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With this thought, we hereby present to you

CRITICAL EXAMINATION OF SEC 85 AND 86 OF BHARATIYA NYAYA SANHITA: INEFFICIENCIES IN ADDRESSING MARITAL RAPE AND PROPOSING LEGAL REFORMS

AUTHORED BY - MANISHA CHOUDHARY

ABSTRACT

Marital rape is still among the most neglected forms of abuse in India, with existing laws failing to provide married women legal protection from sexual violence by their spouses. This research critically examines the shortcomings of “Sections 85 and 86 of the Bharatiya Nyaya Sanhita (BNS), 2023,”¹ which treat marital rape as mere cruelty rather than a serious violation of bodily autonomy and dignity. By analyzing constitutional rights, judicial interpretations, and International human rights commitments, this study highlights how this legal gap undermines gender equality and personal liberty, violating “Articles 14 and 21 of the Indian Constitution.”² Drawing from global legal frameworks, this paper underscores the urgent need for reform. It advocates for the removal of Exception 2 under Section 63 of the BNS, explicit criminalization of marital rape, judicial sensitization, and stronger enforcement mechanisms. Acknowledging marital rape as a criminal offense is essential—not only from a legal standpoint but also as a crucial move toward ensuring justice, dignity, and equal rights for women.

KEYWORD: Cruelty, Marital Rape, Bodily Autonomy, Consent, Criminalisation.

Introduction

Despite being one of the most intimate violations of human dignity, marital rape remains outside the purview of criminal law in India, leaving countless women trapped in silent suffering. From the NFHS-5 data, approximately 12% of ever-married women in India have faced sexual violence from their husbands. This figure underscores the alarming prevalence of marital rape and coerced sexual acts, which remain unrecognized under Indian criminal law. The data further reveals that alcohol consumption, lower education levels, and controlling

¹ Bhartiya Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

² INDIA CONST. art. 14, 21.

behaviours significantly increase the likelihood of spousal sexual and physical violence³.

Across the globe, 32 countries—including India, Pakistan, and Bangladesh—have still not criminalized marital rape. In India, the exception for marital rape stands in direct conflict with global human rights standards like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It also weakens India's pledges made during the 59th session of the Commission on Human Rights in 2003 and the Fourth World Conference on Women held in Beijing.

India's continued refusal to criminalize marital rape undermines its international commitments to uphold gender equality, respect personal dignity, and safeguard a woman's right to bodily autonomy. This legal gap not only denies countless women the basic right to consent but also reinforces deep-rooted patriarchal norms that place a husband's authority above a wife's fundamental rights.⁴

Although the “Bharatiya Nyaya Sanhita (BNS), 2023, has replaced the Indian Penal Code”⁵, it still retains the marital rape exception, thereby excluding married women from legal protection against sexual abuse. This provision starkly contradicts international human rights standards. “Specifically, Section 67 allows for sexual violence within marriage, which conflicts with Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as it discriminates based on marital status.”⁶

The Indian government has repeatedly opposed the criminalization of marital rape, reasoning that such a move could lead to misuse of the law, threaten the institution of marriage, and conflict with the country's socio-cultural values, where marriage is regarded as a sacred bond. Additionally, the government contends that existing legal remedies, such as those under ‘Section 498A of the Indian Penal Code’⁷ (now replaced by Sections 85 and 86 of the

³ *Nearly 1 in 3 women have suffered spousal sexual, physical violence: Family health survey*, TOI, May 11, 2022, <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms>.

⁴ Ayantika Bhattacharyya, *Marital Rape Law International View*, LEGAL SERVICE INDIA E-JOURNAL (Jan. 04, 2025, 10:40 PM), <https://www.legalserviceindia.com/legal/article-7872-marital-rape-laws-a-n-international-overview.html>.

⁵ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023, (India)

⁶ Surya Rajkumar, “*International Law, Right to Privacy and Marital Rape in India*”, OXHRH BLOG, (Jan. 04, 2025, 9:04 AM), <https://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india>

⁷ The Indian Penal Code, 1860, Act 45 of 1860.

‘Bharatiya Nyaya Sanhita’⁸), adequately address issues of marital cruelty.⁹ However, this stance conflates two distinct acts—rape and cruelty—ignoring the unique nature and severity of sexual violence. Rape is a violation of bodily autonomy and consent, while cruelty generally pertains to emotional or physical abuse unrelated to sexual violence.¹⁰ Treating marital rape as mere cruelty under Sections 85 and 86 trivializes its gravity and fails to recognize the central issue of consent. Moreover, treating marital rape under the category of cruelty imposes an unfair burden on survivors, as they are required to meet a higher threshold of proof in the absence of clear legal acknowledgment of sexual violence within marriage. This lack of clarity in the law diminishes the gravity of the offence and restricts victims from receiving proper legal remedies and protection.

Existing Legislative Framework

On July 1, 2024, the Bharatiya Nyaya Sanhita, 2023, came into force, replacing the Indian Penal Code (IPC).

- Section 63 of the BNS, along with its exception clause, grants legal protection to husbands by exempting sexual acts within marriage from being classified as rape, thereby excluding marital rape from the scope of criminal law.

“Exception 2.---Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.”¹¹

- Sections 85 of BNS :
“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.”¹²

- Sec 86 of BNS : Cruelty defined

“For the purposes of section 85, “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)

⁸ Bhartiye Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

⁹ Ananthakrishnan G, Centre argues against labelling marital rape as rape says it is ‘disproportionate’ and ‘harsh’, THE INDIAN EXPRESS, Oct 4, 2024, <https://indianexpress.com/article/india/centre-sc-criminalising-marital-rape-9602198/>.

¹⁰ Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of marital rape in India, understanding its Constitutional, Cultural and Illegal impact*, 11 NUJS L. Rev. 121 (2018)

¹¹ Bhartiye Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

¹² Bhartiye Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

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 security or is on account of failure by her or any person related to her to meet such demand."¹³

Although marital rape is not expressly mentioned as a ground for divorce in family law, it has been interpreted as such under Sections 85 and 86. The Kerala High Court, in a significant judgment, acknowledged this interpretation. *"Merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce. We, therefore, are of the view that marital rape is a good ground to claim divorce."*¹⁴

Sec 85 and 86 complement 'The Protection of Women from Domestic Violence Act (2005)',¹⁵ Offering orders to prevent abuse and eviction from the household, financial reparations, and other civil solutions to address domestic violence.

A spouse subjected to cruelty can pursue legal recourse by lodging a criminal complaint under Section 498A of the IPC, while also using the same instances of abuse as valid grounds for seeking divorce under family law. 'Section 13, Hindu Marriage Act 1955'¹⁶; 'Section 2, Dissolution of Muslim Marriage Act 1939'; 'Section 32, Parsi Marriage and Divorce Act 1932'¹⁷; 'Section 10, Indian Divorce Act 1869'¹⁸; 'Section 27, Special Marriage Act 1954'¹⁹.

Inadequacy of Cruelty Provisions

'Sections 85 and 86 of the Bharatiya Nyaya Sanhita (BNS)'²⁰ were introduced to tackle domestic violence and dowry-related offenses. However, these provisions fail to address the specific issue of sexual violence within marriage effectively. They do not explicitly recognize marital rape as a serious crime, ignoring the critical aspect of consent that defines the offense of rape. By treating marital rape as a form of cruelty, the law downplays the severity of the act and overlooks the profound physical, emotional, and psychological harm it causes to victims.

¹³ Bhartiya Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

¹⁴ Shaju Philip, *Marital rape a good ground to claim divorce*, says Kerala HC, THE INDIAN EXPRESS, <https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-hc-7442347/>.

¹⁵ The Protection of Women from Domestic Violence Act, 2005, No.43, Act of Parliament.

¹⁶ Hindu Marriage Act, 1955, No.25, Act of Parliament, 1955.

¹⁷ The Parsi Marriage and Divorce Act, 1936, No.3, Act of Parliament.

¹⁸ Indian Divorce Act, 1869, No.4, Act of Parliament.

¹⁹ Special Marriage Act, 1954, No 43, Act of Parliament.

²⁰ Bhartiya Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

This approach reduces the seriousness of marital rape to just another instance of mistreatment, failing to acknowledge the unique trauma associated with sexual violence. It also stands in sharp contrast to the repealed Section 375 of the Indian Penal Code (IPC), which treated rape outside marriage as a grave violation of dignity and personal autonomy. The disparity in how the same act is addressed, depending solely on whether the victim is married, creates an unfair and discriminatory legal framework. By not recognizing marital rape as a distinct offense, these provisions deny justice to victims and reinforce outdated, harmful perspectives about consent and marital relationships.

Constitutional Violations

ARTICLE 14: The Supreme Court laid down the principle that any classification made by law must be based on intelligible differentia and must have a rational nexus with the object sought to be achieved by the law. This principle ensures that the right to equality is upheld and arbitrary discrimination is prevented.²¹

Treating the act of raping a married woman as an offense of cruelty under Sections 85 and 86, while the same act committed against an unmarried woman is addressed as the crime of rape, highlights a disparity in legal treatment. It is in violation of Fundamental right to equality enshrined under article 14 of Constitution of India. This classification is based on the argument that the state aims to safeguard the sanctity of marriage to ensure greater societal stability.²²

By enacting laws to criminalize cruelty and introducing the PWDVA, 2005, it is evident that the State acknowledges that safeguarding the institution of marriage cannot serve as an all-encompassing objective.

ARTICLE 21: Treating marital rape solely as an act of cruelty under Sections 85 and 86 of the Bharatiya Nyaya Sanhita (BNS) fails to recognize the profound violation of a woman's fundamental rights, particularly those enshrined in Article 21 of the Indian Constitution. Article 21 guarantees the right to life and personal liberty, which the Supreme Court of India has expansively interpreted to include the right to live with human dignity, bodily integrity, and

²¹ State of West Bengal v Anwar Ali Sarkar, AIR 1952 SC 75; [1952] 1 SCR 284.

²² AnanthaKrishnan G, Centre argues against labeling marital rape as 'rape,' says it is 'disproportionate' and 'harsh', THE INDIAN EXPRESS, (Oct 4 2024), <https://indianexpress.com/article/india/centre-sc-criminalising-marital-rape-9602198/>.

personal autonomy. In the landmark case of *Maneka Gandhi v. Union of India*²³ The Court emphasized that the right to life encompasses the right to live with dignity and free from exploitation.

Marital rape directly infringes upon a woman's bodily autonomy and integrity, stripping her of control over her own body and violating her dignity. By categorizing such a grievous act merely as cruelty, the law minimizes the severity of the offense and denies the victim the recognition and justice she deserves. This approach not only undermines the gravity of the crime but also perpetuates a legal framework that fails to protect women's fundamental rights within marriage.

Furthermore, the Supreme Court, in *K.S. Puttaswamy (Retd.) v. Union of India*²⁴, affirmed the right to privacy as an intrinsic part of Article 21, encompassing the sanctity of one's body and the right to make intimate decisions. Marital rape violates this right by disregarding a woman's consent and autonomy within the marital relationship.

Therefore, treating marital rape under the umbrella of cruelty, rather than recognizing it as a distinct and severe offense, constitutes a violation of Article 21. It fails to uphold the constitutional promise of dignity, autonomy, and the right to life for married women, thereby perpetuating injustice and inequality within the legal system.

Challenges in Proving Consent

Proving consent retrospectively is inherently challenging in intimate relationships, making it difficult for victims to substantiate their claims. There are three ways to treat consent while criminalising marital rape. The first would be to presume consent and it would be on the victim to rebut the consent. The second would be to presume absence of consent and it would be on the accused to establish consent. The third would be to establish a new system for establishing consent in marital rape cases. This would require us to make changes in evidence law as well. Considering only wife's testimony for marital rape would not be enough. It will result in false cases being filed against the husband in order to take revenge or extort money from him and his family by the wife.²⁵

²³ *Maneka Gandhi v. Union of India*, 1978 AIR 597, 1978 SCR (2) 621

²⁴ *K.S. Puttaswamy (Retd.) v. Union of India*, AIR 2017 SC (CIV) 2714

²⁵ Debby Jain, S.498A IPC : How Supreme Court Raised Concerns About Misuse Of Anti-Dowry & Cruelty Laws Over Years, LIVE LAW , (15 Dec 2024, 10:28 AM) <https://www.livelaw.in/top-stories/supreme-court-take-on-misuse-of-section-498a-ipc-cruelty-harassment-over-implication-of-husband-family-278393>.

Where exists marital rape by husband there are traces of prolonged physical and mental cruelty as well. Here comes the cruelty in working following the guidelines laid down by Apex court in *Samar Ghosh V. Jaya Ghosh*. Factors that would need to be considered before establishing the consent of the wife would be to examine the complete matrimonial life of the parties. Finding out the traces of acute mental pain and agony, and any kind of physical abuse tolerated by the victim.²⁶ The testimony of family and relatives would also enhance the truth of the case. Expert testimony, specifically of Doctors, would prove to be good evidence to showcase mental and physical injury suffered by the accused. This way the victim would not be out of remedy against marital rape and the husband wouldn't be falsely trapped into criminal cases by wife.

These delicacies cannot be furnished through sec 85 and 86 of BNS, the scope and nature of cruelty and marital rape are far from each other.

Sentencing Period

"It need to be addressed that punishment for cruelty under sec 85 can extend to 3 years and fine, whereas punishment for rape is rigorous imprisonment, which shall not be less than 10 years but may extend to life imprisonment."²⁷ This is violative of article 14 enshrined under fundamental rights of constitution. After Nirbhaya case the rape laws became stricter in our country. It is emphasised again and again in the court of laws that rape is not sex it is sexual violence and very serious crime and carries maximum punishment similar to that of murder. Because a murderer takes away the life of a person but rape takes away the soul of a person.²⁸

Marital rape is severely punished in various countries, highlighting the global recognition of its gravity. In Liechtenstein, Mongolia, and Rwanda, marital rape can result in a lifetime imprisonment, especially in cases where the victim is killed. "Countries like Guatemala, the Philippines, Serbia, and Grenada impose penalties ranging from 30 to 50 years, while Mozambique, Ecuador, Luxembourg, New Zealand, Greece, Argentina, and Monaco prescribe imprisonment for 10 to 30 years. These stringent punishments underscore the urgent need for India to criminalize marital rape and establish strong legal penalties to ensure justice for victims and uphold their dignity and rights."²⁹

²⁶ Samar Ghosh V. Jaya Ghosh (2007) 4 SCC 511.

²⁷ Bhartiye Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023, (India)

²⁸ Rafiq vs State Of U.P MANU/SC/0196/1980.

²⁹ Rohit Pradhan, Punishment for Marital Rape in these Countries, you didn't know about!, LEXFORTI, (July 24 2020), <https://lexforti.com/legal-news/marital-rape/>.

It is essential to eliminate the exception clause and classify marital rape as an offense under the scope of rape rather than cruelty to ensure equal legal protection for all rape victims, regardless of their marital status.

Legal Reforms

Many times, police hesitate to register cases of marital rape due to societal stigma and the belief that marital relationships are private matters. This lack of explicit laws criminalizing marital rape leaves victims without adequate recourse.¹⁸ To change this, it is vital to remove “Exception 2 under Section 63 of the Bharatiya Nyaya Sanhita (BNS),”³⁰ which currently prevents husbands from being prosecuted for sexual assault against their wives. There is a pressing need to establish explicit legal provisions that classify marital rape as a grave offence, ensuring it is addressed with the same severity as other types of sexual assault.. Additionally, the judiciary needs to be sensitized through proper training to understand the unique challenges of marital rape and its implications on constitutional rights. Victim-centric guidelines should also be developed to ensure fair handling of such cases. Public awareness campaigns are essential to challenge the stigma around marital rape and to promote gender equality. Furthermore, police accountability must be improved so victims can file complaints without fear, and their safety and dignity are prioritized.

Conclusion

This research critically examines the inefficiencies of “Sections 85 and 86 of the Bharatiya Nyaya Sanhita (BNS)”³¹ in addressing marital rape, highlighting the disparity between cruelty provisions and the recognition of rape as a distinct offense. The central question explored is whether the current legal framework adequately protects married women from sexual violence and upholds their constitutional rights, particularly under “Articles 14 and 21 of the Indian Constitution”³². The paper underscores how treating marital rape as cruelty trivializes its gravity, undermines the concept of consent, and perpetuates gender inequality.

This research underlines the urgent need for legislative change to correct the systemic neglect of marital rape as a punishable offence. It critiques the insufficiency of cruelty-based provisions, the infringement of constitutional rights, and India's failure to meet its international

³⁰ Bhartiya Nyaya Sanhita, 2023, No.45,Acts of Parliament,2023,(India)

³¹ Bhartiya Nyaya Sanhita, 2023, No.45,Acts of Parliament,2023,(India)

³² INDIA CONST. art. 14,21.

commitments. By analyzing global legal standards and judicial precedents, the study advocates for the immediate criminalization of marital rape, ensuring it is treated on par with other acts of sexual violence.

The objective of this paper extends beyond critiquing current legal frameworks—it also puts forth actionable recommendations. These include eliminating Exception 2 under Section 63 of the BNS, enacting specific provisions to criminalize marital rape, and promoting broader societal reform through judicial education, public awareness initiatives, and stronger accountability mechanisms for law enforcement.

Collectively, these steps aim to affirm the dignity, autonomy, and fundamental rights of all women, irrespective of their marital status.

Ultimately, this research advocates for a shift from viewing marriage as an institution that supersedes individual rights to one that respects personal liberty and equality. Criminalizing marital rape is not only a legal obligation but also an ethical responsibility to safeguard women's basic rights and support the creation of a fair and equal society.



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