

## CRIMINALIZATION OF MARITAL RAPE

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*Rape is such an offence where the woman loses agency over her body. It violates her bodily integrity and dignity. The law gives strict punishment to the perpetrator of the crime. However, when it comes to rape within marriage, the law instead of protecting the victim, focuses on protecting the criminal. A large number of women has to face the consequences of non-criminalization of this offence. This paper provides a comprehensive view on the present status of marital rape. It begins by examining the origin of marital rape exemption and then it moves on to explain the justifications that exist in today world. A detailed reasoning has been provided as to why none of these justifications are valid. It then talks about the reality of marital rape and how it traumatises the wife. The law aims at protecting the sacred institution of marriage by not interfering, but how can a marriage remain sacred when she has to encounter sexual violence. After providing a general overview, this paper then focuses on marital rape in the Indian context. Firstly, how the legislature is reluctant about making changes regarding marital rape exemption. Secondly, about how the marital rape exemption is unconstitutional and should be removed. Throughout the paper, an attempt is made to prove that there is no justification for the marital exemption in current times. There is a real and urgent need of criminalizing marital rape with strict punishments.*

### ORIGIN OF MARITAL RAPE EXEMPTION

Early Judeo Christians in the 16<sup>th</sup> century believed that rape was the legitimate way of acquiring wives.<sup>1</sup> American Social Worker, Florence Rush explained this in her book, *The Best Kept Secret: Sexual Abuse of Children* where she wrote:

"any female taken by a man in copulation belonged to him and his kindred. And since copulation with or without consent established male possession of the female, vaginal penetration superseded all impediment"<sup>2</sup>

Following this, Lord Matthew Hale, Chief Justice of England in 17<sup>th</sup> century declared that "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>3</sup> This theory was accepted over a long period. The rationale behind this was that husband and wife were considered as one entity upon

<sup>1</sup> Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STANFORD LAW REVIEW, 679 (1996).

<sup>2</sup> FLORENCE RUSH, *THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN* 32 (1980).

<sup>3</sup> MATTHEW HALE et al., *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 629 (1736).

marriage, that is to say that the legal existence of a woman was suspended during her marriage.<sup>4</sup> According to Blackstone, marriage was a civil contract but the contracting parties could not define the terms of the contract.<sup>5</sup> The wife had to forfeit her legal rights and the husband assumed her rights or assumed a right over her.<sup>6</sup> Putting it in another way, Lawrence Friedman said “Essentially, husband and wife were one flesh; but the man was the owner of that flesh.”<sup>7</sup> Thus wives were considered as husbands’ property and they had no legal rights.<sup>8</sup> This was referred to as the “Unities Theory”. Since women were considered as chattel of men, the rape laws were aimed at protecting the property of men against men. It was considered as if the rapist robbed the father of his daughter’s virginity before the property (daughter) could reach the market of matrimony or robbed and damaged the “priced possession” (wife) of the husband.<sup>9</sup> This shows how marital rape exemption originated and came into being.

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## JUSTIFICATION FOR EXEMPTION AND THEIR PROBLEMS

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In this patriarchal society, the law makers have come up with several reasons and justifications for the exemption of marital rape. In this section, let us understand the probable justifications that exist even today and why those justifications are problematic.

### Implied Consent

In common law doctrine, “implied consent” is the most frequently cited basis for marital rape exemption both judicially and legislatively.<sup>10</sup> This theory originated with Lord Hale’s statement in the 17<sup>th</sup> century that upon marriage the wife is deemed to have given an implied and irrevocable consent to sex on demand with her husband.<sup>11</sup> A “woman’s decision to marry a man constitutes an agreement or contract to make herself sexually accessible to him.”<sup>12</sup> It is thus argued that if a husband forces himself upon his wife after his wife’s refusal, he is doing nothing more than taking the benefits of the marital contract. By denying sexual intimacy, the wife has breached the terms of the contract.<sup>13</sup> Thus the husband cannot be held criminally liable for doing something which is his publicly sanctioned contractual right.<sup>14</sup>

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<sup>4</sup> WILLIAM BLACKSTONE & THOMAS MCINTYRE COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765).

<sup>5</sup> *Id.* at 432.

<sup>6</sup> Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOCIAL INQUIRY, 941 (1995).

<sup>7</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 208 (1973).

<sup>8</sup> LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 35-38 (1969).

<sup>9</sup> ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 90 (1984)

<sup>10</sup> Linda Jackson, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 185-187 (1994).

<sup>11</sup> *Id.* at 184.

<sup>12</sup> Keith Burgess-Jackson, *Wife Rape*, 12 PUBLIC AFFAIRS QUARTERLY 1, 3-5 (1998).

<sup>13</sup> James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, 141-142 (1987).

<sup>14</sup> Jackson, *supra* note 12, at 4.

However, the problem with this argument is that if one takes marital contract seriously, then the remedy for the breach of marital contract should have been damages, the aim of which is to place the aggrieved party in a position have had the contract been performed.<sup>15</sup> Thus, forced sexual performance by the husband on the wife cannot be a remedy for breach of the marital contract. The second problem is that the terms of marital contract are not negotiable by the parties which is against the general rule of contract law that the parties are the master of terms of the contract.<sup>16</sup> Thus, it makes no sense to call marriage a “marital contract” and interpret that one of the implied terms of the marital contract is that of sexual advances by the husband, irrespective of the consent of the wife.

### Marital Privacy

This argument suggests that privacy in marriage is so fundamental that the public and hence the legal system should be precluded from judging the activities between a husband and a wife.<sup>17</sup> Professor Hilf compared marital privacy to something like “drawing a curtain” around the marriage such that the public stays out and the spouses stay in.<sup>18</sup> The rationale behind this argument is that, even though non-consensual intercourse by husband is harmful for a wife, it would be worse to allow her to bring rape charges against her husband as it would adversely affect marital privacy.<sup>19</sup>

Even this argument has a problem. Just because the parties related are spouses, it does not justify harmful, non-consensual conduct between the parties and immunity from legal action. The law intervenes in cases of physical violence like grievous hurt, assault, dowry and of course death of the wife by the acts of the husband. It is unclear why spousal rape is an exception to this rule. When a husband is forcing himself on his wife, one has to understand that there is something more going on in the marriage which might be harmful for the wife.<sup>20</sup> Just like law intervenes in cases of physical violence, it should intervene in cases of sexual violence also to protect the wife without getting concerned about marital privacy. In no case can marital privacy be greater than violence (sexual or physical) to the wife. Thus, the principle of marital privacy should stand null and void and the law should protect the wife against rape from husband just as it protects a wife from domestic violence.

### Marital Preservation

According to this argument, marital preservation outweighs the harm that is caused to the wife due to marital rape.<sup>21</sup> The marital relationship is undermined if a wife is allowed to file rape charges against her husband. If so happens and the husband is prosecuted, then

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<sup>15</sup> 2 JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 521 (ST. PAUL, MN: WEST PUBLISHING COMPANY 1977).

<sup>16</sup> *Id.* at 5.

<sup>17</sup> Jackson, *supra* note 10, at 189.

<sup>18</sup> Michael G. Hilf, *Marital Privacy and Spousal Rape*, 16 *NEW ENG. L. REV.* 31, 33 (1980).

<sup>19</sup> Jackson, *supra* note 12, at 10.

<sup>20</sup> *Id.*

<sup>21</sup> Jackson, *supra* note 12, at 7.

“the law will have fostered marital discord and prevented reconciliation.”<sup>22</sup> Thus, husband and wife are expected to resolve their issues independently<sup>23</sup> without the interference of law. The problem with this argument is that, to expect a marriage to survive and flourish even after facing such incidents is just absurd and ridiculous. And even if the marriage survives due to stigmas attached to breaking a marriage, such a relationship would definitely not flourish. The lawmakers want the parties to reconcile but they fail to understand that such reconciliation would lead to further non-consensual intercourses.<sup>24</sup>

### Evidentiary Concerns

In a marriage, sexual intercourse is the norm and it happens in private. Hence it becomes difficult to prove and disprove whether it was consensual or not.<sup>25</sup> And since consent is a “state of mind or act of will” it becomes difficult to establish by empirical means. Lord Hale, once said rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”<sup>26</sup> Thus, due to evidentiary concerns, marital rape stands as an exemption. The problem with this kind of reasoning is that, just because it has few or no witness or it is difficult to prove, a crime cannot be decriminalized. The society relies on the judicial system to ensure no innocent is penalised.<sup>27</sup> It is argued that consent is difficult to prove and is empirically slippery in case of marital rape, but in that case, using the same rationale, non-marital rape should also be decriminalized because even that makes consent dispositive.<sup>28</sup> Also from a jurisprudential point of view, the sole purpose of law is not just conviction but is also a deterrent and educational tool, announcing to the society what is a socially and morally acceptable behaviour.<sup>29</sup>

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## REALITY OF MARITAL RAPE

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After examining the major justifications, in my opinion there is no reason to treat marital rape differently from any other non-consensual intercourse. Now let us understand the reality of marital rape. Marital rape exemption reflects and showcases the abuse that married women experience daily whose husbands claim that they have a right to their wife’s

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<sup>22</sup> *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARVARD LAW REVIEW 1255, 1261 (1986).

<sup>23</sup> Jackson, *supra* note 10, at 190.

<sup>24</sup> *supra* note 22, at 1266.

<sup>25</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 382 (Simon and Schuster 1975).

<sup>26</sup> Cynthia A. Wicktom, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 (1988).

<sup>27</sup> Jackson, *supra* note 10, at 192.

<sup>28</sup> *supra* note 22, at 1269.

<sup>29</sup> Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VERMONT LAW REVIEW 33, 50-51 (1982).

body.<sup>30</sup> It is a serious problem that married women face all over the world. Often economic dependency of wife on husband triggers sexually and physically abusive marriage. Husbands presume that they have special immunity just because the family is financially dependent on him.<sup>31</sup> This has led to the belief that wives are duty bound to fulfil all sexual obligations on demand of their husband.<sup>32</sup> Forced sex in marriage becomes a weapon, husbands use to dominate their wives. Brownmiller wrote against this practise and said:

"[I]f women are to be what we believe we are—equal partners— then intercourse must be construed as an act of mutual desire and not as wifely 'duty' enforced by the permissible threat of bodily harm or of economic sanctions."<sup>33</sup>

Rape of a married women is not only rape of her body but also rape of her trust and love. It creates a sense of fear and insecurity in the wife within the institution of marriage. Recently, there has been an increased recognition of domestic violence. Many recent laws and amendments have come up against dowry, cruelty, domestic violence and female infanticide. However, marital rape which is also a form of domestic violence has failed to gain recognition and support.<sup>34</sup> Marital rape is the most prevalent form of rape<sup>35</sup> but ironically it cannot be termed as rape in legal terms. Some reformers even go on to say that marital rape always come with other forms of domestic violence.<sup>36</sup> Marital rape and domestic violence like battery always go hand in hand. It involves brutality, terror, violence and humiliation.<sup>37</sup> "Victims of marital rape experience a trauma similar to that of victims of stranger rape. Rape by anybody, including a husband, is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm."<sup>38</sup> In fact, marital rape is more traumatic as it occurs frequently, year after year.<sup>39</sup> A woman who is raped by her husband is likely to be raped several times and the woman has no other option other than enduring it. They have no legal remedies and they often feel overpowered by their husbands' authority and thus they submit to his will to protect themselves from further physical violence.<sup>40</sup>

Marital rape also faces a serious problem of underreporting. Women are reluctant to report such incidents due to family loyalty, inability to leave the relation due to stigmas attached,

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<sup>30</sup> Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STANFORD LAW REVIEW 677, 683 (1996).

<sup>31</sup> DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* xvi (rev. ed. Ind. Univ. Press 1990) (1982).

<sup>32</sup> *Id.* at 58

<sup>33</sup> BROWNMILLER, *supra* note 25.

<sup>34</sup> Eskow, *supra* note 30, at 684.

<sup>35</sup> DAVID FINKELHOR & YLLOKERSTI, *LICENSE TO RAPE: SEXUAL ABUSE OF WIVES* 7 (1987).

<sup>36</sup> Moira K Griffin, *In 44 States, It's Legal to Rape Your Wife*, *STUDENT LAWYER* 21 (1980)

<sup>37</sup> D. Finkelhor, *Marital Rape: The Misunderstood Crime*, Address to the New York County Lawyer's Association (1984)

<sup>38</sup> *supra* note 22, at 1261.

<sup>39</sup> Russell, *supra* note 31 at iii.

<sup>40</sup> *The Dark Side of Families: Current Family Violence Research*, 22 *FAMILY PROCESS*, 126 (1983).

concern about their children or other similar reasons. Thus, the reality is, in an institution of marriage, "[w]hen you are raped by your husband you [have to] live with your rapist."<sup>41</sup>

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## MARITAL RAPE IN INDIAN CONTEXT

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Rape has been defined in section 375 of the Indian Penal Code (45 of 1860)<sup>42</sup>. Despite several cases, amendments and law commission reports, marital rape is not included within the scope of section 375. According to the exception 2 provided in section 375, a wife above the age of fifteen cannot be raped by her husband. Section 376 of the Indian Penal Code provides punishment for rape. It can clearly be interpreted that wife rape where the age of wife is above 15 is not punishable. Where the age of wife is between 12 to 15, rape of such wife by her husband is punishable with imprisonment up to 2 years or fine or both. Rape of wife under the age of 12 has a higher punishment. It is punishable with imprisonment

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<sup>41</sup> Finkelhor, *supra* note 37.

<sup>42</sup> Section 375 of the Indian Penal Code: A man is said to commit "rape" if he—

- a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or
- d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions—
  - a. First.—Against her will.
  - b. Secondly.—Without her consent.
  - c. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
  - d. Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
  - e. Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.
  - f. Sixthly.—With or without her consent, when she is under eighteen years of age.
  - g. Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

of either description for a term which shall not be less than seven years but may extend to life or for a term extending up to ten years and shall also be liable to fine. Even rape of judicially separated wife has a lesser punishment of imprisoned up to two years and fine. This shows how casually law takes rape of wife. However, the 172<sup>nd</sup> Law Commission Report that was submitted in the year 2000 suggested, inter alia, removal of exception 2 of section 375 IPC. Justice Verma Committee was constituted to recommend amendment to the criminal law. In its report submitted on January 2013, it stated: "The law ought to specify that marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation."<sup>43</sup> But, it seems that the legislature is reluctant and has no intention to amend the present rape law to criminalize marital rape. Courts have set precedents even in cases where there is an ongoing matter of divorce, the husband cannot be held guilty for rape. In the case of *Shree Kumar v Pearly Karun*<sup>44</sup>, the husband had non-consensual intercourse with his wife. There was an ongoing dispute on divorce between the parties. The Court held that since the parties were not judicially separated, the act of the husband does not constitute rape.

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## CONSTITUTIONALITY OF MARITAL RAPE EXEMPTION

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According to the Indian Constitution, any law that is not in confirmation with the Constitution can be declared null and void on the grounds of being unconstitutional. We will examine how exception 2 of section 375 (marital rape exemption) violates Article 14<sup>45</sup> and 21<sup>46</sup>. Article 14 of the Indian Constitution grants a fundamental right to equality. This can be interpreted as equality among equals.<sup>47</sup> Section 375 of the Indian Penal Code which provides protection against rape to women does not regard rape by husband within marriage. This classification is due to the marital status of the woman. But even married women require protection in their private sphere. Instead of protecting the victim of marital rape, the law focuses on safeguarding the criminal. Withdrawing protection under section 375 of IPC within marriage is irrelevant. Women, married or unmarried are equal before the law and require protection even if the perpetrator of the crime is her husband. This classification, based on the marital status of women is thus unnecessary and violates Article 14. Article 21 grants right to life and personal liberty. Right to life does not mean mere survival. After the *Maneka Gandhi v Union of India*<sup>48</sup> case, jurisprudence of article 21 has increased. It was established that right to life is much more than just existence. In the case of *The Chairman, Railway Board & Ors v Mrs. Chandrima Das & Ors*<sup>49</sup>, the court held

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<sup>43</sup> Justice Verma Committee Report 2013.

<sup>44</sup> 1999 (2) ALT Cri 77.

<sup>45</sup> Article 14 of Constitution of India states as under: "The State shall not deny to any person equality before the law and equal protection of laws within the territory of India."

<sup>46</sup> Article 21 of constitution of India states as under: "Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law"

<sup>47</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 80.

<sup>48</sup> 1978 AIR 597.

<sup>49</sup> AIR 2000 SC 988.

that rape violates right to life. Rape is not only sexual violence but also an act of aggression aimed at humiliating and degrading the bodily integrity of a women.<sup>50</sup> Thus, using the same reasoning, rape of wife by husband also violates the wife's right to life under article 21. Even a woman's right to sexual privacy is violated when she is raped. In the case of *State of Maharashtra v Madhkar Narayan Mandikar*<sup>51</sup>, the Supreme Court held that every woman has right to sexual privacy and it cannot be violated by any person. Thus, it is quite evident that marital rape exemption violates right to sexual privacy of married women. Apart from that, marital rape also deprives the victim of right to good health. It causes both psychological and physical harm which include miscarriage, stillbirth, bladder infection, infertility, anxiety, depression, suicidal ideation etc.<sup>52</sup> Right to good health which was included under article 21 in the case of *C.E.S.C. Ltd. Etc v Subhash Chandra Bose and Ors*<sup>53</sup> is clearly violated in case of marital rape. Thus, we can see how marital rape doctrine violates right to live with dignity, right to sexual privacy and right to good health which are all included under article 21, and hence it should be declared unconstitutional.

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## CONCLUSION

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There is an immediate need to criminalize marital rape for the interest of justice. Rape, irrespective of it being within or outside marriage is a crime against the women's bodily integrity and the victim loses agency over her body. Given the fact that marital rape victims are most likely to get raped several times, it is more traumatic than non-marital rape. One must understand that marriage does not thrive just on sex. It is quite evident that this spousal exemption is due to the position that women occupy in a patriarchal society. Famous British philosopher, John Stuart Mill, back in 1869 critiqued the idea of marriage that existed. In his book *The Subjection of Women* he wrote against the male domination in marriage and he repeatedly used "master and slave" to describe the relation between husband and wife. For Mill, married women represented slaves in several ways and were thus considered property of their husband. Even in that time, Mill was against marital rape as it brought down the stature of wife underneath that of a slave.<sup>54</sup> This has become an ultimate weapon for men to dominate and objectify their wives. This truth cannot be denied, and the victims suffer in silence due to the lack of legal provisions. However, it is wrong to say that wives have no remedy at all. They have recourse under section 498A of the IPC<sup>55</sup>. This is the only criminal remedy dealing with "cruelty" that protects the wife

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<sup>50</sup> Bodhisattwa Gautam v. Subhra Chakraborty, 1996 AIR 922.

<sup>51</sup> AIR 1991 SC 207.

<sup>52</sup> SHIVANI GARG, MARITAL RAPE (2012).

<sup>53</sup> AIR 1992 573.

<sup>54</sup> JOHN STUART MILL, SUBJECTION OF WOMEN (1869).

<sup>55</sup> Section 498A of the Indian Penal Code: Husband or relative of husband of a woman subjecting her to cruelty—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation—For the purpose of this section, "cruelty" means—

from violent sexual behaviour of the husband. But the maximum punishment is imprisonment for three years and fine which is far less than the punishment for rape. Apart from that they have civil remedy under Protection of Women from Domestic Violence Act, 2005. The victim of marital rape can apply for judicial separation from her husband under this provision.<sup>56</sup> These remedies do not provide complete protection to wives. Moreover, there is a need of terming the offence as “RAPE” and it being included under section 375 of the IPC (i.e. removal of exception 2 of 375 of IPC). Marital rape is no different than other forms of rape and thus it deserves same amount of punishment.

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(a) 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; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

<sup>56</sup> Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii)