Marital Rape Exemption - Adding Insult to Injury

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I. Introduction:

The offence of rape is not new; it is as old as Adam. Men in all times have used the weapon of rape against women- a basic weapon of force used by men to keep all women subordinated as a second sex. From Old Testament Jewish code up to feudalism, rape was treated primarily as theft - a property offence- one perpetrated against *men*. Rape as offence was principally considered that of stealing or abducting women from her rightful proprietor, normally her father or husband. Only when abduction was made a distinct felony in the sixteenth century, the crime of rape came to be seen essentially as that of sexual ravishment, which in turn was viewed as the theft of chastity and virtue, rather than of body. Even later, criminalization of rape in the statute book perpetuated a man's world. Marital rape i.e. rape by a husband on his wife, was never considered to be a criminal offence in the past. This same common law notion continued till recently in criminal law of many countries, to which India is not an exception. The reasoning advanced for not making marital rape as offence is that, consent for marriage by women is also an irrevocable consent for sexual intercourse with her husband, thus there cannot be any rape within the marriage.

II. Position in England:

In England, until the judgment of House of Lords in *R* v. *R*[2], husband was immune from the criminal liability of marital rape. The authority relied upon by the common law courts was Sir Matthew Hale's **Pleas of the Crown**, which was first published in 1736. Sir Matthew Hale says, "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 herself in this kind unto her husband which she cannot retract"[3]. It was after centuries of life as a common law offence that rape became a creature of statute by virtue of Section 1 (1) of the Sexual Offences Act 1956 in England, which says, "It is an offence for a man to rape a woman". However this statute made no attempt to define rape, it rested its meaning on common law. In 1976, however, rape was defined as "Unlawful sexual intercourse with women who at the time of the intercourse do not consent to it". No reference was made in these statutory provisions as to the position of husband

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2 [1991] 3 W.L.R. 767 (HL).

3 Cf. Richard Brooks, Marital Consent in Rape, *Crim. L. R.* 1989, Dec, 877.

and wife. The inference of this section was the word "unlawful" means outside the marriage, thus, within marital relationship there cannot be offence of rape. In *R* v. *R*[4], Lord Keith of Kinkel with the other members of the House (Lord Brandon of Oakbrook, Lord Griffiths, Lord Ackner and Lord Lowry), held that "the rule that a husband cannot be criminally liable for raping his wife if he has sexual intercourse with her without her consent no longer forms part of the law of England since a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage, the wife submits herself irrevocably to sexual intercourse in all circumstances…". Here the word 'unlawful' becomes the key to Lord Keith's explanation of the abolition of the marital rape immunity, bringing together the common law development and the significance of the 1976 statute. He rejects an argument that the word 'Unlawful" means "outside the bond of marriage" and concludes that the word has no meaning and is "mere *surplusage*", for forceful sexual intercourse was invariably unlawful. After this judgment, in England, a corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994, which specifically made it an offence for a husband to rape his wife. This judgment of House of Lords was also affirmed by the European Court of Human Rights in the decision of *SW v. United Kingdom*[5].

III. Position in India:

The criminal law in India is based on the Common law doctrines which was prevailing at the time of codification of Penal Code in the 19th century, therefore the common law exception of marital rape also travelled in the Indian criminal law. However, the exception of section 375 and section 376-A of the Indian Penal Code recognizes 'Marital Rape' in a limited manner. This was not the case earlier when the Penal Code was drafted by Lord Macaulay. In the original draft of Lord Macaulay clause 359 (which dealt with the offence of rape) was provided with an exception that "sexual intercourse by a man with his wife is in no case rape"[6]. An unmistakable preference for the rights of husband over his wife against the wife's right to herself. But the final version of the Penal Code differed a little from clause 359 of the earlier draft and the exception to the offence of rape stood, as "Sexual intercourse by a man with his wife, the wife not being under ten years of age, is not rape"[7]. The age of consent was raised subsequently to 12 years[8], 13 years[9]

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4 Supra note 2.

5 *[1995] 1. F.L.R.434 (ECHR)*

6 C.f., Vasudah Dhagamwar, *Law Power and Justice, Protection of Personal Rights Under the Indian Penal Code*, N. M. Tripathi Pvt Ltd., 1974 .

7 *Ibid*.

8 By the amendment to the Indian Penal Code in 1891.

9 By the amendment to the Indian Penal Code in 1925.

and 15 years[10] by various amendments to the Penal Code.

The Indian penal code recognizes that a husband could rape his wife, but only in few circumstances i.e, when the wife is not below 15 years of age and if the husband and wife are cohabiting together, then there is absolute immunity to husband from the liability of marital rape[11]. If the wife is under 12 years of age then he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both[12] if he commits rape on her. If he rapes his wife who is living separately from him under a decree of separation or under any custom or usage then in such case he shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine[13]. Except these circumstances the Penal Code does not hold the husband liable for sexual intercourse with his wife against her consent. Clause sixth of section 375 of the penal code imposes absolute liability on a man if he has sexual intercourse with a woman even if she consented for the same, if she is below 16 years of age, but if a wife is not below 15 years of age then her consent is immaterial. It is a paradox, that in India the minimum age of marriage of a girl is 18 years of age, while on the other hand the penal code still recognize that a women if married at the age of 15 or above, she gives an irrevocable consent to have sexual intercourse to her husband.

The common law doctrine of exempting husband from the liability of rape is based on the observation of Sir Matthew Hale's in his textbook, **Pleas of crown**[14]. It is not a principle of criminal law founded upon any judicial decision, rather it is a deduction made upon contractual principles. This was as novel as it was fallacious. The English criminal law did away with this fallacy through judicial creativity[15] and also later on by an Act of Parliament[16]. In India, various women's organizations have been demanding from quite a few decades to rationalize and neutralize the rape law. Public interest litigation was filed in the Supreme Court of India by a NGO Sakshi, an organisation interested in the issues concerning women, for directions concerning the definition of the expression "sexual intercourse" as contained in section 375 of the Indian Penal Code[17]. There after the Apex Court requested the Law Commission "to examine the issues submitted by the petitioners and examine the feasibility of making recommendation for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the

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10 By the amendment to the Indian Penal Code in 1940.

11 Exception to Section 375: 'sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape'.

12 Section 376 .

13 Section 376 A.

14 See supra note 2.

15 *R* v. *R* [1991] 3 W.L.R. 767 (HL)

16 Section 147 of the Criminal Justice and Public Order Act, 1994.

17 Writ Petition (Crl.) No.33 of 1997

loopholes". The Law Commission did not agreed with the recommendation of *Sakshi*, of deletion of the exception to section 375 of the Penal Code. The argument of *Sakshi* was that if husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law; if so, there is no reason why concession should be made in the matter of offence of rape where the wife happens to be above 15 years of age. In the response to this argument, the Law Commission concluded that excluding this exception would amount to excessive interference with the marital relationship, thus this exception clause should not be deleted[18]. The reason forwarded by the law commission for non deletion of the exception clause from the rape law in India is erroneous. The Criminal Law in India has interfered earlier in many other matters of marital relations, such as cruelty to wife, adultery, bigamy and so on. Why did the Law Commission felt that deleting the marital exception clause from the Penal Code would amount to interfering in marital relations? In U.K. a husband could be held guilty for raping his wife; the House of Lords and the Parliament never considered it as an excessive interference in the marital relationship. In United States of America, the marital rape exemption is given up in almost all the fifty States, it is difficult to understand how in India it would amount to excessive interference into marital relationship. What is meant by excessive interference in marital relations? This has to be understood in terms of gender relations and sexual politics. This approach of the law commission is a patriarchal attitude within which it wants to criminalize rape. In the past, under patriarchy rape was reckoned a crime against men, surely heads of households has strong incentives to prosecute those who violated their mother, wives or daughter. Thus a husband can have sexual intercourse with her without her consent, because she is his property and any interference would amount to interfering in his personal right of enjoyment of his property. If immunity is given to husband and wife, then why not between cohabitees, or for that matter between any couple who have had previous consensual sexual relations? A cohabitee knows no immunity from prosecution for rape, even if attacker and victim have lived together 'as man and wife' for years and are still doing so at the time of offence. If the difficulty to prove rape in marriage is argued as a defense for not making it a crime, again the same point, if valid at all, applies equally to cohabitees. In any event, difficulties of proving the case can arise in relation to any criminal offence and it cannot be a reason for granting immunity from prosecution.

Will the removal of husband's immunity open the floodgates and inundate the police with jealous and vindictive wives making complaints of rape against their husbands? This fear is groundless. There is no such stampede from wives alleging assaults nor from jealous cohabitees or girlfriends shouting 'Rape'. A

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18 *Law Commission of India*, 172 report, 2000, para 3.1.2.1.

victim's understandable wish not to be involved in a rape trial is a significant disincentive to filing a complaint, whether or not in marriage context, and in terms of physical abuse wives appear to be particularly reluctant complaints. The police have frivolous and vexatious complaints on occasion in many spheres of the criminal law and know how to handle them.

IV. Conclusion:

In 1992 the House of Lords in *R* v. *R*[19] abolished the ancient English immunity which prevented a man from being prosecuted or convicted for the rape of his wife, describing the rule as "anachronistic and offensive". The observations of Sir Matthew Hale, on which the Common Law definition was relied upon till recently, are not based on any judicial authority and are clearly obsolete. It is time for the Indian law makers to change the colonial law of rape, which is based on fallacious understanding of the common law, prevailing then. The Constitution of India guarantees justice and equality to all individuals. Justice demands that the sexual autonomy of a woman has to be recognized. Sexual autonomy means the freedom to refuse to have sex with any one for any reason and even husband, is not an exception to it. The exception clause under section 375 of the Penal Code reflects the legislature's view of a wife as being her husband's private property rather than an autonomous self determined person. In-fact husbands are provided with a license to impose themselves on their wives whenever they choose, irrespective of the wishes of their wives. Imposing liability on the husband for having sexual intercourse with his wife against her wish is a much waited change in the Indian criminal law, which unfortunately is not on the agenda of the Indian law makers and of the Judiciary.

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19 Supra note 1.