

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

---

**Volume 5 | Issue 3**

---

**2022**

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

---

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Consent, Marital Rape, and Social Acceptability An Exploration across different Cultures

---

GOPIKA BANSAL<sup>1</sup>

## ABSTRACT

*History vocalizes that women were subjected to being property either of their father or husband. Whether the offence was rape or adultery the reasoning in legal precedents prescribed it to be a violation of stealing the property of someone else rather than treating it to be a violence of human/sexual rights and not bringing this crime to be defaming their honour. Article 14 of the Indian Constitution tends to guarantee equality to all citizens, yet there is a difference based on marital status with the victims of rape in terms of justice being provided to them, where the predators of such heinous acts are not given equal punishment or are not even given any punishment.*

*This research paper focuses on the position of marital rape, a form of domestic violence, by looking into its history and its legal position across different cultures, nations, and perspectives. Often women perceived across the world that fulfilling a man's sexual desire in marriage is bound because it is their duty or else they would be a victim of physical violence. Since consent is paramount, this paper examines its appearance and evolution and explains that the institution of marriage is no free license to sex regardless of consent. Societal norms mixed with gender play a crucial role in the ongoing process of giving women equal representation for their right against such crime and with diverse opinions about it, the social acceptability of accepting it as a crime differs. Yet even if some states around the world have taken a step forward, it is to be seen that marital rape due to physical force, illegal threat, or societal pressure can lead to honour killing or other forms of violence against women. It is said that religious beliefs and social customs, merged with staggering illiteracy form an environment wherein marital rape cannot be criminalized seemingly because society isn't prepared for it.*

*The acceptance of the phenomenon that "once married, women's perpetual consent is implied" is reassessed through this paper as it calling out and popularising the value of consent by saying that sex without consent is rape- whether the attacker is your spouse or not. The wave of feminism has started the conversation of letting the women to have the autonomy to make decisions regarding their bodies regardless of their relationship status and having a statute on marital rape that penalizes the guilty. Overall, this paper*

---

<sup>1</sup> Author is a Student at O.P. Jindal Global University, India.

*emphasizes the importance of consent by looking at different cultures and their social acceptability which may even lead to falling apart of marriages.*

## **I. INTRODUCTION**

Marital rape is the unwanted sexual contact or penetration (oral, and/or vaginal) with the genitals due to threatened or actual physical force or in case women do not give affirmative consent including sexual exploitation and sexual contact where a husband coerces his wife to have sexual acts with a third person<sup>2</sup>. While marital unity was considered to be a “private economical relation” saying “husband and wife” alike to relations like “parent and child” and “master and servant” that comes under the private sphere<sup>3</sup> the feminist movement attacked the unequal status of women by being treated as property and institutionalised evolution by representing women's rights and popularising human rights. The three mentioned legal relationships (husband and wife, parent and child, and master and servant) layout unilateral division of power where the husband belongs to the superior class<sup>4</sup>.

This research paper limelight the history of the status of women and marital rape as to how it was at no time a notion. This paper also focuses on how religious cultures where marriage is more of a sacrament rather than being a contract has influenced the position of marital rape and country like India has privatised this offence by saying it to be a private matter and should remain within the four walls has impacted the problem. In the name of legal solution, the remedies available are of civil nature. Overall, this research paper is an exploration of marital rape signifying the gravity of consent.

## **II. LEGAL HISTORY AND THE STATUS OF WOMEN:**

In ancient times, rape, a crime, by the world was looked upon to be a tort of theft of property owned by a man usually a father or a husband. Instead of legally considering it to be a crime against the victim/survivor/sufferer, it was deemed to be a damage to the property of the father or husband which would impliedly mean that a husband cannot rape his wife, destructing the significance of marital rape<sup>5</sup>. The role of serving to be a wife disowns the appalling possibility of getting raped by your spouse was told by Sir Matthew Hale. He reasoned it by saying that

---

<sup>2</sup> Patricia Mahoney & Linda M. Williams, Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape Ncdsv.org (2022), [http://www.ncdsv.org/images/nnfr\\_partnerviolence\\_a20-yearliteraturereviewandsynthesis.pdf](http://www.ncdsv.org/images/nnfr_partnerviolence_a20-yearliteraturereviewandsynthesis.pdf) (last visited Jun 10, 2022).

<sup>3</sup> Rebecca M. Ryan, The Sex Right: A Legal History of the Marital Rape Exemption JSTOR (1996), <https://www.jstor.org/stable/828736> (last visited Jun 13, 2022).

<sup>4</sup> Rebecca M. Ryan, The Sex Right: A Legal History of the Marital Rape Exemption JSTOR (1996), <https://www.jstor.org/stable/828736> (last visited Jun 13, 2022).

<sup>5</sup> Jonathan Herring. *Family Law: A Very Short Introduction* (first published 2014) p. 35. (1).

marriage is a contract which brings along with it irrevocable mutual consent of engaging in sexual activity from where she cannot disavow<sup>6</sup>. It also gives husband the “right to sex”<sup>7</sup> which was also seen to be the ground for divorce in case the wife refuses to have sex. Until the 20<sup>th</sup> century, the supporters of this theory were the English law, who believed in coverture<sup>8</sup>, whereupon raping the spouse would be charged as raping oneself<sup>9</sup> abandoning women’s independent legal entity.

Consent, one’s right, in some cultures cannot be given by a woman alone but requires one whole big family who arranges the marriage to state her permanent consent<sup>10</sup> passing the control that the families had now to the husband over the woman’s sexuality. The trace of the wife’s body being controlled by the husband was also reflected in how adultery<sup>11</sup> was said to be “the highest property invasion” by English Lord Chief Justice John Holt<sup>12</sup>. Thus, adultery and rape were thought to be similar by many cultures as both were to be seen as a violation of the husband’s rights (stealing of his property), and marital rape rather than being a crime against the right to self-determination of women was considered as a property crime against the husband<sup>13</sup>. Moreover, it was told to women that in marriage regardless of her will, the wife must fulfil the husband’s sexual desire. It is also to be noticed that the traditional foundation of marriage was for reproduction.

This took away for a man to be prosecuted for spousal rape as the woman being her property after marriage. Yet rape laws were formed, due to “bride capture”<sup>14</sup> to protect the men’s interests and not of women. Thus, it can be said that this endorsed and formulated as a basis of ideology for marital rape and the laws pertaining to it throughout the world before the evolvement took place. This also maintained the public interest by encouraging harmony and privacy above gender-based violence in spousal relationships and the state not interfering in it.

---

<sup>6</sup> Sir Matthew Hale, *Hale's History of the Pleas of the Crown* - Archives Hub [Archiveshub.jisc.ac.uk](https://archiveshub.jisc.ac.uk/search/archives/41ef6e72-27df-3402-af07-2e73e6aed7f5), <https://archiveshub.jisc.ac.uk/search/archives/41ef6e72-27df-3402-af07-2e73e6aed7f5> (last visited Jun 13, 2022).

<sup>7</sup> Deborah C. England, *The History of Marital Rape Laws* [www.criminaldefenselawyer.com](http://www.criminaldefenselawyer.com), <https://www.criminaldefenselawyer.com/resources/criminal-defense/crime-penalties/marital-rape.htm> (last visited Jun 6, 2022).

<sup>8</sup> The legal status of women, upon marriage, particularly related to protection and ownership of property was merged with her husband.

<sup>9</sup> Kersti Yllö and M. Gabriela Torres, *Marital Rape: Consent, Marriage, and Social Change in Global Context* Oxford Scholarship, (2016).

<sup>10</sup> Kersti Yllö and M. Gabriela Torres, *Marital Rape: Consent, Marriage, and Social Change in Global Context* Oxford Scholarship, (2016).

<sup>11</sup> The act of a man having sexual relations with the wife of another man.

<sup>12</sup> Pillsbury Samuel H Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* NYU Press (2000).

<sup>13</sup> Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape* JSTOR (2000), <https://www.jstor.org/stable/3481263?origin=crossref&seq=1> (last visited Jun 1, 2022).

<sup>14</sup> Stealing of woman from father and raping her i.e., raping the father’s property.

The family courts in India aim of prioritizing settlement of dispute even when freeing women from such bonds may prevent them from such heinous crimes and would come out to be on a better path. Maharashtra court, in a case, where the wife was left with paralysis, said that forcible sex with the wife isn't an "illegal thing"<sup>15</sup>.

### III. MARRIAGE IN INDIA: A CONTRACT OR A SACRAMENT?

Marriage even though may have been legally recognized as a legal contract, in India where religious beliefs, social customs, poverty, illiteracy, and the mindset of society<sup>16</sup> is attached to every aspect of the institution of marriage, it becomes more like a sacrament. Marriage is worshipped in India to the level where women even though being raped by their husbands don't use the word "rape"<sup>17</sup>. Instead, it is observed that they say "he was forceful" which the women don't like but have to go through this inopportune because of the fear of being beaten up if shown disagreement.

As per the Hindu traditions and Hindu law, marriage was treated as a sacrament where it solemnized a relationship between a woman and a man. The conjugal rights were bestowed which were consensual, making sex between the spouses consensual even in cases where they were not<sup>18</sup>. In a case, *Rukhmabai* in 1885<sup>19</sup>, who had a child marriage, later on, didn't want to reside with her husband, who claimed restitution of conjugal rights which was justified by the British Privy Council<sup>20</sup>. In 1890, an eleven-year-old child bride called *Phulmonee* was raped by her husband who was thirty-five years old and died due to injuries she acquired through it<sup>21</sup>. Even in such an odious crime, the husband wasn't charged with rape but only a 'rash and negligent act' as she had passed the age of consent<sup>22</sup>. These two cases introduced the conversation about consent in Hindu marriages.

---

<sup>15</sup> Krishnadas Rajagopal, Courts continue to differ in views on marital rape Thehindu.com, (2014), <https://www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article61430217.ece> (last visited May 4, 2022).

<sup>16</sup> Nimisha Jaiswal, Why India's minister of women thinks we need to accept marital rape USA Today, (2016) <https://www.usatoday.com/story/news/world/2016/03/24/why-indias-minister-women-thinks-we-need-accept-marital-rape/82205680/> (last visited Nov 24, 2021).

<sup>17</sup> Nimisha Jaiswal, Why India's minister of women thinks we need to accept marital rape USA Today, (2016) <https://www.usatoday.com/story/news/world/2016/03/24/why-indias-minister-women-thinks-we-need-accept-marital-rape/82205680/> (last visited Nov 24, 2021).

<sup>18</sup> VVP Sharma, Marital rape cannot hide behind Hindu tradition: learn from Nepal News 18, (2015) <https://www.news18.com/blogs/india/marital-rape-cannot-hide-behind-hindu-tradition-learn-from-nepal-14000-985893.html> (last visited Nov 5, 2021).

<sup>19</sup> *Dadaji Bhikaji vs Rukhmabai*, (1885) ILR 9 Bom 529.

<sup>20</sup> Saptarshi Mandal, The Impossibility of Marital Rape, (2014) <https://doi.org/10.1080/08164649.2014.958124> (last visited Nov 24, 2021).

<sup>21</sup> Saptarshi Mandal, The Impossibility of Marital Rape, (2014) <https://doi.org/10.1080/08164649.2014.958124> (last visited Nov 24, 2021).

<sup>22</sup> Saptarshi Mandal, The Impossibility of Marital Rape, (2014) <https://doi.org/10.1080/08164649.2014.958124> (last visited Nov 24, 2021).

Post-independence, there was modernisation in the laws that governed the Hindu marriage reducing the sacramental aspects of certain traditions required in the religious ceremony. Consent between the parties was started to be treated as the main ingredient, however, this was established by the minimum age required for marriage which also described the mental capacity to give consent<sup>23</sup>. However, as stated by the family law scholars, the Hindu marriage's resemblances as a contract is a fallacy between two adults who gave their consent as the Hindu Marriage Act is usually interpreted by the judge within the ideology of marriage as a sacrament. It is also to be noted that the age of a woman can't signify her sexual maturity and not her active consent in Hindu marriage, as stated by Flavia Agnes, a legal scholar<sup>24</sup>.

In Christianity, the book of Genesis creates an ideal description of a man, woman and marriage which says that a man is created by God in his image. He also created women. Thus, a man should leave his parents and should become a part of his wife making them both one flesh<sup>25</sup>. This doctrine of not two but one flesh in marriage is said to be supported by the Gospel of Jesus<sup>26</sup> and in Epistles by Apostle Paul<sup>27</sup>. Apostle Paul further states that both the spouses involved in marriage shouldn't deny their partner sexual intercourse. He further states that a wife and a husband doesn't have right over their own body but each other's and one shouldn't deprive the other of sexual activity except in case of consent when the partner is fasting or praying<sup>28</sup>. It is said that sex in marriage is a duty that prevents sins like adultery and also forms procreation.

It is also to be noted that this 'conjugal sexual right' is also said by a few scholars that "such conjugal right imposed against the wishes of the other partner, isn't supposed to be said to a true act of love, and it goes against the moral grounds"<sup>29</sup>. This starts the discussion on condemning marital rape in Christianity and raising a voice against force in marriage. However, we can say that the duty of the spouse towards the other in marriage is seen to be a sacrament. Marital rape in Islamic law, in the relationship of husband and wife, is unknown and hard to exist considering its nature of it. In this, it is expected that both the husband and the wife need

---

<sup>23</sup> Saptarshi Mandal, The Impossibility of Marital Rape, (2014) <https://doi.org/10.1080/08164649.2014.958124> (last visited Nov 24, 2021).

<sup>24</sup> Flavia Agnes, Interrogating 'Consent' and 'Agency' Across the Complex Terrain of Family Laws in India, (2011) <https://kafila.online/2012/06/12/consent-age-and-agency-reflections-on-the-recent-delhi-high-court-judgement-on-minors-and-marriage-flavia-agnes/> (last visited Nov 24, 2021).

<sup>25</sup> Hebrew Bible, 'The Book of Genesis'.

<sup>26</sup> Matthew, *The New International Version*.

<sup>27</sup> Apostle Paul, *Ephesians*.

<sup>28</sup> New King James, *Corinthians*.

<sup>29</sup> Pope Paul VI, *Humanae vitae* (first published 1968).

to be patient and fulfil sexual desires and with such expectations, marital rape cannot exist<sup>30</sup>. Moreover, in Muslim law, marriage is considered a contract that allows women to negotiate their rights and its dissolution<sup>31</sup> giving more rights as compared to the Hindu law. However, Muslim law was devalued as it did not go through codification and state-led reform misrepresenting Muslim laws to be giving fewer rights to women. In such a situation, while calling on the concept of marriage as a sacrament it foreclosed the idea of consent in marriage for women.

#### **IV. SOCIAL ACCEPTABILITY UNEXPECTED: PRIVATISING MARITAL RAPE AND PROVIDING CIVIL REMEDIES IN INDIA**

The state has consistently been hiding behind the excuse of the sanctity of marriage for their actions of non-intervention which in a way hampers social acceptability by not making people aware of its seriousness. It has also been heard from government officials, where Sumitra Mahajan, a female legislator said 'we have our peculiar family system and the counselling is done within the family. The counselling should be done within the four walls of the house'<sup>32</sup>. Moreover, the parliamentary committee had stated that there are other means to approach the court if a woman has been distressed by her husband's act and in India, family courts have the provision of cruelty to solve such problems. They also stated that having marital rape under the law can bring stress to the entire family system and there might be more injustice on behalf of the committee.<sup>33</sup>

India recognizes the problem of sexual violence in marriage, but instead of bringing forced sex under Indian Penal Code, it gives civil laws under family dispute resolution and domestic violence as it considered this act to be framed under private dispute between the spouses. 'Cruelty', a ground for divorce is recognized by all religious personal laws and secular laws. This ground hasn't been defined by the law and has a widespread meaning through judicial interpretation<sup>34</sup>. In *Kusum Lata v. Kampta Prasad*<sup>35</sup>, the wife charging cruelty against her husband argued for judicial separation as the latter demanded sex against her wish even in serious illness. The trial court and the district court had dismissed her appeal, however, the

---

<sup>30</sup> Muh Endriyo Susila, Islamic Perspective on Marital Rape, <https://doi.org/10.18196/jmh.v20i2.271> (last visited Nov 27, 2021).

<sup>31</sup> Saptarshi Mandal, The Impossibility of Marital Rape, (2014) <https://doi.org/10.1080/08164649.2014.958124> (last visited Nov 24, 2021).

<sup>32</sup> Government of India, *Debate of the Lok Sabha* (19 March 2013) Lok Sabha Secretariat, New Delhi.

<sup>33</sup> Parliamentary Standing Committee on Home Affairs, Rajya Sabha Secretariat, New Delhi, Government of India, *167th Report on the Criminal Law (Amendment) Bill, 2012* (2013)

<sup>34</sup> It extends from denial to having children to untrue claims of adultery against a spouse to the wife not serving tea to the husband.

<sup>35</sup> AIR 1965 All 280

Allahabad High Court granted the wife's appeal mentioning the other two courts were favouring the husband. Also, in *Vinit Joglekar v. Varsha Joglekar*<sup>36</sup>, on the ground of cruelty, the wife filed for divorce which was granted by the lower and appellate courts as the husband's increased sex demand and forced her to watch blue films.

Even though the Hindu Marriage Act may not define any particular sexual offence for cruelty, the Indian Divorce Act, 1869 that rules the termination of marriages in India in Christians, and gives women the right to initiate divorce, in case of a husband committing rape, sodomy<sup>37</sup>, or bestiality<sup>38</sup> without anyone including the wife. The court in the case of *Grace Jayamani v. E.P. Peter*<sup>39</sup> ruled in favour of a wife who had asked for a divorce by saying 'non-consensual sodomy' as a ground.

Very few judicial decisions recognize marital rape and provide the wrongdoer legal punishment, yet, it is to be noticed that forced sex is usually not the ground taken by wives to seek a remedy which could be due to social acceptability of the crime influencing their mindset of it to be not a crime or due to the perception that the case become weaken if based the case on such ground. Moreover, in August 2019, Dipak Misra, former Chief Justice, remarked that in India marital rape shouldn't be a crime<sup>40</sup>. He argued it by saying that anarchy in families could be created because of it and family platforms upholding the family values is the reason why our country is maintaining itself<sup>41</sup>. It is to be said that marital rape is criminalized in the west and the reason for it not being in India is due to socio-economic and cultural differences between the two. Our country withholds religious customs and social norms that are mentioned above making people not ready for this change.

## V. CONCLUSION

In marriage, non-consensual sex, a form of domestic violence giving mental and physical brutality, stands alone with civil remedies where its relevance with or without such remedies is ambiguous. Being backed up with Penal Code and having segregated laws on spousal rape can impact its social acceptability of it, otherwise, when left at the discretion of the judicial system, a suit with "only" such basis can incapacitate justice by stating it to be an immaterial ground. The history of women being treated as property has governed us thus far, but narrowing

---

<sup>36</sup> AIR 1998 Bom 73

<sup>37</sup> Anal sexual intercourse.

<sup>38</sup> Sexual intercourse between an animal and a person.

<sup>39</sup> AIR 1982 Kant 46.

<sup>40</sup> Pallavi Prasad, Why It's Still Legal for Indian Men to Rape Their Wives The Swaddle, (2020) <<https://theswaddle.com/marital-rape-inda-decriminalized-crime/>> (last visited Dec 1, 2021).

<sup>41</sup> Pallavi Prasad, Why It's Still Legal for Indian Men to Rape Their Wives The Swaddle, (2020) <<https://theswaddle.com/marital-rape-inda-decriminalized-crime/>> (last visited Dec 1, 2021).

its footprint to the level where footprints of “implied consent” fade away and the already existing path of consent are appraised with utmost importance. The vision of marriage from being visioned as a sacrament has taken a few steps ahead in the journey of being witnessed as a contract where marital rape may get acknowledged as inhumanity.

\*\*\*\*\*