.[39]

However, a new controversy arose with the introduction of the Sexual Offenses (Amendment) Act (in the same year when Steele was decided), where the definition of rape included the phrase 'unlawful sexual intercourse with a woman.[40] It was presumed that the statute preserved the common law marital exemption as sexual intercourse between a husband and wife is, under the common law definition of the word, not 'unlawful'. In several subsequent cases, in fact, the justices decided that, based on the following of the statute, the exemption was alive and well in England.[41] Even the English Law Commission endorsed this view when it published a paper titled 'Rape Within Marriage' which stated that the common law martial exemption still existed in England in its general form at that time.[42]

The paper could have ended all questions regarding the status of the exemption in England but for three crucial cases heard by the English judiciary

33 (1954) 2 All. E.R. 529.
34 (1891-94) 2 All. E.R. 61.
35 Supra note 33, at 533-534.
36 (1974) 3 All. E.R. 663.
37 There was a decision to the similar effect in R v. Roberts, (1968) Crim. L.R. 188.
38 (1976) 65 Cr. App. R. 22.
39 Id. at 25.
40 See $ 1(1), Sexual Offenses (Amendment) Act 1976.
41 See for example R. v. Kowalski, (1987) 86 Crim. App. R. 339; R. v. Sharples (990) Crim. L.R. 198.
42 See the Law Commission of England, Rape Within Marriage, Working Paper No. 116 (1990).

in 1991 which decided the fate of the proposition. In England, ultimately, the exemption received its death sentence from a forward thinking judiciary at a time when Parliament could not (or would not) change a legal fiction which placed married women at a disadvantage relative to non-married women.[43]

The first of these cases was R v. R,[44] where the wife was raped by her husband after she had left him for her parents' house. Both the Crown Court and the Court of Appeal refused to accept the husbands' argument that he could not be convicted for the rape of his wife. The House of Lords, speaking through Lord Keith, held that 'on grounds of principle there is now no justification for the marital exemption to rape.[45] He further found out that in section I (I) of the Sexual Offences (Amendments) Act 1976, which defines rape is to be treated as a mere 'surplusage' and not as meaning 'outside marriage', since it is clearly unlawful to have sexual intercourse with a woman without her consent.[46] The House supported the view of Lord Lane CJ in the Court of appeal where he had held that the ruling was 'not the creation of a new offence, but was the removal of a common law fiction which had become anachronistic and offensive.[47]

The other case was R v. C,[48] where Justice Simon Brown reiterated the above view and held that 'the position in law today is… that there is no marital exemption to the law of rape. The third case was R. v. J.[49] There, Justice Rougier, noting Justice Brown's opinion in R. v. C (supra) with admiration, made it quite clear that he felt constrained by the state of the law as it existed at the time, and that he could not unilaterally declare an end to the exemption, as it was the Parliament's job to do so.

After these case it was quite clear, as Ngaire Naffine remarks, that Hale's Plea's should now have the ring of antiquity, as should the writings of Blackstone[50]. The status of women had changed since those times and apart from property matters and availability of matrimonial remedies, one of the most important changes was that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.[51] The corresponding amendment to the

43 Melisa J. Anderson, supra note 19, at 166.
44 (1991) 4 All. E.R. 481.
45 Id. at 485.
46 Id. at 489.
47 (1991) 2 All. E.R. 257, 266
48 (1991) 1 All. E.R. 755
49 (1991) 1 All. E.R. 759.
50 Nagaire Naffine, Possession: Erotic Love in the Law of Rape, (1994) 57 M.L.R. 10, 21.
51 See LORD KEITH in R v. R. (1991) 4 All. E.R. 481, 484.

statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994 which does not make any distinction between marital and non marital rape.

Scotland

The marital exemption to rape in law of Scotland was to be found in the writings of David Hume who wrote that 'the husband … though he cannot himself commit a rape on his won wife, who has surrendered her person to him in that sort, may however be accessory to that crime …[52] Hume's doctrine met the same fate in Scotland as Hale's doctrine did in England, although it is very interesting to note that Scotland, with its own separate level system and without a statutory definition of rape, declared the exemption as archaic a year earlier than it was done in England.

In two earlier cases, HM Advocate v. Duffy[53] and HM Advocate v. Paxton,[54] it had been held by single judges that the exemption did not apply where the parties to the marriage were not cohabiting. However, the High Court of Judiciary in S v. HM Advocate[55] settled the question once and for all, by holding that the exemption, if it had ever been a part of the law of Scotland, was no longer so. It held that 'the reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applied today. [56]

Republic of Ireland

Unlike England and Scotland, Ireland brought an end to the marital exemption to rape through legislation introduced in the parliament. Initially, the Irish Constitution itself gave protection to the sanctity of the family and provided greater protection against state intrusion in domestic relations law.[57] The Irish State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack.[58] In the early 1990's however, public opinion on the issues of marital rape and domestic violence rose and this publicity, combined with the nation's first two cases of spousal rape[59] led to legislative changes in domestic violence law in

52 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING THE DESCRIPTION AND PUNISHMENT OF CRIME, Vol. 1 306 (Bell & Bradfute, 4th ed. Edinburg, 1844).

53 1983 S.L.T. 7.

54 1984 S.L.T. 105.

55 1989 S.L.T. 469

56 Id. at 473.

57 See Art. 41, The Constitution of Ireland (1937).

58 Id. Art. 41, $3 (1).

59 Due to secrecy laws and other factors, the case name and abbreviations are not obtainable. Therefore, the cases are referred to as 'Case A' (First Marital Rape Trial

Ireland.[60]

Accordingly, martial rape was criminalized by the Irish legislature under the 1990 Rape Act which came into effect in January 1991.

United States of America

Notwithstanding the revolutionary changes in the status of women since the seventeenth century in most areas of the law, some form of Hale's statement of spousal rape immunity has remained the law in many jurisdictions throughout the United States.[61] For over 300 years this statement alone served as a justification for a spousal immunity involving rape charges, and was the origin for judicial recognition of the marital rape exemption in the United States.[62] Nevertheless, during the last 25-30 years some very powerful arguments have come up against the marital exemption and today, there exists a significant amount of scholarly literature on this subject.[63] Particularly since the early 1980s, the marital rape exemption has come under increasing attack and the commentators have recognized that these laws are an 'antiquated holdover from an earlier and discarded view of women.[64]

However, the Courts began showing signs that they might protect the bodily integrity of married women in decisions holding that a husband could be found guilty for forcing, or for aiding and abetting, the rape of his wife by a third person as early as the late 1800s itself.[65] State v. Dowell,[66] decided four years after the above case in the Supreme Court of North Carolina, also enforced the third-party caveat. In 1899, a Louisiana Court in State v. Haines[67] also continued the judicial trend that condemned the participation of husbands in rapes of their wives by third parties. There were several other cases in

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Collapses as Jury Is Discharged, The Irish Times, July 23, 1992) and 'Case B' (Man in marital Rape Case Freed, The Irish Times, Mar. 5, 1993).

60 See generally Christine Taylor, Northern Ireland: The Policing of Domestic Violence in Nationalist Communities, 10 WIS. WOMEN'S L.J. 307 (1995).

61 Rene Augustine, Marriage: The Safe Haven for Rapists, 29 J. FAM. L. 559 (1990-91)

62 Note, The Marital Rape Exemption, 52 N.Y.U.L. Rev. 306, 307 (1977).

63 See for example Anne C. Dailey, To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255 (1989) ANN. SURV. AM. L. 343 (1990); Judith A. Lincoln, Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape, 35 WAYNE L. REV. 1219 (1989); Lisa R. Eskow, The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualising its Prosecution, 48 STAN. L. REV. 677 (1996); Sallee Fry Waterman, Better or for Worse: Marital Rape, 15 N. KY. L. REV. 611 (1988).

64 See Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 YALE J.L. & FEMINISHM 2007, 249 (1992).

65 See People v. Chapman, 28 N.W. 896 (1886).

66 11 S.E. 525 (N.C. 1890).

67 25 So. 372 (1899).

which this proposition was followed and the Court's consistently found that a husband has a right to rape his wife, but that right was high alone and he is liable for aiding and abetting the rape of his wife.[68] But, all these cases dealt with a situation in which the husband was not directly involved for the rape of his wife. Frazier v. State,[69] was the only early-twentieth century case where the husband was directly involved for the rape of his wife. The appellate Court in that case held that 'all the authorities hold that a man cannot himself be guilty of actual rape upon his wife; one of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation…, which was hardly surprising.

But after this case the rule of immunity for the rape of a spouse continued essentially unchanged and without serious challenge in the courts until the late 1970s[71] In this contact Jill Hasday observes-'the history of marital rape necessarily contains large silences because of this absence of prosecution. Cases left unevaluated and unbrought are much harder to reconstruct than the concrete proceedings of trails and appeals and as a consequences, the record of the marital rape exemption has on occasion, bizarre locations.[72]

The rape trial of John Ride out in 1978 was perhaps the first case to make public the issue of marital rape.[73] In this highly publicized case, the husband was charged with raping with wife when they were living together, under Oregon's revised rape statutes, which abolished the exemption preventing prosecution of the husband for raping his wife. Although John Ride out was acquitted, the issue had been raised and the public was made aware that husbands do not have unrestricted access to their wives' bodies.[74] In the same year, a series of New Jersey Courts in State v. Smith[75] harshly criticized the underlying premises of spousal rape immunity, stating that Hale's notion of a wife's irrevocable consent to intercourse during marriage was tantamount to 'bondage of a wife' and was 'fatally anachronistic' given the changes in the status of women since the seventeenth century. Since the time of the Ride out and Smith trials, several cases have severely criticized Hale's Doctrine and State that the marital exemption has no place in modern

68 See People v. Meli, 193 N.Y.S. 365 (Sup. Ct. 1922); State v. Overman, 153 S.E. 2d 44, (1967); State v. Getward, 365 S.E. 2d 209 (1988); State v. Martin, 194 S.E. 2d 60 (1973).

69 48 Tex. Crim. 142.

70 Id. at 144. See also, state v. Parsons, 285 S.W. 412 (Mo. 1926).

71 "Form hale until 1977 there was no serious challenge to the spousal exemption", see generally People v. De Stefano, 121, Misc. 2d 113, 119 (1983).

72 Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373, 1393 (2000).

73 State v. Rideoul, No. 108866 (Or. Cir. Dt., Dec. 27, 1978).

74 Sallee Water Freeman, supra note 63, at 625.

75 148 N.J. Super. 219, 169 N.J. Super. 98 (affirmed), 85 N.J. 193 (revised).

81 missing

society.[76] The most significant and of these cases has undoubtedly been People v. Liberta,[77] which offered a major step forward in human rights by granting married women legal protection against rape by their husbands.

Further, in 1984 a Virginia Court in Weishaupt v. Commonwealth[78], minimized Hale's theory of irrevocable consent to rape in marriage, asserting that it 'was no law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in seventeenth century England.[79] Among other jurisdictions, the Supreme Court of Georgia in Warren v. State[80] concluded that the marital exemption did not exist any longer. It held that 'women are no longer regarded as chattel or demanded by denial of a separate legal identity and the dignity associated with recognition as a whole human being.

On the legislative front, it will be seen that the judicial decisions have found recognition through legislative action in most states throughout the United States. In 1976, Nebraska became the first state to delete spousal immunity from their rape statute. One year later, Oregon followed Nebraska's lead and in 1978 became the first state to charge a husband with rape while he and his wife were still married and living together. Over the next two and half decades marital immunity was abolished for sexual offenses in twenty-four states and the District of Columbia by the year 2003. In the remaining twenty six states, marital immunity remains in one form or another.[82] Although in some of these twenty-six states marital immunity for the specific crime of forcible rape is dead, immunity for other sexual offenses thrives.[83]

Canada

Section 143 of the old Criminal Coed of Canada retained the spousal immunity to rape by expressly providing that 'a male person commits rape when he has sexual intercourse with a female person who is not his wife..' However, this position was altered in the year 1983 when Bill C-127 was introduced in the parliament which repealed the existing rape statute by

76 See Merton v. State, 500 So. 2d; State v. Rider, 449 So. 2d; Commonwealth v. Chretiien, 417 N.E.2d 1203 (1981); State v. Willis, 394 N.W. 2d 648; Shunn v. State, 742 P. 2d 775 (Wyo. 1987); People v. De Stefano, 21 Misc. 2d 113; State v. Morrison, 85 N.J. 212.

77 474 N.E. 2d 567 (1984).

78 315 S.E. 2d 847 (1984).

79 Id. at 850.

80 336 S.E. 2d 221 (1985).

81 Id. at 225 (quoting Trammel v. United States, 445 U.S. 40, 52).

82 See generally Michelle J. Anderson, Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, 54 HASTINGS L.J. 1465, 1468-1470 (2003).

83 Id.

criminalizing martial rape.[84] It is apparent from the Parliamentary debates surrounding the Bill that the impetus for the change in the law was the increased awareness that rape was a crime of violence rather than a crime motivated by sexual desire.[85]

Australia

The end of the marital exemption to rape in Australia was brought about by the decision of the High Court of Australia in The Queen v. L.[86] The rule of a husband's exemption was rejected 'as now (forming) part of the common law of Australia.[87] A two pronged approach characterizes the decision by the Australian High Court on consent to marital rape- (a) it expressed doubt about Hale; and (b) emphasizes mutual respect in marriage.[88] When compared to English Law, there is evidence to show that the Australian law is more openly committed to principles of equality and autonomy in sexual relations than in English law.[89] Current rape law has been amended to take account of persons, rather than of irreducible categories of male and female.[90] In New South Wales for example, the rape statute clearly states that 'the fact that a person is married to a person upon whom an offence (of rape) is alleged to have been committed is no bar to the first mentioned person being convicted of the offence.[91]

South Africa

In South Africa, prior to the passing of the Prevention of Family Violence Act, 1993 it was commonly accepted by the courts in their interpretation of Roman Dutch law that a man could not be found guilty of raping his wife.[92] Only after the passage of the Act in 1993 was marital rape outlawed and punished as a crime.[93]

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84 See generally Criminal Code, An Act to Amend the (Sexual Offences), S.C. 1980-81-82-83 C. 125, $ 6 repealed $ 143 R.S.C. 1970 c. 34, and $ 19 replaced it with $$ 146.1-246.8.

85 For a general discussion see Renu Mandhane, Efficiency or Autonomy? Economic and Feminist Legal Theory in the Context of Sexual Assault, 59 U. TORONTO FAC. L. REV. 173, 181 (2001).

86 66 A.L.R. 36 (Austl. 1991).

87 Id, at 39.

88 See Katherine O'Donovan, supra note 16, at 101.

89 Id, at 103.

90 See for example Crimes Act $ 61 H(1), New South Wales; Criminal Law Consolidation Act, $ 5 (1935), South Australia; Criminal Code, $ 324F Western Australia; Crimes Act $ 62 (2) (1958), Victoria.

91 Crimes Act (1900), $ 61 T, New South Wales.

92 See for example State v. Ncanywa, 1992 (2) SA 182 (Ck).

93 For a discussion on the development of the law. see generally Carol M. Kaplan, Voices Rising: An Essay on Gender, Justice and Theater in South Africa. 3 SEATTLE J. FOR SOC. JUST 711, 717 (2005).

96 missing

New Zealand

The marital rape to exemption in New Zealand was abolished in 1985 when Section 128 to the Crimes Act, 1961 was enacted. The Act provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred[94]. In R. v. D.,[95] a Court of Appeal in New Zealand expressly stated that marriage between the parties will not warrant a reduction in sentence. There is now, therefore, no distinction in principle to be drawn between sexual violence in marriage and outside of marriage.

Italy

In Italy, which has a completely different legal system when compared to the above countries, the concept of marital exemption was surprisingly also abolished by a decision of the Supreme Court of Italy in 1976.[97] Article 29 of the Italian Constitution stipulates that marriage is based on the equality of spouses, both as citizens and a person, both natural and legal. Based on that idea, the Supreme Court held in 1976 that the rape law applied to marital rape. The court explained that the object of the crime is not the sexual act between the husband and the wife but he violence used to force nonconsensual sex.

Germany

The German Legislature after a very heated debate on the issue of rape within marriage, very recently abolished the marital exemption to rape.[98] Under the new law, unlike the majority of states in the U.S. it does not matter whether the spouses lived together or separately at the time of the rape. The new law also allows all rape cases to be prosecuted even against the victims will.

France

The marital exemption to rape is recognized as a crime in France and has maximum punishment of 15 years in prison.[99]

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94 See $ 128 (4), Crimes Act (1961)

95 (1987) 2 NZLR 272.

96 See generally Saurabh Mishra & Sarvesh Singh, MNarital Rape-Myth. Reality and Need for Criminalization, (2003) PL WEB JOUR 12.

97 See generally Amy Jo Everhart, Predicting the Effect of Italy's Long-Awaited Rape Law Reform on "The Land Of Machismo", 31 VAND. J. TRANSNATL L. 671, 699 (1998).

98 See for a discussion of the legislative progress Taljana Homle, Penal Law and Sexuality: Recent reforms in German Criminal Law, 3 BUFF. CRIM. L. REV. 639, 657 (2000).

99 See generally Ministere De La Justice, Victime De Violences Au Sein Du Couple, available at, http://wwww.justice.gouv.fr/publicat/violenvces.htm.

Nepal

In smaller countries like Nepal where the legislature still does not recognize marital rape, court decisions have recognized marital rape as a crime. The Supreme Court of Nepal recently declared that husbands who force their wives to have sex can now be charged with rape[100]. The Court also directed the Nepali parliament to amend the present laws relating to rape so that they reflect the new ruling, including the right to self defense against their husbands in the event of rape of attempted rape.

Peru

Peru was among the first countries in Latin America to adopt special legislation on domestic violence.[101] In 1991, the marital rape exemption was expressly removed from the Peruvian Criminal Code which has now become a model to follow for other Latin American countries.[102]

The above discussion shows that a consensus has started emerging in various countries around the world that violence in any form, whether inside or outside marriage, should be regarded as a crime and nothing else. Smaller and developing countries like Nepal, Peru, Sri Lanka and Mexico have also amended their rape laws to exclude the marital exemption to rape. In this context, it becomes incumbent on the Indian judiciary and the parliament it is worth noting that even the various international law documents oblige the state parties to criminalize various acts of violence like marital rape.

IV. Modern Justification for Marital Exemption to Rape

The most prominent of modern defenses for the marital exemption to rape comes from the privacy arguments. Defenders of this exemption often quote that bringing in legal intervention in family maters is like introducing a bull in a china shop. It posits that there is something inherent in the nature of the relationship between husband and wife that makes legal intervention inappropriate, misguided, and ultimately self defeating.[103] It contends that the marital relation depends on intimacy protected from outside scrutiny, intimacy that could not survive if the law intervened to investigate and prosecute martial rape charges.[104] But this argument is not tenable. It is indeed likely that a

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100 See generally Marital Rape Now a Crime in Nepal, Wel, Dec. 2002, available at http://www.isiswomen.org/womenet/wlists/we/archive/msg00111.html.

101 See generally Human Rights Watch Memorandum on Peru, Law of Protection from Family Violence (2000), available at, http://wwwlhrw.org/backgrounder/wrd/peru-women/html.

102 For a discussion on the Peruvlan law, see Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, The Recently Revised Marriage Law of China: The Promise and The Reality, 13 TEX J. WOMEN & L. 251, 274-275 (2004).

103 ill Hasday, supra note 72, at 1486.

104 Id.

rape prosecution by a wife against her husband would destroy the possibility of reconciliation. However, the tenuousness of this argument lies in the assumption that a marriage of this type is worth saving.[105] A marriage where rape is involved may not be worthy of preservation.[106]

Another justification that is commonly given for the marital exemption is that there is both a quantitative and qualitative difference between marital and non marital rape.[107] The quantitative argument is that marital rape does not occur often enough in our society to be recognized as a problem.[108] The qualitative argument is that the damage to a wife from a marital rape is less severe than the damage caused to a victim of non-marital rape.[109]

The qualitative argument also suggests that marital rape is not a serious crime since the victim does not suffer as much as a non marital rape victim.[110] A logical corollary of the above argument is that offered in support of keeping the marital rape exemption is that it would be impossible to prove a case when the couple has had consensual sex, perhaps hundreds of times before.

The last of the arguments offered by marital exemption defenders holds that a marital rape victim can pursue other legal remedies, such as assault charges and divorce. Bit the arguments in favor of this justification have been rejected by scholars and interest groups alike. Although true, these alternative remedies are inadequate.[111] There is a qualitative difference between the crime of rape and the crime of assault and the fact that rape statutes exist… is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault.[112] Rape laws, unlike assault and battery laws, recognize that rape is a psychological crime, as well as a physical one, which deeply harms a woman's sexual integrity.

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105 Note, Marital Rape in California: For Better or For Worse, 8 SAN FERN. V.L. REV. 239, 251 (1980).

106 Weishaupt v. Commonwealth, 315 S.E. 2d 847, 855 (Va. 1984).

107 Lalenya Weintraub Suegel, The Marital Rape Exemption: Evolution to Extinction, 43 CLEV. ST. L. REV. 351, 358.

108 Schwartz, supra note 3, 42-43.

109 Id, at 43.

110 See, Michael G. Hilf Marital Privacy and Spousal Rape, 16 NEW Eng. L. REV. 31, 41 (1980). He notes: (A married person has, to some extent, a lesser expectation of personal autonomy; therefore, the Moreover, the harm caused by spousal rape would seem to be less severe than the harm caused by non-spousal rape. While a married person's interest in bodily integrity is not inconsiderable. a balance must be struck between the individual's interest in private autonomy and the public policy favoring spousal immunity).

111 Lalenya Weintraub Siegel, supara note 107, 363.

112 Peopl v. Liberia, 474 N.E. 2d 567-574 (N.Y. 1984)

IV. Conclusion: A Case for Reform

The underlying endeavor of this study has been to look at the marital exemption to rape from a historical perspective. It shows how the traditional perspectives of this doctrine have undergone a change, even in countries where this doctrine is said to have originated. Against this backdrop of reforms in the last decade, the time is ripe for countries like India to remove this anachronistic provision from the statute books. We live in a social that has been governed by customs and traditions since ages. Our customs and religion has never recognized that a man has an absolute right to rape his wife. Thus, it is hardly surprising to note that the Holy Qu'ran itself is very clear about the fact that the basis of a marital relationship is love and affection between the spouses, and not power or control Moreover, there is hardly any evidence to show that the husbands were exempted from raping their wives even under the ancient Hindu laws. All that the ancient Shastra's said is that a wife cannot act independently in matters relating to law and should keep her speech, eyes and actions under strict control[113] It needs to be understood that the martial exemption to rape is an alien import into our society and is a notion long abolished in various parts of the world.

Under these circumstances, until courts, legislatures, and the general public recognize that rape is a crime of violence and power and not a crime of sex, married rape victims will suffer a double betrayal—first by their loved one turned rapist and then by a system that is ideally designed to protect them. Justice Holmes once wrote:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from a blind imitation of the past."[114]

I think that the time has come for states to case their blind imitation of the past and give married women the protection they deserve.

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113 Gautama Dharmasutra: XVIII, 29, cited in DHARMASUTRAS (Trsl. by PATRICK OLIVELLE) (Motilal Banarsidass, 1st ed. Delhi 2000).

114 See Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).