

## **Sociological Dimensions of Rape within Marriage vis-a-vis a Married Woman's Right to Her Own Person**

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### **Abstract**

Legal thinker, William Blackstone wrote in late 1760's that "by marriage the husband and the wife are one person in law; that is, the very being or legal existence of woman is suspended in marriage". Reflecting upon this principle, a married woman's legal identity would merge with her husband's, where she had to abdicate her right after marriage. The institution of marriage became central to debates about the position of women in the nineteenth century, in which gendered and classed notions of equality restricted women's rights within marriage. This article explores the sociology of marriage and various obligations imposed either by societal values or norms on the husband and the wife. It briefly discusses concepts related to marriage, such as – marital unity and authority, right of chastisement, rights of individuals within marriage and domestic/intimate partner violence. It also deals with the concept of right to equality and a married woman's right to her own person in relation to her marital obligations.

**Keywords:** Rape, Marital Rape, Marriage Obligations, Individual Rights, Domestic Violence, Intimate Partner Violence, Right to Equality.

### **I. Introduction**

PETRUCHIO: "will be master of what is mine own: She is my goods, my chattels; she is my house, My household stuff, my field, my barn, My horse, my ox, my ass, my anything."<sup>3</sup>

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<sup>3</sup> WILLIAM SHAKESPEARE, TAMING OF THE SHREW, Act III Scene II (1590-1592).

It is often seen and heard that men use the tools of violence (physical, mental, sexual so on and so forth) upon women to show, maintain and reinforce their power and authority.<sup>4</sup> Violence, in any form, towards women have become a means of subjection and subordination. One such form of violence is Marital Rape. For most people, forced sex in marriage is not considered as ‘real rape’.<sup>5</sup> Forced marital sex, ‘conjures up an unpleasant, but not particularly serious, marital squabble’<sup>6</sup>, and this attitude towards the issue of marital rape is originated from the ‘social understanding that women were the property of men, first of their fathers and then of their husbands’<sup>7</sup>. Legal thinker, William Blackstone wrote in late 1760’s that “by marriage the husband and the wife are one person in law; that is, the very being or legal existence of woman is suspended in marriage”<sup>8</sup>. Reflecting this principle, a married woman’s legal identity would merge with her husband’s, where she had to abdicate her right to file charges against her husband and it became impossible to accuse her husband of rape. The institution of marriage became central to debates about the position of women in the nineteenth century, in which gendered and classed notions of equality restricted women’s rights within marriage.<sup>9</sup> This article explores the sociology of marriage and various obligations imposed either by societal values or norms on the husband and the wife. It briefly discusses concepts related to marriage, such as – marital unity and authority, right of chastisement, rights of individuals within marriage and domestic/intimate partner violence. It also deals with the concept of right to equality and a married woman’s right to her own person in relation to her marital obligations.

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<sup>4</sup>UN Women, *Research and Data: Ending Violence Against Women*, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/research-and-data> (last visited June 17, 2022).

<sup>5</sup> DAVID FINKELHOR, KERSTI YLLO, *LICENSE TO RAPE* 13 (Free Press 1987).

<sup>6</sup> *Id* at 13.

<sup>7</sup> DIANA E.H. RUSSEL, *RAPE IN MARRIAGE* 227 (Macmillan Publishing Co. Inc. 1982)

<sup>8</sup> RAQUEL K. BERGEN, *WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS* 3 (Sage Pub. Inc. 1996). See, 1 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 442 (1753) <https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1> (last visited May 7, 2019).

<sup>9</sup> SHELLEY RICHARDSON, *FAMILY EXPERIMENTS* 177 (ANU Press, 2016).

## II. Sociology of Marriage: Obligations Imposed by the Societal Values and Norms on Husband and Wife

Abraham H. Maslow suggested in the ‘hierarchy of needs’<sup>10</sup>, that the biological or physiological needs was the first basic need for the humans to satisfy, before they go on to the second set of needs. In this hierarchy of needs apart from food, clothing, shelter and good health, sex is one of the important physiological needs that a person needs to fulfill in order to satisfy his other needs.<sup>11</sup> But, then the question is, does a person need to enter into an institution of marriage in order to enjoy or satisfy his/her sexual desire? Or, a person, in order to satisfy his basic need for sex can enter into sexual activity with anybody, irrespective of their consent to the act? As we know, humans are social animals where each one of us believe in the philosophy of society and rule of law. As a group we have agreed to live within the ambit of such social norms. One norm being ‘marriage’, Maslow, in his theory states that marriage is one of the social/love needs (third hierarchy of needs)<sup>12</sup> which becomes the motivating factor in a person’s life and which may have given birth to the ‘concept of marriage’. This particular need is not just social but part psychological, as stated by Maslow, “We are motivated by the desire to achieve or maintain the various conditions upon which these basic satisfactions rests”.<sup>13</sup>

Marriage is a common practice in almost all the cultures, religions and communities in the world. While there is much variation between different groups with regard to customs and beliefs regarding marriage, the institution of marriage itself is common to all.<sup>14</sup> The essential feature about marriage is that it is a stable relationship in which a man and a woman are socially permitted,

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<sup>10</sup> Abraham Maslow’s hierarchy of needs is one of the best-known theories of motivation. Maslow’s theory states that our actions are motivated by certain physiological and psychological needs that progress from basic to complex. See, Kendra Cherry, *Maslow’s Hierarchy of Needs*, <https://www.verywellmind.com/what-is-maslows-hierarchy-of-needs-4136760> (last visited June 11, 2022).

<sup>11</sup>A.H.Maslow, *A Theory of Human Motivation*, 50 PSY. REV. 370-396 (1943), <http://psychclassics.yorku.ca/Maslow/motivation.htm>, (last visited June 11, 2022).

<sup>12</sup>A.H.Maslow, *A Theory of Human Motivation*, 50 PSY. REV. 370 - 396 (1943), <http://psychclassics.yorku.ca/Maslow/motivation.htm>, (last visited June 11, 2022).

<sup>13</sup> *Id* at 370.

<sup>14</sup> M.N. SRINIVAS, INDIA: SOCIAL STRUCTURE 47 ( HPC 1969).

without loss of standing in the community, to have children.<sup>15</sup> The institution of marriage has its roots in the ancient histories of almost all cultures and societies. “It is a socially supported union involving two or more individuals in what is regarded as a stable, enduring arrangement based at least in part on a sexual bond of some kind.”<sup>16</sup> The social significance of marriage is respected and recognized by every legal or non-legal entity. According to Robert H. Lowie, “marriage denotes those unequivocally sanctioned unions which persist beyond sexual satisfaction and come to underline family.”<sup>17</sup> Another observation made by Earl Koos on marriage is that “marriage is a dividing line between the family of orientation and family of procreation. These individual roles are different in these two forms of family..... All these roles are associated with a number of duties and obligations.”<sup>18</sup> Marriage is also defined as “a set of rules and regulations, which specify the rights, duties and privileges of the husband and wife with regard to each other.”<sup>19</sup> Depending on the social structure that the man and woman belongs to, marriage may require religious, social and/or civil sanction, although some couples may come to be considered married simply by living together for a period of time (common law marriage and under traditional/customary laws of indigenous people). Having said that, marriage is present as a social institution in all cultures. This is done throughout the world to an extent that every person has a human and legal right to marry. As stated by Harry Johnson, “No society leaves marriage unregulated..... there are always norms concerning what persons, under what conditions, and in what manner may establish a marriage relationship..... The total pattern of these norms for a particular society is the institution of marriage.”<sup>20</sup>

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<sup>15</sup> HARRY M. JOHNSON, *SOCIOLOGY: A SYSTEMATIC INTRODUCTION* 146 (Allied Pub. Pvt. Ltd. 2011).

<sup>16</sup> Ashley Crossman, *The Definition of Marriage in Sociology*, <https://www.thoughtco.com/marriage-3026396> (last visited June 13, 2022).

<sup>17</sup> AJOY KUMAR SINGH, *KINSHIP, MARRIAGE AND FAMILY 1* (Certrum Press 2015).

<sup>18</sup> Yet Concepcion, *Sociology of Marriage and Kinship : Conceptual and Theoretical Framework Sociology of Marriage and Kinship: Conceptual and theoretical framework*, file:///Users/arpitasingh/Downloads/Sociology\_of\_Marriage\_and\_Kinship\_Concep.pdf.

<sup>19</sup> GEORGE A. LUNDBERG, ET.AL., *SOCIOLOGY* 63-67 (3rd ed. 1953).

<sup>20</sup> HARRY M. JOHNSON, *SOCIOLOGY: A SYSTEMATIC INTRODUCTION* 149 (Allied Pub. Pvt. Ltd. 2011).

Today, marriage is viewed as an institution, with legal and social recognition, in which the husband and wife ‘mould their marriages to suit their purposes and identities’<sup>21</sup>. Even though the institution of marriage remains the same but the definition of marriage keeps evolving with time. This brings us to the question – How was marriage defined in the nineteenth century? Marriage in 1840’s meant that a man and women had become husband and wife, which means that the individual identities of women and men would be changed permanently.<sup>22</sup> Marriage today, is a legal understanding between a wife and her husband as two individuals who have contracted to live together, as a result of which they jointly acquire legal and social privileges along with duties and responsibilities.<sup>23</sup> John Stuart Mill’s passage on ideal marriage truly describes the essence of what marriage should be, an institution where both husband and wife are equals in every form.

“What marriage may be in the case of two persons of cultivated faculties, identical in opinions and purposes, between whom there exists that best kind of equality, similarity of powers and capacities with reciprocal superiority in them — so that each can enjoy the luxury of looking up to the other, and can have alternately the pleasure of leading and of being led in the path of development — I will not attempt to describe ... this only, is the ideal of marriage.”<sup>24</sup>

Mill’s definition of ideal marriage is far from the reality of marriage. In fact, it was Mill, who once said that the average marriage is a form of enslavement of women, sexual and otherwise.<sup>25</sup> J.S. Mill’s acknowledgement that during his time, marriage was the only actual bondage known to the law and that, “the law

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<sup>21</sup> Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 TGLJ 95, 96 (1991), <https://core.ac.uk/download/pdf/70374744.pdf> .

<sup>22</sup> *Id.* at 97.

<sup>23</sup> Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 TGLJ 95, 97 (1991), <https://core.ac.uk/download/pdf/70374744.pdf> .

<sup>24</sup> JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 121 (1st Kindle ed. 2011).

<sup>25</sup> SHELLEY RICHARDSON, *FAMILY EXPERIMENTS* 213 (ANU Press, 2016).

of servitude in marriage was a monstrous contradiction to all the principles of the modern world”<sup>26</sup>.

However, in the domain of marriage, as rightly pointed out, “law and social norms have been intricately interwoven to form a complex scheme of social regulation”<sup>27</sup>. Marriage under traditional law emphasized and imposed both gender norms and commitment norms. Husband and wives performed hierarchical and differentiated roles dictated by gender norms, while commitment norms defined marriage as a relationship of lifelong obligation.<sup>28</sup> During the 1960s, in America, the social and legal norms in traditional marriages, underwent a revolutionary change.<sup>29</sup> Laws prohibiting discrimination against women in employment, education and other public policies, dismantled the hierarchical and differentiated gender roles in marriage.<sup>30</sup>

In England, under early English law, the theory of a wife’s criminal liability was based on the presumption that the wife is acting under the control of her husband.<sup>31</sup> In fact, Matthew Bacon, in one of his works<sup>32</sup>, fairly sums up the early English law on ‘marital authority’, stating that

“law allows authority to be placed in the husband as the fittest to provide for and govern the family. Consequently, the husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty and may beat her, but not in a violent or cruel manner.”<sup>33</sup>

Ancient English law allowed a husband to have control over his wife’s person, where he would indulge in beating his wife as he did his servants.<sup>34</sup> In the

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<sup>26</sup> JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 101-102 (1st Kindle ed. 2011).

<sup>27</sup> Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VLR 1901, 1904 (2000).

<sup>28</sup> *Id* at 1904.

<sup>29</sup> Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VLR 1901, 1939 (2000).

<sup>30</sup> *Id* at 1939.

<sup>31</sup> Edward Manson, *Marital Authority*, 7 LQR 244, 245 (1891).

<sup>32</sup> MATTHEW BACON, *NEW ABRIDGMENT OF THE LAW* 691 (7th ed. 1831).

<sup>33</sup> Edward Manson, *Marital Authority*, 7 LQR 244, 245 (1891).

<sup>34</sup> *Id.* at 247.

nineteenth century, a husband had limited prerogative to chastise his wife.<sup>35</sup> In Blackstone's treatise on the English common law, it was explained that a husband could 'give his wife moderate correction'<sup>36</sup>. A husband could subject his wife to corporal punishment or chastisement if she was disobedient and defied his authority. As stated by Gilbert Beckett,

"By the old law, a husband might give his wife moderate correction... but it is declared in black and white that he may not beat her black and blue, though the civil law allowed any man on whom a woman had bestowed her hand, to bestow his fists upon her at his own discretion. The common people, who are much attached to the common law, still exert the privilege of beating their wives..."<sup>37</sup>

Romulus of Rome was the person behind the first known 'law of marriage'<sup>38</sup> which required married women as having no other refuge, to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions.<sup>39</sup> Even today, men (husbands) in violent relationship share almost the same sentiments as the above discussed ancient norm. In 1400's, Friar Cherubino of Siena, authored the 'Rules of Marriage', that established the process by which a husband was to rule his wife, stating that,

"when you see your wife commit an offense, don't rush at her with insults and violent blows...Scold her sharply, bully and terrify her. And if this still doesn't work...take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body...then readily beat her, not in rage but out of charity and concern for

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<sup>35</sup> Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2117, 2122 (1995-1996).

<sup>36</sup> SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (1753) <https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1>, (last visited May 7, 2019).

<sup>37</sup> GILBERT ABBOTT A BECKETT, THE COMIC BLACKSTONE 81 (Bradbury, Evans & Co. 1866).

<sup>38</sup> ANGELA BROWNE, WHEN BATTERED WOMEN KILL 164 (Free Press, 1987).

<sup>39</sup> *Id* at 164.

her soul, so that the beating will rebound to your merit and her good.”<sup>40</sup>

The right to chastisement gained its authority from the ‘doctrine of marital unity’<sup>41</sup> which meant that,

“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything....”<sup>42</sup>

Before the intervention of equity within the institution of marriage, the prime notion which governed the law of husband and wife, was not that of a ‘unity of person’, but that of the guardianship, which the husband has over the wife and over her property.<sup>43</sup> It was only after the doctrine of equity, which later evolved into statutory law (law of contract and law of property) that a woman in marriage retained a legal personality distinct from that of her husband.<sup>44</sup>

Whereas, in America it was Tapping Reeve, who authored the first family law treatise in 1816, where he wrote about the doubts he had relating to the concept of husband’s authority over his wife.<sup>45</sup> He said that it would be difficult to exactly ascertain as to what power the husband has over the person of his wife.<sup>46</sup> In fact he was of the opinion that, the law does not view the husband and wife as one

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<sup>40</sup> *Id.*

<sup>41</sup> SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (1753) <https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1>, (last visited May 7, 2019).

<sup>42</sup> *Id.* at 444.

<sup>43</sup> Glanville L. Williams, *The Legal Unity of Husband and Wife*, 10 MLR 16, 18 (1947), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-2230.1947.tb00034.x> (last visited June 19, 2022).

<sup>44</sup> *Id.* at 19.

<sup>45</sup> Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2117, 2124 (1995-1996).

<sup>46</sup> TAPPING REEVE, THE LAW OF BARON AND FEMME; OF PARENT AND CHILD; OF GUARDIAN AND WARD; OF MASTER AND SERVANT; AND OF THE POWERS OF THE COURT OF CHANCERY 84 (New Haven, Oliver Steele, 1816).

person.<sup>47</sup> During the antebellum<sup>48</sup> era, America witnessed the ‘temperance movement’<sup>49</sup>, it was this movement that first initiated public conversation about wife beating.<sup>50</sup> America’s first convention on ‘woman’s rights movement’<sup>51</sup> was held in 1848, where the common law doctrines of marital status were denounced in a formal ‘Declaration of Sentiments’<sup>52</sup>. Woman’s rights advocates attacked husband’s authority over his wife by protesting against chastisement and the hierarchical structure of marriage.<sup>53</sup> The 1848 Declaration of Sentiments identified chastisement as part of a political system of male dominance.<sup>54</sup>

Formal repudiation of the right of chastisement came about with the 1871 case, in Alabama. In this case<sup>55</sup>, the court held that the ancient right of chastisement

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<sup>47</sup> *Id.* at 89.

<sup>48</sup> The antebellum period (1832-1860) is defined as the time between the formation of the U.S. government and the outbreak of the American Civil War, <https://wams.nyhistory.org/a-nation-divided/antebellum/> (last visited June 19, 2022).

<sup>49</sup> Temperance movement was the movement dedicated to promoting moderation and, more often, complete abstinence in the use of intoxicating liquor, <https://www.britannica.com/topic/temperance-movement> (last visited June 19, 2022).

<sup>50</sup> Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2117, 2127 (1995-1996).

<sup>51</sup> On July 1848 more than three hundred people assembled in Seneca Falls, New York, for the nation’s first women’s rights convention. At this meeting, Elizabeth Cady Stanton read her now-famous ‘Declaration of Sentiments’ protesting women’s inferior legal status and listing eleven resolutions for the moral, economic, and political equality of women, the most radical of which demanded “the elective franchise” (Library of Congress), <https://www.loc.gov/exhibitions/women-fight-for-the-vote/about-this-exhibition/seneca-falls-and-building-a-movement-1776-1890/seneca-falls-and-the-start-of-annual-conventions/declaration-of-sentiments/> (last visited June 19, 2022).

<sup>52</sup> ELIZABETH CADY STANTON, DECLARATION OF SENTIMENTS, REPORT OF THE WOMAN’S RIGHTS CONVENTION (John Dick, Rochester, 1848), <https://www.loc.gov/exhibitions/women-fight-for-the-vote/about-this-exhibition/seneca-falls-and-building-a-movement-1776-1890/seneca-falls-and-the-start-of-annual-conventions/declaration-of-sentiments/> (last visited June 19, 2022).

<sup>53</sup> Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2117, 2128 (1995-1996).

<sup>54</sup> *Report of the Woman’s Rights Convention (Seneca Falls Convention Report)* 8 (1848), <https://nyheritage.contentdm.oclc.org/digital/collection/p16694coll96/id/58> (last visited June 19, 2022).

<sup>55</sup> *Fulgham v. The State Ala.*(1871).

was barbaric and not appropriate for American society.<sup>56</sup> Observation made in this case was that,

“The husband is not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband’s slave and the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the state, and is entitled, in person and in property, to the fullest protection of its laws.”<sup>57</sup>

Similarly, in the same year there was another case<sup>58</sup> in which Massachusetts Supreme Court rejected a husband’s prerogative to chastise his wife. The court affirmed, announcing that “beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent.”<sup>59</sup>

In the first few decades of the twentieth century, the family courts began to analyze the violent behaviour of the husbands from the sociological and psychological perspective, to such an extent that wife beaters were not punished for their violent acts.<sup>60</sup> As historian Elizabeth Pleck mentioned in her book that,

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<sup>56</sup> Fulgham v. The State Ala.(1871) cited in Joseph M. Quinn , *Wife Beating or Chastisement?: An Approach to Generating New Theoretical Concepts for Understanding the Changing Frames and Discourses of Domestic Violence* (Unpublished M.A. dissertation, The University of North Carolina, 13(2007) <https://libres.uncg.edu/ir/uncg/f/umi-uncg-1438.pdf> (last visited on June 21, 2022).

<sup>57</sup> *Id* at 3.

<sup>58</sup> Commonwealth v. McAfee, 108 Mass. 458 (1871).

<sup>59</sup> Commonwealth v. McAfee, 108 Mass. 458, 461 (1871) cited in Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2117, 2131 (1995-1996).

<sup>60</sup> Sarah Elizabeth Bradford Petty, *From Marital Chastisement to Intimate Partner Violence: Revising the Story of Domestic Violence in the United States* (Unpublished Senior Projects Spring, Bard College) 17(2017),[https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1057&context=enproj\\_s2017](https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1057&context=enproj_s2017) (last visited June 21, 2022).

the basic goal of the courts was to preserve the family, act in the best interests of the child, and offer a curative rather than punitive approach to family problems.<sup>61</sup> Wife beating became a concern because it disturbed ‘domestic harmony within the institution of the family’<sup>62</sup>, not because such behaviour of a violent husband was unacceptable by the society at large. The demise of the common law doctrine, in America, did seem to signal an important shift in conceptions of marriage.<sup>63</sup>

In India, the rules governing marriage were observed by everyone, everywhere, while it is likely that the degree of observance varied from one section of the society to another and from one part of India to another.<sup>64</sup> Vedic society was one which valued marriage very highly, during this period the institution of marriage was strongly planted.<sup>65</sup> In ancient India, husband and wife were not two separate entities capable of division, but two halves constituting an entire, single organic whole.<sup>66</sup> Marriage was regarded as a sacrament and family was a social and political unit.<sup>67</sup> As mentioned in Rig Veda<sup>68</sup>, marriage was an established

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<sup>61</sup> ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO PRESENT, 120 (Oxford University Press, 1987).

<sup>62</sup> Sarah Elizabeth Bradford Petty, *From Marital Chastisement to Intimate Partner Violence: Revising the Story of Domestic Violence in the United States* (Unpublished Senior Projects Spring, Bard College) 17(2017), [https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1057&context=senproj\\_s2017](https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1057&context=senproj_s2017) (last visited June 21, 2022).

<sup>63</sup> Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2117, 2142 (1995-1996)

<sup>64</sup> M.N. SRINIVAS, INDIA: SOCIAL STRUCTURE 47 (HPC 1969).

<sup>65</sup> T.S. Rukmani, *Rethinking Gender: Based On Sanskrit Texts*, [https://www.academia.edu/14872051/Empowerment\\_of\\_Women\\_Based\\_on\\_Sanskrit\\_Texts](https://www.academia.edu/14872051/Empowerment_of_Women_Based_on_Sanskrit_Texts) (last visited June 8, 2022).

<sup>66</sup> ITHIHAS - KALEIDOSCOPE OF INDIAN CIVILIZATION, *Institution of Marriage in Ancient India*, <https://ithihas.wordpress.com/2016/10/26/institution-of-marriage-in-ancient-india/> (last visited June 8, 2022).

<sup>67</sup> *Id.*

<sup>68</sup> The Rig Veda is the earliest of the four Vedas and one of the most important texts of the Hindu tradition. The Rig Veda consists of 1028 hymns, organised into ten books known as maṇḍalas. The philological and linguistic evidence indicates that the Rig Veda is one of the oldest existing texts that probably originated between 1500 and 1200 BCE.

institution in the Vedic age, in which a wife and husband shared equal rights and duties within marriage.<sup>69</sup> The term ‘*Kanyadaan*’ or the concept of the father gifting away his daughter does not appear in Rig Veda, which shows that a woman in that era was treated with much dignity, honor and love.<sup>70</sup> Evidence shows that the famous ‘marriage hymn’ in Rigveda, calls upon members of the husband’s family to treat the daughter in law (wife) as the queen.<sup>71</sup> In fact, the concept of equality within the marriage is very well stated in Rig Veda, “the home has, verily, its foundation in the wife.....the wife and husband, being the equal halves of one substance, are equal in every respect; therefore both should join and take equal parts in all work, religious and secular.”<sup>72</sup> The status of married women in Vedic India was based on liberty, equality and cooperation.<sup>73</sup> Somehow, post-Vedic period onwards, women in general suffered setback when various restrictions were put on woman’s rights and privileges. As mentioned in *Manusmriti*<sup>74</sup> a woman should never be independent, “as a daughter, she is under surveillance of her father; as a wife, of her husband; and as a widow of her son.”<sup>75</sup>

The social significance of marriage, not just in India but in most societies, serves to socially identify children by defining kinship ties to a mother, father, and extended relatives.<sup>76</sup> It also serves to regulate sexual behavior, to transfer, preserve, or consolidate property, prestige, and power, and most importantly, it

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BRITISH LIBRARY, <https://www.bl.uk/collection-items/rig-veda> (last visited June 8, 2022).

<sup>69</sup> Sreenivas Rao, *Rig Veda - Position of Women*, <https://sreenivasaraos.com/2012/09/04/rig-veda-position-of-women-22/>, (visited on June 8, 2022). See, RGVEDA SAMITHA 10.85.26-27, <https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc839487.html> (last visited June 8, 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* See, RGVEDA SAMITHA 10.85.46.

<sup>72</sup> *Id.* See, RIGVEDA SAMITHA 5,61.8.

<sup>73</sup> MAMTA RAO, LAW RELATING TO WOMEN AND CHILDREN, 27 (3rd ed. 2012).

<sup>74</sup> Manusmriti, also called Manava-dharma-shastra (The Dharma Text of Manu), traditionally the most authoritative of the books of the Hindu code and first ancient legal text in India. It is attributed to the legendary first man and lawgiver Manu, <https://www.britannica.com/topic/Manu-smriti> (last visited June 8, 2022).

<sup>75</sup> MAMTA RAO, LAW RELATING TO WOMEN AND CHILDREN, 28 (3rd ed. 2012).

<sup>76</sup> Ashley Crossman, *The Definition of Marriage in Sociology*, <https://www.thoughtco.com/marriage-3026396> (last visited June 9, 2022).

is the basis for the institution of the family.<sup>77</sup> Marriage is based on mutual rights and obligations among the spouses, which also makes it a social and legal contract between two individuals. A marriage, is more than a relationship between two people, it is codified as a social institution in legal, economic, social and spiritual/religious ways.<sup>78</sup> There are sociological theories which elaborates the discussion on marriage; individuals involved as partners in the marriage and its social significance.

The first theory is the Structural-Functional theory where the functionalists uphold the notion that families are an important social institutional factor which plays a key role in stabilizing society and holding it together.<sup>79</sup> This theory focuses on the consequences of marriage for the operation of society. Functionalists argue that marriage is good for society and the individual couple, it provides social benefits, and an environment in which love and commitment can be freely expressed.<sup>80</sup> The theorists look at the most significant functions that hold a marriage together and make it work. Durkheim<sup>81</sup> was one of the main proponents of this theory, for him, the ‘union of two spouses’ was “an intimate association, one that is lasting, often even indissoluble, between two lives throughout their whole existence.”<sup>82</sup> Marriage creates sexual relations between individuals which gives way to reproduction that forms a necessary part of ensuring the survival of the society. Structural-functionalists study marriage from a macro or broad perspective where the focus is not on the less common functions

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> MARRIAGE AND FAMILY, *Theoretical Perspectives on Marriage and Family*, <https://courses.lumenlearning.com/alamo-sociology/chapter/reading-theoretical-perspectives-on-marriage-and-family/> (last visited June 9, 2022).

<sup>80</sup> LINDA L. LINDSAY, *GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE* 224-225 (Routledge, 2016).

<sup>81</sup> David Emile Durkheim was a famous French philosopher and sociologist known as the father of the French school of sociology for his methodology combining empirical research with sociological theory.

<sup>82</sup> Ari Ezra Waldman, *Marriage Rights and the Good Life: A Sociological Theory of Marriage and Constitutional Law*, 64 *HLJ* 739, 757 (2013), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1204&context=hastings\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1204&context=hastings_law_journal) (last visited June 9, 2022).

that affect some marriages, but on the most important functions that affect nearly every marriage.<sup>83</sup>

The Social-Conflict theory studies the differences in people, and the disputes and problems that are caused by such differences. The theorists<sup>84</sup> are of the opinion that conflict can exist between individuals within the institution of family.<sup>85</sup> Conflict theory studies 'conflicts as simple as the enforcement of rules from parent to child, or they may examine more serious issues such as domestic violence (spousal and child), sexual assault, marital rape, and incest.'<sup>86</sup> According to this theory, the patriarchal and patrilineal systems prevalent in the society, furthers concentration of wealth in the hands of males, which promotes female subservience, neglect, and poverty.<sup>87</sup> The question which comes to mind is whether marriage benefits women and men equally? On an application of the social-conflict theory it is viewed that men were/are considered superior to women which was brought out in the study<sup>88</sup> of 'marital power'. It was found

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<sup>83</sup> Yet Concepcion, *Sociology of Marriage and Kinship: Conceptual and Theoretical Framework Sociology of Marriage and Kinship: Conceptual and theoretical framework*, file:///Users/arpitasingh/Downloads/Sociology\_of\_Marriage\_and\_Kinship\_Concep.pdf.

<sup>84</sup> German Philosopher, Karl Marx developed conflict theory, whereas, 'Modern Conflict Theory' is associated with C.Wright Mills and Lewis Coser. The modern conflict theorists have expanded the work of Marx and taken it beyond social class. They opine that conflict can exist between various groups: between men and women, between families, between races etc.

<sup>85</sup> Yet Concepcion, *Sociology of Marriage and Kinship : Conceptual and Theoretical Framework Sociology of Marriage and Kinship: Conceptual and theoretical framework*, file:///Users/arpitasingh/Downloads/Sociology\_of\_Marriage\_and\_Kinship\_Concep.pdf.

<sup>86</sup> MARRIAGE AND FAMILY, *Theoretical Perspectives on Marriage and Family*, <https://courses.lumenlearning.com/alamo-sociology/chapter/reading-theoretical-perspectives-on-marriage-and-family/> (last visited June 9, 2022).

<sup>87</sup> LINDA L. LINDSAY, *GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE* 226 (Routledge, 2016).

<sup>88</sup> One of the earliest studies examining the distribution of power within marriage was conducted by Robert Blood and Donald Wolfe in *Husbands and Wives: The Dynamics of Married Living* (1960). In this study over 900 wives were interviewed about the character of their marriage. More specifically, about who made decisions within the marriage, arguing that decision making was a clear indicator of the exercise of power and authority within any relationship. In the result of their findings, the researcher concluded that decision making, and thus power, within marriage was based on the level of social and economic resource that each spouse brought to the marriage. Thus, the greater

that the spouse with most access to value resources held the most power.<sup>89</sup> As in the case where a husband brings home the money and provides financial stability is more powerful than a housewife. In general, conflict theorists tend to study areas of marriage and life that involve inequalities or discrepancies in power and authority, as they are reflective of the larger social structure.<sup>90</sup>

The next theory is the Symbolic-Interaction theory, this theory stresses on the exchange of symbols between individuals in social interaction.<sup>91</sup> The prominent sociologists associated with this approach are Max Weber, Herbert Mead, Erving Goffman, George Homans and Peter Blau.<sup>92</sup> It looks at a situation from the perspective of individuals, their thoughts and their method of communication with the society they live in. Symbolic interactionists specifically focus on a couple's contribution to the family in which the role of the husband and the wife becomes traditionally gendered, such as housework, even when they desire egalitarian marriages.<sup>93</sup> The question that fits this theory is, what meaning does marriage hold for the people living in the society? This theory views the world in terms of symbol and the meanings assigned to them. Sociologist influenced by this theory often focus on direct interactions in the context of everyday life, and how these interactions play a major role in creating societies and institutions.<sup>94</sup> This theory is dedicated in finding out how differences in society make people think or act differently in any given situation. Within the family, the work of a

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the differential in, a spouse's earnings, education and status, the greater power that spouse would have to make decisions over different aspects of family life. *See*, ROBERT O. BLOOD AND DONALD M. WOLFE, *HUSBANDS & WIVES: THE DYNAMICS OF MARRIED LIVING*, (Praeger Publishers Inc., New Ed. 1972).

<sup>89</sup> LINDA L. LINDSAY, *GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE* 226 (Routledge, 2016).

<sup>90</sup> MARRIAGE AND FAMILY, *Theoretical Perspectives on Marriage and Family*, <https://courses.lumenlearning.com/alamo-sociology/chapter/reading-theoretical-perspectives-on-marriage-and-family/> (last visited June 9, 2022).

<sup>91</sup> ANTHONY GIDDENS, *SOCIOLOGY* 26 (5th ed. 2006).

<sup>92</sup> Yet Concepcion, *Sociology of Marriage and Kinship : Conceptual and Theoretical Framework Sociology of Marriage and Kinship: Conceptual and theoretical framework*, [file:///Users/arpitasingh/Downloads/Sociology\\_of\\_Marriage\\_and\\_Kinship\\_Concep.pdf](file:///Users/arpitasingh/Downloads/Sociology_of_Marriage_and_Kinship_Concep.pdf).

<sup>93</sup> LINDA L. LINDSAY, *GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE* 227 (Routledge, 2016).

<sup>94</sup> ANTHONY GIDDENS, *SOCIOLOGY* 23 (5th ed. 2006).

husband and wife is mostly defined, having said that, the roles of the couple may change over time on the basis of what the couple wants rather than what they currently have.<sup>95</sup>

Another theory which is based on the premise that individuals seek to maximize their rewards and minimize their costs through their interaction with others, is the Social-Exchange theory.<sup>96</sup> The concept of separation among husband and wife or divorce is a good example that is based on this theory. This theory puts forward the notion that a husband and wife, weighs the reward associated with their marriage, which might lead to divorce in case they feel that they are at a loss due to marriage.<sup>97</sup> At the same time, some couples continue to stay in an unhappy marriage because they think that staying together becomes a better option than staying alone. There are cases where partners choose to tolerate the problems than to discuss them, even when they are unhappy, because they fear that confronting each other with the problem will create more difficulties.<sup>98</sup>

An alternative form of marriage, which is overtaking the traditional form of marriage, is the 'egalitarian marriage'<sup>99</sup>. These marriages are egalitarian in both structure and function, endorsing gender equality in families. Examples of such marriages are found in the Scandinavian countries, specifically Norway and Sweden, that consistently rank highest in all measures of human development, including gender role egalitarianism and policies designed to translate it to the family instead of ranking husband over wife, egalitarian marriage presumes a

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<sup>95</sup> LINDA L. LINDSAY, *GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE* 227 (Routledge, 2016).

<sup>96</sup> Yet Concepcion, *Sociology of Marriage and Kinship: Conceptual and Theoretical Framework*, file:///Users/arpitasingh/Downloads/Sociology\_of\_Marriage\_and\_Kinship\_Concep.pdf.

<sup>97</sup> *Id.* at 49.

<sup>98</sup> NIJOLE V. BENOKRAITIS, *MARRIAGES AND FAMILIES: CHANGES, CHOICES AND CONSTRAINTS* 105, 106 (Pearson Education Ltd. 2011).

<sup>99</sup> Sabino Kornrich et al., *Egalitarianism, Housework, and Sexual Frequency in Marriage*, 78 ASR 26, 50 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4273893/> (last visited June 11, 2022).

partnership pattern.<sup>100</sup> These marriages are based on ‘partnership’ rather than gender role beliefs about a husband’s dominance and a wife’s acceptance of it.

Each theory plays its part in understanding the society we live in. It lets us understand an institution of marriage and individuals involved in it from different perspectives, as propounded by various theories. The sociological significance of marriage is that it is an institution based on mutual rights and obligations, imposed on husbands and wives, by societal values and norms. These factors may also serve as a basis for the non-criminalization of the act of rape within marriage. Should gender based roles be the foundation of marriage or, marriage should be based on equal partnership of two individuals. With changing times, the traditional definition of marriage should evolve and move beyond gender. From decision making to performing family roles should be based on talent and choice, rather than traditional beliefs. A society based on gender equality, will transform the institution of marriage into an egalitarian marriage.

### **III. Individual Rights within Marriage**

Marriage is an institution which defines the relationship between a man and woman, who choose to be a part of this institution. In some cultures, it is viewed as a contract between two individuals, where they share equal duties and enjoy equal rights, whereas, in some cultures marriages are considered as a sacramental union of a man and a woman. The purpose of marriage could differ in all the cultures or religion, but in essence, it is the union of two separate individuals – a man and a woman. Apart from religious, social and psychological relevance of marriage, one cannot ignore the legal personality of marriage in today’s era. Legal marriage means exclusive sex-rights conferred by the wife/woman in exchange of certain immunities.<sup>101</sup> The husband/man places himself under an obligation to provide the wife with food, clothing shelter; to protect her reputation and to be responsible for her in every way.<sup>102</sup> In return the wife promises to be always willing to serve the husband, in whichever way the husband desires and also, be faithful to him. The husband by virtue of being a

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<sup>100</sup> LINDA L. LINDSAY, *GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE* 235 (Routledge, 2016).

<sup>101</sup> Juliet Everts Robb, *Having Right and Being Right*, 30 IJE 196, 206 (1920).

<sup>102</sup> *Id* at 206.

husband, can demand restitution in the event of unauthorized sexual access. “The husband is the only person with the right to control the sexuality of wife.....but only a husband has an institutionalized, socially supported right to control her sexuality”.<sup>103</sup>

A legal recognition given to the institution of marriage mainly defines the rights and duties of the husband and wife, so that in case of conflict it becomes easy for the law to come to a just conclusion in imposing the same to either party or both. It becomes imperative to examine the role of the wife in preceding societies in order to fully understand the development of modern laws regarding the rights of women in general, and the legal rights of married women, specifically.<sup>104</sup> This also brings us to a critical question – whether the husband or wife have right to sex in marriage? In fact, can right to sex be recognized as a right at all? For the sake of discussion, if ‘sex’ gets the status of a legal right within marriage, then it imposes a legal duty upon the partner to conform to the same. Consider a situation where a husband feels that having sex with his wife is his legal right and it is the duty of the wife to oblige to his demand. If this is so, then how does the concept of consent play its part? Can one say that a wife’s consent holds no importance as it becomes her duty to oblige to her husband’s right to sex? According to Professor Gary, “A legal right is that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts so far as the power arises from society imposing a legal duty upon a person or persons”.<sup>105</sup> If we go by this definition of legal right, then considering the above example, the husband gets the power upon his wife, which forces her to do an act even if she is unwilling. If the moral purpose of marriage is the duty and the right to sexual privileges, and this comes in conflict with sexual sovereignty of an individual, which one should prevail? The traditional notion of marriage has been that marriage merges two individuals and make them as one unit, somehow, the rights attached to this marital unit is above the rights of individuals – the man

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<sup>103</sup> Duran Bell, *Defining Marriage and Legitimacy*, 38 CUR. ANT. 237, 238 (1997).

<sup>104</sup> Melisa J. Anderson, *Lawful Wife, Unlawful Sex-Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 GJICL 139 (1998), <https://digitalcommons.law.uga.edu/gjicl/vol27/iss1/4/> (last visited June 11, 2022).

<sup>105</sup> JOHN CHIPMAN GARY, *THE NATURE AND SOURCES OF THE LAW* 18 (Macmillan Pub. Ltd. 1948).

and the woman. The concept of marital authority, which is based on the age-old idea of patriarchy, gives the husband a superior sexual authority over his wife's sexual privacy. The constant conflict between rights of a person as an individual and as a unit, is the core issue in case of marital rape. In marital relation, it is the wife who forfeits her legal existence by surrendering her independent rights in law, which the husband assumes as his own.<sup>106</sup> Historically, husbands have had the right (or obligation) to force wives into obedience through discipline or chastisement, this so called right of a husband was based on the belief that men were naturally superior.<sup>107</sup> It seems wife-beating became the extension of the legal and religious traditions of the subordination of women.<sup>108</sup>

Every right whether moral or legal imposes a relative duty on a party or parties other than the party in whom the right resides. The concept of 'duty bound wives' is another reason why rape within marriage seems like a foreign concept in a country like India. There have been ample cases where a wife feels that it is her duty to obey her husband's demand for sex as he has the power which arises from the core concept of marital authority and marital unity. Both 18th and 19th century law considered the sexual aspect of marriage as fundamental, where marriage contract was regarded as the regulation of man's natural sexual instinct.<sup>109</sup> The sexual superiority of the husband, transformed into the most basic right of a husband, where the wife was obliged to perform her duty of providing the same to her husband. "Living in the same house, but willfully declining matrimonial intimacy and companionship, is *per se* a breach of duty, tending to subvert the true ends of marriage."<sup>110</sup> The natural system of rights and duties was described as the masculine 'conjugal right' and the feminine 'duty of

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<sup>106</sup> Rebecca M. Ryan, *The Sex Rights: A legal History of Marital Rape Exemption*, 20 LSI 941, 945 (1995).

<sup>107</sup> REBECCA EMERSON DOBASH ET. AL., *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 37 (Macmillian 1979).

<sup>108</sup> *Id.* at 40-43.

<sup>109</sup> Rebecca M. Ryan, *The Sex Rights: A legal History of Marital Rape Exemption*, 20 LSI 941, 945 (1995).

<sup>110</sup> JAMES SCHOUER, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT*, 37 (Little, Brown, & Co. 1889).

cohabitation'.<sup>111</sup> The male conjugal right which can also be termed as the marital sex right, introduced the concept of sexual coercion within marriage. The women and men had different perceptions of the nature of sexual coercion. For a woman, sex was coerced, if she felt obligated to have sex with the husband, even when it was against her wish.<sup>112</sup> Whereas, men, in contrast, felt they had a right to sex in marriage, and it was the duty of the wife to consent to have sex.<sup>113</sup> "Because marriage existed above the individual the marriage institution enjoyed privileges that placed it literally above the law."<sup>114</sup>

Inequalities in gender power relations can have differential implications for sexual coercion.<sup>115</sup> For some men forcing an unwilling wife, to have sex, is justified as this is based on their belief that husbands have a right to marital sex. "In the sexual power relations between a married couple, fulfillment of the man's needs appeared to take precedence over the woman's consent."<sup>116</sup> In the present context, with regard to the nations that have not criminalized marital rape, citing the reasons discussed above, the question remains, what about the individual rights of the wives? What about the basic right to privacy; right to her own corpus?

Right to marital sex can never be considered as an absolute right, because every right signifies the jural relationship that exists between two or more persons, namely, the holder of legal rights and the person bound by the legal duties. Just because two people are married to each other, they cannot be duty bound to provide pleasure in the form of sex, to one another without the consent of the other partner. The rights and duties are correlatives, that is, there can be no right

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<sup>111</sup> Rebecca M. Ryan, *The Sex Rights: A legal History of Marital Rape Exemption*, 20 LSI 941, 945 (1995).

<sup>112</sup> Annie George, *Differential Perspectives of Men and Women in Mumbai, India on Sexual Relations and Negotiations within Marriage*, 6 REP. HLT. MAT. 87, 91 (1998).

<sup>113</sup> *Id* at 91.

<sup>114</sup> Rebecca M. Ryan, *The Sex Rights: A legal History of Marital Rape Exemption*, 20 LSI 941, 946 (1995).

<sup>115</sup> Annie George, *Differential Perspectives of Men and Women in Mumbai, India on Sexual Relations and Negotiations within Marriage*, 6 REP. HLT. MAT. 87, 91 (1998).

<sup>116</sup> *Id* at 91.

without a corresponding duty or a duty without a corresponding right.<sup>117</sup> Therefore, an unwilling or non-consensual act of sex can never be justified behind the veil of the institution of marriage. One does not cease to have certain individual rights just because they have entered an institution that is built on the idea of marital unity; marital authority of the husbands over their wives; husband's right to chastise their wives; coverture and conjugal rights.

Sociologist Jessie Bernard in her book, *The Future of Marriage*<sup>118</sup> argues that marriage can be examined in two parts. One as husband's marriage and other as the wife's marriage. According to her the effect of marriage on the husband is very different from that of the wife. Bernard's work suggests that the effect of marriage on a man is much positive as compared to the effect on a woman. According to her, wives suffer more stress, anxiety and depression within the institution of marriage.<sup>119</sup> The benefits that a husband and a wife draw from the marriage are radically different.<sup>120</sup> "Paradoxically, many if not most wives state that they are satisfied with and find fulfillment in marriage. It is argued that this is simply due to the fact that women have been socialized to believe that they ought to feel this way."<sup>121</sup> Such women become victims to the 'Pygmalion Effect'<sup>122</sup> in terms of marriage. The individualistic personality of the wife become passive and subordinate to that of her husband. "Her self-image deteriorates as she accommodates to her husband rather than fulfilling herself as a person in her own right."<sup>123</sup>

Carole Pateman, a feminist political scientist, argues that male sexual rights are embedded in the concept of individual freedom that structures social contract

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<sup>117</sup> GEORGE WHITECROSS PATON, *A TEXTBOOK OF JURISPRUDENCE* 249 (Oxford Uni. Press 2017).

<sup>118</sup> JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 8-10 (Yale Uni. Press, 2009).

<sup>119</sup> *Id.*

<sup>120</sup> MIACHEL HARALAMBOUS ET. AL., *SOCIOLOGY: THEMES AND PERSPECTIVES* 386-388 (14th ed., 2012).

<sup>121</sup> *Id.* at 367.

<sup>122</sup> Pygmalion effect is a phrase adopted from Sir George Bernard Shaw's play 'Pygmalion'. This effect refers to the wife's redefinition of self and an active reshaping of the personality to conform to the wishes or needs of husband.

<sup>123</sup> MIACHEL HARALAMBOUS ET. AL., *SOCIOLOGY: THEMES AND PERSPECTIVES* 387 (14th ed., 2012).

theory.<sup>124</sup> According to her, marriage is more of a sexual contract than a social contract, in which the husband is the owner of the sexual right within the marriage agreement. As Pateman states, the inherent rights in a marriage contract are, both, ‘sexual sovereignty and subjugation’<sup>125</sup>, “the story of the social contract is a story of freedom; the sexual contract is a story of subjection”<sup>126</sup>. However, over the years and with the overturn of the marital rape exemption (for nations that have criminalized marital rape) the fundamental dialectic of rights has been altered and the foundation of the husband’s patriarchal identity has been disrupted.<sup>127</sup>

Every country recognizes a person’s right to marry, as a human right and also as a legal right. In fact, it goes a step further by recognizing certain individual rights within marriages. In case of a woman/wife, these rights are portrayed in two ways – one defines the rights of the wife and the other defines right of an individual person within the institution of marriage.

“While we may wish the facts to be otherwise, the distribution of rights in marriage is seldom symmetric. The social support that defines the rights of a husband overwhelms the resistance of his wife without necessarily producing a similar rightful claim for a wife that overwhelms the impulses of her husband.”<sup>128</sup>

The purpose of this study is the analysis of the rights of a woman, as an individual within the institution of marriage. The discussion on the existing legal status of a woman as an individual is fundamentally based on various concepts/theories that arose from the very institution of marriage. These concepts/theories play an important role in defining the rights and the duties of wife and husband, within their matrimonial set up. Even though these concepts/theories are based on the old notions and norms of a civilized society, which still has a strong hold in the present context, especially in relation to the cultures and values that are in

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<sup>124</sup> CAROLE PATEMAN, *THE SEXUAL CONTRACT 2* (Stanord University Press, 1988).

<sup>125</sup> Rebecca M. Ryan, *The Sex Rights: A legal History of Marital Rape Exemption*, 20 LSI 941, 947 (1995).

<sup>126</sup> CAROLE PATEMAN, *THE SEXUAL CONTRACT 2* (Stanord University Press, 1988).

<sup>127</sup> Rebecca M. Ryan, *The Sex Rights: A legal History of Marital Rape Exemption*, 20 LSI 941, 947 (1995).

<sup>128</sup> Duran Bell, *Defining Marriage and Legitimacy*, 38 CUR. ANT. 237, 240 (1997).

practice by the people worldwide. The above discussion is relevant in understanding the inadequacies and lacuna embedded in various legal provisions which fail to recognize and protect the inviolable rights of a person as an individual.

#### **IV. Intimate Partner Violence / Domestic Violence**

An unequal power relation between men and women is best projected through gender-based violence. According to the ‘Declaration on the Elimination of Violence Against Women’<sup>129</sup>, violence against women is defined as “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 in private life.”<sup>130</sup> Violence against women (both domestic and otherwise) is not merely a criminal act of physical force, it is the constant exploitation, discrimination, economic and social stratification and a creation of ongoing terror and threat in minds of womenfolk. As rightly said, how one defines and categorizes types of violence depends on the way one views the world.<sup>131</sup> Violence against a woman, in the form of mental abuse or marital rape, within a family setting is part of a wider system of male power, control and domination.<sup>132</sup> As Kersti Yllo points out -

“Domestic violence is not just an individual problem, but a social and political one. Violence is a means of social control of women that is at once personal and institutional, symbolic and material. The restrictions on women’s psychic and physical

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<sup>129</sup> UN GENERAL ASSEMBLY, DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN, GA Res 48/104, GAOR, UN Doc A/Res/48/104 (Dec. 20, 1993).

<sup>130</sup> DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN, art.2, 1993, <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women> (last visited July 9, 2022).

<sup>131</sup> JAMES EARNEST HENDRICKS, ET AL., CRISIS INTERVENTION: CONTEMPORARY ISSUES FOR ON-SITE INTERVENERS 134 (Charles C. Thomas, 2010).

<sup>132</sup> *Id* at 134.

freedom created by the fear and reality of male violence are inescapable.”<sup>133</sup>

There are many cases where physical violence is not a primary mode of abuse, many women are subjected by their husbands/partners to coercive control method that range from intimidation and emotional abuse to violence.<sup>134</sup> Activists and feminists who are working against violence insist that violence against women should not be defined as a crime against an individual who happens to be a woman, “Rather this violence must be seen as a crime of misogyny, of hatred against women.....society’s acceptance of patriarchal assumptions and structures also accepts and condone these violations of women’s autonomy.”<sup>135</sup> Feminist sociologist, Michael P. Johnson set out a typology of intimate partner violence, where he gives his perspective on the various types of intimate partner violence,<sup>136</sup> one of which is ‘Intimate Terrorism’, such is a sexist violence which is mostly carried out by men who believe that marriage confers upon them a right of ownership over their wives. Such men terrorize their wives through “physical and/or sexual violence with a variety of non-violent control tactics, such as economic abuse, emotional abuse, the use of children, threats and intimidation, invocation of male privilege, constant monitoring, blaming the victim or threats to “out” a person from work or family.”<sup>137</sup>

There was a time when intimate partner violence/spousal abuse, in the West had turned into an epidemic<sup>138</sup> which was brought to light by John Stuart Mill when he wrote about it, “Men, in any great country, who are little higher than brutes, and that this never prevents them from being able, through the law of marriage,

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<sup>133</sup> KERSTI YLLO AND MICHELE BOGRAD (EDS.), *FEMINIST PERSPECTIVES ON WIFE ABUSE* 48 (Sage Publications, 1988).

<sup>134</sup> JAMES EARNEST HENDRICKS, ET AL., *CRISIS INTERVENTION: CONTEMPORARY ISSUES FOR ON-SITE INTERVENERS* 135 (Charles C. Thomas, 2010).

<sup>135</sup> LOIS CPOELAND AND LESLIE WOLFE, *VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME: DEFINING THE ISSUES* 3, Center for Women Policy Studies, 1991).

<sup>136</sup> Michael P. Johnson, *Gender and Types of Intimate Partner Violence: A Response to An Anti-Feminist Literature Review*, 16 *AGGRESSION AND VIOLENT BEHAVIOR-A REV. J.* 290 (2011),

<sup>137</sup> *Id* at 290.

<sup>138</sup> Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence* 90 *NULR* 1032 (1995-1996).

to obtain a victim, the breadth and depth of human misery caused in this shape alone by the abuse of the institution swells to something appalling.”<sup>139</sup> Lenore Walker, a psychologist by profession, in her study<sup>140</sup> of spousal abuse/battered women, wrote about ‘the cycle of violence’<sup>141</sup>. According to her, such abusive spousal relationship goes through a cycle of three stages: The first stage is “tension building”, where the wife faces minor battering and in the process she tries to calm the husband/abuser by becoming nurturing, compliant, and may anticipate his every whim; or she may stay out of his way.<sup>142</sup> The victim/wife, in essence, becomes her abuser’s/husband’s accomplice by accepting some of the responsibility for his abusive behavior.

The second stage is the “Acute Battering Incident”<sup>143</sup>, where the abuser/husband fully accepts the fact that his rage is out of control.<sup>144</sup> The abuser/husband may start out by justifying his behavior to himself, his rage is so great that it blinds his control over his behavior.<sup>145</sup> In most cases the abuser/husband wants to teach his wife/victim a lesson and stops when he feels that she has learned her lesson. By this time, however, she has generally been very severely beaten or sexually abused/raped by her husband. The abusers/husbands, in most cases, concentrate on justifying their abusive behaviour and instead blame their wives/partners.<sup>146</sup> The husband/abuser is mostly triggered by an external event or his internal state, this kind of extreme assault, abuse (which may be sexual in nature) or battery lasts from two to twenty-four hours.<sup>147</sup> It becomes pertinent to mention that it is during the tension-building phase and the acute battering phase that sexual abuse/marital rape by the husbands/partners takes place in a frequent manner.<sup>148</sup>

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<sup>139</sup> JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 48 (1<sup>st</sup> Kindle ed. 2011).

<sup>140</sup> LENORE E. WALKER, *THE BATTERED WOMAN* (E-books ed. 2009). The author of this book has collected over 120 detailed stories of battered women. She has listened to fragments of over 300 more stories. Lenore has also interviewed dozens of helpers who have offered their services to battered women.

<sup>141</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 75 (E-books ed. 2009).

<sup>142</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 75-76 (E-books ed. 2009).

<sup>143</sup> *Id.* at 79.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 80.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 128.

In the third stage, which is known as “Kindness and Contrite Loving Behaviour”<sup>149</sup>, the abuser/husband shows extremely loving, kind, and contrite behaviour.<sup>150</sup> In this stage the husband/abuser begs for the forgiveness of his wife/victim and promises her that he will never repeat his actions.<sup>151</sup> The author is not sure as to how long this phase lasts, but this romantic stage lasts until the entire cycle starts over again. “Most women report that before they know it, the calm, loving behavior gives way to little battering incidents again, a new cycle of battering behavior begins.”<sup>152</sup> The question that comes to mind is, why and how these men turn into wife/partner abusers. The initial focus of the women’s movement against spousal violence were the victims, and not much research was done related to the behaviour of the abusers.<sup>153</sup> With time, and with the growth of counselling/treatment programmes for the abusive husbands/partners, the researchers and counselors have been able to construct more accurate profiles of the abusers/husbands.<sup>154</sup>

In a similar research, Donald Dutton reported that power motivation and intimacy anxiety were the two variables found in clinical literatures of the abusers/batterers.<sup>155</sup> Dutton through his study revealed that the abusers or husbands who are violent towards their wives projected power issues, these men felt the need to control and dominate their wives/female partners “their belief that female independence meant loss of male control, and their attempt to persuade or coerce the female into adopting their definition of how the relationship should be structured and how it should function”.<sup>156</sup> The typical abuser (husband) is a traditionalist, believing in male supremacy and the stereotyped masculine sex

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<sup>149</sup> *Id.* at 84.

<sup>150</sup> *Id.*

<sup>151</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 85 (E-books ed. 2009).

<sup>152</sup> *Id.* at 89.

<sup>153</sup> Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NULR 1032, 1039 (1995-1996).

<sup>154</sup> Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WLR 267, 286-29(1985).

<sup>155</sup> DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 64,65 (UBC Press, 1995)

<sup>156</sup> *Id.* at 64 - 65.

role in the family, where sex is frequently used as an act of aggression to enhance self-esteem in view of waning virility.<sup>157</sup>

Often, there are these questions that are leveled at an abused wife/partner –Why does a wife stay with an abusive husband? Why would anyone subject herself to repeated, sexual assaults, rapes and severe beatings? Why would anyone remain in a relationship that carries an ever-present threat of sexual assaults, injury and sometimes even death?<sup>158</sup> To this, Lenore Walker’s contention is that “the very fact of being a woman, more specifically a married woman, automatically creates a situation of powerlessness. This is one of the detrimental effects of sex-role stereotyping.”<sup>159</sup> Walker goes on to say that in the patriarchal set up marriage does not offer equal power to men and women, even the law seems to perpetuate the historical notion of male supremacy.<sup>160</sup> The above observation holds its validity as there are nations including India, where a husband cannot be found guilty of raping his wife, where the husband still has the legal right to decide where the family will live, restricting the woman’s freedom of movement. The explanation for the abused woman’s behavior is not as simple as it seems, it is far more complex, and arises from a tragic combination of social and personal forces.<sup>161</sup> Economic, social and legal status of the husband and wife has much role to play when it comes to the power dynamics of the marriage. Since men more often than women hold higher-paying jobs with more status, their occupational prestige gives them decision-making powers they can use to engage in physical and psychological one-upmanship.<sup>162</sup>

The private sphere of home was seen as a protected place of refuge and a haven in a tough and cruel public world of politics and business.<sup>163</sup> This excuse was well packaged into one of the main reasons for keeping women away from the

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<sup>157</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 56-57 (E-books ed. 2009).

<sup>158</sup> Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WLR 267, 279 (1985).

<sup>159</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 70-71 (E-books ed. 2009).

<sup>160</sup> *Id.* at 71-73.

<sup>161</sup> Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WLR 267, 280 (1985).

<sup>162</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 77 (E-books ed. 2009).

<sup>163</sup> Malinda L. Seymore, *Isn’t it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NULR 1032, 1071 (1995-1996).

public life to an extent that even the U.S. Constitution was interpreted to recognize a 'private realm of family life which the state cannot enter'.<sup>164</sup> The legal system refused to enter the private sphere and intervene in the ongoing family relations,<sup>165</sup> where an act which otherwise would be considered as a crime in the eyes of law would not attract any penal provisions if performed by the husband upon his wife. The absence of the state, of law, from the private sphere of family (especially marriage) has itself contributed to male dominance and female subordination.<sup>166</sup> As stated by Schneider -

“The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation.”<sup>167</sup>

However, some feminist theorists, argued that the affirmative role that privacy plays for women is important to womenfolk in many ways.<sup>168</sup> It provides an opportunity for individual self-development and individual decision making. In fact, there were other related aspects of privacy, such as the notion of autonomy, equality, liberty, and freedom of bodily integrity which was central to women's independence and well-being, especially for women who have been victim of intimate partner violence and marital rape.<sup>169</sup>

Feminist movement against domestic violence and rape reforms were spear headed in late 1960's and 1970's.<sup>170</sup> The criminal system had failed to address

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<sup>164</sup> Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

<sup>165</sup> Elizabeth M. Schneider, *The Violence of Privacy*, 23 CLR 973, 976 (1990-1991), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1363&context=faculty> (last visited July 14, 2022).

<sup>166</sup> Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NULR 1032, 1071 (1995-1996).

<sup>167</sup> ELIZABETH M. SCHNEIDER ET. AL., PERSPECTIVES ON WOMEN'S SUBORDINATION AND THE ROLE OF LAW, 117 (D. Kairys ed., 1982)

<sup>168</sup> Elizabeth M. Schneider, *The Violence of Privacy*, 23 CLR 973, 979 (1990-1991), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1363&context=faculty> (last visited July 14, 2022).

<sup>169</sup> *Id.* at 979.

<sup>170</sup> ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 20-34 (Yale University Press, 2000).

crimes based on gender and to acknowledge the fact that these crimes were ‘manifestation of larger patriarchal attitudes’<sup>171</sup>. The main purpose of the movement, against domestic violence and rape reforms were to secure social justice for women. Liberal feminists called for the formal equality of genders, with a demand that the criminal laws should treat men and women equally.<sup>172</sup> “Male privilege and domination were further eroded as violence was redefined, from appropriate chastisement directed towards and inferior to criminal abuse.”<sup>173</sup>

The fight against domestic violence in India was in no way different from that of its counterparts. In India, the contemporary feminist movement emerged in the late 1970s and early 1980’s.<sup>174</sup> During this period the issue of any and all forms of violence against women occupied national focus. This movement attempted to break silence and speak up about the humiliations, atrocities, tortures and assaults on women (at home and outside) that were being faced by them in their daily existence.<sup>175</sup> In the 1980’s, the movement became more aggressive in the demand for legislative reforms related to women. However, not until 2005 did the term domestic violence exist in legal parlance, but with the adoption of section 498 A<sup>176</sup> (which was inserted by the Criminal Law (Second Amendment)

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<sup>171</sup>AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* 92 (Uni. of California Press 2020).

<sup>172</sup>Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1266&context=uclf> (last visited July 14, 2022).

<sup>173</sup>ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 22 (Yale University Press, 2000).

<sup>174</sup>Sarbani Guha Ghosal, *Major Trends of Feminism in India*, 66 *TIJPS* 793, 809 (2005).

<sup>175</sup>*Id.* at 809.

<sup>176</sup>The Indian Penal Code, 1860, s.498 states that - 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-

(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

Act, 1983 (46 of 1983) with effect from 25th December, 1983) and section 304 B<sup>177</sup> (which was inserted in the Indian Penal Code with effect from November 19, 1986 when Act 43 of 1986 came into force) of IPC, 1860, it was a step closer to identifying and accepting the domestic problems and violence being faced by married women in India.<sup>178</sup> It was only in 2005, that the Protection of Women from Domestic Violence Act<sup>179</sup> was passed and became a law in effect from 26th October 2006. This was an act which brought the politics of rights into the house, which challenged the patriarchal definition of a family and a woman's position in it.<sup>180</sup> The Protection of Women from Domestic Violence Act, 2005 has proved to be a landmark in the fight against domestic violence based on gender injustice.

Intimate partner violence is often treated as a private matter, but this perception is challenged by the human rights framework, which provides a tool to reframe such kind of violence as a collective problem that society as a whole must address.<sup>181</sup>

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security or is on account of failure by her or any person related to her to meet such demand.

<sup>177</sup> The Indian Penal Code, 1860, s.304 states that - (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

<sup>178</sup> Kaamila Patherya, *Domestic Violence and the Indian Women's Movement: A Short History*, INQUIRIES JOURNAL, <http://www.inquiriesjournal.com/a?id=1702> (last visited July 15, 2022).

<sup>179</sup> THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005, Act No. 43 of 2005.

<sup>180</sup> Kaamila Patherya, *Domestic Violence and the Indian Women's Movement: A Short History*, INQUIRIES JOURNAL, <http://www.inquiriesjournal.com/a?id=1702> (last visited July 15, 2022).

<sup>181</sup> Paola Garcia Rey, *Domestic Violence as a Human Rights Violation*, ACLU (July 16, 2022, 11:00 am), [https:// www.aclu.org/blog/womens-rights/violence-against-women/domestic-violence-human-rights-violation](https://www.aclu.org/blog/womens-rights/violence-against-women/domestic-violence-human-rights-violation).

## V. The Right to Equality and a Married Woman's Right to Her Own Person

One of the issues raised during the late 19<sup>th</sup> century feminist movement was, a married woman's lack of control over her body or her own person. Elizabeth Cady Stanton, the prominent and brilliant theorist of the movement was one of the first to demand a woman's (wife's) right to her own person. She stated that, "women's inequality is rooted in their lack of control over their person."<sup>182</sup> Stanton identified this right of a woman, as the foundational right upon which all other political and economic equality need to rest.<sup>183</sup> Apart from Stanton, other feminists such as, Lucy Stone and Susan B. Anthony voiced out woman's right to control marital intercourse as the core component of equality. In fact, Anthony stated in the 10<sup>th</sup> National Women's Right Convention, "Nearly all the wrong of which we complain grow out of the inequality, the injustice of the marriage laws that rob the wife of the rights to her and her children – that makes her the slave of the man she marries."<sup>184</sup>

During this period, the approach of the feminists was centered towards the idea of women being equal to men. Catharine Mackinnon was of the view that any form of physical violence (including domestic violence or intimate partner violence) towards women have implicitly been regarded as a feature of the sex difference.<sup>185</sup>

"Understanding that the most widespread social inequalities faced by women have been imagined as women's differences from men, hence not inequalities, helps explain why equality law has traditionally not been used to address violence against

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<sup>182</sup> ELIZABETH CADY STATON, ET AL., *HISTORY OF WOMAN SUFFRAGE* (Forgotten Books, 2019).

<sup>183</sup> Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CLR 1375, 1420 (2000).

<sup>184</sup> This statement was made by Susan B. Anthony at the 10th National Woman's Rights Convention, held in New York on 10th and 11th of May (1860).

<sup>185</sup> Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws*, 4 IJCL 181, 183 (2006).

women, one of the most commonly occurring examples of unequal treatment based on sex.”<sup>186</sup>

The traditional legal approach to the concept of equality which is based on Aristotle’s dictum that equality means ‘treating likes alike, unlikes unlike’<sup>187</sup> ignored the reality of substantive equality, and mostly revolved around sameness and difference phenomena.<sup>188</sup> It was this shortcoming of the traditional legal approach to equality which gave birth to an alternative thought in the modern debate on equality and equal rights of women. The alternative conception about equality asks whether a concrete, historical and social hierarchy exists rather than abstractions of sameness and difference.<sup>189</sup> Basing on the above approach, many questions were raised such as – ‘What does it mean, when one says woman and men being equal? Do women want to be treated like men? Does equality require different treatment? Are other values more important than equality? How should one define and respond to sexual difference? If there is difference between men and women, then how should it be emphasized? Is there scope for affirmative action in order to achieve functional equality?’<sup>190</sup> Mackinnon further states that-

“In mainstream equality theory, discrimination is treating someone who has the same rank, status, or qualities as if they were not the same as others of that group. But if someone is not already of that group, they are not relevantly the same as others in it and can be treated less well, and that is not seen as unreasonable or arbitrary”.<sup>191</sup>

In addition to the above observation, Chirstine A. Littleton’s concept on women’s equality opens up a whole new debate, according to her ‘equality is based on

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<sup>186</sup> *Id* at 183.

<sup>187</sup> ARISTOTLE, THE POLITICS 307 (1943) *cited in*, Catharine A. MacKinnon, *Equality*, 149 DAEDALUS, <https://www.amacad.org/publication/equality> (last visited July 17, 2022).

<sup>188</sup> Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws*, 4 IJCL 181, 182 (2006).

<sup>189</sup> *Id.* at 187.

<sup>190</sup> MICHAEL FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1290-1291 (8th ed. 2008).

<sup>191</sup> Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws*, 4 IJCL 181, 184 (2006).

phallogentrism'<sup>192</sup>. She labels her theory as 'Equality as Acceptance', which means that the key to equality is in the acceptance of women's difference, it is on the society to recognize these differences and in order to bring about the equality, it has to do more than merely accommodate the difference.<sup>193</sup> Equality as acceptance does not focus on source of difference but on the consequences, the differences that difference make.<sup>194</sup> The success of formal equality can be inconsistent with substantive equality. According to the alternative theory, law should promote equality for women by ending subordinating practices. "It deserves the name of substantive equality because it takes substantive inequality as its point of departure and produces equality in substance at its point of arrival."<sup>195</sup>

Another writer, Ann Scales points out in one of her essays that, "A just legal system must attempt to assure fairness.....law is, after all a social tool. It is only extrinsically important. Its actual value depends upon its success in promoting that which is intrinsically valuable".<sup>196</sup> With reference to the statement made by Ann Scales, the 'Rights of a Wife to Her Own Person' (which is intrinsically valuable) is a right which is not given to her by any sovereign authority. It is an inherent right that she possesses by virtue of being a human. Issue is not in providing of something which a person already possesses, but law has to play its significant role in recognizing the presence of such a right and then protecting the same. Such acceptance can bring about equality in its real sense. As

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<sup>192</sup> The term phallogentrism was coined by the French Feminists of 'Politique et Psychanalyse' school which tends to view that social institutions are created from the male view point, see Elaine Marks and Isabelle De Courtivron, *New French Feminism: An Anthology* (1980) in MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 1290-1291 (8th ed. 2008).

<sup>193</sup> John Capps, *Pragmatism, Feminism, and the Sameness-Difference Debate*, 32 TRAN. OF THE CHARLES S. PEIRCE SOC. 65, 89 (1996).

<sup>194</sup> D.Rhode, *Justice and Gender* (1989), Michael Freeman in MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 1290-1291 (8th ed. 2008).

<sup>195</sup> Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws*, 4 IJCL 181, 188 (2006).

<sup>196</sup> Ann Scales, *The Emergence of Feminist Jurisprudence*, 95 YLJ (1986), in MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 1302-1303 (8th ed. 2008).

MacKinnon writes, “The issue is not freedom to be treated without regard to sex, the issue is freedom from systematic subordination because of sex.”<sup>197</sup>

## VI. Conclusion

When feminists view the issue of marital rape or rape by stranger, they often ask this question as to “why the defence of the consent focuses on the perception of the defendant and what he reasonably thought the woman wanted, rather than the perception of the woman and the intentions she reasonably thought she conveyed to the defendant.”<sup>198</sup> However, in case of rape by stranger, focus is more on the consent or intentions of the victim rather than that of the defendant or the accused, unlike in the case of marital rape/spousal rape or rape by intimate partner. The question raised by the feminists remains unanswered by the legal fraternity of those nations which have failed to criminalize the act of marital rape.

A woman’s right to her own person in marriage is her fundamental right which lays foundation for other rights (social, economic and political). Irrespective of this being such a fundamental or foundational right, why is it that only few nations have taken some initiative to recognize, accept and provide protection to the same? Almost all nations have shown importance to the equal rights of men and women but is it functional equality that we seek or is it mere literal concept of equality? We can have a better idea of a nation’s efforts towards realization of justice for women only when we analyze their efforts in dealing with the issue of marital rape. As rightly stated “Sex equality laws exist nearly everywhere, and sex equality exists virtually nowhere.”<sup>199</sup>

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<sup>197</sup> Catharine MacKinnon, *Sexual Harrasment of Working Women* (1979) in MICHAEL FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1307 (8th ed. 2008).

<sup>198</sup> Jeanne Susan Estrich, *Real Rape* in MICHAEL FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1361 (8th ed. 2008).

<sup>199</sup> Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws*, 4 IJCL 186 (2006).