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With this thought, we hereby present to you

# **MARITAL RAPE AS AN OFFENCE: ANALYSIS IN THE CONTEXT OF INTERNATIONAL LEGAL INSTRUMENTS**

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## **Abstract:**

Forceful sexual intercourse tantamount to **rape** only. Even if the same is taking place in the context of marital bonding, it will be considered as **rape** only. But there is always a notion that rape can't take place within marital tie as because the parties hereinafter are presumed to have given consent to each other. In reality this is not so. Many-a-times, it has been found that married women have become silent sufferer of forceful sexual relationship by their husband. Due to social stigma, they are either prevented to raise their voice or else to unable to lodge a complaint against such atrocity. Rape is rape even though the same is happening within four cornerstone of a matrimonial house. A woman shall never ever be regarded as a chattel and must be given right to autonomy over their bodies. Mere marriage does not entitle the husband to have control over the body of his legally wedded wife. He must borne in mind that legalization of marriage is equipped with some exceptions as well. Having sexual intercourse against wife's will is not only prevented rather to be dealt with stringent provision.

This present work tried to focus on existing legal provisions and instruments sob in existence to curb the menace of **Marital Rape** globally.

**Keywords:** Rape, Marital tie, Sexual Relationship, Marital Rape, Married Women.

## Introduction: -

Undoubtedly, ‘**marital rape**’ has become a societal problem with having its impact worldwide. A large number of countries have been facing this tremendous issue of **marital rape** since a long and which affects millions or even trillions of women in society. Though some countries have criminalized it, the position of rest of the countries are stagnant and married women belonging to these countries are silent sufferers of this agony. There are many countries wherein **marital rape** still exists as a legal one. **India** is one of those countries wherein the penalization of **marital rape** has yet not been possible. Unlike **India** there are many more countries globally wherein the offence of **marital rape** has been given due emphasize and penal provisions have been set to criminalize this grave offence accordingly. **Poland** was the first country to criminalize **marital rape** in their national domain. As like **Poland**, there are several other countries like **Israel, U.K., U.S.A.** which have their own set of legal norms to curb the old aged taboo of **marital rape** respectively. Apart from these, there are several other international instruments which specifically provides for rights of women and their protection from any kind of sexual violence.

## Status Of Marital Rape in European Countries:-

While dealing with the concept of prevalent status of **marital rape** in **European Countries** one must rely upon the scenario so in existence in **United Kingdom** and in **Poland**.

**Marital Rape & United Kingdom: -** Till 1991, **U.K.** used to be guided by old aged customary rule of the country, that is to say, sexual intercourse between a husband and his wife even without her consent is not “**rape**”. In the words of **Sir Mathew Hale** [ **History of the pleas of the crown by Sir Mathew Hale (1736)**], “the husband of a woman cannot himself be guilty of an actual rape upon his wife on account of the matrimonial consent which she has given, and which she cannot retract.”<sup>1</sup> Reiterating **Sir Hale’s** viewpoint, **John Fredrick Archbold** (1822) stated that “**a husband cannot be guilty of rape upon his wife**”.<sup>2</sup>

In the case of **R v. Clearance**<sup>3</sup>, the court deduced that rape can happen in a marriage when the wife refuses sexual intercourse and the husband uses force or violence against her.

**R v. Clarke**<sup>4</sup>, the court in the instant case, allowed charging the husband with the sections of

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<sup>1</sup> A guide to marital rape- <https://www.noblesolicitors.co/about/a-guide-to-marital-rape.html> [ Last visited on Jan 02, 2022 at 6:45 PM]

<sup>2</sup> *Ibid*

<sup>3</sup> 22 Q.B.D. 57 (1889)

<sup>4</sup> 2 All E.R. 448 (1949)

raping his wife who lived separately from him.

With the pronouncement of landmark judgement in the leading case of **R v. R** the position concerning **marital rape** in **U.K** got a new momentum: -

In the present case the husband pleaded not guilty of attempt to rape on his wife by arguing on the grounds of **Section 1 of Sexual Offences Act, 1976** which stated that the rape of one's own wife is not '**unlawful**'. The court rejected his claim and held him liable for rape.<sup>5</sup>

With the introduction of **Sexual Offences Act, 2003** a new dimension in the context of **marital rape** in **U.K.** has been brought. In the words of **Section 1** of the said Act, the prosecution must prove the following essentials to prosecute an offender under the charge of '**marital rape**': -

- penetration of vagina, anus or mouth occurred,
- the penetration was intentional,
- there was no consent from the side of the complainant to the act of penetration,
- the defendant knew about the fact that the complainant has not given consent for it.<sup>6</sup>

After the criminalization took place, husband has been held guilty for rape in a multiple no of cases. **For instance**, in the case of **R v C**<sup>7</sup>, the defendant argued that he had raped his wife before marital rape was criminalized and thus, he should not be convicted for rape. However, the court dismissed his appeal by stating that '**his marriage certificate did not entitle him to force his unwanted sexual attractions on her**'.

**Status Of Marital Rape in Poland:** - It was **Poland** which for the first time criminalized **marital rape** by early **1932**. In the year **1969** a fruitful change was introduced to the existing criminal code of **Poland**. As a result of which the offence of **rape** was characterized as an offence against freedom of an individual. The said changes also added that married women have equal rights to retain their sexual freedom as that of an unmarried woman. This similar concept was incorporated to the **Criminal Code of 1997** also. In **Poland**, a woman can seek justice against **marital rape** only if the husband has raped her with utmost cruelty or she was made to sleep with someone else by her husband, against her will.<sup>8</sup>

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<sup>5</sup> R v. R (1991) UKHL 12

<sup>6</sup> Sexual Offences Act, 2003, Section 1

<sup>7</sup> (2004) EWCA Crim. 292

<sup>8</sup> *Supra note at 23*

**Marital Rape Law in U.S.A.:** - There was no such concept of **marital rape** in the existing rape laws of **U.S.A.** until early **1970s**. The **Model Penal Code (1962)** of **U.S.A.** contained exemption for marital rape and states that a male who has sexual intercourse with a female not his wife is guilty of rape.<sup>9</sup>

**Oregon v. Rideout**<sup>10</sup>, in this case for the first time a man was charged for **marital rape** while having cohabitation with his wife. The husband was accused of raping his wife. But later on, he was acquitted by the jury trial.

In **People v. Liberta**<sup>11</sup>, the court declared marital rape as unconstitutional.

Similarly, in **Merton v. State**<sup>12</sup>, the marital rape was held unconstitutional.

It was during **1993**, all the **50** states of **U.S.A.** criminalized marital rape.<sup>13</sup> At present in majority states of the **US**, there is no exemption from marital rape but the punishment for the same differs. Some states have less severe penalties and some have monetary fine up to **\$50,000** on being found guilty.<sup>14</sup>

There are still few States wherein certain exceptions have been given to the husband depending upon the circumstances under which sexual intercourse takes place. **For instance:**

- Sexual intercourse is regarded as rape only when domestic violence is present in the states of **Connecticut, Ohio, Maryland, Mississippi, Minnesota, Nevada and Oklahoma.**
- In the State of **Virginia**, court approves the substitution of fine and prison with personal therapy if the victim agrees for the same in the case of **marital rape.**
- In the State like **South Carolina**, the rape of a wife is non-consensual only if there is threat involved by use of some weapon or aggravated force.<sup>15</sup>

It is thus noticeable that even though **United States** took effective measures to criminalize **marital rape**, the law differs from State to State and whether the husband can be held liable or not completely depends upon the law of the State from where he belongs.

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<sup>9</sup> Model Penal Code, 1962

<sup>10</sup> Oregon v. Rideout, Marion County Circuit Court (1978)

<sup>11</sup> 64 NY 2d 152 (1984)

<sup>12</sup> (1986) 500 So. 2d. 1301

<sup>13</sup> Monica Steiner; *Rape- any non-consensual sexual intercourse -between-non-spouses has always been illegal*, <https://www.criminaldefencelawyer.com/marital-rape-laws.html>

<sup>14</sup> *ibid*

<sup>15</sup> *Supra note at 21*

**Canada & Marital Rape Provision: - Canadian** history of **marital rape** exemption traces its root to **England** as because **Canada** didn't gain independence from **England** until **July 1, 1867**. Alike **England**, the **Canadian** history is also firmly rooted in **Lord Hale's** famous statement and the notion that a man was incapable of raping his wife because marriage created an irrevocable implied consent to sexual relations. The **Criminal Code of 1892** defined **rape** as an “act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats, or fear of bodily harm....”.<sup>16</sup> However, the said **Code** didn't mention anything about **marital rape**.

Many-a-years later, in one of the leading cases, the **judicial approach** towards **marital rape** was witnessed:

**King v. Faulkner**<sup>17</sup>, the **trial court** in the instant matter convicted the accused of raping a young girl. On appeal, the **defense** argued that the case should have been withdrawn from the **jury** as because the government had failed to prove that the girl was not married to the accused. The **court of appeal** however rejected this argument because it felt that there was plenty of evidence to show that the young girl was not married to the accused.

In the year **1970**, **Canada** again codified **spousal immunity**. **Section 143** of the **Criminal Code of 1970** provided for the definition of **rape** in following manner:

“a male person commits **rape** when he has sexual intercourse with a female person who is not his wife.”<sup>18</sup> Unfortunately, the **code of 1970** also failed to provide for any suitable remedy for eliminating “**spousal immunity**”.

It was only during **1980** a **feminist movement** gave an impetus to this issue. The said **movement** was mainly perpetrated with an aim to amend existing **rape laws** and also to eliminate **spousal immunity**. To them, **rape laws** embodied the prejudices and fears of the dominant male group. Apart from that the main propaganda of this very **movement** was to curb **marital immunity**. Majority members of the **feminist movement** asserted that the subordination of women as wives to their husband's sexual demands was a perpetuation of sex-role dependency relationships.<sup>19</sup> As a consequence of the above stated **movement**, **Bill C-127** got enacted with an intent to remove **spousal immunity**. In short, the elimination of **marital**

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<sup>16</sup> Theresa Fus, *Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches*, 39 Vanderbilt Law Review 481, 481-516 (2021), <https://scholarship.law.vanderbilt.edu/vjtl/vol39/iss2/5>

<sup>17</sup> 19 C.C.C. 47 (Court of Appeal for British Columbia, 1911)

<sup>18</sup> *Supra Note 16 at p.497*

<sup>19</sup> *Ibid*

**exemption** in **Canada** occurred legislatively to reflect the changes in the view of the society. Despite of all these changes, it is still quite rare for a **husband** to be charged with sexual assault of his wife. **Marital rape** is apparently difficult to research because **victims** are likely to deny or minimize the extent of the abuse and are reluctant to complain about the same.

**Status of Marital Rape In Asian Countries:** - The existing scenario of **marital rape** in **Asian** countries may well be explained under the following heads: -

**Marital Rape Provision in Nepal-** In **Nepal**, the provision concerning **marital rape** is guided by the **Muluki Criminal Code, 2074**. As per, **Section 219(4)** of the said **code**, if a **husband** commits rape upon his **wife**, he shall be liable to punishment with **imprisonment** not exceeding **five years**.<sup>20</sup>

**Marital Rape Provision in Bhutan-** In **Bhutan**, the concept of **marital rape** is explicitly recognised as an offence and thus penalised. **Section 199** of the **Bhutanese Penal Code** defines **marital rape** as a coercive or forceful sexual intercourse within the sphere of marriage. **Section 200** of the said **code** stipulates that a person being guilty of **marital rape** shall be liable to face the punishment of **imprisonment** for a minimum period of **1 year** and a maximum period of **3 years**.<sup>21</sup>

**Sri Lanka & Marital Rape Provision-** In **Sri Lankan** context, **marital rape** is not explicitly criminalised except in the cases the **husband** and the **wife** are judicially separated. As per **Section 363 (a)** of the **Sri Lankan Penal Code**, a man is said to commit rape if he has sexual intercourse with a woman without her consent, even where such woman is his wife, and she is judicially separated from the man.<sup>22</sup>

**Afghanistan's Marital Rape stance-** In **Afghanistan**, the **Law on Elimination of Violence Against Women, 2009** criminalised **sexual assault** against an adult woman by a man and does not exempt **marital rape** or **spousal abuse** from its purview. However, the **Shiite Personal Status Law** explicitly legalises **rape** within the context of **marriage** by providing that it shall be the duty of the wife to submit herself to the husband.<sup>23</sup>

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<sup>20</sup> K.B.Dahal, *Marital Rape Law in Nepal*, MERO ADALAT ( June 25, 2023, 12:00 PM), <https://meroadalat.com/marital-rape-law-in-nepal/>

<sup>21</sup> The Daily Star, *Marital rape and the law*, <https://www.google.com/amp/s/www.thedailystar.net/law-our-rights/news/marital-rape-and-the-law> [ Nov 10,2020, 12:00 AM]

<sup>22</sup> *Ibid*

<sup>23</sup> *Ibid*

**Status of Marital Rape in Middle East Countries:** - Alike any other global region the scenario respecting **marital rape** is more or less similar in **middle east countries** as well. Some of these instances are as following: -

**Saudi Arabia's Marital Rape scenario-** In **Saudi Arabia** the concept of **marital rape** has at no point of time been recognized as a **crime**. In fact, the **Islamic Law** of the land presupposes that it is legal for a husband to have sexual intercourse with his wife even without her consent.<sup>24</sup>

**Iran and Marital Rape provision-** In **Iran**, the offence of **rape** itself is illegal and is subjected to strict penalties including **death penalty**. However, **Article 221 of Iran Penal Code, 2012** considers sex within marriage as consensual and therefore doesn't address **spousal rape** including in cases of forced marriage.<sup>25</sup>

**Position of Marital Rape in Jordan-** The **Penal code of Jordan** stipulates for a minimum **10 years of imprisonment with hard labour** for the commission of **rape** against a girl child or a woman aged **15 years or older**. However, **Article 292(a)(1)** of the said **code** explicitly excludes **marital rape** from the definition of **rape**.<sup>26</sup>

**Israel's Legal Framework on Marital Rape:** - Out of **4** International conventions against women **3** have been ratified by **Israel** in its domestic context. It is pertinent to note that **74** percent of **Israel's** population follow **Judaism** and wherein **marital rape** is forbidden in **Jewish** law.<sup>27</sup>

In the leading case of **Cohen v. The State of Israel**<sup>28</sup>, it was held that "**unlawful sexual intercourse**" includes **marital rape**.

In the year **1991**, a new legislation by the name of **Law for Protection of Family Violence** got enacted. One of the prime concerns of this law was to protect married women from physical or sexual abuse by the spouse or any member of the family.<sup>29</sup>

**Countries Where Marital Rape is not criminalized:** - There are almost **32** countries in the

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<sup>24</sup> Social Laws Today, [https://sociallawstoday.com/marital-rape-in-india-legal-or-illegal/#Saudi\\_Arabia](https://sociallawstoday.com/marital-rape-in-india-legal-or-illegal/#Saudi_Arabia) (Last visited Jun.25, 2023)

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

<sup>27</sup> Anjali Tripathi, 'Marital Rape: - Stripping the sanctity of matrimonial relation. An International Analysis', Sorbonne Student Law Review (June 6, 2021), <https://sorbonnestudentlawreview.org/journal/article/view/96/58>

<sup>28</sup> Criminal Appeal 91/80;35(3) PD (1980)281

<sup>29</sup> *Supra Note 159*

world wherein **marital rape** has not been criminalized yet and most interestingly, majority of them are developing nations. These include the following: -

- **Pakistan**
- **Bangladesh**
- **China**
- **Haiti**
- **Laos**
- **Mali**
- **Myanmar**
- **Senegal**
- **Tajikistan**
- **Afghanistan**
- **Botswana**
- **Democratic Republic of Congo**
- **Iran**
- **Lebanon**
- **Malaysia**
- **Nigeria**
- **Singapore**
- **Uganda**
- **Algeria**
- **Brunei Darussalam**
- **Egypt**

**Interna Conventions:** - “Human Rights” plays a pivotal role in the charter of **United Nations**. In the words of **Article 1(3)** of **U.N. Charter** “**protection** of human rights is one of the purposes of the **U.N.**”<sup>30</sup> Apart from this “**right to dignity**”, “**freedom from discrimination**” etc. have also been placed with great adherence. In the context of ‘**marital rape**’ and protection of rights of women, a plethora of international instruments are present. Some of these are as following: -

**Convention On the Elimination of All Forms of Discrimination Against Women**

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<sup>30</sup> The United Nations Charter, Article 1(3)

(CEDAW): - Since the fundamental of the present study lies on **marital rape** and its non-recognition as an offence in **Indian** context, it is very much necessary to refer the relevant provisions in this regard: -

**Art.3.** Women are primarily equal to men in every aspect of life, and that it is the duty of the States to ensure that women enjoy all the fundamental rights and freedoms.<sup>31</sup>

**Art.5.** By virtue of this article, an obligation has been imposed upon the State to abolish such colonial practices which limits the rights of women and also to take steps to eliminate stereotyping.<sup>32</sup>

**General Recommendation 19 (GR-19):** - Any act which inflict physical, mental or sexual harm upon women deems to fit as discrimination against women. It has further been added on the recommendation that the direct relationship between violence and liberty which elucidates **rape** is harmful to the physical and mental health of a woman, whether the perpetrator is their spouse or not, and thus violates human rights and fundamental freedoms of a woman.<sup>33</sup>

**General Recommendation 35 (GR-35):** - It is an improvement upon **GR-19** of CEDAW. As per this recommendation, **marital rape** is a rape on the basis of lack of freely given consent which takes account of coercive measures.<sup>34</sup>

It has been recommended by the **CEDAW Committee** of **UN** that **India** should broaden the definition of **rape** under **IPC** and to remove **exception 2** of **Section 375** of **IPC** which legalizes **marital rape**.<sup>35</sup>

**The Declaration on Elimination of Violence Against Women (DEVAW), 1993: - Article 2** of the very declaration states for violence against women which includes psychological, sexual and physical violence occurring inside a family and within the general community.<sup>36</sup>

**Article 2(a)** of **DEVAW, 1993** specifically provides for considering **marital rape** as an offence against woman.<sup>37</sup>

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<sup>31</sup> CEDAW, Article 3

<sup>32</sup> CEDAW, Article 5

<sup>33</sup> CEDAW, General Recommendation 19

<sup>34</sup> CEDAW, General Recommendation 35

<sup>35</sup> *Ibid*

<sup>36</sup> DEVAW, Article 2

<sup>37</sup> DEVAW, Article 2(a)

Apart from the above stated **provisions, DEVAW, 1993** also recommend the States to develop their administration in a way to penalize the offenders who causes wrong to any woman and to fix the wrongdoings done to them so that these women can get justice and legal remedies for the harm they have suffered.

**For instance,** States should pursue by all appropriate means a policy of eliminating violence against women and should exercise due diligence to prevent, investigate and punish acts of violence against women whether committed by state or private actors.<sup>38</sup>In terms of **Article 4(d)** States should develop penal sanctions in domestic legislation to punish the wrongs caused to women.<sup>39</sup>

**International Covenant on Civil and Political Rights (ICCPR),1966:** According to **Article 17**, no person should be exposed to arbitrary nosiness on his Privacy, or to illegal attack on his honour and reputation. It further provides for right to protection against such attacks:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”<sup>40</sup>

As per **Article 26** of **ICCPR**, the domestic law of the member state should provide for equal protection of status and dignity to all citizens irrespective of their **status** or **race**. Therefore, the law of the land which creates discriminatory treatment between married and unmarried women concerning **rape** issues is said to be violative of **Article 26** of **ICCPR**:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>41</sup>

**International Covenant on Social, Economic and Political Rights (ICESCR), 1966:** - As per **Article 12** of this **covenant**, all the people irrespective of their sex, age and marital status, have a right to good physical and mental health:

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<sup>38</sup> DEVAW, Article 4(c)

<sup>39</sup> DEVAW, Article 4(d)

<sup>40</sup> ICCPR, Article 17

<sup>41</sup> ICCPR, Article 26

“(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.....”<sup>42</sup>

**Universal Declaration of Human Rights (UDHR), 1948:** - Universal Declaration of Human Rights (UDHR), 1948 holds a prior place in the United Nations Charter. A multiple number of individual rights have been placed under **UDHR, 1948**.

**Art 3** of the declaration states that everyone irrespective of their gender, age, marital status and other criteria has the right to life and liberty<sup>43</sup>:

“Everyone has the right to life, liberty and security of person”

In addition to **Article 3**, there are several other provisions of the said **declaration** which specifies for protection of human rights to all concerned. The most relevant among these are as following:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.<sup>44</sup>

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>45</sup>

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>46</sup>

Having a discussion on the rights provided under **UDHR**, it is noteworthy to state that **marital rape** should not be treated as different to that of **rape** and the victims should be provided with legal remedies so that their ‘**right to life and liberty**’ is not compromised.

**Beijing Declaration and Platform for Action of the Fourth World Conference on Women (1995):** - According to **para 113** of the said declaration, the term “**violence against women**” denote any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life:

“**113.** The term “**violence against women**” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women,

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<sup>42</sup> ICESCR, Article 12

<sup>43</sup> UDHR, Article 3

<sup>44</sup> UDHR, Article 7

<sup>45</sup> UDHR, Article 8

<sup>46</sup> UDHR, Article 12

including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:

- a. 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>47</sup>

**India's Obligation under Human Right Treaties: - India** is a signatory to almost all the international treaties and thus there is an obligation upon the State to ratify the same with due consonance. But in reality, the scenario is something different. By time and again, **Indian judiciary** also tried to incorporate the same view in a large number of cases. Some of these instances are as following: -

**Kesavananda Bharati v. State of Kerala**<sup>48</sup>, The **Apex Court** recognized India's obligation towards international law and opined that international covenants and conventions can help in determining the scope of certain basic rights.

**Sheela Barse v. The Secretary, Children's Aid Society**<sup>49</sup>, In the present case the **Apex Court** recommended that **India's** domestic legislation should incorporate the international obligations when the domestic law is silent on it and the international law is not inconsistent to the domestic law.

**Gita Hariharan and another v. Reserve Bank of India & Another**<sup>50</sup>, The **Supreme Court of India** acknowledged the significance and the need to comply with the international obligations.

**CONCLUSION: - Marital Rape** indeed has been penalized in some developed countries with due effect. But there are still some lacunae regarding the same. By time and again, international treaties, conventions etc. have talked about ratification of the proposals and recommendations so taken place thereunder. But the countries like **India**, is still in drawback to set a suitable legal norm for penalizing **marital rape**. Hence, the married women in **India** are still under darkness and they are not getting any suitable justice in this regard.

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<sup>47</sup> Para 113, Beijing Declaration and Platform for Action, 1995

<sup>48</sup> (1973) 4 SCC 225

<sup>49</sup> (1987) 3 SCC 50

<sup>50</sup> (1999) 2 SCC 228