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Analysis of the International Scenario with Reference to Marital Rape

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ABSTRACT

Rape within marriage is considered as a valid act. This keeps spousal rape outside the arena of crime. The short sighted attitude of society towards women makes them prone to victimization. The punishment for the horrendous act of marital rape cannot be escaped with hinging on the reason of the existence of relationship of husband and wife. The common law doctrine of Hale which provides immunity to marital rape was followed in various countries. The newspaper coverage throws the grim light on the persistent incidents of violence against women occurring globally. This espoused concern at the global level leading to the adoption of various covenants and declarations comprising of various Articles to safeguard the dignity and worth of women. Perturbed by the consistent derogation of human rights of women, certain Articles have been specifically laid down to secure the persona of women. Spousal rape is clearly a derogation of human rights.. The Indian Law does not criminalise rape within marriage barring the exception of victim child wives despite the unconstitutional nature of the act. It is necessary to delve into the international instruments in order to understand that marital rape causes transgression of significant human rights. Few instruments are mentioned herein containing some significant Articles which indicate that marital rape is clearly a cause of indignation of women's dignity and must be punished. The paper also highlights the position prevalent in South Africa and UK.

Keywords: *spousal rape, dignity, marriage, human rights, international instruments.*

I. INTERNATIONAL INSTRUMENTS

A brief discussion of some instruments has been done below to highlight the need to discard the marital rape exemption in accordance with the Covenants and Declarations.

(A) The Charter of UN

The first paragraph of Preamble of Charter of UN reaffirms faith in the human rights, equality between men and women, dignity of every person.

The provision in UN Charter shows a consensus that there are some basic rights to which every

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individual is entitled. Thus, the UN Charter aims to preserve this purpose through international cooperation whereby no discrimination is caused.³ Under the Charter, General Assembly has been entrusted with the responsibility to undertake the task of studying and making recommendations for the international cooperation and fuller realisation of human rights by eliminating discrimination on the grounds of race religion, sex or language.⁴ The Charter lays down that universal respect for all is to be promoted without distinction on various grounds.⁵ Further Article 56 provides that the UN members take pledge to take a joint and a separate action for the fulfilment of goals enunciated in Art. 55. The Charter provides that ECOSOC may give certain suggestions and recommendations for promoting respect for human rights.⁶ UN Charter empowers ECOSOC to establish commissions which will help in the achievement of human rights.⁷ For instance, Commission on the Status of Women is a body created by ECOSOC. Further, the UN Charter provides the objective of trusteeship council to strengthen respect for human rights and also the fundamental freedoms without creating any sort of distinction on the grounds of race, sex, language or religion.⁸

The importance of individual rights is clearly indicated in the UN Charter. It is necessary that such rights must be respected in true sense by abolishing practices or acts like marital rape which go against individual rights.

(B) Universal Declaration of Human Rights, 1948

UDHR was adopted in 1948. Preamble of UDHR provides that dignity and inalienable rights of people form the foundation of peace. UDHR consists of 30 Articles. The 21 Articles enunciate civil and political rights whereas 6 Articles cover rights of economic and social nature. India is also a signatory to it. The Constitution of India contains certain provisions consonant to UDHR. The Declaration under Article 1 provides that all human beings are born equal when it comes to their rights and dignity.⁹ It acknowledges that everyone is entitled to all rights and freedoms provided in the Declaration. “*Race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*” are immaterial.¹⁰ UDHR ensures right to life, liberty and security to every person.¹¹ The Declaration prevents infliction of cruel, inhuman, torture or degrading treatment or

³ Art 1 ¶ 3 of the UN Charter.

⁴ UN Charter, art 13 ¶ 1.

⁵ *Id.*, art 55(c).

⁶ *Id.*, art 62.

⁷ *Id.*, art 68.

⁸ *Id.*, art 76(c).

⁹ UDHR, 1948, art 1.

¹⁰ *Id.*, art 2.

¹¹ *Id.*, art 3.

punishment.¹² It ensures equality before the law, equal protection of law and protection against discrimination.¹³ This is consonant with Article 14 and 15 of the Constitution.

The Declaration provides that rights with respect to marriage be provided to both the parties equally while the marriage is subsisting or at the time of dissolution.¹⁴ From the examination of the abovestated articles, it can be concluded that rape in marriage clearly violates right to life, inflicts torture, infringes the principle of equality, affects security and liberty of a person. Thus, the rape in marriage clearly derogates the principles enunciated in this Declaration. The Supreme Court in *Keshavananda Bharati v. State of Kerala*¹⁵ viewed that UDHR is of non-binding nature but it shows that India well understood about human rights when the Constitution was adopted. However, the Declaration must be followed in light and spirit by India taking into account the objective of the Declaration. So, India must curb discrimination which marital rape results into.

(C) Convention on the Elimination of All Forms of Discrimination against Women, 1979

The General Assembly adopted CEDAW on Dec 18, 1979. The Convention is known by the name of 'International Bill of Rights of Women'. It came into effect in 1981. India has also ratified this Convention. India ratified it in 1993. CEDAW provides the meaning of the term "*discrimination against women*" as any sort of "*distinction, exclusion or restriction*" based on sex which results in the disruption in the enjoyment of their rights.¹⁶ Discrimination against women has been condemned and to wipe it out, the State parties have undertaken to recognize the principle of equality, taking proper legislative measures for the achievement of equality and preventing discrimination through impartial tribunals.¹⁷ The Convention also provides that State parties undertake to abolish laws, practices or customs which are discriminatory to women.¹⁸ The Convention is aimed at assuring the development of women by taking requisite steps in social, cultural and economic arenas.¹⁹ This international instrument also clearly lays down that practices which stereotypical in nature and lead to prejudices must be checked.²⁰ Marital rape is also a stereotypical practice and it requires to be checked.

Under Part III, certain fields are mentioned where State Parties are required to take steps to

¹² *Id.*, art 5.

¹³ *Id.*, art 7.

¹⁴ *Id.*, art 16.

¹⁵ *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

¹⁶ CEDAW, 1979, art 1.

¹⁷ *Id.*, art 2.

¹⁸ *Id.*, art 2 cl. (f).

¹⁹ *Id.*, art 3.

²⁰ *Id.*, art 5.

eliminate discrimination against women which include education,²¹ employment,²² healthcare,²³ economic and social life,²⁴ women in rural areas.²⁵ The principle of equality of women on par with men in the eyes of law has been embodied.²⁶ It talks about taking of suitable measures to wipe out discrimination in marriage and family related affairs. It aims at same rights and also the similar kind of responsibilities at the time of marriage and its dissolution.²⁷

The Supreme Court in *Apparel Export Promotion Council v. A.K. Chopra*²⁸ observed that instruments like CEDAW and Beijing declaration obligate State and courts to ensure that laws must be gender-sensitive in nature. The court viewed that the core principles enunciated in these must be due regarded when it comes to interpretation of domestic laws. Thus, the court viewed that these Conventions must be followed and given effect properly.

India has ratified the Convention providing two declaratory statements and with reservation. The two declaratory statements provide that as far as Art. 5(a)²⁹ and Art. 16(1)³⁰ of the Convention are concerned, India will comply with these taking into consideration the factor as to non-interference in the affairs of community having personal nature except by consent or by initiative.

The declaratory statement with regard to Art.16(2) provides that compulsory registration of marriages is not practical or possible in India due to varied forms of customs, religions and taking into consideration the level of literacy. India has also provided reservation with respect to Art.29 Para 2³¹. Art. 29(2) of the Convention permit States to make this reservation. Moreover, India has not ratified Optional Protocol³². The Optional Protocol allows the Committee to investigate and conduct enquiry with respect to the abuses. India has not recognized competence of this Committee. This deprives victims from approaching the Committee.

²¹ *Id.*, art 10.

²² *Id.*, art 11.

²³ *Id.*, art 12.

²⁴ *Id.*, art 13.

²⁵ *Id.*, art 14.

²⁶ *Id.*, art 15.

²⁷ *Id.*, art 16 cl. (c).

²⁸ *Apparel Export Promotion Council v. A.K. Chopra*, Decided on Jan 20, 1999.

²⁹ CEDAW, 1979, art. 5(a) provides that State Parties are obligated to modify the patterns of conduct of social and cultural nature with respect to men and women aiming at eradicating all practices, prejudices and customary based upon stereotypical roles of genders.

³⁰ *Id.*, art 16(1) provides appropriate measures by State Parties shall be taken to end discrimination in marriage and family related matters against women.

³¹ By virtue of this reservation, India excludes it from jurisdiction of ICJ when parties do not agree to decision of arbitration.

³² Optional Protocol to the Convention on the Elimination of Discrimination against Women, entered into force on Dec 22, 2000.

Also, the General recommendation No. 19³³ adopted by the Committee on the Elimination of Discrimination against Women recognizes that the gender-based violence which causes mental, physical or sexual harm or suffering is also included in the definition of Discrimination enunciated under Art. 1.³⁴ It also enunciates that family violence is prevalent and women are victims of varied forms of violence inside family including sexual assault, rape etc.³⁵ Also, GR-35³⁶ updated GR-19 which recognizes that if marital rape is devoid of free consent and “takes account of coercive circumstances” then it will be considered under sexual crimes.

So, a lot still needs to be done in furtherance of preventing discrimination of women as India still lags behind in preventing discrimination against women. India seems to be violating the provisions of declaration by not recognizing marital rape as an act having criminal nature or tendency as it goes against the principle of non-discrimination which this Convention aims at.

(D) International Covenant on Civil and Political Rights, 1966

This Covenant comprises of 53 Articles. It is divided into six parts. Under this Covenant, the State Parties have undertaken to strive for the principle of equality between men and women by ensuring equal enjoyment of civil and political rights embodied in the Convention.³⁷ Also, it provides that in case of emergency State parties cannot suspend certain human rights like right to life, freedom from inhuman or degrading treatment.³⁸ The Convention recognizes the right to life of every human being.³⁹ This international instrument refrains from meting out torture or degrading treatment to anyone.⁴⁰ ICCPR ensures equality before law and equal protection of laws. It aims to prevent any sort of distinction and discrimination on various grounds including sex.⁴¹

India ratified this Convention on March 27, 1979. In the light of various provisions embodied in the Convention, it is necessary that the practice of marital rape be renounced to ensure dignity and safeguard life of women.

(E) International Covenant on Economic, Social and Cultural Rights, 1966

Art. 1: This Article recognizes right to self-determination,

³³ General Recommendations adopted by the Committee on the Elimination of Discrimination against Women, GR-19: Violence against Women, Eleventh Session (1992).

³⁴ *Id.*, General Comment 6.

³⁵ *Id.*, General Comment 23.

³⁶ Committee on the Elimination of Discrimination against Women, GR-35 on gender-based violence against women updating GR-19, Sixty-seventh session (2017)

³⁷ ICCPR, 1966, art 3.

³⁸ *Id.*, art 4.

³⁹ *Id.*, art 6.

⁴⁰ *Id.*, art 7.

⁴¹ *Id.*, art 26.

Art. 3: This Article ensures equal enjoyment of economic, social and cultural rights thus eliminating discrimination.

The rights enunciated under this Convention are corresponding to the Directive Principles of the State Policy under the Indian Constitution.

(F) Vienna Declaration and Program of Action, 1993

The World Conference on Human Rights recognizing and understanding the need to protect human rights which hold great significance and relevance for the international community adopted this Declaration on June 25, 1993. The World Conference took into consideration the principles embodied in UN Charter and Universal Declaration on Human Rights. Also, the Preamble of the Declaration provides that the Conference adopted the Declaration as it was concerned and bothered by varied forms of violence inflicted upon women and the subjection to discrimination all over. The Conference looked forward towards providing progress in human rights.

The Vienna Declaration and Program of Action stressed regarding the nature of human rights having universal nature thereby implying that each individual has some inherent rights.⁴² The conference acknowledged the elimination of sex based discrimination and complete participation of women at par with men in various facets.⁴³ The Declaration provides that violence based upon gender and various forms of sexual harassment which goes against the dignity of person must be eradicated.⁴⁴ Also, it mentions regarding the promotion of various instruments adopted pertaining to human rights of women.⁴⁵ India has acknowledged the protection of human rights by welcoming this Declaration.⁴⁶

(G) Declaration on the Elimination of Violence against Women, 1993

The UN General Assembly adopted this Declaration on Dec 20, 1993 realising the immediate need to provide the rights to women. The Declaration was adopted for the fuller realisation of rights to women embodied in various international instruments including the duly implementation of CEDAW.⁴⁷

The Declaration defines 'violence against women' as any act of violence which is gender-based consequent to which harm in physical, sexual or psychological nature is caused. Even threats

⁴² Vienna Declaration and Program of Action, 1993, art 5.

⁴³ *Id.*, art 18 ¶ 1.

⁴⁴ *Id.*, art 18 ¶ 2.

⁴⁵ *Id.*, art 18 ¶ 4.

⁴⁶ Prakash Shah, *International Human Rights: A Perspective from India*, 21(1) Article 3 FORDHAM INTERNATIONAL LAW JOURNAL 35 (1997).

⁴⁷ DEVAW, 1993, Preamble.

to cause such acts constitute ‘violence against women’.⁴⁸ This Declaration provides marital rape as a kind of violence against women.⁴⁹ Right to life,⁵⁰ equality,⁵¹ equal protection of law,⁵² freedom from discrimination,⁵³ preventing torture, cruel, inhuman or degrading treatment⁵⁴ have been recognized as rights to which women are entitled and which must be safeguarded. DEVAW provides that matters relating to violence against women should be punished and sanctions must be developed by State Parties for punishing.⁵⁵ The Declaration provides no such situation should arise where re-victimization occurs owing to improper implementation of laws.⁵⁶

The Declaration is non-binding in nature. However, the acknowledgement under the Declaration with respect to violence against women requires that India must recognize the need to end violence and discrimination against women. Moreover, the declaration was adopted to ensure proper implementation of CEDAW to which India is also a signatory. This requires India to take into account the provisions of this Declaration to curb violence against women.

(H) Convention on Torture

The Convention on torture was adopted by General Assembly on Dec10, 1984 titled as “Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”. Similar kind of provision ‘against torture’ is also included in other international instruments like ICCPR.⁵⁷ The Convention came into effect on June 26, 1987.

The Convention enunciates the meaning of the term ‘torture’. According to the meaning, torture is any act by which⁵⁸:

- (1) Infliction of pain or suffering of physical or mental kind which is severe in nature is caused intentionally.
- (2) It is inflicted to obtain information or confession from such person or third person, to punish for an act that he or third person has committed, to intimidate or coerce him or third person or based upon any discriminatory reason.

⁴⁸ *Id.*, art 1.

⁴⁹ *Id.*, art 2.

⁵⁰ *Id.*, art 3(a).

⁵¹ *Id.*, art 3(b).

⁵² *Id.*, art 3(d).

⁵³ *Id.*, art 3(e).

⁵⁴ *Id.*, art 3(h).

⁵⁵ *Id.*, art 4(d).

⁵⁶ *Id.*, art 4(f).

⁵⁷ ICCPR, 1967, art 7.

⁵⁸ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, art 1.

(3) Infliction is by State actor or at their acquiescence or with consent.

The Committee against Torture made it clear that if the State authorities or the State actors fail to prevent gender-based violence such as rape, then it would be considered as violation of this Convention.⁵⁹ CAT also emphasizes that females are at risk of violence within homes by private actors.⁶⁰ This brings violence by private actors within the ambit of the Convention.

India has not ratified the Convention. There is existence of widespread torturous practices in India which calls for the immediate need to ratify this Convention. The torturous acts aim at attacking Right to Life. Marital rape is also an act of torture which needs to be addressed. Thus, India must ratify this Convention which can act as a guard against abuses faced by women.

II. LAW ON MARITAL RAPE IN OTHER COUNTRIES

In this part, discussion of development of law in South Africa and UK has been discussed. The changes in law with the judicial interpretations and legislative provisions have been enumerated below.

(A) South Africa

South Africa has criminalised marital rape. The judicial decisions highlight that the relationship of husband-wife acted as a mitigating factor in rape cases. With the time, South Africa came up with the legislative provisions and criminalised marital rape. Moreover, certain procedural changes were made which favoured women.

1. Background of the exemption

Earlier South Africa provided immunity to husbands for marital rape. The basis for providing this immunity was the proposition of Hale laid in 1732. According to Hale's proposition, husband cannot be guilty of rape for his lawful wife due to the presumption of non-retractable consent and contract which she gave to her husband.

Early Jurists and philosophers talked about the authoritative right of husbands over their wives and contemplated such authority as if given by supreme power or as per the laws of nature. The Roman-Dutch Law relegated women to an inferior status.⁶¹ The various legal authorities noted that rape by husband of his wife is not punishable under Law. Damhouder views husband has

⁵⁹ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, Implementation of art 2 by States parties, ¶ 18.

⁶⁰ *Id.*, ¶ 22.

⁶¹ Felicity Kaganas, *Rape in Marriage: Developments in South African Law*, 35(2) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 457 (April 1986).

complete right over wife. Similar views are made by Huber and Moorman.⁶²

2. Early Attitude of Courts in South Africa on Marital Rape

There have been cases in South Africa where the punishment has been reduced on the ground of intimate relationship in rape cases.

- *S v. Mvumvu*⁶³

As per the facts of this case, accused, born at Qumbe in Transkei lived in accordance to the customs and traditions of his tribe. He entered into customary marriage with a girl aged 15 years at the time of marriage. Two children were born out of this wedlock. After about 4 years of marriage, certain marital disputes arose between them. Consequently, his wife left the matrimonial place and began to live with her brother. The couple married according to customs which recognized the custom of lobola. As per the customary marriage, lobola was to be paid back. The accused thought that marriage still subsisted because lobola was to be returned by the family. On the other hand, she regarded that marriage had ended.

After the hearing at the magistrate court where domestic violence verdict was passed against him, he forcibly took her to his home. She was raped on various occasions. She tried to leave somehow. He again raped her twice when he visited the complainant's place and also assaulted her with stick.

The court in this case imposed lesser sentence basing its judgement on "substantial and compelling circumstances" such as they were not strangers to each other and were married as per customs. The court also considered the false belief under which he was living that dowry price (lobola) was not paid back and he could exercise the benefits of conjugal rights. Court sentenced him to 10 years imprisonment on two counts for rape. He was also sentenced for abduction and assaults for 3 years and 3 months respectively to be run concurrently.

Thus, the court in this case justified the imposition of lesser sentence due to the existence of relationship between them.

- *S. v. H*⁶⁴

In this case, husband appealed against his conviction for assault. The husband tried to attempt rape with his estranged wife after which he was charged with indecent assault. In this case, the Judge held that as per the law of land, husband cannot be charged for raping his wife, So, he

⁶² Nico, P. Swartz, Kagiso Tshwene, *et.al.*, *Is a Husband criminally liable for raping his wife? A comparative analysis* 3(3) INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH AND REFLECTION 9 (2015).

⁶³ *S v. Mvumvu*, 2005 (1) SACR (WCC); 2016 (2) 62.

⁶⁴ *S. v. H*, South African Law report 750 (1985(2)).

cannot be charged for assault in order to have sex against her wife. However, if violence falls beyond the scope of actual intercourse, he can be punished for offence of unlawful assault.⁶⁵

- *S v. Ncanywa*⁶⁶

In this case, it was held that the irrevocable consent of wife does not exist in law and goes against the morals of the society. Judge Heath stated that the partners in marriage are equal and they have control over their bodies. It was observed that the marital obligation does not give authority to husband to have sexual intercourse against the will of wife. The case went in appeal where the appellate division reversed the conviction on the ground of marital rape and held that this rule does not have place in Roman-Dutch law. The Appellate Division compared it with the law prevalent in England. It concluded that marital rape exemption still existed in the Roman-Dutch Law.⁶⁷

III. PROVISIONS AS TO MARITAL RAPE IN SOUTH AFRICA

The following part enunciates the provisions under various acts. It discusses certain substantive and procedural changes made in laws of South Africa to uphold dignity of women.

- **Prevention of Family Violence Act, 1993**⁶⁸

The Preamble of this Act specifically states the objectives of this Act which provides for marital rape as well apart from prohibiting family violence and ill-treatment of children. In the definition clause, the definition of the parties⁶⁹ is contemplated as including the husband and wife married where the marriage has taken place by custom, law or they are living together as a couple.

Sec. 5⁷⁰ enunciated the provision as to marital rape. It provides an overriding effect. The overriding effect has a wider implication under Sec. 5 as the provision overrides any other law or common law. It provides that the husband can be convicted for the rape of his wife.

This provision was repealed by Sec. 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007⁷¹

⁶⁵ Sonya A. Adamo, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries* 4(3) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 581-582 (1989).

⁶⁶ *S v. Ncanywa*, 1992 (2) SA (Ck).

⁶⁷ NICO, P. SWARTZ, *supra* note 60 at 10.

⁶⁸ Prevention of Family Violence Act, 1993, Act No. 133 of 1993.

⁶⁹ Prevention of Family Violence Act, 1993, § 1(2).

⁷⁰ § 5 provided "*Rape of wife by her husband*

5. *Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.*"

⁷¹ The Schedule appended to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 mentions that § 5 has been repealed by § 68 of this Act which provides regarding the repeal and amendment of laws.

- **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007**⁷²

South African Law Reform Commission (SALRC) took into consideration various cases related to sexual offences upon the direction of Minister of Justice and Constitutional Development and passed this Act. The Act was passed with the purpose to prevent sexual offences and to protect the victims. This Act criminalises marital rape. The provisions relevant to the study are:

- **Sec.3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007**

This Sec. provides the definition of rape. It provides any unlawful and intentional act of sexual penetration by any person against the complainant without its consent as rape. The words ‘any person’ imply inclusion of husband as well. Sec.1 provides the meaning of ‘sexual penetration’. It includes penetration “*into or beyond the genital organs, anus, or mouth of another person; any other part of the body of one person or any object including any part of body of an animal*”.

The word ‘consent’ has been defined under Sec. 1(2) which denotes a voluntary consent. Further, sub-section 3 enumerates the circumstances under which consent cannot be said to a voluntary consent. It provides usage of force or intimidation, threat of harm, abuse of power or authority, false pretences or fraudulent means, or where the person is incapable to understand the nature of sexual act as the circumstances where consent is not said to be free or without coercion. This sub-section clearly mentions that these circumstances are not exhaustive.

- **Sec. 56 of Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007**

Part 2 of the Act contains provisions as to defences and sentencing. The Sec. explicitly mentions that defence as to the existence of relationship, be it marital or otherwise cannot be pleaded by the accused when charge under Sec. 3⁷³, 4⁷⁴, 5⁷⁵, 6⁷⁶ or 7⁷⁷ has been made.

- **Sec. 59 of Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007**

The length of delay as to the reporting of offence under the Act is immaterial. This provision clearly provides the gap between the alleged commissions and reporting cannot be used to draw any inferences.

This provision provides greater protection to those victims who made up their minds later to

⁷² Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, Act No. 32 of 2007.

⁷³ § 3 Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 provides the provision for rape.

⁷⁴ *Id.*, § 4 talks about compelled rape.

⁷⁵ *Id.*, § 5 enumerates the provision for sexual assault.

⁷⁶ *Id.*, § 6 contains provision for compelled sexual assault.

⁷⁷ *Id.*, § 7 contains provision for compelled self-sexual assault.

file case of sexual offence committed against them. The nature of such offences makes it difficult for the victims to come up and complain against such offences. The social stigma which arises from such acts lead to delay on the part of victims in such cases. Thus, the provision takes into account all the social realities.

The Indian Law does not provide any specific provision as to the length of delay in rape cases. However, the courts in India in various cases have applied this principle in rape cases.⁷⁸ Since, marital rape is not criminalised in India, so the non-applicability of this principle in such cases is obvious.

Sec. 60 Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

This Section has given up the requirement of caution in the complainant's evidence in cases of sexual offences. This implies that the section has done away with the requirements of corroboration in cases pertaining to sexual offences.⁷⁹

- **Criminal Law (Sentencing) Amendment Act, 2007⁸⁰**

The Act under Sec. 51(3) (aA) provides that the previous sexual history, relationship existing between the accused or complainant, absence of physical injury, cultural or religious beliefs about rape laws have not been considered compelling circumstances.

United Kingdom

The position in UK is clear. The law in UK criminalises marital rape. The judicial decision acted as a benchmark in law on marital rape in UK. The legislative provision also provides no exemption to husband for rape of his wife.

Existence of exemption in UK

In UK, Hale's doctrine prevailed which recognized the marital rape exemption as cited in the "History of the Pleas of Crown". This doctrine was followed in UK.

The law on rape in United Kingdom was contained in the Sexual offences (Amendment) Act, 1976.⁸¹ According to this law, rape was defined as 'unlawful sexual intercourse with woman' and the word 'unlawful' excluded rape by husband of his wife.⁸² The marital rape exemption

⁷⁸ The Indian Judiciary has held delay is immaterial in cases of sexual offences. For instance, in *State Of Punjab v. Gurmit Singh & Ors*, 1996 SCC (2) 384.

⁷⁹ Oyebanke Yebisi & Victoria Balogun, *Marital Rape: A Tale of two legal systems* 38(3) OBITER 546 (2017).

⁸⁰ Criminal Law (Sentencing) Amendment Act, 2007, Act No. 38 of 2007.

⁸¹ Sexual offences (Amendment) Act, 1976, Chapter 82.

⁸² Melisa J. Anderson, *Lawful Wife, Unlawful Sex-Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27(139) THE GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 152 (1998).

was not applied in certain circumstances. The non- applicability was observed where separation order was granted by court.

Development of law on marital rape in UK

The following case laws reveal the progress of the law with respect to marital rape in UK. The findings of the cases have been discussed briefly to shed light on the attitude of courts in United Kingdom.

- *Regina v. Clarence*⁸³

In this case, the court commented upon the Marital Rape Exemption which was propounded by Hale where Justice Wills ruled out the possibility of rape between couple. This decision however did not alter the law on marital rape.

- *R v. Clarke*⁸⁴

In case of judicial separation order, exemption is non-applicable.

- *R v. Steele*⁸⁵

It was observed that marital rape exemption will not apply where a separation agreement incorporates provision of non-cohabitation. Also, in cases of an injunction order obtained by wife restraining husband from molesting her or having sexual intercourse, exemption is not applied. In case of decree nisi of divorce, exemption will not apply. It was also observed that in case where a protective order has been sought but not issued yet, exemption will not apply.

- *R v. R*⁸⁶

In this case husband said to his wife on telephonic conversation when she was away residing with her parents as to his intention regarding divorce to which he was looking forward. He went at her place and raped her at her parents home. In this case, the Trial Court judge Justice Owen observed that when the intention of divorce was clear from telephonic conversation, wife's consent cannot be implied for sexual intercourse.

The Court of Appeal viewed that the relationship between the rapist perpetrator and victim will not matter. It was made clear that a new offence was not being created rather common law fiction of implied consent is being removed. The case went to the House of Lords where the court cited the case under Scottish Law. It referred to *S v. HM Advocate*⁸⁷ and held that the

⁸³ *Regina v. Clarence*, (1889) 22 Q.B.D. 23(1888).

⁸⁴ *R v. Clarke*, (1949) 33 Cr. App. R. 216.

⁸⁵ *R v. Steele*, (1976) 65 Cr. App. R. 22.

⁸⁶ *R v. R*, (1991) 1 All. E.R. 747.

⁸⁷ *S v. HM Advocate*, 1989 S.L.T 469.

word unlawful includes marital rape as well. This case acted as a benchmark for the law relating to marital rape in UK.

- *SW v. UK: CR v. UK*⁸⁸

In this case the European Court of Human Rights upheld the abovementioned decision of House of Lords.

- The Sexual offences Act, 2003⁸⁹ criminalises marital rape in UK. Sec. 1 of the Act provides :

“(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.”

This Section does not provide immunity to husband. The offender can be any person. This shows marital rape has been criminalised in UK.

IV. INDIA AND INTERNATIONAL COVENANTS

Art. 253 of the Indian Constitution provides the power of Parliament to make law for implementation of any treaty, agreement or convention for the whole or any part of territory of India. Court has laid that where the domestic law does not provide adequate provision, provisions of International instruments must be considered if these are not inconsistent with fundamental rights.⁹⁰

In *Sheela Barse v. Secretary, Children Aid Society & Others*⁹¹, the court observed the need to implement the provisions with respect to children in accordance with the obligations under the conventions which India has ratified. This shows that India must follow the provisions of

⁸⁸ *SW v. UK: CR v. UK*, (1995) 21 EHRR 363.

⁸⁹ The Sexual offences Act, 2003, Chapter 42.

⁹⁰ *Vishakha v. State Of Rajasthan & Ors*, AIR 1997 SC 3011.

⁹¹ *Sheela Barse v. Secretary, Children Aid Society & Others*, 1987 AIR 656, 1987 SCR (1) 870.

Conventions in the absence of domestic law.

V. CONCLUSION

From the study, it can be concluded that the various international instruments support the abolition of exemption through various provisions. India must commit itself to the ending of act of marital rape in consonance with the various Conventions and Declaration. It must ratify the Convention against Torture. With regard to the position of countries, it can be seen that South Africa and UK have criminalised marital rape. Apart from these, various other countries have abolished the immunity through judicial decision or by explicitly providing provision. India must make a comparative analysis of the provisions existing in various countries and aim at adopting the ones that best suit its conditions thereby following the procedure which helps in facilitating the criminalisation of marital rape thus rooting out this heinous crime.
