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The Marital Status Exemption in Rape

By

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Under section 375 of the Indian Penal Code, sexual intercourse by a man with his own wife, the wife being over fifteen years of age, is not rape, even though it be forcible, against her will or without her consent.[1] He is, however, punishable under the Code for raping his own wife,

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1. S.375, I.P.C., provides:

> "A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following categories:-
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> First:- Against her will.
> Secondly:- Without her consent.
> Thirdly:- With her consent, when her consent has been obtained by putting her in fear or hurt.
>
> ... ...
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> Exception:- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

It is not clear under this exception whether any sexual intercourse by a man with his wife who is below fifteen years of age would amount to rape regardless of her consent. One commentator takes the view that lack of consent has to be proved even then: Chitaley and Appu Rao, 3 A.I.R. Commentaries: The Indian Penal Code 346 (2nd ed., 1975).

But another commentator takes the view that consent would be immaterial, given the fact that the wife was below fifteen years of age: Nelson, The Indian Penal Code 2025 (6th ed., 1970). However, the case cited by Nelson in support of his view, viz., Kartick Kundu v. State, 1967 Cr. L.J. 1411 at 1413 does not deal with this point. Yet his view would seem to be preferable than the other, having regard to the object of this exception.

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if she is below fifteen years of age.[2] It would seem that her consent would be immaterial in such cases,[3] having regard to the object of this exception (to the exemption given to husbands from the offence of rape) which is to protect the personal safety of married girls below a certain age from premature sexual intercourse with their husbands with often disastrous consequences to themselves and with a grave risk of infant mortality following in its wake.

Unfortunately in this regard, while the Law Commission had proposed that sexual intercourse by a man with his child wife (i.e. below fifteen years of age) should be taken out of section 375 of the Code and be made into a separate offence,[4] the Joint Committee which sat on the Indian Penal Code (Amendment) Bill, 1972, has taken the view that sexual intercourse by a man with his own wife, regardless of her age, should not be regarded as rape. The Joint Committee has, therefore, deleted the clauses pertaining to sexual intercourse by a man with his child wife under the proposed new section on rape in clause 157 of the Bill.[5]

Obviously the Joint Committee which sat on the Bill had not given deep thought to the rationales underlying the exemption given to the husband from this offence or considered at length the changing trend towards abolition of this special exemption in the wake of women's rights movement in the common law countries or the position in this regard in civil law countries or socialist countries of the world. This paper is concerend with those aspects.

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2. Under S.376, I.P.C., where the wife is below twelve years of age the punishment is the same as that provided for rape generally, viz., imprisonment for life, imprisonment of either description that may extend to ten years and fine. The punishment provided is milder where the wife is between twelve and fifteen years of age, being imprisonment of either description that may extend to two years or fine or both.

3. See Nelson, supra note 11 at 2025. The fifth clause of s.375, I.P.C., whereby a man commits rape if he has sexual intercourse with a girl below sixteen years of age, whether with or without her consent, also provides a useful analogy in support of this view.

4. See the Law Commission of India, 42nd Report on the Indian Penal Code 277-78 (June, 1971).

5. See the Report of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, The Gazette of India, Extraordinary, Part II, Sec.2, 546/15 and 546/80 and 81 (Jan.29, 1976).

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Before considering those aspects, a few other points of law in this respect may be noted. Under the law, a husband can be guilty of abetting the rape of his wife, regardless of her age, and if he were present at that time, he would be deemed to have committed rape itself in spite of the fact he is exempted from the offence itself (and attempt thereof).[6]

However, as the law stands, a husband enjoys immunity from a charge of rape even though he has forcible non-consensual sexual intercourse with his wife who has been living apart from him whether by mutual agreement or under a decree of judicial separation.[7] In such a case, the marriage technically subsists. The Law Commission did not consider this to be right. It considered that in such circumstances sexual intercourse by a man with his wife without her consent should be punishable as rape.[8] The Joint Committee which sat on the Indian Penal Code (Amendment) Bill, 1972, has viewed favourable the introduction of an additional explanation to the proposed new section on rape to deem a woman living separately from her husband under a decree of judicial separation or by mutual agreement to be a woman other than the man's wife for the purposes of this section. But the Joint Committee has reduced the quantum of punishment provided in this regard from a maximum of seven years imprisonment to one of three years only.[9] In this respect also, the Joint Committee has viewed with partiality the position of the husband in relation to this offence.

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6. S.376, I.P.C., read with s.109, I.P.C., where the offence is committed in consequence of the abetment.

   S.376, I.P.C., read with s.115, I.P.C., where the offence is not committed in consequence of the abetment.

   S.376, I.P.C., read with s.114, I.P.C., where the husband was present at the time the offence is committed in consequence of the abetment.

7. In case of judicial separation, as the law stands, a husband who has sexual intercourse with his wife against her will or without her consent may be guilty of contempt of court, but it is doubtful whether he will be guilty of rape-Chitaley and Appu Rao, supra note 1 at 646.

8. See the Law Commission of India, supra note 4 at 277-78.

9. See the Report of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, supra note 5 at 546/15 and 546/81.

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It does not follow from the exemption of the husband from the offence of rape that the law regards the wife as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law.[10] The husband has not the absolute right to enjoy the person of his wife without regard to the question of safety to her, as for instance, if the circumstances be such that it is certain death to her, or that it is probably dangerous to her life.[11] The husband may by his forcible act of intercourse, bring himself under any of the other provisions of the criminal law, depending upon the individual circumstances of the case, that is, having regard to the phusical condition of the wife, and to the intention, the knowledge, the degree of rashness or negligence with which he is shown to have acted on the occasion in question.[12]

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10. Queen Empress v. Hurree Mohun Mythee, I.L.R. 18 Cal. 49 at 52(1891) per Wilson, J.

    The husband was convicted inthis case under S.338, I. P.C. (causing grievous hurt by doing an act so rashly or negligently as to endanger life or personal safety of others) for rapturing the vagina of his wife aged eleven years and so causing the haermorrhage which led to her death. (the jury acquitted him on other charges; at the time of this case the law of rape did not apply when the wife was over ten years of age.)

11. Ibid. See also, Emperor v. Shahu Meharab, A.I.R. 1917 Sind. 42, The husband was convicted in this case under S.304-A for causing the death of his child wife by a rash or negligent act of sexual intercourse with her(the girl was above twelve years of age but had not attained puberty; at the time of this case the law of rape did not apply when the wife was over twelve years of age).

12. Thus, except for rape, a husband may be charged with any of the following offences as might be applicable as a result of his forcible sexual intercourse:

    (i) S.304, I.P.C. (Culpable homicide not amounting to murder)
    (ii) S.304-A, I.P.C. (Causing death by doing a rash or negligent act).
    (iii) S.323, I.P.C. (Voluntarily causing hurt)
    (iv) S.325, I.P.C. (Voluntarily causing grievous hurt)
    (v) Ss.336-338, I.P.C. (rash or negligent act which endangers human life or personal safety of others; causing hurt or grievous hurt by such an act)
    (vi) Ss.352&358, I.P.C. (assault or use of criminal force otherwise than on sudden and grave provocation; and upon such provocation.)
    (vii) S.377, I.P.C. (unnatural offence).

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In the U.K.

As the exemption of husbands from our law of rape is based on a common law principle, an enquiry into the position of English law in this respect at present would be relevant. Section 1(1) of the Sexual Offences Act, 1956 provides:

"It is an offence for a man to rape a woman."

The maximum punishment for the offence is life imprisonment.[13] As the Act does not define the offence, one has to look to the common law definition of it.[14] Under common law, a husband cannot be guilty of raping his wife. It was stated by Mattew Hale:

"The husband cannot be guilty of a rape commited by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given herself in this kind unto her husband, which she cannot retract."[15] But a husband may be convicted as a secondary party to a rape committed by another on his wife. As Mathew Hale puts it:

"The in marriage she hath given up her body to her husband, she is not to be by him prostituted to another."[16]

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13. Under s.37 read with sch.2 of the Act.

14. The traditional definition of rape is to be found in Archbold's Criminal Pleading, Evidence and Practice para 2871 (38th ed., 1973):

"Rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud." The term 'unlawful' in this context means sexual intercourse outside the bonds of marriage." See Smith and Hogan, Criminal Law 288 (2nd ed., 1969).

15. 1 Pleas of the Crown 629. No authority is cited by Hale for this proposition. In R. v. Clarence, 22 Q.B.D. 23 (1888), this matter was considered by way of obiter by the court of Crown cases Reserved consisting of thirteen judges whose views differed considerably. Wills, J. stated that he was not prepared to assent to the proposition that rape between married persons was impossible. A.L.Smith, Stephen, and Hawkins, J.J., seem to have accepted the traditional view though their judgments are not clear on this point. Field and Charles, J.J., expressed doubts in this regard.- See the comment by Morris and Turner in 2 Univ. Q.L.J. at 256(1952-'55). It follows that a husband cannot be guilty of an attempt to rape his wife.

16. Ibid. See R. v. Lord Audley, Lord Castlehaven's Case, (1631) 3 State Tr. 401 (H.L.).

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Though the husband has the right to enjoy the person of his wife, nevertheless he is not entitled to use force or violence for the purpose of exercising that right. If he does so, he may make himself liable to the criminal law, though not for rape, but for whatever other offence the facts of the particular case warrant. Thus, a husband may be guilty of wounding or causing actual bodily harm to his wife or of assaulting her.[17]

Where the couple have separated whether under an order of separation or by mutual agreement with a non-molestation clause, the exemption of the husband from this offence would cease to apply. In R. v. Clarke.[18] Byrne, J. held that although as a general proposition of law a husband cannot be guilty of rape on his wife, yet where the justices had made an order containing a provision that a wife be no longer bound to cohabit with her husband, the consent to marital intercourse impliedly given by the wife at the time of marriage was revoked thereby and the husband in such a case was not entitled to have intercourse with her without her consent, with the result that he could be guilty of rape.

In R. v. Miller,[19] Lynskey, J. held distinguishing the Clarke case, that the fact that a wife had left her husband and had presented a petition for divorce did not amount to a revocation of the consent, to marital intercourse impliedly given by her at the time of the marriage, and as the implied consent had not been revoked either by an act of the parties (like an agreement to separate containing a non-molestation clause) or by any order or decree, the husband could not be guilty of rape but would be guilty of an assault occasioning actual bodily harm.[20]

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17. See R. v. Miller (1954) 2 All E.R. 529 at 534, per Lybskey, J., (R.v. Jackson (1891) 1 Q.B.671 was followed in this case). See infra note 20.

18. (1949) 2 All E.R. 448-49 (hereinafter called the Clarke case).

19. Supra note 17 at 583.

20. See Bromley, Family Law 97 (4th ed., 1971) who criticizes this decision as follows:

> "It is difficult to see logically how this can be, for if the wife is deemed to have given an implied consent to intercourse, she ought also to be considered to have given implied consent to any act connected therewith and her consent should clearly be a defence to a charge of assault."

But he admits that

> "even though logically unsupportable, the decision is clearly consonant with the changed views of the wife's status in the present century."

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Both these cases seem to be founded on a literal application of the implied consent rule rather than on recognition of the desirability of eliminating the exemption.

In the U.S.A.

It would be interesting to examine the position in this regard in the United States of America which has also adopted the common law. The husband's immunity from a charge of rape was first judicially recognised in Commonwealth v. Fogarty.[21] The immunity was statutorily recognised in a number of states. As one writer points out:

"Twenty-seven states provide in the rape statutes for the husband's immunity. Nineteen of these sates include this immunity in the definition of rape or sexual assault. Eight other states have separate statutory exemptions. In the states that do not provide for the exemption by statute, the common law rule has been applied in marital rape cases."[22]

The same writer also states:

"In nine states which have a statutory exemption, it does not apply to certain married persons living apart. In Colorado, New Hampshire and Oregon, it is sufficient that the spouses merely be living apart for the immunity not to apply. In Michigan, Minnesota, and Nevada, the husband and wife must not only be living apart, but one of them must also have filed (a suit) for divorce or separate maintenance. Finally, in Louisiana, Maryland, and North Dakota, the exemption is not available if the parties are separated by a judicial decree." 23

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21. 74 Mass. (8 Gray) 489-90(1857). This decision was based on Mathew Hale's st tement alone. This case is cited in the note on the Marital Rape Exemption, 52 N.Y.U.L.R. 306 at 307 (1977).

22. Note on the Marital Rape Exemption, supra note 21 at 308. (Foot-note references in the passage are omitted here). Nineteen sates are silent on the question of this immunity, but the common law rule is considered to apply - See Annot., 84 A.L.R., 2d., 1017, 1019(1962). As regards the remaining four states, see infra note 46 and the test thereto.

23. Supra note 21 at 318-19. (foot-note references in the passage are omitted here).

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The Model Penal Code's definition of rape also exempts husbands.[24] However, in at least four of the states, the exemption has been given up either totally or partially as will be referred to later.

Rationales for the exemption

Consent rationale

Several rationales have been suggested to justify the husband's immunity from rape of his wife. The foremost is the implied consent rationale advanced by Matthew Hale.[25] In the Clarke case, Byrne, J. put it as follows:

The reason is that on marriage the wife consents to the husband exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. The marriage right of the husband in such circumstances exist by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse as in the case of unmarried persons." 26 Significantly enough, outside the context of rape, no authority exists for the saying that marriage implies consent to copulation

24. See A.L.I., Model Penal Code, s.213, 1, rape and Related Offences (Proposed Official Draft, 1962) which states:

"(1)Rape, A male who has sexual intercourse with a female not his wife is guilty of rape if....."

"(2) Gross Sexual Imposition.
A male who has sexual intercourse with a female not his wife commits a felony of the third degree if...."(emphasis added).

See also s.213.6 which is generally applicable to art. 213.

S.213.6(2) states:

"Spousal Relationship.Whenever in this Article the definition of an Offence excludes conduct with a spouse, the exclusion shall be deemed to extent to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouse living apart under a decree of judicial separation..."(emphasis added).

25. See the text note 15 and the note.

26. Supra note 18 at 448.

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at all times.[27] Besides this retionale is not consistently and logically applied in such a way as to deprive a married woman of the protection of the criminal law with respect to crimes other than rape that a husband may commit in the course of sexual activity.[28] Even if this rationale was

27. The civil law recognised the right of a wife to withdraw her consent under certain circumstances. She is not, for instance, bound to submit to inordinate or unreasonable demands by her husband.
-Bromley, Family Law -161(3rd ed., 1966). See also Holborn v. Holborn, (1947) 1 All E.R. 32.
A wife may also refuse intercourse because her husband has been guilty of a matrimonial offence, which she does not wish to condone, or because he is suffering from a venereal disease.
-Foster v. Foster, (1921)p.438.
If the husband should force sex upon his wife under the circumstances, he would be guilty of marital cruelty, a cause for judicial separation.(It is submitted that this would be the case even under the Hindu Marriage Act, 1955. See Mulla's Principles of Hindu Law 723(14th ed., 1974).
The civil cases echo the distinction drawn by Hawkins, J. in his dissenting judgment in R.v. Clarence, supra note 15 at 51, between what a woman is assenting to upon marriage and what she is not-that is, she is assenting to the act of sexual intercourse, but not to another act which is dangerous to her health under the circumstances.

28. Interestingly enough such an argument was put forward in R.v. Clarence, supra note 11 and two of the judges conceded that if a husband could not be guilty of the rape of his wife because of an implied consent at the inception of the marriage, then he could not be guilty of an assault occasioning actual bodily harm so long as the injuries resulted purely from the intercourse as in this case (transmission of gonorrhoea) per Wills, J. at 33-35 and Stephen, J. at 46. But the majority decided that there could be no offence because the wife had actually consented to sexual intercourse in spite of the unhealthful results growing out of it.

See also the criticism of the Miller case by Bromley, supra note 20, by the same logic. See further, supra note 12 for a list of offences that a husband might be guilty of under the Indian Penal Code connected with his sexual activity.

justified when it was first articulated[29]: it is inconsistent with the present day acceptance of egalitarianism in sexual relationships.[30] It seems unreasonable to infer that upon marriage a woman intends to make her body accessible to her husband whenever he wants her. By marrying she probably indicates that she will consent to intercourse but she also probably believes that she can refuse intercourse at any given time (though not for a continued period lest it amounts to cruelty).[31]

There ought to be mutual consent by the husband and wife for each sexual act, for if women are to be equal marital partners, sexual intercourse must be mutually desired and not viewed as a "wifely obligation" which she has no right or power to retract from.[32]

Legal status of wife rationale

The exemption originated also from the traditional notions regarding the status of the wife and of the purpose behind the rape law. The wife was traditionally considered to be the chattel or property of her husband. The purpose behind the rape law was to ensure the "masculine pride in the exclusive possession of a sexual object."[33] Virginity and marital chastity were, therefore, cherished values that were sought to be protected against the often unprovoked, unpredictable and highly brutal attack which, in turn, called forth vengeance.[34] Rape invariably damaged the reputation of the victim. It destroyed the acceptability of an unmarried

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29. This is an assumption of doubtful validity. It is worth noting, however, that in Hale's time a valid marriage could not be dissolved except by death or by a private Act of Parliament.

    See the Miller case, supra note 17 at 530 where Lynskey, J., points out that though there have been departures from the olden view of marriage, Hale's proposition with regard to the exemption of the husband from a charge of rape of his wife has not been overruled.

30. See L.J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 Calif. L.R. 1169 at 1222 (1974).

31. See note on Race and Battery between Husband and Wife, 6 Stan. L.R. 719 at 722 (1954).

32. See note on the Marital Rape Exemption, supra note 21 at 331.

33. See note on Forcible and Statutory Rape, 62 Yale L.J. 55 at 72 (152-53).

34. Supra note 31 at 724.

girl as a bride.[35] However, within the ordinary marriage relationship, where the parties have been intimate, forcible sexual intercourse without the consent of the wife was not looked at as rape, as the husband would only be making use of his property.

Akin to the traditional notions regarding the status of the wife was the common law principle of unity of person - that upon marriage a wife's legal identity merged into that of her husband.[36] This concept of a married woman made rape by a husband impossible, since he cannot rape himself.

These legal fictions which treated a wife as husband's property or his other half, have been discarded today in most areas of law. Marriage is now regarded as a partnership in which both husband and wife share equal rights. The purpose of rape law can now be considered as one of protecting a woman's personal safety and freedom of choice than as one of protecting male interests in woman's integrity.[37] Therefore, the exemption of husbands from the law of rape could be given up now.

Problems of evidence rationale

The difficulties of proving a rape charge as between husband and wife, and the possibility of a fabricated complaint by the wife against the husband have been advanced as reasons for the exemption. While it is true that the status of marriage gives rise to an inference of consent, yet that by itself is not a sufficient reason to preclude a wife from preferring a charge of rape against her husband if she would. The law does not, for instance, bar a woman who is sexually familiar with a man from preferring a charge of rape against him, though consent could be inferred even in that case owing to previous sexual relationship.[38]

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35. "The demand that a girl shall bring with her into marriage with one man no memory of sexual relations with another is after all nothing but a logical consequence of the exclusive right of possession over a woman which is the essence of monogamy..."
4 Freud, Collected Papers 217 (Reviere's Transl. 1925)

36. See 1, Blackstone, Commentaries, 442:

The very being or legal existence of the woman is suspended during the marriage, or atleast is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything."

37. Note on the Marital Rape Exemption, supra note 21 at 311.

38. Id. at 314.

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Similarly the possibility of a false complaint by a scheming wife or her using the threat of prosecution to obtain a favourable property settlement from her husband upon divorce, is not a convincing argument as it is not consistent with the fact that she could still file complaints against her husband for crimes other than rape.[39] It should also be borne in mind that if it is difficult for a wife to prove a charge of rape as against her husband, then the abandoning of the exemption would certainly not be a strong weapon in the hands of a vengeful wife. 40

Reconciliation rational.

Another reason put forward in support of the exemption is that intra-marital rape prosecutions would prevent reconciliation and foster marital

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39. Ibid. /Under the Indian Penal Code, a husband may be convicted of assault or use of criminal force (s. 352) or of an unnatural offence (s. 377) upon his wife -- offences which equally bear the possibility of falsification/.

40. Ibid. See f.n. 55 therein. It is also a fact that rape prosecutions are often more shameful for the victims than for the defendants. A feminist writer points out:

> "/W/hile men successfully convinced each other and us that women cry rape with cause and glee, the reality of rape is that victimized women have always been reluctant to report the crime and seek legal justice -- because of the sham of public exposure, because of the complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her ...."
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> S. Brownmiller, Against Our Will: Men, Women and Rape. 387 (1975).

It would seem that there must be easier ways of blackmailing.

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discord, which is against the policy of the law. This reason is also inconsistent with the lack of immunity for the husband as regards other offences he may commit in this connection. It also presumes the existence of marital harmony, which is not valid as the truth remains that such a charge against the husband will not be preferred unless the couple are separated or marital discord has long characterised the relationship. 42

Alternative remedy rationale

Finally, it is said that assault and battery (criminal force) laws provide adequate protection to the wife.[43] This argument assumes the validity of the exemption when in fact the question should be why allow it at all. Without doubt, this exemption is outdated. "The fact that rape occurs in a marital context does not affect the interests involved. Likewise, it should not affect the protection". [44] Therefore, a fair consideration of the dangers involved in forcible sexual intercourse without the consent of the wife and also modern lifestyles within marriage make it necessary to abandon this exemption.

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41. "Forcible rape between unmarried persons is the culmination of a desire whose very inception is disapproved; between married persons it is a loss of control over an explosive but encouraged situation". -- supra note 31 at 725.

42. Not on the Marital Rape Exemption, supra note 21 at 315-16.

43. Supra note 31 at 719, 725-28.

44. Supra note 21 at 316.

Recent developments in the U.S.A.

Recently public and judicial opinion[45] have begun to recognize the inadequacy of these rationales for holding on to this exemption in the present day. The exemption was given up in the recent revisions of the rape laws of South Dakota, Delaware and Hawaii.[46]

South Dakota has completely eliminated the requirement in the offence of rape that the victim be a female and not the wife of a perpetrator.[47] Delaware now classifies rape in two degrees. Rape is in the first degree if the victim is not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact. Marriage or previous sexual contact, however, reduces the offence to the second ...

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45. See State v. Smith, No. 1600-75 (Essex country ct., N.J., Jan.,21, 1977), a case of marital rape where the court strongly disapproved of the husband's immunity from rape on his wife, though it did apply the rule.

    See also People v. Hartwell, No.75-091591-FM (Wayne Country, Mich.Cir. Cit., Mar.,16,1976) and State v. Bateman, 113 Ariz. 107, 540 p. 2d 6 (1976).

    These two cases, though they do not deal with spousal immunity in rape, yet reflect a judicial awakening to the view that women are no longer legally bound to a sexually subservient role in marriage.
    See supra note 21 at 320-22, where the above cases are referred to.

46. See supra note 21 at 317 and the footnotes therein. The prior definitions of rape in the laws of South Dakota and Delaware had explicitly provided for the husband's immunity. The rape law of Hawaii did not explicitly refer to the exemption earlier. As regards the position in Iowa, see infra note 49.

47. S.D. Compiled Laws Ann., Ss. 22-22-1 note (supp. 1976); referred to in supra note 21 at 317, f.n. 74.

degree.[48] Hawaii also classifies rape in a manner similar to Delaware. It, however, differs from the Delaware statute as regards first degree rape in two respects: (i) the rape is classified as first degree if the female has not permitted the aggressor sexual contact within the previous twelve months; and (ii) regardless of whether the male and female are voluntary social companions, the rape is classified as first degree if the male inflicts serious bodily injury upon the female.[49]

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48. Del. Code, tit. 11, Ss. 763-764 (Supp. 1976). If the defendant inflicts serious physical, mental or emotional injury upon the victim, the rape is classified as first degree regardless of the relationship of the victim and the defendant -- ibid.

Rape in the first degree is class A felony punishable by life imprisonment and rape in the second degree is class B felony punishable by three to thirty years imprisonment. Referred to in supra note 21 at 317, f.n. 75 and 76.

49. Hawaii Penal Code, Ss. 730 (1972) (emphasis added to show the differences).

In Iowa, a husband may be prosecuted for certain "sexual abuses" of his wife. There are three degrees of sexual abuses, only one of which exempts separated spouses. A husband is still exempt from a charge of sexual abuse for an act merely "done by force or against the will of the other," i. e., when the force used stops short of deadly risk and no third person assists him. -- 1976 Iowa Legisl. Surv. No. 4, col. 1, Ss. 901-904; referred to in supra note 21 at 318, f.n. 79-85.

Recent trend in the U.K.

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In R.g. v. Reid, a case not of rape but of kidnapping, the Court of Appeal, Criminal Division has by way of obiter questioned the husband's immunity from rape prosecutions. One of the issues in this case was whether a man could be guilty of kidnapping his own wife and the court held that he can be, whether his wife had separated from him or was cohabiting with him.[51] It refused to express an opinion whether Miller[52] is a decision "which would be upheld today."[53] But it did observe:

"The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete ...." 54

It would seem that the exemption of the husband from the offence of rape would not survive another challenge under English Law.

Position in a few other countries

Several foreign jurisdictions allow prosecution of husbands for rape on their wives. In the U.S.S.R. and some of the other communist countries, rape is defined without any reference to marital status. Marriage, in those countries, is not considered to give the husband the rights to marital intercourse

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50. /1972/2 All E.R. 1350 (C.A. Crim.Divn.).

51. The Court said:

> "Nor do we see any reason why a wife who is not separated from her husband, should lack this protection of the criminal law."
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> Id. at 1353.

52. Supra note 17.

53. Supra n 50 at 1352

54. Id. at 1353.

once and for all.[55] The Swedish Penal Code defines rape in terms of a man forcing sexual intercourse on a woman by the use of violence or threat of imminent danger. However, "if in view of the woman's relationship to the man ... the crime is considered less grave", then the offence is called, "sexual assault", which carries a lesser sanction than rape.[56] The Danish Criminal Code defines rape as "intercourse with any woman obtained by force, etc.," and this has been interpreted by a Danish court as being applicable to marital rape.[57] South Australia has recently passed a legislation which abandons this exemption.[58]

To conclude, the Joint Committee which sat on the Indian Penal Code (Amendment) Bill, 1972, has taken a view that is contrary to the development elsewhere in the world and even to our existing law in this regard. This amendment by the Joint Committee entrenches the marital status exemption in rape without regard to the age (and hence, the safety) of the wife. To say the least, the Joint Committee does not seem to have considered the rationales underlying the exemption which are outmoded, insufficient in the context of modern lifestyles within marriage, and opposed to the principle of equality between the sexes in marriage. There appears to be no good reason why a wife who is cohabiting with her husband should be denied the protection of the criminal law in this regard.

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55. See Livenah, on Rape and the Sanctity of Matrimony, 2 Israel L.R. 415 at 420-21. Referred to in supra note 21 at 319, f.n. 95.

56. Livenah, supra note 55 at 421.

57. Ibid.

58. Seven Days, Feb., 28, 1977; cited in supra note at 319, f.n. 95.

The existing definition of rape at least protects wives below the age of fifteen years. One is puzzled by the retrograde amendment that has been made by the Joint Committee in this regard.

It is submitted that the legislature should re-consider the social desirability of abolishing this exemption and should either completely abandon it or create a new offence that might be called, "marital rape", which would carry a lesser sanction than for rape. Where the wife is below fifteen years of age, her consent could be immaterial for the purposes of the proposed offence in order to protect child wives who are a reality in our country in spite of legislation against early marriages.

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Wadhwa