

## **Violence Against Women In India With Special Reference To Marital Rape – A Legal Perspective**

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### **Abstract**

Understanding Indian society from ancient period tells us, the condition of women is deteriorating gradually in the society. Modernization can only be seen in terms of new trends but the mindset of the people is perishing constantly specially with regards to women. The respect and status which an ancient woman had enjoyed is been denied by same and she is facing harassment and other social issues. Considering marriage being one of the most primary social institution in India an also which is been viewed as a pure bond of love and mutual understanding between a man and a woman but still women face a lot of issues within and outside the family. The study will enable us to basically understand about marital rape which satisfies section 375 except, exception 2 under IPC1. In India marital rape is not considered as a crime. India being one among 36 countries of the world who still haven't criminalize marital rape although countries like Poland, Australia, England, etc. did. The study will enable us to understand the provision that a woman can avail through the constitution and also to understand the gender biased laws that perpetuate towards the substantiation of marginalization of women and violence against women in India. From the data obtained in the study it was noticed that the Constitution of India need new laws to cease such an act in the society and also deleting exception 22 from sec. 375 should be there but along with this people also need to be morally and socially educated and an awareness is to be bought about in order to stop such an act.

Key words: Marital rape, Marginalization, Discrimination.

Theme : Violation of Women Rights – Marital Rape

### **Introduction**

Marginalization of women tells about the degrading women's status in our society. In most countries including India, the status of women is deteriorating day by day. Modernization in society can only be seen in terms of new trends but not the mind-set of the people therefore, we can see the declining status and respect of women in our society. The status, respect and

dignity a woman had in ancient times is vanishing by time. Before that they were treated as goddesses and were prayed as well but now the scenario is completely different. Women's Marginalization<sup>1</sup> in the social arena is a result of a few elements. This can be recognized extensively in the particulars including socio-economic<sup>2</sup> and ideological.

### **Socio-economic aspects**

The role of women is confined within the house only as from early era the model of an ideal woman talks about her position of a house maker for which she is not paid in return. Her dependence on man, low social status when compared to men and gender discrimination creates marginalization of women. Here, the Marxists(Theory, 2008) argue that whether a woman is working then also she will be paid less as compared to male members working at the same position. They are exploited and sometimes excluded from wage labour therefore, the women became original proletariat<sup>3</sup> in the 1<sup>st</sup> form of class oppression. The concept of patriarchy in Indian society defines that the main function of women is to gratify male's sexual needs and to look after their home and children. The domination of men is the root cause of women's oppression in society and their exploitation.

### **Ideology and misconception**

Gender is a social concept and when we talk about gender so, there are only two genders that exist in the society i.e. masculine and feminine. Considering females socially weaker to men is the general ideology of the people that prevails in the patriarchal<sup>4</sup> society. They are considered polluting during their menstruation and childbirth, and are isolated and sent away from the main residential and gardening area. The beliefs and culture says that women are viewed as a private and domestic world that is disassociated from politics and public purpose.

### **Patriarchal Society**

Since ancient times, Indian society works on Patriarchal features but the influence of this male domination is seen from medieval era and still it is prevailing. It was the time when the foreigners invaded India and women's condition in India started degrading. During that time most of the women on the one hand surrendered themselves to protect their lives and on the other hand some of them preserved their dignity and respect and took their lives themselves

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<sup>1</sup>Treating inferior, insignificant and ignored.

<sup>2</sup>Societal reconstruction shaped by social process with use of economic science.

<sup>3</sup>Deprived class of workers.

<sup>4</sup>Dominance of men and suppression and exploitation of women.

only. The Biggest example for this is Queen Padmavati<sup>5</sup>(Aayush, 2018). She with all other women of the palace took their life and committed **Jauhar**<sup>6</sup> that is Mass Suicide, just to preserve their dignity from the Mughal Invaders. But here the question here arises is why anything happening hampers the dignity of a woman when she didn't commit anything wrong but not the men who initiates and do all such things?

This is because from childhood only the children (both boys and girls) are treated, Pampered and brought up in a different manner. Boys are taught to be masculine, strong and dominating and Girls are taught to be polite, decent, sacrificing, dignified and caring. So now if we consider a family who is not financially strong or capable enough then more preference is given to studies of boys rather than girls. They have to sacrifice. This led to the development of the concept of "Dual Investment". Dual Investment is when the investment is done for two things and thus the girls are treated as Double Burden for the Father. He has to spend on her education as well as marriage which includes Dowry<sup>7</sup> as well.

This is what is prevailing at present but in ancient era complete and proper education was also provided to girls. The dowry was not dowry but the presents and gifts of the father to her daughter. They were allowed to do all the stuff because they were considered "Kshatrani" the warriors.

### **Who is an Ideal woman (Sita and Draupadi)?**

In context to Indian Society(Rao, 2018) an ideal woman is the one who obeys her husband and family, who works according to them and for them and is always ready to sacrifice anything for them. An Ideal women, perfect women, ideal womanhood or the perfect womanhood are the labels to apply to subjective thoughts on idealised female traits. The term "Ideal Women" is applied in various context for example Sita and Draupadi(Kishor, 2011). Sita was the wife of Lord Rama and there are lot of incidents when she proved herself an ideal woman or "AadarshNaari" in social sight.

- At the time of Vanvaas, she decided to go with her husband and refused for all the pleasures of Palace life.

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<sup>5</sup>Legendary 14<sup>th</sup> century queen remembered for her bold sacrifice.

<sup>6</sup>Voluntary mass self-immolation by women to avoid get caught by foreign invaders.

<sup>7</sup>Gifts or money transferred during marriages.

- She gave “AgniPariksha”<sup>8</sup> just to prove her purity because she was said to do so by her husband
- After doing that as well she was rejected and she was sent out of Ayodhya. At time also without even asking a single question she left the palace and started living in the forest although she was pregnant at that time.

From her childhood only her brought up is like that she has to be very decent and polite and caring and obedient and soft hearted for her father in her own house and for her husband and in-laws in their house. If we consider Draupadi here, then she is totally contrasting to Sita. She, every time questions her husbands, argued with them, insulted them in front of everyone in the palace. If only one hand as an individual she can be considered as an independent women who fought for herself, her rights, her dignity and especially for the right thing but on the other hand the way she behaved with her husband was totally aloof from the margins of an ideal women

As a whole, looking into social context, Sita is now considered as an ideal woman because she fulfilled all the criteria for the same.

### **Protection of Women from Domestic Violence Act, 2005 (PWDVA)**

The function of the law was to be straightforward—address violence against women inside the home. Just because, the new law ventured inside the home and managed private spaces of people—something the law had abstained from doing up to that point—yet specifically. It recognized that domestic violence is "widely prevalent but has remained largely invisible in the public domain".(Sen, 2016)

#### **The law**

PWDVA was passed on 13 September 2005, during the tenure of the United Progressive Alliance government. It's a civil law aimed at providing a fourfold support system to women who have suffered violence at home: residence orders, custody orders, protection orders and monetary relief from a respondent. Before PWDVA, women could only seek recourse under the Indian Penal Code (IPC)—sections 304B<sup>9</sup> (dowry death) and 498A<sup>10</sup> (cruelty by husband

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<sup>8</sup>Ancient way of testing guilt or innocence of someone, which is taken as divine proof.

<sup>9</sup>IPC, 1860's section 304 clause B is Dowry Death. Unnatural death within seven years of her marriage when subjected to cruelty or harassment by her husband or any relative for dowry, such death shall be called “dowry death”.

<sup>10</sup>Driving the woman to commit suicide or to cause grave injury. Forcing her to meet any unlawful demands.

or his relative).The law was broad in its definition— “domestic relationship” includes married women, mothers, daughters and sisters.

### **Section 3 in The Protection of Women from Domestic Violence Act, 2005**

This section includes harms or injuries to the health, safety, life,etc. whether mental or physical, of the aggrieved person or tends to do so and includes causing physical, sexual, verbal, emotional and economic abuse.

### **Defining Domestic Violence**

PWDVA defined domestic violence for the first time. With regards to global definitions, it didn't limit itself to physical violence alone. The definition incorporates not simply physical abuse, which is increasingly recognizable and is simpler to demonstrate (for instance, utilizing medicinal records), yet in addition angles like emotional and sexual abuse. It even incorporates the danger of violence as a major aspect of the definition.Marital rape is an exception to rape under IPC, but the Domestic Violence Act comes to the rescue of victims through protection orders or orders to stop violenceThe impact of the law, however, hasn't been remarkable. If we look at orders under the PWDVA, it will be noted that most orders do not specifically mention the category of sexual abuse even when alleged; when it is mentioned, the same is usually viewed through a patriarchal lens—from a moral viewpoint and less as violence or abuse.

### **Marital Rape vs. Conjugal Right**

Marital rape(Jewelchanda, 2014) or spouse rape is very common version of rape which never attracted much attention. It's an act of sexual intercourse with one's own wife without her consent and it doesn't falls under the definition of rape under section 375 because of exception 2 of this section under Indian penal code. Somewhere it shows that the institution of marriage in present era is to satisfy the sexual and physical needs of one another because rape is committed when it is done without the consent of the female than, no relationship can restrict its implementation. marital rape<sup>11</sup> is committed when a women is not ready for sexual intercourse with her husband but she was forced for the same, being in a marital relationship it is the duty of the husband to take care of his wife by cooperating with her and making her comfortable, not by show her the other side of a devil to which she can't question as well. This helpless situation and ill treatment of women shows that they are still treated as an object of sex in our society. They are still an economic burden for her own family and are

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<sup>11</sup>One of the form of domestic violence and sexual abuse.

always expected to make her husband and in laws happy after her marriage. Although it's an exceptions that in some of the western countries<sup>12</sup> marital rape is a crime but, till date it didn't attract any legal attention in our country. Thus in India it's not a criminal offense. The difference is that it is committed behind the doors and into a marital bond so, there is no questioning over the victim and her character. If a man consider himself masculine, strong than some mercy, politeness and cooperation should be there with his own wife who sacrificed and is doing the same for him. While conjugal rights<sup>13</sup> are those rights granted by marriage(Aiyar, 2017) to the partners in a marital relationship. If this includes the right to have sex legally then morality says that a woman is also a human being and she should not be treated as an object by anyone. A woman leaves her home and family for a man, so it is rather a responsibility for him to take care of herself, than a conjugal right to satisfy himself. In the early era the institution of marriage, the women are considered as a man's property and both have the responsibility to rear their offspring. It was the duty of both the partners to safety each other's needs and desires. The matter of love and affection in the institution of marriage has taken its place very recently.

Hence, law and morality go hand in hand. If law gives us certain rights that includes and imposes some duties over us as well and morality tells us about how those rights should be used and which would not hamper the rights of another person. Since, marriage is a pure bond of love that binds two souls in a pre-relationship. Being in such a relation on the one hand if it is the duty of both the partners to satisfy one another then on the other hand it is the duty of both the partners to understand and respect each other's feelings and make them comfortable for anything.

### **Marriage doesn't mean consent for sex**

The institution of marriage is not for sexual pleasures. It is not something that permits anybody to do such an act that affects another one's rights, desires and privacy just because of the legality of something which cannot be legal and humane as well. (India, 2018)A bench of Acting Chief Justice Gita Mittal and C Hari Shankar<sup>14</sup> said that," in a relationship like marriage, both man and woman have a right to say 'no' to physical relations". The Delhi High Court, while hearing petitions on making marital rape an offense, has seen that physical power isn't vital for rape as a man could carry her wife under financial pressure to force her for sex. It additionally held that marriage doesn't imply

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<sup>12</sup>Poland (1932), Czechoslovakia (1950), The Soviet Union (1960), Denmark (1960), Sweden (1965), Norway (1971) criminalized marital rape.

<sup>13</sup>Implied sexual privileges by marriage.

<sup>14</sup>All India Democratic Women's Association, NGO's PIL in Delhi HC.

that spouse is continually consenting for physical relation with her husband. "Force isn't a pre-condition of rape." A bench of Acting Chief Justice Gita Mittal and C Hari Shankar also observed that marriage gives the privilege to both man and women to "NO" to physical relations. "Marriage doesn't imply that the women are all time ready, willing and consenting." The Centre has opposed the seeking to declare marital rape an offence saying that it may destabilise the institution of marriage.

### **Bride Trafficking or One Night Bride**

Marriage is an important structure of the society; it is also a dream of hope for the girls. This moment is a hope for positive change for the girls. It is a moment when girls dream about their future. But, alas the age of modernization has made even the institution of marriage a charioteer of its race. In this race so many innocent girls whether they are literate or illiterate, adult or minor are victims of physical and mental exploitation in the name of fake and forced marriages. After marriage when she expect herself to be special for someone in her life, there also she faces the cruelty including domestic violence, marital rape, etc.(Kumar, 2017)

India, where women are provided with the status of a mother. A country which worships thousands of goddesses. No matter how long and difficult the path is, mental peace is found by bowing down to goddesses. But in the same place daughters are considered burdens, they become objects of trade and commerce. They are ill-treated. And during the birth of a girl child the mother is said to be responsible for the same. Therefore we can see the 2011 census, there are 940 women to every 1000 men but in some Regions like Bihar, Haryana mostly in Northern parts of India, there are 916 women to every 1000 men.

### **Trade**

The trade of daughter is due to helplessness, poverty, illiteracy, lack of unemployment or sometimes the reason includes her father only, who is under pressure from his relatives, neighbours and local touts. Sometimes girls who have themselves been victims of such marriages come to their native village persuade other girls and their families by giving false statements of their happiness. These girls take away other girls from their villages, the innocent girls are sacrificed for such marriage. These girls and women are enticed easily in the name of either marriage or love by the touts. The touts give all sorts of false promises to the parents. When they target a girl, the touts spend Rs. 10,000 to Rs. 5000 on the family members of the girls. They offer liquor, false jewellery and clothes to the family members. They spend about Rs. 40,000 or Rs. 50,000 on marriage and take away the girl from the village during the night hours. These girls are sold off at high prices in the flesh market.

**Linking between marital rape and one-night bride.**

These Women find themselves in a world deprived of any values. She lives a life which has to pay to live. The payment is made through her body. She is forced to live a life full of violence and exploitation. The commercial use of her body is done by nobody else but the husband who had given her dreams. The husband and the touts become traders of her life and body. They marry these women and force them to work as sex slave. Numerous girls get trapped in the quicksand of these false love and marriages. She becomes an object of consumerism.

**Linking marital rape and switching husbands from in laws and Nikahhalala.**

Women in their home itself – in her in-law's house, she remains within the boundaries of the house become an object of sexual satisfaction. Her husband uses her for his own sexual demands only day or night her life is limited to the bed. The bed sheets may change every day but not her life. She becomes a permanent object of exploitation. From the wedding fire she begins her journey of becoming mentally broken person. A moment comes when all her hopes die, she becomes a living corp.

**Triple talaq**

Triple talaq has been declared illegal in the country. The Muslim Women (Protection of Rights on Marriage), Bill, 2019<sup>15</sup> which criminalizes instant 'triple talaq' among Muslims and attracts a jail term of three years.

**Nikahhalala**

Nikahhalala(Mulla, 2019) is a practice in which a woman, after being divorced by triple talaq, marries another man, consummates the marriage, and gets divorced again in order to be able to remarry her former husband. Nikah means marriage and halala means to make something halal, or permissible. A woman from Bhilai in Chhattisgarh received a triple talaq(Talaq Talaq Talaq, 2019) from her husband over the phone. The husband went on to marry another woman after that. After that, her father-in-law had asked her to undergo nikahhalala in order to get back with her husband. Father in Law married her daughter in law and after marriage, he had raped her continuously for a few weeks and then again divorced her. In order his son can remarry her former spouse<sup>16</sup>.

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<sup>15</sup>An Act to guard the rights of married Muslim women and to ban divorce by pronouncing talaq by their husbands and to supply for matters connected therewith or incidental thereto.

<sup>16</sup>The Muslim Women (Protection of Rights on Marriage), Bill has received Presidential assent which criminalises instant talaq.

### **In laws raping the newly wed brides.**

As indicated by a (Gang Rape by In Laws, 2019)FIR enlisted at the women police headquarters of Bhiwadi on Monday, the women, matured around 25 years, claimed that she was given a moment divorce by her significant other by articulating 'talaq' thrice last Friday. That day itself, when she questioned triple talaq(Aslam, 2008), her dad in-law and his brother allegedly raped her while her brother by marriage beat her up, the police said. "The husband has been booked for giving triple talaq, brother-in-law for beating her, the father-in-law and the other relative for gang-rape".<sup>17</sup>

In a horrific incident, (2019)a 26-year-old woman living in a town on the edge of Muzaffarnagar town was ruthlessly raped. She was gang-raped by her husband and brother-in-law over dowry(Lawmann's, 2018). The occurrence occurred on March 6 yet became exposed on March 14, reported -The Times Of India.<sup>18</sup>

A newly married woman has accused her father-in-law of raping her after her new family were unhappy with a small dowry. The victim alleges her elder sister-in-law poisoned her with spiked milk before filming the attack. The bride, from the city of Ambala in North West India, threatened to report the alleged incident to the police. (Sept. 2018)<sup>19</sup>

### **Why Marital Rape should be criminalized.**

(Makkar, 2019)Bodily integrity is the sacredness of the physical body and stresses the significance of individual's self-sufficiency and the self-assurance of people over their own bodies. When everyone has this right then, why is a married woman denied for the same?Indian Penal Code Section 375<sup>20</sup> gives unambiguous conditions with respect to which activity is to be considered as assault. As a rule, non-consensual sex or rape is considered as assault. Indeed, even consensual intercourse with a minor girl is also viewed as assault. then what difference happens after marriage that all the bonding is removed which were led before and for the same thing by which she was restricted is now forced.

- "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

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<sup>17</sup>Jaipur, Nov 27 (PTI) a lady has alleged that she was raped by her father-in-law and another relative, while her husband pronounced "talaq" to her thrice, in a day.

<sup>18</sup>In UP, woman raped by husband and his brother in-law on wedding night over dowry.

<sup>19</sup>Father in law 'drugged and raped son's newlywed bride'

<sup>20</sup>A rape is committed when, against will, without consent, forced consent, consent by cheating, and consent by unsoundness of mind, with or without consent if age is less than 16 years.

Is this special case reasonable? Why are spouses constantly expected to give an agreement? It is her total right to choose by ideals of being an individual to choose what she does. However IPC(Paranjape, 2016) gives an exemption therefore making all spouses insusceptible to the in any case offensive wrongdoing. Here we are discussing if spouses merit this right. Let us see contentions from both sides:

- **Arguments in favour of making marital rape a criminal offence :**

1. It removes the privilege of a woman to say "NO". Her being married, separated, bereft, nothing can remove her right.
2. Marriage is a partnership of consensus between two equivalent people. In this manner giving spouses a benefit to pressure her isn't directly under any conditions. Women face extreme violence now. Men don't have any acquaintance with it is wrongdoing. State as a result of its inaction is an associate right now. Our Constitution recommends all men to respect women.

- **Contentions against criminalising marital rape:**

1. There is an enormous chance of abuse of this law. Prevention of Dowry Act<sup>21</sup> is one such model. The conviction rate in dowry cases is under 30%, which implies the law is being abused by the spouse and her family.
2. Occurrences of marital rape can't be denied totally, however such cases are rare. In the event that a law is essential for such a modest number of cases, at that point there must be an identical law for securing men as well.
3. Existing law for Prevention of Domestic Violence(Lawmann's, Protection of Women From Domestic Violence Act, 2005, 2017) can be amended to incorporate arrangements for such cases. Making it a heinous crime isn't an appropriate remedy. Since thinking of it as rape will crush the family ones for all.

How about we see what different nations have done about these cases. Many may contend such laws can suit present day western social orders yet not Indian arrangement which depends on the foundation of the family. It is astonishing to see Nepal, Ghana and Indonesia have established laws condemning marital crime. These are not western or present day social orders. In addition, any social crime is hard to handle. It is hard to handle in view of the natural qualities they have. They are not considered as a crime by the greater part of the general public. Despite the fact that the general public will feel sorry for the ladies being explicitly ambushed by her husband, it won't raise a voice. Since society is moulded to such

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<sup>21</sup>Dowry Protection Act, enacted on May 1, 1961.

crimes. The facts demonstrate that a single law won't transform anything. The cultural outlook must be changed to change reality. This was true on account of the Dowry Act. Cases of misuse must not be ignored. It is the cornerstone reasoning of Indian Jurisprudence that "no innocent must be punished". To have checks at different levels and have a strong, full proof law must be the objective. The lessons learnt from the dowry act misuse can be put to compelling use.

## Suggestions

In the darkness even a beam of light gives a rise to hopes. The world lives in Hope. There are some women who want to, who overcome these odds by their struggle and courage and come out of these issues and make a new start in their lives.

### 1. Benefits that women can avail from Constitution and Government.

- a. As there is nothing separately mentioned about marital rapes in PWDVA. There are no laws legislated for marital rape. Therefore, to counter such issues, new laws are needed to be made by the legislature and that should not be on the papers only but their implementation should be looked after. Deteriorating women's status, health, etc. in the society is constant.
- b. Constitution protects individual from 'Unjust Laws'<sup>22</sup> that is exception 2 of sec. 375. Striking down to this exception there is a need to remove it or amend it so that things can be possibly come under certain controls. Earlier also the question of constitutionality of Sec. 375 exception 2<sup>23</sup> was rose. There is violation of article 14, Right to Equality and article 15(Jain, 2018), Non – Discrimination on the basis of caste colour, sex, etc. So, here there is a discrimination of law for women being raped in accordance of them belonging to the criteria of different ages, status of married or unmarried are marginalised and exploited in and out of the family. Laws are not being equal for everyone. Proper laws are needed to be made to solve all such problems.

### 2. Development of Benevolent Patriarchal Society

- a. We know this is a patriarchal society. We live in this society and we are adapted to this patriarchal society. This patriarchal society cannot be turned overnight. But an initiative can be taken by us to develop it as a "Benevolent Patriarchal Society". Where people can be made aware about what's going on

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<sup>22</sup>An 'Unjust Law' is out of harmony with the Moral Law.

<sup>23</sup>Sexual intercourse by a man with his own wife, is not rape.

in society, the importance of education of society. A Benevolent patriarchal Society can help us to reduce these heinous issues and crimes to a large extent.

### **3. Development of Progressive Husband**

- a. Family Members should give guidance to small kids especially the boys. They should be inculcated with social and moral responsibility towards girls. The family should teach the newly wed couples, about life and understanding each other. Respecting each other. Police Departments should engage themselves in finding out ways to stop all such offenses. Progressive Husbands can emerge from the Passive Aggressive Husbands. Seminars and Campaign and workshops should be conducted in rural and suburbs educating people the concept of Progressive Husband

### **4. Moral and Social Awareness in New Upcoming Generation.**

- a. If you are looking to better connect with others, and share more meaningful, genuine interactions, perhaps you want to increase your social awareness. Moral capability is important, whereas most of the development decisions are aimed. Social awareness is the ability to comprehend and appropriately react to both broad problems of society and interpersonal struggles. Social awareness requires competency in areas such as emotional intelligence and empathy. Theoretically, social awareness is actually the interworking of multiple concepts at once. Social sensitivity means empathy for others and the ability to infer, Social insight means moral judgment and the ability to comprehend situations quickly, and Social communication means the ability to interact appropriately with others, including problem-solving interactions. In this way, the New upcoming generation which are in schools and colleges by mechanism of workshops, campaign, Legal Aid Cell, re-evaluating these issues of India regarding marginalisation of women should be included in the syllabus and make them understand, guide them morally.