

MARITAL RAPE– SOCIETAL DISTURBANCE OR SILENTLY CUSTOMARY ACCEPTANCE: AN ANALYSIS OF WOMEN – CENTRIC CRIMINAL JURISPRUDENCE IN CONTEXT OF MARITAL RAPE FROM IPC TO BNS

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"Women plus law equals magic; we prove that every day."⁴⁵³

The transformation of the Indian Penal Code, 1860 to Bharatiya Nyaya Sanhita, 2023 has shifted the social and the legal status of the women in the society is one of the core discussions after this legislative change. This shift seems to be the approach towards survivor rather victim. But also at same parlance there is also a debate regarding this approach in context of substantive empowerment or only the symbolic approach towards the women victims.

This paper will deal with a comparative approach of the legislature in context of women in IPC and BNS. Along with it would discuss the change from victim to survivor approach towards the women in India. It also will tackle the feminist jurisprudence, restorative justice theory backed by the discussion in light of dignity. This piece of research would try to find the traces whether this BNS uses dignity oriented terminology for women or it carries neutral terminology, backed by comparison with other Nation State's laws.

Moreover, this paper would focus on an approach to deal with the cases of the marital rape, whether BNS has shifted in this concept or denies full agency as like IPC. It also would provide few suggestive measures which may tackle the negative impact also after this modification from IPC to BNS.

Keywords: Victim, Survivor, Marital Rape, Feminist Jurisprudence, Gender Sensitive Balance

INTRODUCTION

Women, the part of this human being which sometimes in the eyes of law are like person or sometimes as property. Specially in the Criminal Laws of India we used to see ample of amendments regarding their safety, victim compensation and punishing the offenders who have committed any offence against any woman. The term "woman" denotes any female

human being irrespective of the age.⁴⁵⁴ It simply means any female from her first breath till last is considered as woman as per the criminal law of India. In BNS, 2023, we see the same approach of the legislature towards the defining of the term woman.⁴⁵⁵

Marital rape seems to be of non consensual penetration in vagina, urethra, anus or mouth of any woman by whom, who is her partner as per

⁴⁵³ Lithwick Dalhia, (2022). Women, The Law And The Battle To Save America. Penguin Press

⁴⁵⁴ Indian Penal Code, No. 45 of 1860, § 10 (India)

⁴⁵⁵ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 2(35) (India).

the law of that land.⁴⁵⁶ It is also defined as sexual intercourse with the spouse and the nature of that intercourse is non consensual.⁴⁵⁷ But what is the status of the very same in IPC, 1860 and in BNS, 2023, that is the core intent of this research.

Now we will see the status of marital rape in the IPC, 1860 and in BNS, 2023 then analyse the difference in the status.

PROVISIONS RELATED TO WOMAN IN CONTEXT OF MARITAL RAPE IN IPC, 1860 AND IN BNS, 2023

This is the most burning issue in the context of women specially in the context of marital rape but we have no provision of marital rape in IPC, 1860. Section 375, 376, 376 A-E deal with the different crimes which are directly or indirectly related to the rape. Section 375 clearly stated that if a male performs any of the listed activities into vagina, mouth, urethra or the anus of woman, it comes under the ambit of rape.⁴⁵⁸ The listed activities are Penetration of penis, Insertion of body part or any object other than penis, Manipulation of body of woman to outcomes penetration and application of mouth to vagina, urethra and anus. There are seven circumstances in which the law consider the activity under the ambit of rape.

Those Circumstances are as follow:⁴⁵⁹

1. Against the will of the woman.
2. Without the consent of the woman.
3. In fear of death or hurt of the loving of that woman, and taking her consent.
4. In pseudo scenario of marriage.
5. In era of unsoundness or intoxication.
6. Woman when under 18 years of age with or without consent.
7. When the woman is unable to communicate consent.

In these issues, we see the punishment for the offenders as minimum 10 years of rigorous imprisonment which may extend to the death

penalty depend on various circumstances. In IPC, We see the provisions under the ambit of Offences against Human Body which is in Chapter XVI.⁴⁶⁰ But the definition of rape is not considering the marital rape in India as per IPC, 1860. Now once take a look on the provisions of BNS, 2023 in context of this issue.

In BNS, 2023, We see there is very slight difference from IPC, 1860. We can see the difference in the context of structure.

Section 63 clearly stated that if a male performs any of the listed activities into vagina, mouth, urethra or the anus of woman, it comes under the ambit of rape. The listed activities are Penetration of penis, Insertion of body part or any object other than penis, Manipulation of body of woman to outcomes penetration and application of mouth to vagina, urethra and anus.⁴⁶¹ There are seven circumstances in which the law consider the activity under the ambit of rape. In BNS, 2023, We see the provisions under the ambit of Offences against Women and Child in Chapter V.⁴⁶²

The another difference is in context of the age of wife in context of exception to rape. earlier it was 15 years and now it is 18 years of age which is only a positive change in context of life of a woman as a wife who is below 18 years of age, but still apart from this we are unable to find any traces of marital rape in context of BNS, 2023.⁴⁶³

STANADARD OF CRIMILISATION OF MARITAL RAPE IN OTHER COUNTRIES AS IN COMPARISON OF PENAL LAWS IN INDIA

The Countries such as India, Afghanistan, and Bangladesh, the marital rape is not a criminal activity and that is why it not punishable. These Countries are the neighbouring countries and the reason is almost same in all these Countries which include Patriarchy and also very less awareness about the human rights. In Legal

⁴⁵⁶ European Institute for Gender Equality, Marital Rape, EIGE Gender Equality Glossary & Thesaurus, https://eige.europa.eu/publications-resources/thesaurus/terms/1397?language_content_entity=en.

⁴⁵⁷ Agarwal N., Abdalla S. M. & Cohen G. H., Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review, 2 PLOS Glob. Pub. Health e0000601 (2022), <https://doi.org/10.1371/journal.pgph.0000601>.

⁴⁵⁸ Indian Penal Code, No. 45 of 1860, § 375 (India)

⁴⁵⁹ Indian Penal Code, No. 45 of 1860, § 375 (India)

⁴⁶⁰ The Indian Penal Code, No. 45 of 1860, ch. XVI, Of Offences Affecting the Human Body (India)

⁴⁶¹ Bharatiya Nyaya Sanhita, 2023, § 63.

⁴⁶² Bharatiya Nyaya Sanhita, No. 45 of 2023, ch. V, Of Offences Against Woman and Child (India).

⁴⁶³ Bharatiya Nyaya Sanhita, 2023, § 63.

context, Afghanistan lacks full control of the very same.⁴⁶⁴ In social context in Afghanistan, if the wife denies the sexual intercourse with her husband, it is a kind of disobedience on the part of wife against the husband, and customs treat this as shame in the context of family and also in societal transaction.⁴⁶⁵

Marital rape is empty and remains silent in the national laws of Bangladesh. And in the definition of rape also you can't find any light of the same, except in the age that if the wife is 13 years or older then the intercourse is not considered as rape.⁴⁶⁶ But the social activists are in position to ask this to the authorities multiple times but there is no ray of awareness against this issue.⁴⁶⁷

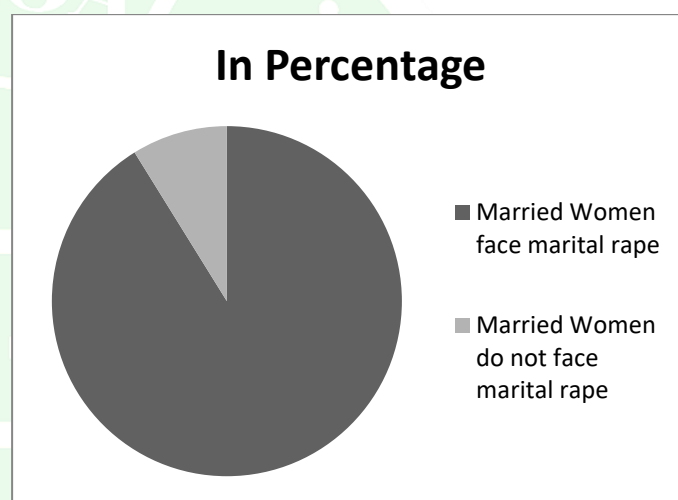
But this marital rape is issue in almost 150 Countries. These Countries penalise this criminal behaviour as it is not only the social evil but also it is against the basic humanity towards an woman human being. Nation States like North America, Europe, Austria⁴⁶⁸, Belgium⁴⁶⁹, Canada, Cambodia, Denmark and Australia etc are in position to penalise marital rape in their society. Since 1993, all the States of United Nation⁴⁷⁰ have penalised marital rape. Along with it also UK is in position to prosecute marital under general rape laws.⁴⁷¹

In Canada, the general rape laws punish offenders irrespective of their marital status or relation. In Denmark too, this offence is punishable under the Criminal Code of Denmark.⁴⁷² After 1976, in Australia, we find significant changes regarding the dignity of the women and this wave of feminism, the marital rape is now considered as an offence in the eyes of law.⁴⁷³ The United Kingdom put restriction on

exemption of marital rape after a landmark case of *Rv R*⁴⁷⁴. Even the legal background of Cambodia punishes marital rape in their territory but backed by some customary barriers.⁴⁷⁵

ANALYSIS OF DATA

In India, we can easily see a large of incidence related to marital rape in our society but we are unable to minimise this scenario in our society because we have no laws which punish the offenders of marital rape. We have different data on which we are going to analyse the issue of marital rape.



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This above graph shows the marital rape recorded incidence is only 33 percent roughly in the society and approx 67 percentages of the married women are in state of not facing any kind of issue related to marital rape as per the data of UNFPA but this was the data of 2010, which has been slightly increased after 15 years.

⁴⁶⁴ Nicholas Dale Leal, Hell on Earth for Afghan Women: From the Ban on Education to the Legal Rape of Girls, EL PAIS (June 2, 2026), <https://english.elpais.com/international/2026-06-02/hell-on-earth-for-afghan-women-from-the-ban-on-education-to-the-legal-rape-of-girls.html>.

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⁴⁶⁶ Penal Code, 1860, § 375 (Bangl.).

⁴⁶⁷ Reneka Ahmed Antu, Marital Rape in Bangladesh (U.N. Women Asia & the Pacific, CEDAW in Practice, art. 16, Aug. 2021)

⁴⁶⁸ Strafgesetzbuch [StGB] [Criminal Code], BGBl. No. 60/1974, § 201 (Austria).

⁴⁶⁹ Code pénal [Penal Code] art. 375 (Belg.).

⁴⁷⁰ 10 U.S.C. § 920 (2024).

⁴⁷¹ Sexual Offences Act 2003, c. 42, § 1 (U.K.).

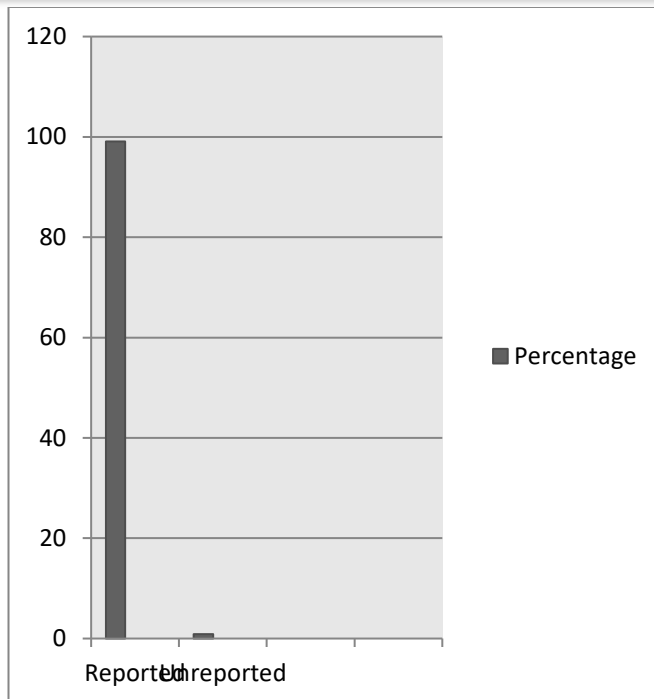
⁴⁷² Straffeloven [Penal Code], Act No. 976 of Sept. 17, 2019, § 216 (Den.).

⁴⁷³ Crimes Act 1900 (NSW) pt. 3, div. 10 (Austl.).

⁴⁷⁴ R. v. R., [1992] 1 A.C. 599 (H.L.) (appeal taken from Eng.)

⁴⁷⁵ Criminal Code of the Kingdom of Cambodia arts. 239–245 (2009) (Cambodia).

⁴⁷⁶ S.J. Jejeebhoy, K.G. Santhya & Rajib Acharya, Health and Social Consequences of Marital Violence: A Synthesis of Evidence from India (Population Council & United Nations Population Fund (UNFPA), 2010),



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The analysis of data given in the above graph is quite disturbing. As we have seen the data of 33 percent of the women are facing this issue after their marriage but due to social stigma and lack of awareness because of absence of the laws related to the marital rape only 0.9 percent of cases are reported and approx 99.1 percents of the case are not reported. This is the real issue on which we have to be more attentive about the woman human being and their human rights after the marriage. We are only manipulating the social criteria of marriage and considered sex as only right and in the demand of this right, our law is ignoring the human rights of those women who are facing these issues in our society.

After the evaluation of all these data, we can say this issue of marital rape is social disturbance because of silently accepted customary norms of marriage backed the family laws.

CONCLUSION

Not every time, we take the back ride of developed countries, rather to feel pride the tag of developing country. If we are waiting for the other States then we are not in position to be Vishwa Guru in the near future. As we have seen

in this research, In the Criminal Laws of India we used to see ample of amendments regarding their safety, victim compensation and punishing the offenders who have committed any offence against any woman. Marital rape seems to be of non consensual penetration in vagina, urethra, anus or mouth of any woman by whom, who is her partner as per the law of that land. It is also defined as sexual intercourse with the spouse and the nature of that intercourse is non consensual.

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⁴⁷⁷ Aisha Akram, The Decriminalisation of Marital Rape: How India Continues to Refuse Justice to Its Married Women, Oxford Hum. Rts. Hub (Dec. 6, 2023)

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