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# THE UNRECOGNISED CRIME - MARITAL RAPE: A CRITICAL EXAMINATION OF LEGAL FRAMEWORKS IN INDIA

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## ABSTRACT

The non-criminalization of marital rape persists as a contentious issue in India, a position upheld by both the Indian Penal Code and recent criminal law amendments. This contrasts with the global trend of progressive legal frameworks that criminalize spousal sexual violence. This exception within Indian law perpetuates a cycle of abuse and silence, leaving numerous women vulnerable to coercion and violence within marital relationships. The omission constitutes a violation of women's fundamental rights, specifically the right to life and personal liberty as guaranteed under Article 21 of the Indian Constitution, contributing to physical and psychological harm and inhibiting access to justice and recourse. *This abstract explores the implications of the ongoing failure to criminalize marital rape in India, highlighting the urgent need for legal reforms that prioritize women's autonomy, dignity, and safety.*

**Keywords:** Marital rape, right to privacy, patriarchal, abuse.

## I. INTRODUCTION

Women in India have been oppressed in many ways over the years. Women's rights and protections have been available since the beginning of the 20th century. As a result, many laws such as the Right to Property, Remarriage, Abolition of Conspiracy, Prevention of Female Infanticide, Workplace Safety Act, and Dowry Prohibition Act were enacted. Although many laws have been passed to protect women's rights, women are still oppressed in many ways. One of them is marital rape. To date, it has not been criminalized as a crime. In India marriage is a holy bond between the husband and wife. The holy relationship where dharma (duty), Artha(property), Kama( sexual desire) and Moksha bring two person together to make a joint effort to attain salvation<sup>1</sup>. This is the biggest thing for to marital rape was not consider as a crime in India religious play a vital role. Many of the practices are abolished but still this was not abolished.

Every human being has the inherent right to life and personal liberty, irrespective of gender. However, the question arises as to whether this liberty encompasses the right to privacy from spousal sexual assault, especially in the context of heteronormative conjugal relations. The modern Indian Supreme Court officially ushered in the concept of the individual right to privacy as a facet of the right to life and personal liberty. There is growing debate and demands that the personal and fundamental privacy right in marriage must include the concept of spousal rape. In legal terms, it is the right to say 'no' to marital sex. As of now, the legal position on marital rape, particularly before divorcing a spouse, is viewed from the perspective of domestic violence. Spousal rape, apart from this dimension, is not an offense in a marital relationship except for a provision in connection with a spouse's sexual intercourse during the marriage if the wife is under 18 years of age.

Globally, around 150 countries are declaring the marital rape is illegal and punishable offence, but still India struggle to do the same. According to various reports, marital rape is not classified as a crime in only 32 countries globally. This list features nations such as the Republic of Congo, Bangladesh, and India. Despite its reputation as a progressive nation, India continues to uphold outdated colonial legislation. Notably, England took the significant step of criminalizing marital rape in 1994.

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<sup>1</sup> Marital rape in India – A Socio-legal Analysis, Dr. Yogesh Kumar, IJESR Volume-9, Issue-3 May-June- 2022

## **II. MARITAL RAPE**

Marital rape is a serious crime in which a husband forces his wife to have sex without her consent. This act breaks her right to make her own decisions about her body, her choice, and her dignity. Marital rape can happen in different ways, like through force, manipulation, or threats.

The Honourable Supreme Court has assessed the situation around marital rape and identified three common types of this crime.<sup>2</sup>

### **1. Battering Rape**

This form of marital rape involves both physical and sexual abuse. The husband may hit or hurt his wife before or during the act of rape, often using a lot of force. This kind of violence is common in abusive marriages and causes serious emotional and physical harm to the victim.

### **2. Force-Only Rape**

In this case, the husband uses just enough force to make his wife have sex without her consent. This type is more common in marriages where there is not much overall violence, but the husband still tries to control his wife's sexual behavior.

### **3. Obsessive/Sadistic Rape**

This is the most severe form of marital rape. The husband may torture his wife or engage in very harmful and unusual sexual acts. This is often driven by sadistic desires and can have terrible psychological effects on the victim.

## **III. ROLE OF RELIGION IN MARITAL RAPE**

In India, marriage is often seen as a religious bond, with the main goal being to have children. These religious views have made it hard to discuss marital rape in public. India has many religions, but none of their scriptures or laws specifically prohibit marital rape.

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<sup>2</sup> Nimeshbhai Bharat Bhai Desai vs. State of Gujarat, 2018, Guj 732

The six major religions in India Hinduism, Islam, Christianity, Sikhism, Buddhism, and Jainism do not strictly forbid marital rape. Each religion includes some exceptions or explanations that make this crime seem acceptable.

The Delhi High Court ruled that the Indian Constitution cannot intervene in personal or family matters because it could weaken the institution of marriage. According to this decision, the privacy of a home and married life is not protected by the Constitution's Article 21 or 14.<sup>3</sup>

**a. Hinduism**

In Hindu beliefs, the relationship between husband and wife is considered a sacred bond. However, Hindu law does not clearly state that husbands can be exempt from rape. Although the religion values a woman's choice and sexual autonomy, it has not removed the old law that allows marital rape. This law has been criticized as a colonial-era remnant that is still in effect.

**b. Christianity**

According to the Bible, marriage is a covenant between a man and a woman in front of God. The purpose of marriage includes having children and building a deep, loving relationship. While the Bible supports the idea of mutual love and respect in marriage, it does not explicitly forbid marital rape.

**c. Islam**

Islam is the second-largest religion in India, with 14.2% of the population. In many Islamic communities in India, marital rape is not recognized as a crime. Religious leaders suggest that in such cases, it is the wife's responsibility to satisfy her husband. Both Shia and Hanafi sects of Islam prohibit unnatural sexual practices and extramarital affairs. If a wife reports abuse, Islamic courts try to help the couple resolve the issue. However, the law does not support the wife's position if the husband is seeking sexual satisfaction.

**d. Sikhism**

A similar perspective was shared by Manjinder Singh Sirsa, an advocate of Sikhism,

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<sup>3</sup> Harvinder Kaur vs Harmander Singh Choudhry AIR 1984 DELHI 66,

who argues that the idea of marital rape does not apply within the framework of marriage. He explains, "A husband and wife are two bodies united by one soul, and both are of equal status." Sirsa also highlights that in our culture, we prefer to resolve family disputes internally rather than take the matter to court.

India's neighboring country, Nepal, which is predominantly Hindu, criminalized marital rape in 2006 and amended its national civil code, the Muluki Ain, which is based on traditional Hindu laws.

On the western side, Pakistan, a Muslim-majority country, revised its definition of rape and recognized marital rape as a criminal offense following the passage of the Women's Protection Act 2006. However, due to the sensitive nature of the topic, very few cases of marital rape have actually reached the courts.

#### **IV. HISTORY OF MARITAL RAPE EXCEPTION**

The provisions that exempt marital rape from being considered a criminal offense were established during the British rule. At that time, married women were not regarded as independent legal entities, but rather as property. Consequently, they did not have a legal identity of their own, and the husband had full authority over them. The marital exception in Section 375 of the Indian Penal Code (IPC) was drafted based on Victorian patriarchal norms. This section failed to recognize the equality of men and women, and instead viewed women as subordinate to men. Women were not allowed to own property and were merged with their husbands under the 'Doctrine of Converture.'<sup>4</sup>

Consider: Legislative debates and reports from the Law Commission of India to understand the reasons behind the marital rape exception clause in India.

- i. The first report addressing this issue was the 42nd Law Commission Report. This report focused on the concept of marital rape.
  - This commission made two major suggestions: first, where the husband and

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<sup>4</sup> "Marital Rape" Harneesh Kaur Fairfield Institute of Management & Technology, IP University, Volume 15, April 2021

wife are judicially separated, the exception should not apply.<sup>5</sup> Although this was a commendable suggestion, the reasoning provided was unclear. It stated that "in such a case, the marriage technically continues, and if the husband has sexual intercourse with her against her will or without her consent, he cannot be charged with the offense of rape. This does not seem correct."

- It also addressed non-consensual sexual intercourse between women aged twelve and fifteen. It suggested that the punishment for such offenses should be placed in a separate section and not be termed rape. Before recent amendments to the Indian Penal Code (IPC), the punishment for rape committed by a husband against his wife, particularly when she was between the ages of twelve and fifteen, was different from other cases. A notable point is the reluctance to classify marital rape as actual rape, instead considering it a lesser form of sexual misconduct. In conclusion, this report stressed the presumption of consent in a marital relationship and the distinction between marital rape and other forms of rape, with the former being seen as less serious. However, it did not address whether the exception clause should be maintained or abolished.
- ii. The Law Commission directly confronted the validity of the exception clause in the 172nd Law Commission Report.<sup>6</sup> During consultation rounds, arguments were made regarding the validity of the exception clause itself. It was argued that since other forms of violence by a husband against his wife had been criminalized, there was no justification for excluding rape from legal accountability. The Law Commission rejected this argument, fearing that criminalizing marital rape could lead to "excessive interference with the institution of marriage."
  - iii. India has enacted several legislations over the years, such as the "Protection of Women from Domestic Violence Act, 2005" and the "Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act," to enhance the protection and safety of women. Following the inhumane Nirbhaya incident in Delhi and the failure of the Criminal Law (Amendment) Act (2013) to address marital rape, the growing

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<sup>5</sup> Law Commission of India, Indian Penal Code, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf>

<sup>6</sup> Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), available at [https://lawcommissionofindia.nic.in/report\\_fifteenth/pdf](https://lawcommissionofindia.nic.in/report_fifteenth/pdf)

demands from women's organizations, human rights groups, and the recommendations of the Justice Verma Commission have raised significant awareness about the need to criminalize marital rape.

- iv. The Committee is aware of the recommendations made by the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) in February 2007. The CEDAW Committee advised that the country should "expand the definition of rape in its Penal Code to reflect the actual experiences of sexual abuse by women and to remove the exception of marital rape from the definition of rape."<sup>7</sup>

Two recommendations were proposed.

- The first recommendation was to completely eliminate the exception clause.
- The second recommendation stressed that the law should clearly state that a marital relationship or any similar relationship cannot be used as a valid defense for the accused, nor should it be relevant in assessing the existence of consent.

Furthermore, it should not be considered a mitigating factor during sentencing. This report examined how the immunity provided when the perpetrator is the victim's husband is based on the outdated belief that women are the property of men and that they consent to their husbands' sexual demands. The Committee noted that such immunity has been removed in many jurisdictions, and in the modern understanding of marriage as an equal partnership, this exception clause is no longer justified.

- v. The Criminal Law Amendment Bill, 2012 (also known as the Amendment Bill, 2012) was prepared. In an effort to expand the scope of the term, the word 'rape' was replaced with 'sexual assault'. However, the Bill did not provide for the criminalization of marital rape.<sup>8</sup> The Amendment Bill, 2012 disregarded the recommendations provided in the report by the committee established under Justice J.S. Verma. In the 167th Report (known as the Standing Committee Report), the Parliament Standing Committee on Home Affairs examined the Amendment Bill, 2012 and conducted public consultations.

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<sup>7</sup> Justice verma committee report [https://adrindia.org/sites/default/files/Justice\\_Verma\\_AmendmenttoCriminalLaw\\_Jan2013.pdf](https://adrindia.org/sites/default/files/Justice_Verma_AmendmenttoCriminalLaw_Jan2013.pdf)

<sup>8</sup> The Criminal Law Amendment Bill, 130 of 2012.

<sup>9</sup> It was proposed that Section 375 of the Indian Penal Code should be revised to remove the exception clause. However, the Standing Committee rejected this suggestion. Their explanation was that "the whole family system may face more stress and the committee may perhaps be doing more injustice." Additionally, they believed that existing remedies, such as Section 498A of the Indian Penal Code, the Protection of Women from Domestic Violence Act, 2005 (PWDVA, 2005), and various personal laws concerned with marriage and divorce, were sufficient.

- vi. In 2015, a private bill was introduced. During discussions, the Ministry of External Affairs and the Ministry of Women and Child Development reported that the UN Committee on the Elimination of Discrimination against Women had recommended to India, among other things, to criminalize marital rape. The Law Commission of India, in its 172nd Report on the Review of Rape Laws, did not suggest the criminalization of marital rape by amending the exception clause in Section 375 of the Indian Penal Code. As a result, there is no current proposal to amend the IPC in this regard.<sup>10</sup>

It is believed that the concept of marital rape, as understood internationally, may not be effectively applied in the Indian context due to various factors such as levels of education and literacy, poverty, diverse social customs and values, religious beliefs, and societal views that regard marriage as a sacred institution.

## V. INTERNATIONAL CONVENTION ON MARITAL RAPE

India is a state party and has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 1 of CEDAW defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status." Exception 2 of Section 375 of the Indian Penal Code, which states "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape," allows violence against women based on their marital status, which is inconsistent with Article 1.

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<sup>9</sup> Standing Committee on Home Affairs, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45,

<sup>10</sup> Press Information Bureau, April 29, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938> (last access on 14.10.2024. 10.50)

Gender-based violence is a form of discrimination that is clearly prohibited by Article 1. Although the Declaration on the Elimination of Violence against Women does not have the binding legal force of a convention or treaty, it is thorough in scope and serves as a strong declaration of principles to the international community. Article 2 (a) of the Declaration unequivocally includes marital rape as a form of violence against women.<sup>11</sup>

State parties to CEDAW are required to show due diligence in addressing violence against women. This requirement is stated in General Recommendation (GR) 19 of CEDAW, which states that state parties must adopt effective legal measures, including penal sanctions, civil remedies, and compensatory provisions, to protect women from all forms of violence. Expanding on GR 19, the General Legislative Measures outlined in Paragraph 33 of GR 35 require states to ensure that the definition of sexual crimes, including marital and acquaintance/date rape, is based on the absence of freely given consent and takes into account coercive circumstances. Failure of states to criminalize marital rape effectively supports or allows this offense, thereby violating the obligation of due diligence.

Clause (f) of Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires state parties to take specific actions to eliminate discrimination against women. This includes taking all necessary measures, such as enacting new laws or amending existing ones, to modify or eliminate any laws, regulations, customs, or practices that contribute to discrimination against women.

Marital immunity in India also violates the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR). According to Article 26 of the Covenant, member states must ensure that all citizens are equally protected in terms of their dignity and status, regardless of their marital status or other factors. Marital rape creates a distinction between married and unmarried women, thus constituting discrimination.

Article 27 of the Geneva Conventions states, “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”

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<sup>11</sup> International Law, Right to Privacy and Marital Rape in India - Surya Rajkumar | Feb 25, 2018 (<https://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india/>) (last access on 14.10.2024. 11.17)

## VI. CONSTITUTIONALITY OF MARITAL RAPE

Marital rape is profoundly dehumanizing, subjecting victims to significant physical and psychological trauma while infringing upon their fundamental human rights. The exemption for marital rape contravenes essential rights enshrined in the Constitution of India, specifically the right to equality as stated in Article 14, and the right to life and personal liberty as protected by Article 21.

In *the State of Maharashtra & Anr. Vs. Madhukar Narayan Mardikar*,<sup>12</sup> The Supreme Court asserted that every woman has the Right to privacy and it must not be violated.

In *Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty*<sup>13</sup>, the Supreme Court held that rape violates Article 21 of the Indian Constitution as it hindered fundamental human rights and breached the victim's right to life and dignity.

In 2015, the RIT Foundation initiated a Public Interest Litigation in the Delhi High Court, challenging the exclusion of marital rape from the definition in Section 375 of the Indian Penal Code. The foundation argued that this exclusion infringes upon fundamental rights as outlined in Articles 14, 15, 19, and 21 of the Indian Constitution.

In May 2022, In the case of *RTI Foundation v. Union of India*, the Delhi High Court issued a divided ruling regarding the criminalization of marital rape in India. Justice Rajiv Shakdher deemed the current law unconstitutional, emphasizing that the right to revoke consent is fundamental to women's rights to life and liberty. Conversely, Justice C. Harishanker dismissed the request to criminalize marital rape, asserting that any legislative change must be undertaken by the legislature, as the matter necessitates a comprehensive examination of various factors, including social, cultural, and legal dimensions<sup>14</sup>.

In the case of *Anuja Kapur vs. Union of India through Secretary*, 2019, a Public Interest Litigation (PIL) was submitted by Anuja Kapur, requesting the Court to compel the Government of India to establish guidelines and legislation concerning marital rape. However, the Supreme Court bench, led by Justice SA Bobde and Justice BR Gavai, dismissed the

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<sup>12</sup> State of Maharashtra & Anr. Vs. Madhukar Narayan Mardikar AIR 1991 SC 207, (1991) 1 SCC 57

<sup>13</sup> Shri Bodhisattwa Gautam vs Ms. Subhra Chakraborty, 1996 AIR 922, 1996 SCC (1) 490

<sup>14</sup> [RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404, decided on 11-5-2022]

petition, stating that the responsibility for creating laws lies with the legislature, not the judiciary, which primarily focuses on interpreting existing laws rather than drafting new ones.

It is essential to examine the judiciary's hesitance to address fundamental rights within the private domain by analyzing the evolution of rulings related to 'restitution of conjugal rights' (RCR). This examination is pertinent as the constitutional law issues associated with RCR parallel the discussions surrounding marital rape. RCR, a remedy that has its roots in English law, has since been abolished in that jurisdiction<sup>15</sup>. It serves as a legal tool allowing a court to mandate that a married couple cohabit, effectively restoring one spouse's conjugal rights against the other.

## VII. CURRENT STATUS OF MARITAL RAPE IN INDIA

Exception 2 of Section 375 of the Indian Penal Code (IPC) validates marital rape against wives "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape". Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita ("BNS") raised the same to eighteen years of age. No provision dealt with the marital rape as a crime in new act.

Engaging in sexual intercourse with one's own wife, who is residing separately, constitutes a punishable offense under Section 67 of the BNS, with penalties ranging from a minimum of two years to a maximum of seven years. This provision represents a significant flaw in the new legislation, as it raises the question of why the punishment for marital rape is less severe than that for rape committed by an individual who is not the spouse, despite both acts being classified as rape.

### Some Dangerous precedents set by High Court

The Madhya Pradesh High Court determined that the lack of consent from the wife regarding sexual activities is not a critical factor in the case of *XYZ (Confidential) v. State of Madhya Pradesh Police Station*<sup>16</sup>, where the wife accused her husband of committing forced unnatural sexual intercourse. Citing the precedents set in *Navtej Singh Johar & Ors v.*

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<sup>15</sup>Criminalization of Marital Rape in India: Understanding its constitutional, Cultural and legal impact- Raveena Rao Kallakuru & Pradyumna Soni 11 NUJS L.Rev. 1 (2018).

<sup>16</sup> Criminal Appeal No. 1184 of 2022 (Arising out of SLP (Crl) No. 1674 of 2022), decided on August 5, 2022

*Union of India*<sup>17</sup> and *Umang Singhar v. State of M.P.*, the court concluded that since the alleged conduct does not constitute an offense under Section 375 of the Indian Penal Code, it similarly cannot be classified as an offense under Section 377 of the Indian Penal Code<sup>18</sup>.

The Navtej Singh Johar case establishes that an offense under Section 377 cannot be substantiated if there is consent involved. In the Umang Singhar ruling, the Court drew a parallel between this situation and the Minimum Age of Consent as outlined in Section 375, asserting that the designation of the man as a "husband" and the woman as a "wife" renders consent irrelevant. This interpretation was subsequently upheld by the Madhya Pradesh High Court. However, the issue arises from conflating these two legal provisions and deviating from the fundamental aspects of the case. The primary question is not whether the act of unnatural sex constitutes an offense, but rather whether the woman consented to the act. Furthermore, the status of a woman as a wife does not grant her husband the right to demand sexual gratification, thereby infringing upon her right to human dignity.

The Chhattisgarh High Court encountered a significant opportunity to classify marital rape as a criminal offense in the case of *Dilip Pandey & Ors. V. State of Chhattisgarh*<sup>19</sup>, given the supportive circumstances. The court affirmed the charges established by the trial court under Section 34 and Section 498A of the Indian Penal Code (IPC), as well as those under Section 377 against the accused husband. However, the court declined to acknowledge this situation as a manifestation of marital rape, ultimately discharging the husband from the charges under Section 376 of the IPC.

Section 498A has faced allegations of misuse throughout its history; however, the judiciary has exercised caution in determining whether to prosecute husbands based on the evidence presented. A notable example is the case of *Rajaram v. The State of Madhya Pradesh*,<sup>20</sup> where the Supreme Court overturned the conviction of the accused after evaluating the "cumulative effect" of the evidence, which included two dying declarations made by the wife. The Court concluded that the High Court had dismissed the sole evidence against the appellant. Similar precautions could be implemented for a marital rape law to mitigate the risk of misuse.

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<sup>17</sup> AIR 2018 SUPREME COURT 4321,

<sup>18</sup>Outlawing Marital Rape: A recurrently validated crime -Ujjaini Biswas. August 9, 2024. <https://elsnluo.com/2024/08/09/outlawing-marital-rape-a-recurrently-validated-crime/> (last access on 14.10.2024. 11.35)

<sup>19</sup> *Dilip Pandey v. State of Chhattisgarh*, (2022) 7 S.C.C. 740 (India)

<sup>20</sup> *Rajaram v. State of Madhya Pradesh*, (2009) 2 S.C.C. 285 (India)

## VIII. CONCLUSION

The belief that marital rape does not constitute genuine rape has not only invalidated the experiences of married women but has also contributed to their ongoing suffering. This misconception serves as the primary justification for the cultural and legal acceptance of the crime. It is imperative to alter the societal and legal frameworks that deny the existence of marital rape, as this form of violence is not only more widespread but also tends to result in more severe repercussions compared to rape perpetrated by strangers.

*“The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law.”<sup>21</sup>*

-P. Venkatrama Reddi

## SUGGESTIONS

The author suggests a solution to address the significant concerns surrounding the potential misuse of legal provisions and the severe consequences for a husband who may be wrongfully convicted. It is proposed that the marital rape exception be deemed unconstitutional and eliminated from the exceptions outlined in Sections 375 of the Indian Penal Code (IPC) and Section 63 of the (BNS) Act. Subsequently, it should be established as a distinct offense under new section of the IPC, with penalties aligned with those specified in Section 498A and its equivalents in Sections 85 and 86 of the BNS. The rationale for this separate legislative categorization lies in the fact that the cruelty defined under Section 498A IPC pertains to specific circumstances detailed in Explanations (a) and (b). In contrast, marital rape can arise from a multitude of factors; thus, confining the offense to a narrow definition would obstruct the pursuit of justice.

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<sup>21</sup> State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600

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