

# ECONOMIC ANALYSIS OF MARITAL RAPE

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## INTRODUCTION

*“Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house...However brutal a tyrant she may be unfortunately chained to ... [her husband] can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.”<sup>1</sup>*

Since the late of the 20<sup>th</sup> century, most of the developed world has criminalised marital rape. India has still not. In a recent press release, the Minister of Women and Child Development stated that the social structure, poor economic conditions and low literacy rate are some of the many reasons why marital rape has not yet been criminalised in the country. A similar stance was taken by the Lok Sabha in response to the recommendations put forth by the Justice Verma report, ‘The Committee deliberated the amendments to section 375 of IPC including the issue of marital rape and observed that if the marital rape is brought under the law, the entire family system will be under great stress and the

Committee may perhaps be doing more injustice.’<sup>2</sup>

Statistics reveal that married women are more likely to experience physical or sexual violence by husbands than by anyone else. Nearly two in five (37 percent) married women have experienced some form of physical or sexual violence by their husband. One in four married women has experienced physical or sexual violence by their husband in the 12 months preceding the survey.<sup>3</sup>

In his History of the Pleas of the Crown (1736), Sir Matthew Hale made the following pronouncement: But 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.<sup>4</sup>

However, in 1991, in a landmark judgement, the House of Lords held, ‘It may be taken that the proposition was generally regarded as an accurate statement of the

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<sup>1</sup>JOHN STUART MILL, THE SUBJECTION OF WOMEN (1st ed. 1869).

<sup>2</sup> MINISTRY OF HOME AFFAIRS, LS.US.Q.NO.2872 (2016).

<sup>3</sup> MINISTRY OF HEALTH AND FAMILY WELFARE, DOMESTIC VIOLENCE (2006).

<sup>4</sup> 2 MATTHEW HALE et. al., HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN (1847).

common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is 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. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.<sup>5</sup>

What is more, contrary to what most men would suppose, the long-term emotional and psychological effects of marital rape appear to be more rather than less serious than those of rape by a stranger because of the element of

betrayal and breach of trust that is present when a woman is raped by her husband.<sup>6</sup>

The transition from providing marital immunity for rape to criminalising the act shows the progress in the common law nations. Despite deplorable statistics and conditions rampant in India, marital rape yet remains to be categorised as a punishable offence.

### **WHY SHOULD MARRIAGE BE A DEFENCE TO A CHARGE OF RAPE?**

Besides the obvious one of difficulty of proof or the evidentiary problems as rape is an underreported crime, there are a number of other problems as regards the marital immunity for rape<sup>7</sup>. In a society that prizes premarital virginity and marital chastity, the cardinal harm from rape is the destruction of those goods and is not inflicted by marital rape. We should not be surprised that in these societies the seduction of a married woman is a more serious crime than rape<sup>8</sup>, as it is more likely to produce children, and they will not be the husband's. In such societies, moreover, the main service that a wife contributes to the marriage are sexual and procreative, and to deprive her husband of these services is to strike at the heart of the marriage. A right to demand something does not entail a

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<sup>6</sup> Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, 11 CRIME AND JUSTICE 163 (1989).

<sup>7</sup> RICHARD A POSNER, *SEX AND REASON* (1992).

<sup>8</sup> ROGER JUST, *WOMEN IN ATHENIAN LAW AND LIFE* (1989).

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<sup>5</sup> R v. R, (1991) 3 WLR 767.

right to take it by force, but it can dilute the felt impropriety of force. The difficulty of providing satisfactory proof of lack of consent in an “acquaintance rape” case is one reason for law’s traditional refuse to make marital rape a crime.<sup>9</sup> In general, the lower the rate of divorce rate, the fewer separations there are; and the problem of proving lack of consent is reduced if the married couple is separated. The exception to the negative correlation between divorce and separation is where, as in Catholic countries until recently, divorce was forbidden but formal separations, often permanently, took their place. Marital rape may be uncommon since few wives will refuse their husband’s demand for sexual intercourse. So may be where marital rape is criminalised the main effect is simply to increase the wife’s bargaining position in a divorce proceeding. The nature of the harm to the wife raped by her husband is a little obscure. If she is beaten or threatened, these, of course, are real harms, but they are the harms inflicted by an ordinary assault and battery. Especially since the goods of virginity and of chastity are not endangered, the fact of her having intercourse many times before seems peripheral

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<sup>9</sup> Michael DA Freeman, *But if you can't rape your wife, who can you rape?: The Marital Rape Exemption Re-Examined* [1981], 15(1) FAMILY LAW QUARTERLY 8 (1981); Sonya A Adamo, *The Injustice of Marital Rape Exemption: A Survey of Common Law Countries*, 4(55) AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY (1989).

to the harm actually inflicted but is critical to making the offence rape.

## CHILD MARRIAGE AND ANTI-RAPE

### LAWS

Worldwide, more than 700 million women alive today were married before their 18th birthday. More than one in three (about 250 million) entered into the union before age 15. India alone accounts for a third of the global total.<sup>10</sup> Girls married young are more vulnerable to intimate partner violence and sexual abuse than those who marry later.<sup>11</sup>

The direct corollary of child marriage is marital rape. Husbands are able to steer their young brides as per their whims. Pregnancy can be incidental to rape or forced with the intention of permanently trapping the child in wedlock. Motives differ, meanings change, methods vary, but the impact is always damaging. Young wives are unaware of the changes their body will undergo. Still recovering from the tremors of repeated rape, they are subconsciously pushed towards a dead end. The excruciating pain due to the intolerable force remains subdued under blankets of male dominance.<sup>12</sup>

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<sup>10</sup> ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS, UNICEF (2014), (Aug 11, 2016), [http://www.unicef.org/media/files/child\\_marriage\\_report\\_7\\_17\\_lr.pdf](http://www.unicef.org/media/files/child_marriage_report_7_17_lr.pdf).

<sup>11</sup> Sarah Crowe & Peter Smerdon, CHILD MARRIAGES: 39,000 EVERY DAY, UNICEF (2016), (Aug 14, 2016), [http://www.unicef.org/media/media\\_68114.html](http://www.unicef.org/media/media_68114.html).

<sup>12</sup> Ria Dalwani, CHILD MARRIAGE, RAPE AND THE LOOPHOLES OF THE LAW HUFFINGTON POST INDIA

Additionally, the young girls ‘had made their husbands aware of their unwillingness to have sex or of pain during sex, but in 80 percent of these cases the rapes continued.’<sup>13</sup>

Exception 2 to Section 375 of the Indian Penal Code, 1860 is abundant with loopholes which need to be plugged. These lacunae in laws can be simply illustrated as – firstly, The Criminal Law (Amendment) Act, 2013 provides that, the age to legally consent to sexual intercourse is 18 years for girls. Secondly, the Prohibition of Child Marriage Act, 2006 sets the minimum age of marriage for a girl at 18 years. However, the marriage of a girl below 18 years is voidable, not void-ab-initio. Thirdly, the Protection of Children from Sexual Offences Act, 2012 provides that a girl below 18 years of age is defined as a child and a child does not have the physical or mental capacity to enter into a sexual relationship. Lastly, section 375 of the Indian Penal Code, 1860 (amended) states that a man is said to have committed rape, if he does any of the intrusive sexual acts as enlisted in Section 375, with a girl below 18 years of age, with or without her consent. However, Exception 2 of the same Section provides that sexual intercourse by a

man with his own wife, the wife not being under fifteen years of age, is not rape.

So, a girl below 18 years is a child. Such a girl is neither physically nor mentally ready to have sexual intercourse. She cannot legally consent to have sex and is also not eligible to get married. Sexual intercourse with a girl below 18 years, with or without her consent, amounts to rape.

But if this girl is his wife? A man can have sexual intercourse with his child wife, the wife being above 15 years of age, with/without her consent and it will not amount to rape.<sup>14</sup>

The apparent glitch in this law renders the law inefficient and extremely arbitrary. Several Law Commission Reports and Public Interest Litigations have been filed; however, no improvement has been made so far. The relevant sections are violative of Article 14, 15 and 21 for the provision discriminates between a girl of 15 years and 18 years without a rational nexus. Also, the classification made is arbitrary and in violation of essential fundamental rights.

An efficient rule or law can be elucidated as: ‘First, a rule is efficient if it has actually been chosen by rational actors under conditions in which they presumptively behave

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(2015), (Aug 17, 2016), [http://www.huffingtonpost.in/ria-dalwani/child-marriage-a-gateway-\\_b\\_7903582.html](http://www.huffingtonpost.in/ria-dalwani/child-marriage-a-gateway-_b_7903582.html).

<sup>13</sup> Mariam Ouattara et al., *Forced Marriage, Forced Sex: The Perils Of Childhood For Girls*, 6 GENDER & DEVELOPMENT (1998).

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<sup>14</sup> Ria Dalwani, *Child Marriage, Rape And The Loopholes Of The Law Huffington Post India* (2015), (Aug 17, 2016), [http://www.huffingtonpost.in/ria-dalwani/child-marriage-a-gateway-\\_b\\_7903582.html](http://www.huffingtonpost.in/ria-dalwani/child-marriage-a-gateway-_b_7903582.html).

in a manner that maximises social wealth (the choice test). Second, a rule is efficient if it would survive the competition of other rules in an evolutionary process that can be shown to produce efficient equilibria (the evolutionary test). Third, a rule is efficient if it seems consistent with a model of economically efficient behaviour (the behavioural test).<sup>15</sup>

The inconsistency in child marriage and rape laws cannot be called an efficient rule; it does not maximise social welfare as it is extremely injurious for the girl child; it fails to satisfy the evolutionary test on comparing the current legal scenario to existing laws in other nations; it does not satisfy the behavioural test as the contradiction proves to be favourable for the husband and incentivises him to commit the crime again.

Also, the private costs incurred by the girl child are astronomical, and tend to spill over into social costs, thereby affecting a number of stakeholders in the society. Similarly, there are a number of negative externalities attached to this offence which is detrimental to the well-being of the girl child.

The loss of adolescence, forced sexual relations and denial of freedom and personal development associated with an early marriage

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<sup>15</sup> Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1697 (1996).

have perpetual psychosocial and emotional consequences. Hence, the paradox in child marriage and anti-rape laws are economically inefficient and need to be amended.

### **BARGAINING IN MARRIAGE AND APPLICATION OF COASE THEOREM**

In his seminal work, 'The Problem of Social Cost,' Ronald Coase held that in cases of private property right disputes involving what have been called externalities, 'with costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.'<sup>16</sup>

The Coase theorem can be simply stated as 'when parties can bargain together and settle their disagreements by cooperation, their behaviour will be efficient regardless of the underlying rule of law.'<sup>17</sup>

Coase dealt with a number of important issues such as the problem of joint social cost and externality, the efficient allocation of property rights and resources between bargaining parties; assuming zero transaction costs and complete information.

In Coase's view, it takes at least two to create an external cost: someone to produce it

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<sup>16</sup> Walter Block, *Coase and Demsetz on Private Property Rights*, 1 JOURNAL OF LIBERTARIAN STUDIES 111 (1977).

<sup>17</sup> ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (4th ed. 2007).

and someone else to bear it. The externality is bilateral in another sense, not only do the two parties combine to produce the harm, one of them is bound to suffer the harm as a result of the conflicting preferences. This raises the inherent problem of joint or social cost situations: Who gets to impose harm on whom? From an economic point of view, Coase argues that the goal should be to minimise the total harm because that way the social product is maximised. It should be evident that the total social cost- the sum of private costs to all parties will be affected by the allocation of the legal right or entitlement to either party.<sup>18</sup>

The assumption of zero transaction costs also has crucial implications for law. Simply put, in a world of zero transaction costs, the law is irrelevant. Whatever, the initial allocation of property rights (or entitlements), and whatever the legal rules governing resource use, parties will costlessly contract to the most efficient allocation of resources.<sup>19</sup> Coase argued that, from an economic perspective, the goal of the legal system should be to establish a pattern of rights such that economic efficiency is attained. The legal system affects transactions costs and

the goal of such a system is to minimise harm or costs, broadly conceived.<sup>20</sup>

The meaning of 'property rights' is this: individuals or associations represented by individuals possess a legal right to prevent others from stealing, invading, destroying, or otherwise interfering with their property. Owners therefore possess a legal right to exclude others from the use of specified property.<sup>21</sup>

To further simplify the notion of allocation of property rights, let us take an illustration. In Coase's example, a baker and a dentist share a wall. The baker uses loud machinery which disturbs the dentist and interferes with his medical practice. There are two solutions to this problem, (i) the baker can buy a less noisy machine; assuming it costs Rs. 50 or, (ii) the dentist can sound proof his walls; assuming it costs Rs. 100.

*Prima facie*, it appears that the fault lies in the noise created by the loud machines used by the baker and therefore he should buy the less noisy machines for Rs. 50. However, one could argue that the dentist was imposing an externality on the baker to bake in silence. It becomes crucial to decide who is entitled to the

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<sup>18</sup> DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS (2011).

<sup>19</sup> *Id.*

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<sup>20</sup> STEVE MEDEMA & RICHARD ZERBE, THE COASE THEOREM (2000).

<sup>21</sup> Gary North, *Undermining Property Rights: Coase and Becker*, 16 JOURNAL OF LIBERTARIAN STUDIES 75 (2002).

'sound' or property rights. This is when either party can approach the legal system to adjudge and decide who has the 'sound rights'. Assuming that the 'sound rights' are with the dentist: this implies that the dentist is entitled to a noise free environment and he can insist the baker on buying less noisy machines. However, if the Court rules in favour of the baker, it means that he is entitled to use his noisy machinery. It would also imply that the dentist cannot force the baker to use less noisy machine and he would have to sound proof his walls. However, since the dentist and the baker are rational, they would resort to the least cost option available: the dentist would simply pay the baker Rs. 50 to buy less noisy machine instead of spending Rs. 100 for sound proofing his walls. This is the most efficient and cost minimising outcome. Coase contends that the initial allocation of property rights does not affect the final result as both the parties will bargain and come to the most efficient outcome which will also be the least cost result. To further strengthen his stance, Coase also assumes that both the parties have complete information, i.e. they have complete knowledge of the costs incurred and who is entitled to the property rights. Therefore, with zero transaction costs, the outcome of bargaining between two parties will be the most efficient and cost minimising.

When we connect the understanding of property rights to a marital relationship, we can reasonably infer that a wife enjoys the right to her private property i.e. her body. She is entitled to the right to prevent anyone from exercising undue authority and cause harm to her private property.

At this stage, it becomes extremely pertinent to understand the scope and extent of conjugal rights. Conjugal rights can be defined as rights and privileges arising from the marriage relationship, including the mutual rights of companionship, support, and sexual relations.<sup>22</sup>

For the sake of simplicity and better understanding, let us consider a conjugal fact case scenario. The man and wife enjoy a legal right to their own private property. They also enjoy certain conjugal rights which allow them the companionship and sexual intimacy allowed in a marriage. In the case of marital rape, because there is a lack of consent on the part of the wife, there is a conflict of preferences between the two parties exercising their own individual rights. The man, exercising his conjugal rights to sexual intercourse and the wife, her right to her private property. Using the Coase theorem, we attempt to come to the most

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<sup>22</sup> Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3<sup>rd</sup> ed. 2011).

efficient allocation of rights between the two parties involved in the conflict.

With reference to the problem of joint social costs, we can infer two things (i) the husband's right to sex interfered with private property rights of the wife (ii) the wife's right to private property is disturbed by the husband's right to sexual intimacy. There is an evident conflict of rights which can be resolved by using the Coase theorem.

On drawing a comparison between the given example and a marital rape scenario, we can observe that the husband and the wife have a conflict of rights. On applying the Coase theorem and arguing for criminalisation of marital rape in tandem, we can deduce that fulfilling the objective of the paper is the most efficient outcome with the aid of the following relevant points:

*1) On Assuming That Marital Rape is a Crime*

This implies that initial property rights lie with the wife, i.e. her right to private property has an over-riding effect on the husband's conjugal right to sex. If the husband exceeds his conjugal right and demands for sex without the consent of his wife, he commits the crime of marital rape. Therefore, the husband will be punished and he will suffer a series of consequences and costs. Whereas, if the husband exceeds his right but the wife does not

consent, he suffers a relatively lower cost. In the first instance, the husband suffers a high cost of being punished and compensating his wife. We can validly assume that this imposition entails a higher cost to the husband in comparison to not raping his wife. Hence, the commission of marital rape is not efficient.

*2) On Assuming That No Legal Framework Exists Which Criminalises Marital Rape*

This implies that the parties are not aware of the initial allocation of property rights, i.e. who has the over-riding right. On assuming that the property right lies with the husband. In such a case, if the husband exercises his conjugal right to sex without the consent of his wife, it is highly possible and likely that she will suffer a series of private and social costs which will injuriously affect her private property. Also, the mental agony and the lack of sense of security on being raped by a close acquaintance will cause insurmountable damage and social costs. Therefore, the commission of rape leads to a high social cost. However, if the husband exercises his conjugal right to sex and not without the consent of the wife, we can infer that he suffers a lesser cost. On comparing the cost borne by the wife and cost of the husband not being able to gratify his lust, we can soundly infer that the cost borne by the wife would be higher. On the other hand, if the initial property rights are with the wife, it implies that she has



the right to consent to sex. In such a case, if there is a lack of consent on the part of the wife, the cost of not being able to gratify his lust will be borne by the husband. However, we can validly deduce that such a private cost will be comparatively less to the cost incurred by the wife in the first case. Therefore, the least cost option would be not allowing the husband to rape his wife or criminalising marital rape. Hence, irrespective of the legal framework and initial allocation of property rights, we observe that the commission of marital rape is not efficient or cost minimising. For that reason, marital rape should be criminalised.

Therefore, we can conclude that using the Coase theorem, the most efficient allocation of property rights would lie with the wife. Also, the most efficient outcome would be criminalising marital rape.

### **NEED TO CRIMINALISE MARITAL RAPE**

There are a number of reasons for making marital rape a punishable offence. It is pertinent here to note the different types of cost as associated to this topic: 1. Private Cost, and 2. Social Cost.

○ *Private Cost*- Private cost is a cost which affects an individual exclusively with no bothering to the society whatsoever. It can be seen as something which can diminish an

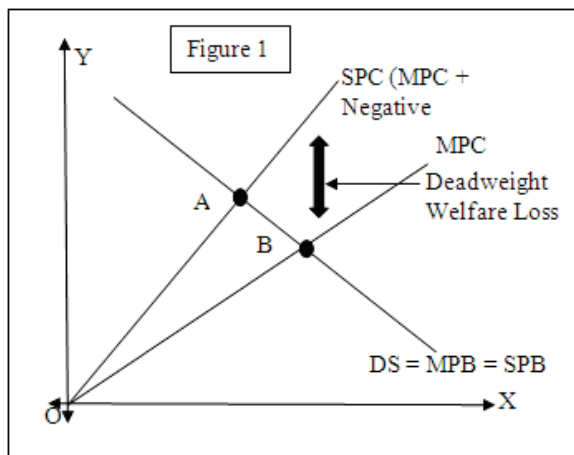
individual's purchasing power, but without affecting the society.

○ *Social Cost*<sup>23</sup>- Social cost is the total cost to society. It includes both private cost plus any external costs. For example, for a person who smokes, the private cost is, say, £6 for a packet of 20 cigarettes. But, there are external costs to a society- air pollution and risks of passive smoking. A social cost diminishes the wealth of the society, a private cost rearranges that wealth.<sup>24</sup> Now if we apply this to the case of marital rape. The effect of the abuses as inflicted by the husband on the wife may have severe repercussions on the wife, but not on the society, initially. This happens as the costs are private. It affects the wife, without having any consequences in the society. And this continues as there are no laws to control or regulate the same. It is at this point when externalities come into the picture. (Externalities are costs or benefits involved in a transaction which does not accrue to the individual or firm which is carrying out the transaction. External costs (or external diseconomies) might include damage to the environment from a mining industry while external benefits (external economies) could be the pleasure incurred in an artificial lake

<sup>23</sup> Tejvan Pettinger, *Social Cost Economics Help*, (Aug 25, 2016), <http://www.economicshelp.org/blog/glossary/social-cost>.

<sup>24</sup> RICHARD A POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

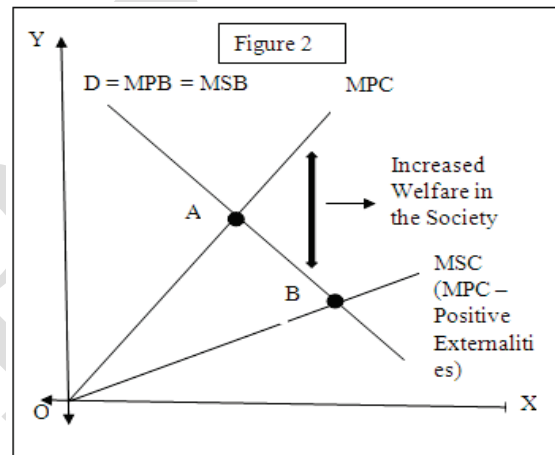
created by hydroelectric works.<sup>25</sup>) In the case of marital rape, externalities ( most of which are negative in nature) can be many. For example, a sense of insecurity in the wife can dampen her so much so to force her into committing suicide, or negative impact or setback on children. So the private cost when coupled with externalities leads to social cost, which now affects the society in large.



In the Figure 1, when only the private costs are taken into consideration the cost so incurred is very less, but when these private costs accumulate it leads to negative externalities, which when added to the private cost, forms the Social Cost, and hence now the cost incurred is high (A) and so are the atrocities as faced by the wife, in a whole, the social welfare of the society would diminish. (Figure 1) However, if in the same situation we are to put laws and regulations then the negative externalities would not make any difference as

<sup>25</sup> P. H COLLIN, DICTIONARY OF ECONOMICS (2006).

the laws also being along in the concept of positive externality. Due to the presence of laws criminalising marital rape the husband would be restrictive in his actions and at the same time the wife would feel safe, this sense of security instils more love and respect in the family and hence all of this together reduces the cost (B). (Figure 2)



We can also use the concept of Sunk Cost to show as why criminalising of Marital Rape is required. Sunk Costs are expenditure on factors which cannot be used for another purpose or cannot be recovered if the firm is shut down. Such expenditure might include advertisement costs or building costs.<sup>26</sup> Sunk costs do not affect a rational actor's decision on price and quantity. Suppose that a life-sized porcelain white elephant cost \$1,000 to build but that the most anyone will pay for it is \$10. The fact that \$1,000 was sunk in making it will

<sup>26</sup> *Id.*

not affect the price at which it is sold, provided the seller is rational. For if he takes the position that he must not sell it for less than it cost him to make it, the only result will be that instead of losing \$990 he will lose \$1,000.<sup>27</sup> Now applying this our situation, the MPC a wife faces when raped is very high, if complained then the Marginal benefit so received might be very less, but it will be higher than the situation when not complained. For if she takes the position that she should not complain as the benefit received would be very less, or in other words the MPC will only decrease marginally; the only result will be instead of decreasing MPC, the MPC will increase geometrically and the incentive the husband would get would only increase thus leading to high MPC for the woman and at some point this increasing MPC might leak out to join the social cost. But for all these to function, there should be existing laws for the same.

### **PUNISHMENT FOR MARITAL RAPE**

In India, marital rape finds insignificant recognition under Section 3 (d)(iii), Protection of Women from Domestic Violence Act, 2005 which defines sexual abuse: *'sexual abuse includes any conduct of a sexual nature that abuses, humiliates degrades or otherwise*

*violates the dignity of the woman'*.<sup>28</sup> However, the Protection of Women from Domestic Violence Act, 2005 is a civil law, meant for protection orders and not to penalise criminally.<sup>29</sup>

Section 498A (a) of the Indian Penal Code, 1860 provides for cruelty in the following words: *'any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;'* However, this provision does not rescue the wife in claiming a right against the husband for any form of sexual abuse. Also, prosecution under this section attracts a punishment of imprisonment of three years and fine. Section 357A of the Code of Criminal Procedure, 1973<sup>30</sup> provides for Victim Compensation Scheme as follows: *'(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.'*; this section is based on the premise that the victim has suffered injury as a result of a crime. The current legal position does not criminalise

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<sup>27</sup> RICHARD A POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

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<sup>28</sup> The Protection of Women from Domestic Violence Act, § 3(d)(iii) (2005).

<sup>29</sup> The Protection of Women from Domestic Violence Act, § 20 (2005).

<sup>30</sup> The Code of Criminal Procedure, § 357A (1973).

marital rape, which is a prerequisite to approach the Court under this provision, hence, rendering this section of no use for the wife.

The question of whether marital rape is a criminal or civil liability is persistent; and for coming to the best solution, this paper explores both the possibilities.

A criminal wrong can be further elucidated in the following relevant points:

- *Criminal Intent- Mens rea* is the legal term for criminal intent. It is fairly evident that in the case of marital rape, the husband's act of forced sexual relations without the wife's consent and use of physical strength is not *bona fide*. This depicts the presence of a guilty mind which is an essential requirement for an act to be categorised as a criminal wrong.
- *Public harm-* In criminal law, as opposed to tort, contract or property laws, harm is not limited to the victim alone. The extent of harm suffered by a wife who is raped is not limited to her; there is a spill over of the private costs incurred by the wife into social costs; which has an adverse effect on the society. Hence, there is a humongous amount of injury experienced further strengthens the cause of criminalising marital rape.
- *Standard of proof:* Another important characteristic of criminal law is the high standard of proving the crime which is imposed on the prosecution. In common law

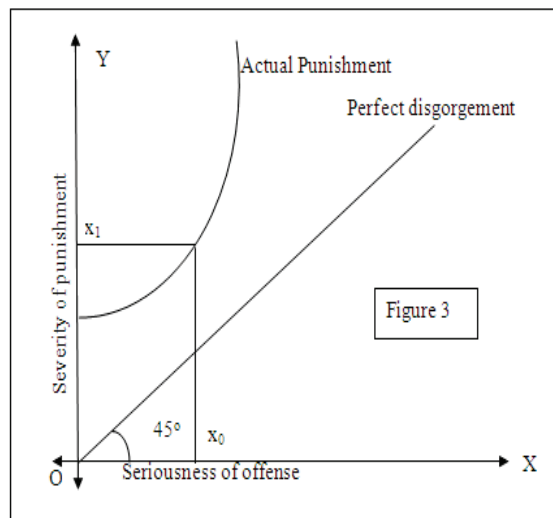
countries, like India, the prosecutor, to secure conviction must prove the case beyond reasonable doubt. This is associated with the wide evidentiary problems associated with proving marital rape. However, the difficulty of proof is not justification alone for not punishing a heinous crime like marital rape.

- *Punishment:* Punishment in criminal law differs from compensation in civil law. In economic terms, the objective of compensation under civil law is to restore the injured back to the original position at the expense of the injurer. This helps in cost internalisation. Since this is not possible for criminal offences, punishment under criminal law aims to make the injurer worse off without affecting the injured. Further, punishment under criminal law aims to deter future offenders. The difference lies in the motivation for committing the act, along with the impact of the act; civil wrongs strictly affect private individuals and are committed without the intention of causing harm as opposed to a criminal wrong which has a wider impact and is committed with a guilty mind. Devising an appropriate remedy for marital rape is extremely pertinent; since the victim has suffered from private costs which must be compensated together with punishing the guilty intention of the husband.

Because marital rape is an offence which consists elements of both civil and criminal wrongs, it can be reasonably inferred that an effective solution would be a combination of both compensations in tandem with imprisonment. This is because of the following reasons:

- *For punishment under criminal law:* imprisonment under criminal law has a deterrent effect on the future delinquents. If convicted, there is a social stigma attached to the offender. Also, the imprisonment is effective in punishing the psychological commitment of the culprit.
- *For punishment under civil law:* perfect compensation helps in overcoming the injury suffered by the wife. The physical force advanced in extracting sexual intercourse puts the wife under great stress and trauma, shaking her trust and faith in her husband. Further, compensation aids in rehabilitating the wife with an aim to restore her back to the original position. Compensation also helps in internalising the costs sustained by the wife.

Therefore, we can reasonably conclude that the most efficient remedy for marital rape would be the perfect combination of imprisonment of the husband and compensation to the wife.



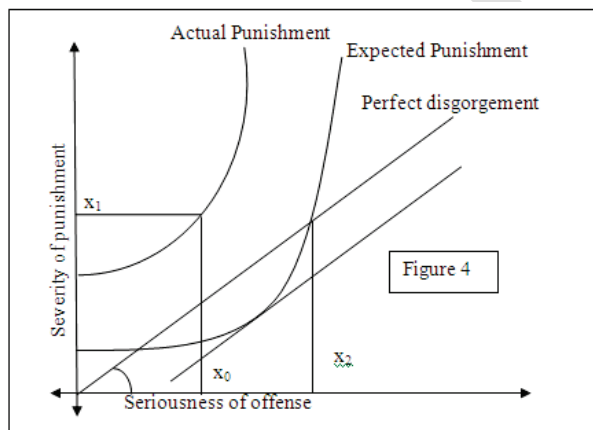
This can be further elucidated as follows:

As the basic assumption of Economics run, ‘...every man is rational’, so is a criminal or perpetrator of marital rape. Rational criminals compare their expected punishment as against their expected gains, and if their answers are favourable they go on to replicate their acts. By a rational, amoral person, it can be understood as someone who carefully determines the means to achieve illegal ends, without restraint by guilt or internalised morality.<sup>31</sup> Crimes can be ranked by seriousness, and punishments by severity. We measure the seriousness of the crime along the horizontal X-axis and the severity of the punishment along the vertical Y-axis. The more severe punishments typically are attached to the more serious crimes. In case of marital rape, even though the crime is serious in nature, the

<sup>31</sup> ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (4th ed. 2007).

punishment (or in more appropriate words, prosecution) attached to it is extremely feeble or insufficient in nature, for at most, any sort of relief the woman can get is monetary, as a result of which the husband gets incentivised to commit the act again. We can illustrate the severity of the punishment as a function of the seriousness of the offence.

The curved line represents actual punishment and shows the severity of the punishment as a function of the seriousness of the crime. The punishment curve slopes upwards to indicate that the punishment becomes more severe as the crime becomes more serious. When the severity of punishment equals the seriousness of the offence, punishment causes perfect disgorgement.



Now, we consider the situation of marital rape. In this case, under the existing laws, for every act of marital rape, the remedy awarded is monetary compensation. And, as every case under Domestic Violence Act, 2005

does not attract separation or divorce, the money so given by the accused to the victim completes a circle and comes back to the accused again. So the relief is nothing but equal to or even less than perfect disgorgement, hence this cannot deter the husband from committing the offence again.

The probability of getting caught is also very important when it comes to deciding whether to commit the crime or not. Every offender calculates the expected value of the crime, which is equal to the gain minus the punishment multiplied by the probability of getting caught.<sup>32</sup> Often, the expected punishment curve will be lower than the actual punishment because of the sole reason that gathering evidence for an act of marital rape is extremely difficult. As long as the expected punishment curve is more than the 45° line the offender will be deterred to commit any act, but the moment the expected punishment curve slips under the 45° line (as seen in Figure 4) the offender continues to commit the crime. Once, the expected punishment dips below perfect disgorgement, the offender gets the incentive to further commit the crime. In the range below the 45° line, the offender gains more than he expects to lose, so crime pays and hence under these

<sup>32</sup> *Id.*

circumstances an amoral person would commit the act of question.

Criminalising and punishing marital rape is difficult, primarily due to the fact that it is fraught with evidentiary problems. Since it is tough to prove the act, the probability of getting caught drastically falls, seriously affecting the expected punishment and the gain accrued to the accused. Furthermore, the lack of information and patriarchal nature of the Indian society shrinks the chances of punishing the accused. However, this argument is weak, for the simple reason that evidentiary problems cannot be cited as an excuse for letting marital rape go unchecked. Also, in economic terms, by increasing the punishment, the cumulative total of expected function shifts the balance towards the victim from the accused as it results in an upward shift of the expected punishment line; making it more costly for the accused to commit the offence. Due to the underlying assumption of rationality, the accused would do a simple cost-benefit analysis; implying that costs exceeding gains which would discourage him from committing the offence and vice versa. Consequently, the actual punishment for marital rape must exceed perfect disgorgement. Above the 45° line is the actual punishment line, and this line should ideally represent the punishment for the offence of marital rape.

We can read off the graph how serious the offence is. The expected profit from the offences equals the difference between the perfect disgorgement line and the expected punishment line. So we can conclude that the marginal benefit received by the offender by a small amount is given by the perfect disgorgement curve's slope. The marginal expected cost to the criminal is equal to the expected increase in punishment from increasing the seriousness of the offence which is given by the slope of the tangent to the expected punishment line. For values of  $x$  below  $x_2$ , the marginal benefit keeps on increasing and exceeds marginal expected cost and so the criminal would increase the seriousness of the offence and if it's more than  $x_2$  then the offender will decrease the seriousness as the marginal expected cost is now less than the marginal benefit so received by the criminal for his act.

*But how do we determine this  $x_2$ ?*

For  $x_2$  to be extremely deterrent to the offender, we suggest that a combination of both perfect compensation and efficient punishment be made liable to the offender, for it is only then the amoral person would be restricted to further commit the act. Only compensation would act as the line of perfect disgorgement and may not be as influential as the same may be when coupled with efficient punishment. Also, only efficient punishment may be efficient because, even

though the punishment may deter the husband from further committing his abusive acts, it may not be truly beneficial to the wife. As compared to other victims of crime say rape or assault victims, in the case of marital rape, the victim need to further stay or spend her life with the husband, and while being prosecuted the wife would need financial assistance to run her family; and therefore, the efficient punishment should be coupled with compensation. Another problem lies in the fact that in the case of intra-marriage rape, perfect compensation might be difficult to be ascertained, and hence compensation should be such that a) it is enough for her to run the family b) the monetary relief would be able to let her continue enjoying her existing living standards. Hence, it can be concluded that a combination of perfect compensation and imprisonment can be an economically efficient remedy for the offence of marital rape.

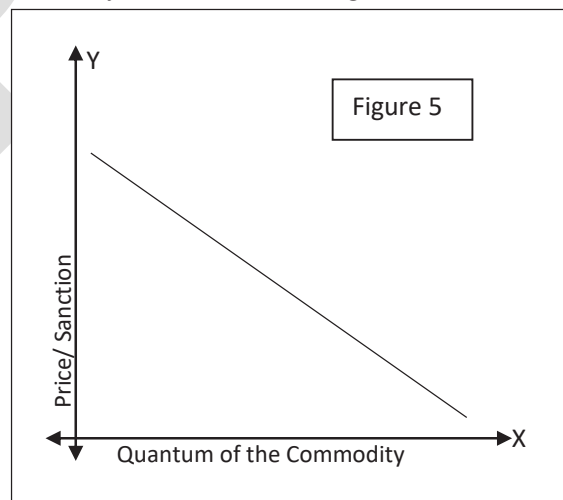
The need to make marital rape a punishable is crucial. On applying the Law of Demand to a marital rape scenario, we can understand and validly deduce the effect of punishment on the demand for non-consensual sex, which in turn, directly affects the rate at which the husband rapes his wife.

In a microeconomic perspective, the Law of Demand can be simply stated as, ‘*other*

*things being equal, if price of a commodity falls, the quantity demanded of it will rise, and if the price of the commodity rises, its quantity demanded will decline.*’

The law of demand expresses the functional relationship between price and quantity demanded. Thus, there is an inverse relationship between price and quantity demanded, *ceteris paribus*.

On connecting the Law of Demand to a conjugal scenario, we can draw an analogy between the consumer and the husband, the commodity demanded being non-consensual



sexual intercourse and the price as the cost which the husband has to pay. Therefore, the consumer is the husband, the commodity is sexual intercourse and the price is the cost incurred by the husband when he wants to engage in such an activity. The independent variable is the price or the cost which is plotted across the Y-axis and the dependent variable is



the quantity of commodity demanded which is measured across the X-axis.

Quite simply, the Law of Demand means that with an increase in price, the quantity demanded will reduce and with a decrease in price, the quantity demanded will increase. When marital rape is not a punishable offence, the cost of non-consensual sex is very low. This is owing to the fact that the husband is physically more powerful and can use force. Also, there is no cost with regard to sanctions which could deter the husband from committing the offence. However, when marital rape is a crime, the price of non-consensual sexual intercourse increases. This is due to the increase in the costs which the husband will have to pay due to the sanctions imposed by law. This effectively reduces the demand for non-consensual sexual intercourse, fulfilling the objective of criminalising marital rape. Further, this has the required deterrent effect, discouraging future offenders from committing the offence.

Alternatively, the Law of Demand is a downward sloping demand curve because of two reasons:

- Income effect- this means that due to a fall in the price of a commodity, the real income or purchasing power of the consumer increases and vice versa. On criminalising marital rape,

the husband would have to pay a higher price, effectively reducing his purchasing power or real income. This leads to a reduction in the quantity demanded.

- Substitution effect- this induces the consumer to demand a cheaper substitute of the commodity demanded when the price increases. When marital rape is criminalised, the price of non-consensual sex increases inducing the husband to reduce demand for the same and shift towards cheaper substitutes like consensual sexual intercourse.

Hence, the demand curve for a commodity demanded is downward sloping. Therefore, we can validly conclude that making marital rape a punishable offence, due to the rise in the cost, the quantity demanded for non-consensual sex will fall.

Owing to the complexity of the nature of this offence together with the series of social norms and backdrop of the society, immunity for marital rape has not been abolished. However, due to the growing awareness and grievous repercussions of this act, we argue that marital rape is a gross violation of fundamental human rights and should be contained by devising an economically efficient law which protects the rights and interests of the victim.