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# Marital Rape- It's Time to Forbid this Evil Practice

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## ABSTRACT

*Marital rape is not a criminal offence in India. Since 70 years of the enactment of the best constitution of the world (.i.e. The Constitution of India), the women in India are deprived of their fundamental rights. The exception 2 of section 375 of the Indian Penal Code, 1860 immunes a husband from the liability and punishment of rape, when he commits sexual intercourse with his wife 'against her will' or 'without her free consent.' The Constitution of India enshrines 'Right to equality', 'Right to dignity', 'Right to life and personal liberty.' The Hon'ble Supreme Court has declared the Right to 'autonomy, privacy and choice over sexual intimacies' as an integral part of Right to life and personal liberty. The exception 2 of section 375 conveys dishonor to the rights enshrined under the Constitution of India. The ultimate aim of the study is to prove that the exception 2 of section 375 of IPC violates Article 14, 15 and 21 of the Constitution. Moreover, this study advocates for the criminalization of marital rape.*

## I. INTRODUCTION

India is the 'largest democracy' known for 'the best constitution in the world.' The 'Right to dignity,' 'Right to equality,' and the 'Right to life and personal liberty,' are an essential facet of the Constitution of India. Unfortunately, India has miserably failed to protect the rights and interests of its 'married daughters' by vesting their husband 'a license to rape', which is known as marital rape. The prevalence of marital rape in India is per se evident from the fact that one Indian woman is raped by her husband in every 3 seconds<sup>3</sup> and 83 % of women between the age group of 18 to 49 are victims of marital rape.<sup>4</sup>

**Marital rape** is a form of sexual intercourse with one's spouse without consent.<sup>5</sup> It is criminalized by about 150 countries, as of 2019,<sup>6</sup> but in India, marital rape is not yet penalized. The [**exception 2 of Section 375**] of the Indian Penal Code, 1860 ("Hereinafter referred as IPC") specifies that "sexual intercourse or sexual acts by a man with his wife, the wife not

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<sup>3</sup> [https://www.equalitynow.org/marital\\_rape\\_is\\_not\\_a\\_crime\\_in\\_india\\_it\\_needs\\_to\\_be](https://www.equalitynow.org/marital_rape_is_not_a_crime_in_india_it_needs_to_be).

<sup>4</sup> Rinchen Norbu Wangchuk, *Survey Takes Veil off Marital Rape in India: Its Time We Had a Serious Discussion*, THE BETTER INDIA, (Mar. 16, 2018), <https://www.thebetterindia.com/134673/survey-nfhs-marital-rape-india/>.

<sup>5</sup> Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

<sup>6</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape\\_laws\\_by\\_country](https://en.wikipedia.org/wiki/Marital_rape_laws_by_country).

being under fifteen years of age, is not rape.” The Hon’ble Supreme Court (“Hereinafter referred as Hon’ble SC”) has extended this age limit to 18 years.<sup>7</sup> This provision legalizes marital rape of women above 18 years and permits a husband to violate the right to ‘life, liberty, dignity, equality, autonomy and privacy’ of his wife. Therefore, this provision degrades the ‘fundamental rights’ under the Constitution of India and ‘human rights’ under international regulations.

It is distressing that a woman who is raped by her husband is not acknowledged as a victim of rape, just because she is married to that man! This indicates that marriage gives a license to the husband to perform sexual intercourse with the wife, as per the desire, while, the consent of the wife is immaterial. Hence, how sardonic is that “*Rape is illegal but marital rape is not,*” *it is like saying alcohol is dangerous but with water it is not.* It is a loophole portraying the inefficiency in the ‘world of justice’.

The male chauvinists argue that the criminalization of marital rape will become a potent weapon in the hands of an unscrupulous wife to harass her husband and it will destroy the marital bond. But, it is important to acknowledge that a marital bond can’t be preserved when a woman is raped by her husband. Even, a husband can’t be allowed to enjoy the consortium with his wife, by subjecting her to atrocities. The false and frivolous allegations will be increased, is just a pessimistic attitude, which is per se vague and can’t be considered in this modern world where a huge emphasis is laid upon the constitutional and human rights.

In this research paper, we have tried to scrutinize the trend of marital rape while gazing upon the alarming data and plight of several women. We have addressed certain important issues, such as;

- *Whether or not, the exception 2 of section 375 of IPC is constitutionally valid?*
- *Whether or not, the exception 2 of section 375 of IPC amounts to a violation of human rights under international regulations?*
- *Whether the international regulations impose obligations on India to criminalize marital rape?*

This study lays a strong emphasis on the grounds, which, per se prove exception 2 of section 375 of IPC to be a clear transgression of the ‘fundamental rights’ of women enshrined under the Constitution of India and ‘human rights’ embodied under the international regulations. The

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<sup>7</sup> Independent Thought v. Union of India, (2017) 10 SCC 800.

ultimate aim of the study is to prove that the exception 2 of section 375 of IPC is unconstitutional and it must be repealed.

## II. DEFINITION OF MARITAL RAPE

Marital rape is defined as sexual intercourse by a husband with his wife 'against her will' or 'without her free consent'. In other words, it is the rape of a woman by her husband.

It is pivotal to consider the gravity of the marital rape because here the threat persists to a woman from her husband, with whom she shares consortium. This threat is graver, as she can be raped by her husband every day. After all, if the law will not protect the women from such sexually perverse men, then who will?

### (A) TYPES OF MARITAL RAPE:

The marital rape can be broadly classified into two categories;<sup>8</sup>

#### 1. Sexual coercion by non-physical means:<sup>9</sup>

- This form of coercion involves social coercion in which the wife is compelled to enter into sexual intercourse by reminding her of her duties as a wife.
- Non-physical techniques and tactics like verbal pressure, false promise, threats to end the marital relationship, etc. are resorted to getting into sexual contact with a non-consenting female.
- Such acts of sexual coercion by the use of non-physical stunts though considered less severe in degree as compared with physically coercive sexual acts, but are widespread and pose a threat to the women's right in the society.

#### 2. Forced Sex:<sup>10</sup>

This involves the use of physical force to enter into sexual intercourse with an unwilling woman. It can be further classified into the following three categories;

- **Battering Rape:** Battering rape is the one where the husband forces his wife during sexual intercourse or maybe after by using aggression and assault. Sometimes he may also use violence to compel her into sexual intercourse.

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<sup>8</sup> Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

<sup>9</sup> *Ibid.*

<sup>10</sup> Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

- **Force Only Rape:** In this type of rape, the husband might not beat the wife but he uses the utmost force to engage her into the sexual act to which she refuses relentlessly.
- **Obsessive Rape:** This type of marital rape involves not only the use of force and violence but also some kinds of perverse acts by the husband, in order to enjoy sexual sadistic pleasure.

### III. AN ALARMING DATA

The data pertaining to marital rape in India is appalling, as mentioned hereunder;

- One Indian woman is raped by her husband in every 3 seconds.<sup>11</sup>
- The fourth National Family Health Survey states that 83% of women between the age group of 18 to 49 are victims of marital rape.<sup>12</sup>
- The third National Family Health Survey of 2005-2006 conducted on 6900 women, who reported experiencing sexual violence. 87.5% recognised their current husband as the perpetrator and 7.9% recognised a former husband as the perpetrator.<sup>13</sup>
- According to the Rice Institute, the instances of sexual violence by the husband were reported 40 times more than sexual violence by others.<sup>14</sup>
- The third National Family Health Survey shows the belief of Indian men over entitlement on wife;<sup>15</sup>
  - ✓ 19.8% of men believe that when a wife refuses to have sex with her husband, he has the right to get angry and reprimand her.
  - ✓ 15.5% of men believe that a wife cannot refuse sex to her husband even if she is tired or not in the mood.
  - ✓ 8.1% of men admitted to believing that a husband is justified in beating up his wife if she refuses to have sexual intercourse with him.

<sup>11</sup> [https://www.equalitynow.org/marital\\_rape\\_is\\_not\\_a\\_crime\\_in\\_india\\_it\\_needs\\_to\\_be](https://www.equalitynow.org/marital_rape_is_not_a_crime_in_india_it_needs_to_be).

<sup>12</sup> Rinchen Norbu Wangchuk, *Survey Takes Veil off Marital Rape in India: Its Time We Had a Serious Discussion*, THE BETTER INDIA, (Mar. 16, 2018), <https://www.thebetterindia.com/134673/survey-nfhs-marital-rape-india/>.

<sup>13</sup> Vineet Bhalia, *A man can rape his wife; Why the government doesn't understand marriage*, DAILY O, (Sept. 11, 2017), <https://www.dailyo.in/voices/marital-rape-centre-ipc-supreme-court-high-court-section-375-women-empowerment-gender-violence/story/1/19451.html>.

<sup>14</sup> *Ibid*.

<sup>15</sup> Vineet Bhalia, *A man can rape his wife; Why the government doesn't understand marriage*, DAILY O, (Sept. 11, 2017), <https://www.dailyo.in/voices/marital-rape-centre-ipc-supreme-court-high-court-section-375-women-empowerment-gender-violence/story/1/19451.html>.

- ✓ 5.7% of men believed that a husband is justified in using force to have sex.
- The fourth National Family Health Survey highlights the physical injuries suffered by women due to sexual violence committed on them by their husband;<sup>16</sup>
  - ✓ 36.5% of women have suffered from cuts, bruises or aches due to the sexual violence committed by their husband on them.
  - ✓ 8.3% of women suffered from severe burns
  - ✓ 21.8% of women suffered from eye injuries, sprains, dislocations, or burns.
  - ✓ 14.8% of women suffered from deep wounds, broken bones or broken teeth.

#### IV. THE PLIGHT OF VARIOUS WOMEN

When will the unfortunate misery of various women be heard? When will the justice be done with a woman who has been raped by her husband? When will the Indian legal system acknowledge marital rape as a crime and penalize it?

Well, the criminalization of marital rape in India might be a wish for many women who have been subjected to rape by their sexually perverse husband. But, the criminalization of marital rape in India is not a cakewalk. The cases mentioned hereunder exhibits the same;

- The Hon'ble SC has refused to entertain a woman's plea to declare marital rape a criminal offence, saying it wasn't possible to order a change in the law for one person.<sup>17</sup>

The misery of the victim is evident from her words that "I was only a toy for him whom he thought he could use differently every night. Whenever we had a fight, he would take it out on me in bed. There were times I pleaded with him to stay away because I was unwell, but he would not take no for an answer, not even during my periods."<sup>18</sup>

The exception 2 of section 375 has deprived such victim of getting justice. It is per se evident from the aforementioned facts that such a provision can't maintain the sanctity of the marriage; rather it only made the woman a 'sex slave' of her husband.

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<sup>16</sup> KUMAR RAJESH, *DATA ON SEXUAL VIOLENCE IN MARRIAGES SHOWS WHY INDIA SHOULD PROGRESS TOWARDS CRIMINALIZING MARITAL RAPE*, HUFFPOST, (FEB. 24, 2018, 2:45 PM), [HTTPS://WWW.HUFFINGTONPOST.IN/KUMAR-RAJESH/LATEST-DATA-ON-SEXUAL-VIOLENCE-IN-MARRIAGES-SHOWS-WHY-INDIA-SHOULD-PROGRESS-TOWARDS-CRIMINALISING-MARITAL-RAPE\\_A\\_23367102/?GUCCOUNTER=1](https://www.huffingtonpost.in/kumar-rajesh/latest-data-on-sexual-violence-in-marrriages-shows-why-india-should-progress-towards-criminalising-marital-rape_a_23367102/?GUCCOUNTER=1).

<sup>17</sup> Bhadra Sinha, *SC rejects plea to make marital rape a criminal offence*, HINDUSTAN TIMES, (Feb. 18, 2015, 7:55 PM), <https://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html>.

<sup>18</sup> <https://www.bbc.com/news/world-asia-india-32810834>.

- The Gujarat High Court in, *Nimeshbhai Bharatbhai Desai v. State of Gujarat*,<sup>19</sup> has acknowledged marital rape to be a grave problem and held that ‘the total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized’. In the present case, the victim was subjected to ‘forceful sexual intercourse’ and ‘unnatural sex’ by her sexually perverse husband many times. The Gujarat High Court has expressed concern over the problems of the victim. However, the court held that the charges against a husband under Section 375 and 377 of IPC can’t be framed because of the exception 2 of section 375 of IPC. The court has left it to the discretion of the legislature to repeal this provision. Hence, justice is denied to the victim.

The Hon’ble SC has held that the term ‘life’ used under the right to life meant something more than a mere animal existence.<sup>20</sup> *“The right to life includes the right to live with human dignity and all that goes along with it.”*<sup>21</sup>

Many women are the victim of marital rape, however, they have not raised their voice against such atrocities because of no legal remedy and those who have tried to ask for a legal remedy were deserted. As a result, the exception 2 of section 375 of IPC makes the life of a woman as ‘a mere animal existence.’

## **V. THE POSITION OF EXCEPTION 2 OF SECTION 375 OF IPC, WITH RESPECT TO PART III OF THE CONSTITUTION OF INDIA**

The position of exception 2 of section 375 of IPC w.r.t. Article 14, 15 and 21 of the Constitution of India is explained hereunder;

### **(A) THE EXCEPTION 2 OF SECTION 375 OF IPC OFFENDS ARTICLE 14 OF THE CONSTITUTION:**

Article 14 of the Constitution guarantees ‘equality before the law’ and ‘equal protection of the law’ to any person within the territory of India.<sup>22</sup> ‘Equality before the law’ is a negative concept implying the absence of any special privilege in favor of individuals,<sup>23</sup>

<sup>19</sup> 2018 SCC OnLine Guj 732.

<sup>20</sup> *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

<sup>21</sup> *Francis Coralie v. Union Territory of Delhi*, 1981 SCR (2) 516.

<sup>22</sup> INDIA CONST. art. 14.

Equality before law- The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

<sup>23</sup> DR. J. N. PANDEY, CONSTITUTIONAL LAW OF INDIA 83 (55th ed. 2018).

whereas, the ‘equal protection of the laws’ is a positive concept implying equality of treatment in equal circumstances.<sup>24</sup>

**1. The exception 2 of section 375 of IPC offends “equality before the law”:**

This provision provides a special privilege in favor of men. They possess an authority to have sexual intercourse with the wife, as per their wish. Thus, this provision makes women the property of their husband. Hence, it violates “equality before the law” by depriving women of equal status and subjecting them to a subordinate position.

**2. The exception 2 of section 375 of IPC offends the “equal protection of the laws”:**

The “equal protection of the laws” means that all persons similarly circumstanced shall be treated alike both in the privileges conferred and liabilities imposed by the law. Equal law should be applied to all in the same situation, and there should be no discrimination between one person and another.<sup>25</sup>

**“Article 14 permits reasonable classification but prohibits class legislation:”**

Article 14 forbids class-legislation, but it does not forbid reasonable classification. The classification, however, must not be ‘arbitrary, artificial or evasive’ but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation.<sup>26</sup>

**i. Test of reasonable classification:**

The ‘twin test’ of Article 14 must be satisfied for a classification to be reasonable. It has two conditions, as enumerated hereunder;<sup>27</sup>

- The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped from others left out of the group.
- The differentia must have a rational nexus to the object sought to be achieved by the act.<sup>28</sup>

**ii. Now, applying the ‘twin test’ of Article 14 on the exception 2 of section 375 of IPC;**

- **“The exception 2 of section 375 of IPC has no intelligible differentia:”**

<sup>24</sup> DICEY, LAW OF THE CONSTITUTION 49, (10th ed. 1985).

<sup>25</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75; Lindsley v. Natural Carbonic Gas Co., (1910) 220 US 61.

<sup>26</sup> R.K. Garg v. Union of India, AIR 1981 SC 2138; Re-special Courts Bill, AIR 1979 SC 478; Air India v. Nargesh Meerza, AIR 1981 SC 1829; R.C. Cooper v. Union of India, AIR 1970 SC 564; Ameronisa v. Mahboob, AIR 1953 SC 91.

<sup>27</sup> *Ibid.*

<sup>28</sup> K. Thimmappa v. Chairman, Central Board of Directors, SBI, AIR 2001 SC 467.



The exception 2 of section 375 of IPC makes classification between the ‘married women’ and ‘unmarried women.’ The rape of an unmarried woman by any person is an offence under Section 375 of IPC, while, if that person is married to that woman, then it will not amount to rape. Thus, the rape of a married woman by her husband doesn’t constitute an offence under Section 375 of IPC. Hence, the law discriminates between a married and unmarried woman and doesn’t afford equal protection to them. Thus, the classification between ‘married and unmarried women’ or ‘rape by husband’ or ‘a person other than husband’ is not based on an intelligible differentia.

- **“The differentia has no rational nexus to the apparent object sought to be achieved by the legislation:”**

The apparent object sought to be achieved by the exception 2 of section 375 of IPC is to preserve the marital bond. But it is important to consider that it will destroy the marital bond because when a wife will be deprived of dignity, liberty and privacy by her husband, then how she will be able to enjoy the marital life? The marital life will become torturous and painful for her. Hence, the object sought to be achieved by the legislation has no rational nexus with the differentia.

Thus, the ‘twin test’ of Article 14 which is essential for a classification to be reasonable is not satisfied. Hence this classification is arbitrary, artificial or evasive, which per se violates Article 14 of the Constitution.

The Hon’ble SC has held that “if the classification is not reasonable and does not satisfy the twin test of Article 14, then the impugned legislation or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached.”<sup>29</sup> Therefore, the exception 2 of Section 375 of IPC is manifestly arbitrary and thereby, violates Article 14 of the Constitution.

#### **(B) THE EXCEPTION 2 OF SECTION 375 OF IPC TRANSGRESSES ARTICLE 15 OF THE CONSTITUTION:**

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<sup>29</sup> R.D. Shetty v. Airport Authority, AIR 1979 SC 1628.

- No citizen can be discriminated on the ground of sex.<sup>30</sup> The equality between sexes and equal protection of gender is an emanation of Article 15<sup>31</sup>. The exception 2 of section 375 of IPC discriminates against women on the grounds of 'sex.' Such a provision makes a woman 'chattel' of her husband. The women are entitled to protection afforded by Article 15(1). Hence, the exception 2 of Section 375 of IPC transgresses Article 15(1) of the Constitution.
- The distinction between 'married and unmarried women' is contrary to the philosophy and ethos of Article 15(3) of the Constitution, whereby, the State is authorized to make special provisions for the advancement of women and children.<sup>32</sup>

**(C) THE EXCEPTION 2 OF SECTION 375 OF IPC VIOLATES ARTICLE 21 OF THE CONSTITUTION:**

Article 21 of the Constitution enshrines 'Right to life and personal liberty.'<sup>33</sup> Dignity, liberty and privacy are the essential facets of this right.

- **The exception 2 of section 375 of IPC violates the 'Right to dignity' of a woman:**

The dignity of the individual is the unwavering premise of fundamental rights.<sup>34</sup> Anything destructive of individual dignity is anachronistic to our constitutional ethos.<sup>35</sup> It is an integral part of Article 21 of the Constitution. When everyone is entitled to dignity, then, how can a woman be denied dignity, just because she is a wife of someone? How can a man be allowed to collar the dignity of a woman, just because he is her husband?

Thus, it's pivotal to deliberate over these questions, so that the women can be bestowed with dignity. Hence, exception 2 of Section 375 of IPC violates the 'Right to dignity' of a woman.

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<sup>30</sup> INDIA CONST. art. 15, cl. 1.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:- The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

<sup>31</sup> Indian Young Lawyers Association v. The State of Kerala, (2019) 11 SCC 1.

<sup>32</sup> INDIA CONST. art. 15, cl. 3.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:- Nothing in this article shall prevent the state from making any special provision for women and children.

<sup>33</sup> INDIA CONST. art. 21.

Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to the procedure established by law.

<sup>34</sup> Indian Young Lawyers Association v. The State of Kerala, (2019) 11 SCC 1.

<sup>35</sup> *Ibid.*

- **The exception 2 of section 375 of IPC violates the ‘Right to privacy’ of a woman:**

The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy recognizes the autonomy of an individual and the right of every person to make essential choices which affect the course of life.<sup>36</sup> Marital rape is the destruction of the sanctified personal space of a woman. It is the modus operandi of seizing her ‘autonomy’ and ‘choice over vital matters of her life’. Hence, it violates the ‘Right to privacy’ of a woman.

- **The exception 2 of section 375 of IPC violates the ‘Right to choice over sexual intimacies:**

The right to privacy includes a ‘decisional privacy’ reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.<sup>37</sup> The marital rape deprives a woman from her ‘right to choice over sexual intimacies.’

- **The exception 2 of section 375 of IPC violates the ‘Right to personal liberty’ of a woman:**

A woman’s right to make reproductive choices is a dimension of personal liberty, under Article 21 of the Constitution. It includes the right to refuse participation in sexual activity or alternative use of the contraceptive method.<sup>38</sup> Thus, the marital rape deprives a woman from the ‘freedom of her person’ and it amounts to a violation of her ‘right to personal liberty.’

Therefore, the exception 2 of Section 375 of IPC violates the right to “dignity, liberty, autonomy, privacy and choice over sexual intimacies of a woman”, which per se amounts to be a clear violation of ‘Right to life and personal liberty’ of a woman. Hence this exception violates **Article 14, 15 and 21** of the Constitution of India.

## VI. INTERNATIONAL JURISPRUDENCE

The marital rape has been criminalized by about 150 countries of the world, as of 2019.<sup>39</sup> The study of some specific countries is enumerated hereunder;

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<sup>36</sup> Justice K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

<sup>37</sup> Justice K.S. Puttaswamy (Retired) v. Union of India, (2019) 1 SCC 1.

<sup>38</sup> Suchita Srivastava v. Chandigarh Administration, 2009 (9) SCC 1.

<sup>39</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape\\_laws\\_by\\_country](https://en.wikipedia.org/wiki/Marital_rape_laws_by_country).

**(A) U.S.A:**

Since 1993, marital rape is illegal in all 50 states in U.S.A.<sup>40</sup> In most states, the criminalization has occurred by the removal of the exemptions from the general rape law by the legislature, or by the courts striking down the exemptions as unconstitutional.<sup>41</sup>

**Punishment:** For each state of U.S.A, there is different legislation and different punishment.<sup>42</sup>

**(B) SCOTLAND:**

In the case of, *S. v. H. M. Advocate*,<sup>43</sup> "The High Court of Justiciary held that there was no marital rape exemption in Scottish law, even if the married couple was cohabiting." 'Lord Justice-General Lord Emslie' questioned if a marital rape exemption was ever part of Scottish law, but even if it was, there was no good reason for it to continue.

**Punishment:** The maximum penalty is up to life imprisonment varying based on gravity.<sup>44</sup>

**(C) ENGLAND AND WALES:**

The marital rape exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of *R v. R*.<sup>45</sup> Lord Keith referred to the case of "*S. v. H. M. Advocate*," he agreed with the Court of Appeal that the marital rape exemption was a "common law fiction" and ruled that "in modern times the supposed marital exemption in rape forms no part of the law of England." The other four lords unanimously agreed with Lord Keith's ratio decidendi.

**Punishment:** A custodial sentence of 4-19 years, depending on the specifics of the case, alongside any mitigating or aggravating factors. Life imprisonment can be handed out if the situation demands.<sup>46</sup>

**(D) AUSTRALIA:**


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<sup>40</sup>Wikipedia,[https://en.wikipedia.org/wiki/Marital\\_rape\\_in\\_the\\_United\\_States#:~:text=Marital%20rape%20in%20United%20States,the%20offence%20vary%20by%20state](https://en.wikipedia.org/wiki/Marital_rape_in_the_United_States#:~:text=Marital%20rape%20in%20United%20States,the%20offence%20vary%20by%20state).

<sup>41</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape\\_in\\_the\\_United\\_States#Changes\\_since\\_1993](https://en.wikipedia.org/wiki/Marital_rape_in_the_United_States#Changes_since_1993).

<sup>42</sup> *Ibid*.

<sup>43</sup> 1989 SLT. 469.

<sup>44</sup> The Newsroom, *Year when marital rape became a crime will shock you*, THE SCOTSMAN, (Jan. 26, 2018, 6:00 AM),<https://www.scotsman.com/news/opinion/columnists/leader-comment-year-when-marital-rape-became-crime-will-shock-you-1433055>.

<sup>45</sup> [1991] UKHL 12.

<sup>46</sup> Nick Titchener, *Marital rape law in the UK: what is it?* LAWTONS SOLICITORS, (June 6, 2019), <https://www.lawtonslaw.co.uk/resources/what-are-the-legal-penalties-for-marital-rape/>.

In Australia, the removal of immunity from marital rape occurred in all states and territories, both by statute and judicial decisions, between the late 1970s and early 1990s<sup>47</sup>. In the case of, *R v. L*<sup>48</sup>, the High Court of Australia ruled that “if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.”

**Punishment:** The law of individual states and territories provide specific penalties.<sup>49</sup>

**(E) GERMANY:**

Germany criminalized marital rape in 1997. In 1997 there were changes to the rape law, broadening the definition, making it gender-neutral, and removing the marital exemption.<sup>50</sup>

**Punishment:** The imprisonment of up to 15 years.<sup>51</sup>

**(F) OTHER COUNTRIES:**

The following countries have also criminalized marital rape;<sup>52</sup>

COUNTRY	YEAR OF CRIMINALIZATION	PUNISHMENT
Netherlands	1991	Imprisonment of maximum 12 years, fine of maximum 78,000 euros or both
Chile	1999	5-15 years of imprisonment
Serbia	2002	Imprisonment of up to 40 years
Turkey	2005	Imprisonment of a minimum of 12 years
Nepal	2006	Imprisonment of up to 5 years

<sup>47</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape#Australia](https://en.wikipedia.org/wiki/Marital_rape#Australia).

<sup>48</sup> [1991] HCA 48.

<sup>49</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape#Australia](https://en.wikipedia.org/wiki/Marital_rape#Australia).

<sup>50</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape](https://en.wikipedia.org/wiki/Marital_rape).

<sup>51</sup> Wikipedia, [https://en.wikipedia.org/wiki/Marital\\_rape\\_laws\\_by\\_country](https://en.wikipedia.org/wiki/Marital_rape_laws_by_country).

<sup>52</sup> *Ibid.*

Greece	2006	5-20 years of imprisonment
Rwanda	2007	Imprisonment of 2 months to life imprisonment with fines of 100,000 to 300,000 Rwandan francs.
Malaysia	2007	Imprisonment of up to 5 years.
Thailand	2007	Imprisonment of 4 years to the death penalty, as well as fines
Monaco	2011	5-20 years of imprisonment

Hence, marital rape is criminalized by various nations across the globe, either by legislative enactments or judicial scrutiny.

## **VII. THE OBLIGATIONS OF INDIA UNDER INTERNATIONAL REGULATIONS:**

Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into with these provisions to enlarge the meaning and content thereof and to promote the object of the constitutional guarantee.<sup>53</sup>

This is implicit from the fact that the Government under Article 51(c)<sup>54</sup> of the Constitution has a duty to honor the internationally recognized rules and principles and the Parliament has the enabling power to enact laws for implementing the international conventions and norms by virtue of Article 253<sup>55</sup> read with Entry 14 of the Union List in Seventh Schedule of the Constitution.<sup>56</sup> Therefore, India is under an obligation to comply with the international regulations which it has ratified, such as ‘Universal Declaration of Human Rights (UDHR)’,

<sup>53</sup> Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

<sup>54</sup> INDIA CONST. art. 51, cl. c.

Promotion of international peace and security;- The State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and encourage settlement of international disputes by arbitration.

<sup>55</sup> INDIA CONST. art. 253.

Legislation for giving effect to international agreements;- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

<sup>56</sup> Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

‘International Covenant on Civil and Political Rights (**ICCPR**)’ and ‘Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**)’ and ‘Declaration on the Elimination of Violence Against Women (**DEVAW**).’

**UDHR** and **ICCPR** provide key rights such as;

- Right to dignity.<sup>57</sup>
- Right to life, liberty and security of person.<sup>58</sup>
- Right to ‘equality before the law’ and ‘equal protection of the laws.’<sup>59</sup>
- Right to protection against torture or (cruel, inhuman or degrading) treatment or punishment.<sup>60</sup>

Article 1 of the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** defines discrimination against women as “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, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The exception 2 of Section 375 of IPC impairs the exercise or enjoyment of the human rights and fundamental freedoms of women. The human rights of women such as ‘Right to life, liberty and security of person’ ‘Right to dignity’, ‘Right to equality’ are lapsed by such provision. Hence, it is discriminatory towards women.

**CEDAW** brings the state parties under certain obligations,<sup>61</sup> such as;

- To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.
- To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

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<sup>57</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, art. 1; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966, PREAMBLE.

<sup>58</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, art. 3; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966, art. 6, cl. 1 & art. 9, cl. 1.

<sup>59</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, art. 7; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966, art. 26.

<sup>60</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, art. 5; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966, art. 7.

<sup>61</sup> CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979, art. 2.

- To modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women.

India is under an obligation to promote and preserve the rights of women, enshrined under the **UDHR** and **ICCPR**. Furthermore, India has an obligation under **CEDAW**, to repeal exception 2 of section 375, in order to eliminate the discrimination against women.

In 1993, the United Nations General Assembly adopted the **Declaration on the Elimination of Violence Against Women. (DEVAW)**<sup>62</sup> It establishes 'marital rape' as a human rights violation.<sup>63</sup> Article 4 of this declaration embodies that the "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women."

Therefore, India should condemn sexual violence against married women and preserve their rights. The customs, traditions, or religious considerations can't save any form of violence over women. It's the need of the hour to criminalize marital rape so that the discrimination and violence against the women can be eliminated.

### **VIII. WHY MARITAL RAPE IS NOT CRIMINALIZED IN INDIA:**

Marital rape is still persisting in India, due to the reasons enumerated hereunder;

**(A) ACCORDING TO THE CENTRAL GOVERNMENT 'THE CRIMINALIZATION OF MARITAL RAPE WILL DESTABILIZE THE INSTITUTION OF MARRIAGE':**<sup>64</sup>

The criminalization of marital rape will not destabilize the institution of marriage. Rather, the marital rape per se destroys the marriage because it subjects a wife to immense pain and torture. It makes a wife the chattel of her husband. Such an institution of marriage is only concerned with the happiness of husband, authorizing him to play with the dignity, autonomy and privacy of his wife.

<sup>62</sup> <https://www.stopvaw.org/devaw>.

<sup>63</sup> **DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN**, 1993, art. 2, cl. a.

Violence against women shall be understood to encompass:- Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

<sup>64</sup> Anusha Soni, *Why central government thinks marital rape cannot be criminalized*, INDIA TODAY, (Aug. 29, 2017, 9:23 PM), <https://www.indiatoday.in/fyi/story/marital-rape-delhi-high-court-central-government-clarifies-sexual-abuse-rape-men-vulnerable-1033772-2017-08-29>.



**(B) “AN UNSCRUPULOUS WIFE CAN HARASS HER HUSBAND BY FALSE IMPLICATIONS” –  
STATED BY THE CENTRAL GOVERNMENT:<sup>65</sup>**

The criminalization of marital rape can become a potent weapon in the hands of an unscrupulous wife to harass her husband, in order to get her nefarious designs fulfilled, can't be used as a ground to deny justice to the victims of marital rape. Married women in India have already suffered a lot. It's the time to rise above such a pessimistic mindset and to protect the married women from the atrocities subjected to them via forced sexual intercourse.

Also! Due to the fear of one false case, we cannot allow 10 innocents to suffer.

**(C) THE CENTRAL GOVERNMENT ADVOCATED THAT ‘THE JUDGMENT AS TO WHETHER IT IS  
A MARITAL RAPE OR NOT WILL SINGULARLY REST WITH THE WIFE’:<sup>66</sup>**

“The women will do grave injustice on men if the marital rape is criminalized.” This is the inference of the Central government here, which advocates for the exception 2 of section 375 of IPC.

It is important to quash such a pessimistic attitude and to acknowledge that “if the marital rape is not criminalized, then the women will be denied of their fundamental and human rights, which per se amounts to gross injustice.” When 150 countries of the world can criminalize marital rape, then why not a country like India, having the best constitution, can do so?

**(D) A PATRIARCHAL SOCIETY:**

Patriarchy is a social system in which the father is the head of the household, having authority over women and children.<sup>67</sup> Such a system is rejected by the society in the modern era, but some practices are still associated with patriarchy. ‘Marital rape’ is a practice, which exhibits that a man is the master of his wife. Therefore, it's important to acknowledge marital rape as ‘arbitrary’ and to curtail such practice from society.

**(E) OTHER FACTORS:**

The former Women and Child development minister, Maneka Gandhi stated, “The concept of marital rape, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament etc.”<sup>68</sup>

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Your Dictionary, <https://www.yourdictionary.com/patriarchy>.

<sup>68</sup> Anusha Soni, *Why central government thinks marital rape cannot be criminalized*, INDIA TODAY, (Aug. 29, 2017, 9:23 PM), <https://www.indiatoday.in/fyi/story/marital-rape-delhi-high-court-central-government-clarifies-sexual-abuse-rape-men-vulnerable-1033772-2017-08-29>.

It was very well established by the Hon'ble SC that "Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country."<sup>69</sup> Therefore, the courts should protect the basic rights of a woman, by declaring the practice of marital rape to be in derogation of the Constitution.

It is important to rise above such myths and acknowledge that the women are denied of their basic constitutional rights since the past 70 years. A woman after her marriage shares consortium with her husband by leaving her home, family and society. She starts a new life, where she takes care of her husband, his family and the children. Hence, for this impeccable contribution of a woman, it's important to give her due respect; her husband and his family should acknowledge it. Moreover, the most important role is of the legal system to preserve and protect her rights. Therefore, it's the need of the hour that our legal system should be modified by criminalizing the marital rape, so that, no woman can be deprived of her dignity and liberty.

## **IX. PRESENT LEGAL REMEDIES FOR A WOMAN AGAINST MARITAL RAPE:**

### **(A) PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: ("HEREINAFTER REFERRED AS PWDVA, 2005")**

- The 'sexual abuse' by husband comes within the ambit of domestic violence under section 3(a) of PWDVA, 2005.<sup>70</sup> 'Sexual abuse' includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.<sup>71</sup>

Therefore, marital rape constitutes 'domestic violence' under Section 3 of PWDVA, 2005.

- Remedies under the PWDVA, 2005;

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<sup>69</sup> N. Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106.

<sup>70</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 3, cl. a. Definitions of domestic violence:- For the purpose of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.

<sup>71</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 3, cl. (d)(ii).

- ✓ The various reliefs, which a woman can get under PWDVA, 2005 are protection order<sup>72</sup>, an order for monetary relief<sup>73</sup>, a custody order<sup>74</sup>, a residence order<sup>75</sup>, and a compensation order.<sup>76</sup>

**(B) INDIAN PENAL CODE, 1860:**

- A woman has a right to file a complaint under section 498A of the IPC.
- Section 498A of IPC specifies that ‘if the husband or the relative of the husband of a woman, subjects her to cruelty, then he shall be punished with imprisonment for maximum 3 years along with fine.’

**(C) MARITAL RAPE CONSTITUTES “CRUELTY”, WHICH IS A GROUND FOR DIVORCE UNDER THE HINDU MARRIAGE ACT, 1955.**

- The Allahabad High Court, in, Sanjiv Gupta v. Ritu Gupta,<sup>77</sup> held “forcible sex, unnatural or natural, is an illegal intrusion in the privacy of the wife and amounts to cruelty against her.” Therefore, in the light of this judgment, it can be inferred that marital rape is forcible sex, which, constitutes cruelty against the wife.
- The cruelty is a ground for divorce under section 13(1)(ia) of the Hindu Marriage Act, 1955.<sup>78</sup> Therefore, a woman is entitled to a decree of divorce on the ground of cruelty, if she's subjected to marital rape.

These are some sort of remedies available for a woman. However, the true remedy will be the ‘criminalization of marital rape’, providing a just and equitable punishment for such brutality.

## **X. CONCLUSION:**

*"Every night there are screams but only some changes to smile in the morning whereas the rest in scars and tears, which cannot be acknowledged because the one articulating the scars is the husband."*

According to Sir Mathew Hale, “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife has given up herself in

<sup>72</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 18.

<sup>73</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 20.

<sup>74</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 21.

<sup>75</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 19.

<sup>76</sup> The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005. § 22.

<sup>77</sup> 2019 SCC OnLine All 2255.

<sup>78</sup> The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955. § 13(1) cl. (ia).

Divorce- Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty.

this kind unto her husband, which she cannot retract.” Historically rape was defined as a crime of theft against the man’s property (husband or father), here the woman was considered as a property of man and no one can cause damage to what he owns, therefore, it was believed that a man cannot rape his wife.<sup>79</sup> Well, we are no more in history; this is the 21<sup>st</sup> century where every woman is an equal human being and not someone’s property!

Unfortunately, marital rape is not a criminal offence in India, even in the 21<sup>st</sup> century. The exception of ‘marital rape’ from the ambit of rape is an outdated law which was enacted by the Britishers in 1872. After the enactment of the Constitution of India in 1950, every citizen has certain fundamental rights. Moreover, Article 13(1) of the Constitution provides that “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of part III, shall, to the extent of such inconsistency be, void.” The exception 2 of section 375 of IPC violates Article 14, 15 and 21 of the Constitution. Hence, it is inconsistent with the provisions of part III of the Constitution, thus, it should be declared void.

The marital rape has been a customary practice where a woman is believed to be obliged to her husband for sexual intercourse in order to maintain the 'sacrosanct' marriage, but it's ironic that how can one be subjected to pain for another's pleasure to maintain the holiness of the relationship. Such an ancient custom was developed due to the patriarchal society, prevalent in those times, whereby, the men were considered superior over women and the master of women.

A custom is defined as any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law in any local area, tribe, community, group or family. A custom will be valid, if it is certain and not unreasonable or opposed to public policy.<sup>80</sup> The Hon’ble SC has held that the characteristics of a ‘valid custom’ are that it must be of immemorial existence, it must be reasonable, certain and continuous.<sup>81</sup> The practice of marital rape, which is continued since time immemorial, is not reasonable, certain and it is opposing the public policy. Hence it should be declared ‘unconstitutional’ by the court of law.

Each day the number of marital rape victim shoots up, stimulating the need of the hour 'to set aside the arbitrary exception 2 of section 375 of IPC.' It is just not important to criminalize marital rape, but, also to make sure that women can avail this advantage. This crime has become so common that now it is assumed that it is okay to force the wife for gratifying sexual desire. Hence, it is important that the cases of marital rape should be duly reported, once the

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<sup>79</sup> JONATHAN HERRING, FAMILY LAW: A VERY SHORT INTRODUCTION 35 (1st ed. 2014).

<sup>80</sup> <http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf>.

<sup>81</sup> Shakuntala Bai v. L.V. Kulkarni, AIR 1989 SC 1359.

penalization comes into existence.

We have to understand that the reporting of cases is important to seek justice. Well, for this there is the need for generating awareness, just like in the recent “#Me Too” movement, where the women who kept quiet earlier were seeking justice. After this movement, there is an increase, in the complaints of sexual harassment cases,<sup>82</sup> the similar wave can be expected if the crime of marital rape is acknowledged as well as the awareness is generated that **‘a wife is not obliged for sex.’**

**“A woman is not just a wife; she is a daughter and sister of someone.”** – Marriage gives a precious gift to a man .i.e. ‘a bride,’ who shares consortium with him, provides him love and affection and helps him in daily life. A husband must understand that she is not, just his wife, but also a daughter and sister of someone. Moreover, he must acknowledge that she is equally entitled to *dignity, autonomy and privacy* and most importantly *the respect* from him and his family.

A case of marital rape *per se* establishes that a husband is using his wife like a ‘sex object’. It exhibits that he is offending her fundamental rights and subjecting her to a very torturous life, which is full of pain and miseries.

It’s time to teach a lesson to every sexually perverse man, that a wife is not for gratifying sexual desires and marriage is not a licence to commit forceful sexual intercourse with the wife. This is the world of equality, liberty and dignity, where no injustice will be tolerated against anyone on any grounds.

### **Life of a victim of marital rape**

*“She loved him.*

*They got married.*

*They were happy.*

*One night she denied*

*He raped her.*

*He lived happily ever after.*

*She cried day and night.*

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<sup>82</sup> Chaitanya Mallapur & Anmol Alphonso, *#MeTooIndia: 54% Rise in Sexual Harassment Reported at Workplaces Between 2014-17*, INDIA SPEND, (Oct. 15, 2018), <https://www.indiaspend.com/metooindia-54-rise-in-sexual-harassment-reported-at-workplaces-between-2014-17/>.

*Wanted to squeal her plight,  
Justice, she desired but the legislation was not hired.  
His reign continued without any alter.  
He lived happily ever after.”*

- It's per se sufficient to show the dire need for the penalization of marital rape.

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