



MARITAL RAPE: SOUTH ASIA FACTSHEET

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This is the fourth document in a series of legal information factsheets curated by iProbono on violence against women and girls. While our factsheets aim to provide a global perspective, the focus of this document are the marital rape laws in South Asia.

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INTRODUCTION

Women in abusive marriages are routinely stripped of their dignity, and rape may be used as an instrument of oppression in these unions. Marital rape is a gross violation of the marriage contract, but ironically, the crime is protected by the patriarchal notions of the 'sanctity' of marriage and family. This factsheet provides an overview of the law on marital rape across five South Asian countries -- India, Bangladesh, Nepal, Sri Lanka and Pakistan.

Article 2(a) of the United Nations Declaration on the Elimination of Violence against Women explicitly recognises 'marital rape' as a form of violence against women. A recent study conducted by the United Nations Population Fund Agency (UNFPA), reports that intimate partner violence is the most common form of domestic violence. As of May 2019, the survey showed that over 54 per cent of women in Bangladesh, 29 per cent in India, 25 per cent in Nepal, 24.5 per cent in Pakistan, and 27 per cent in Sri Lanka have experienced physical and/or sexual violence by an intimate partner in their lifetime.

The basis for continuing to distinguish marital rape from other forms of rape can be traced to common law traditions around concepts of doctrine of coverture and implied consent. The doctrine of coverture rests on the principle that the husband and wife merge their identities upon marriage and become ipso facto one individual in the eyes of law. The doctrine is premised on viewing 'women as chattel', as the 'property' of the dominant male member of her immediate family. A husband was not deemed capable of raping his own wife, as her chastity or fidelity was his to own. Far more widely accepted was the theory of implied consent, which proceeds by considering

marriage as a social contract, in which the woman willingly submits her autonomy in exchange for protection. It was an established notion that such consent, once given, is irrevocable and complete, and hence by virtue of her marriage, the woman has provided unconditional consent to sexual relations with her husband.

During the COVID-19 pandemic, several reports both anecdotal and academic, marked an increase in domestic violence during lockdowns across the globe. However, as marital rape is not a recognised criminal offence in many countries, data on sexual violence in domestic spaces during lockdown remains unclear. In this factsheet, we examine the law on marital rape in five South Asian jurisdictions out of which only one, Nepal, criminalises marital rape.

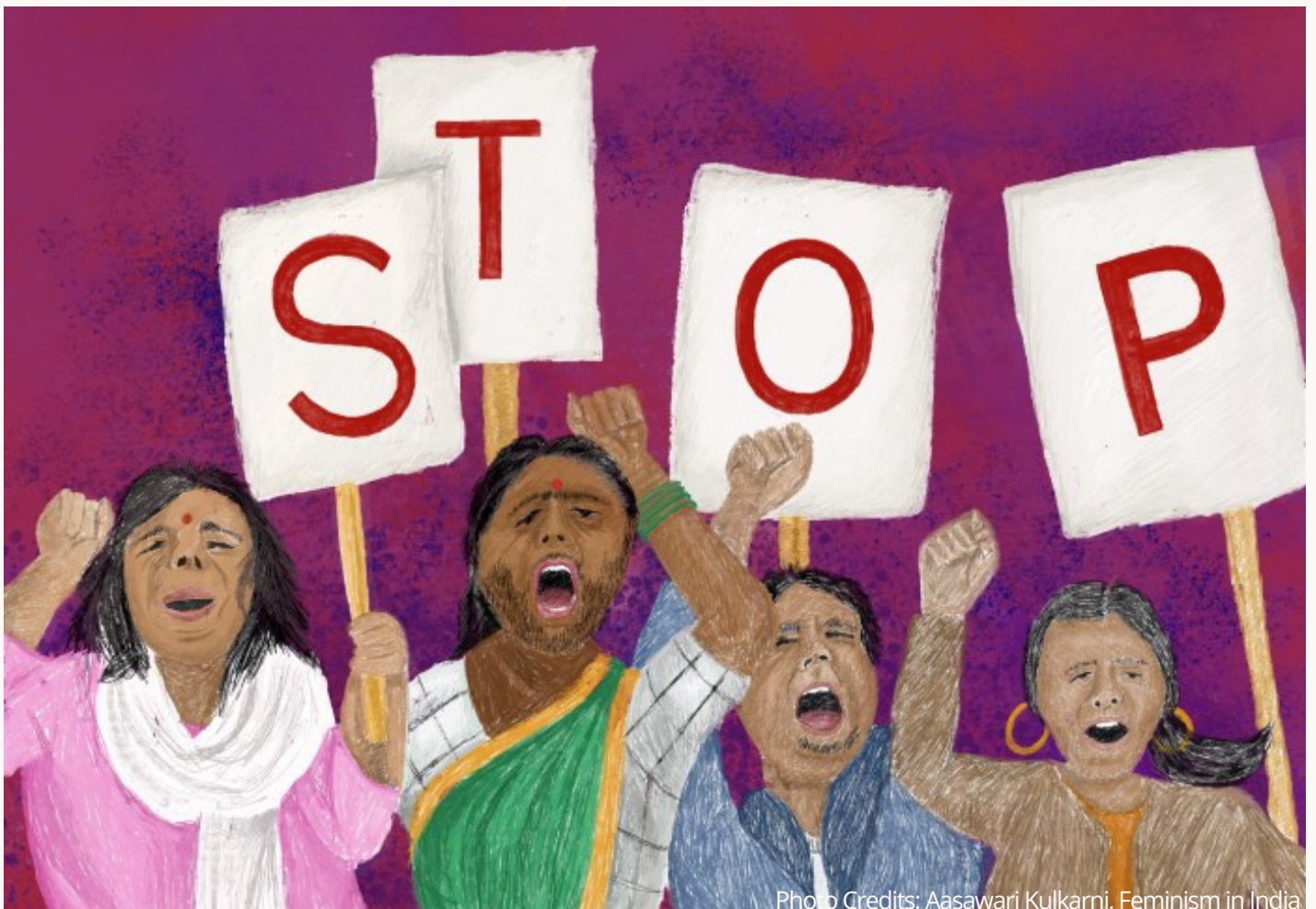


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BANGLADESH



Marital rape is partially criminalised in Bangladesh and attracts a much lower punishment than non-spousal rape. The colonial Penal Code of 1860 was amended to criminalise marital rape in 1991. Like its South Asian neighbours, Bangladesh is trapped in the archaic notion that a woman consents unequivocally to sexual intercourse with her husband upon marriage.

Victims of marital rape never report their crime, since the marital rape of women and girls above the age of 12 is totally excluded from the offence of rape in the country. As per a combined reading of ss. 375 & 376 of the Penal Code (1860) the punishment for other forms of rape is imprisonment for

10 years up to life whereas for marital rape, in cases where the wife is not under 12 years of age, it is imprisonment up to 2 years. On 25 October 2020, a 14-year-old girl from Tangail was admitted to Dhaka Medical College and reportedly died due to excessive genital bleeding, just over a month after her marriage to a 34–35 year-old man, who had recently returned from the UAE. This led to the filing of a writ petition challenging the validity of marital rape exceptions to ss. 375 and 376 of the Penal Code, as being discriminatory and violating the fundamental rights of married women and girls. The High Court has issued notice to the ministries of law & justice, women & children affairs and home affairs. Petitioners have relied on a study conducted by the Bangladesh Bureau of Statistics, which had interviewed 19,987 ever-married women and reported that over 5,390 women were raped by their husbands.

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The exception under Section 375 of the Penal Code is also upheld in related provisions on rape such as Section 9(1) of the *Nari o Shishu Nirjaton Doman Ain, 2000*. In a survey conducted by the Dhaka Tribune regarding marital rape, 63.8 per cent of respondents stated that it was acceptable. A study conducted in February 2019 by the Bangladesh Rural Advancement Committee's Advocacy for Social Change department revealed that only 4 per cent of the 4800 respondents to the survey considered marital rape to be a form of violence.

INDIA

India remains one of the 36 countries in the world that has not criminalised marital rape. When a Bill to criminalise marital rape was introduced, it was rejected by Parliament on the notion that marriage is a sacred institution and touching it will lead to the breakdown of culture and society. Patriarchal structures propagate a culture of silence, tolerance, adjustment and compromise to respect the 'honour', the 'pride' and the 'values' of Indian families and diminish violence against women. Men's groups actively lobby to dilute the law against domestic violence to prevent its misuse by women. These groups also argue that a penal law against marital rape will be abused by women.

The National Family Health Survey IV conducted by the Ministry of Health and Family Welfare found over 83 per cent of married women between 15-49 years were sexually assaulted by their husbands. Under the rape law (s. 375) of the Indian Penal Code (IPC), sexual violence in marriage is excluded from the ambit of rape, provided the wife is over 15 years. The constitutionality of this exception was challenged before the Supreme Court of India in *Independent Thought v. UOI*[1]



Photo Credits: Reuters

and it was argued that the exception creates separate categories – married and unmarried women – and such a classification does not pass the test of ‘*intelligible differentia*’ under Article 14 of the Indian Constitution. The Supreme Court read down this exception and held that it must be interpreted in line with pro-girl child legislations. The effect of this judgment is that marital rape is not a criminal offence as long as the wife is 18 years or older. The constitutional validity of India’s marital rape exception is under challenge at the Delhi High Court.

The definition of ‘domestic violence’ under the Protection of Women from Domestic Violence Act, 2005 includes ‘sexual violence’, however, the section only imposes civil liability and cannot be used to initiate criminal proceedings.

In 2013, the UN Committee on Elimination of Discrimination Against Women (CEDAW) recommended that the Indian government should criminalise marital rape. The JS Verma committee set up in the aftermath of nationwide protests over the 16 December 2012 gang rape case also recommended the same. A report by the United Nations Population Fund (UNFPA) indicated that more than two-thirds of married women between the ages of 15 and 49, across various socio-economic conditions, have been beaten or forced into sex. In the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*[2],

The Gujarat High Court held that “human rights of women include their right to control and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Women do not divest themselves of such rights by contracting marriage for the simple reason that human rights are inalienable.”

[2] 2018 SCC Online Guj 732, available at <https://indiankanoon.org/doc/185050052/> (last accessed on 24th May, 2021)



NEPAL

Marital rape is explicitly criminalised in Nepal, a demographically Hindu majority country. The Supreme Court of Nepal in *Forum for Women, Law and Development, Thapathali v His Majesty's Government* ('FWLD case'), held that the marital rape immunity was unconstitutional, and violated Nepal's obligations under international human rights instruments, in light of the changing norms and values in criminal law. Interestingly, the Supreme Court also noted that despite religious and traditional beliefs, the law regulating familial affairs had to align with changes in the social, economic and cultural contexts.

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Marriage is an association between two independent equals and on account of marriage women are not converted into property, whose sexuality could be controlled by their husbands. The preservation of the sanctity of marriage effectively reinforces patriarchal stereotypes by perpetuating the idea that women have no sexual freedom or autonomy within the marital relationship. Nearly 75 per cent of women aged 15-49 surveyed in the Nepal Demographic and Health Survey (NDHS) of 2016 had experienced sexual violence, of which 8 per cent were married women. In the FWLD case, the Supreme Court found the failure to criminalise marital rape in the 'Muluki Ain', the General Code of Nepal, as unconstitutional and against the principles of the ICCPR (International Covenant on Civil and Political Rights).

While the definition of rape in the Criminal Code Bill of 2017 has been widened and the punishment for marital rape increased, there is still this unjustifiable difference between rape and marital rape. This is in violation of a recent decision of the Nepalese Supreme Court that had ordered the government to make provisions to bring consonance between discriminatory sentencing policies in cases of marital and non-marital rape.



Section 219(4) of the Criminal Code Bill defines marital rape as a criminal offence, with up to a five-year jail sentence. The sentencing under this provision is different from other forms of rape for which the sentence is higher. This Bill provisions for a sentence of 6 to 10 years for rape of a woman under 14 years of age and a sentence of 3 to 5 years for rape of a woman who is 14 years of age or older. This Bill also extended the statute of limitation for rape cases from 35 days to one year. The United Nations Human Rights Council called for it to be made significantly longer and the UN Committee on the Elimination of Discrimination against Women recommended that it be removed entirely.

A study from 2014 revealed that out of the 362 women surveyed, 53.6 per cent had experienced marital rape everyday or frequently, and that women who were raped were just over twice as likely to suffer from gynaecological complications. Another study of pregnant women in a maternity hospital in Nepal revealed that among the victims of sexual violence, 45 per cent were victims of marital rape.

PAKISTAN



Section 6 of the Hudood Ordinance of 1979 explicitly excluded marital rape from the legal definition of rape. This exception was removed by the Protection of Women (Criminal Laws Amendment) Act, 2006 and the definition of rape was amended to broadly include marital rape. The socio-cultural context of Pakistan overrides the legal provisions that protect women from marital rape and no cases have been reported despite overwhelming evidence of marital rape. A 2003 domestic violence survey reported that nearly 47 per cent of married women living in Islamabad and Rawalpindi were coerced into non-consensual sex. Under Islamic law marriage is a contract. If a wife refuses sex with her husband without valid justification (health, menstruation, or fasting), she is deemed to be disobedient and in breach of her moral and religious duties. These gendered injunctions rooted in patriarchal interpretations of religious texts combined with the lack of sexual autonomy have conditioned women to internalise the obligation to sexual submission.



Photo Credits: Paul Ratje

"It is, however, punishable under Section 375 of the Penal Code, which criminalises rape. Despite this, there has only ever been one case of marital rape ever reported, in spite of marital rape being a prevalent issue. "

Marital rape is not an offence under Zina law, which is the Islamic law relating to unlawful sexual offences. It is, however, punishable under the Section 375 of the Penal Code, which criminalises rape. Despite this, there has only ever been one case of marital rape ever reported, in spite of marital rape being a prevalent issue. Activists argue that this is because of the confusion in legal provisions, for example, in a case in 2018, a woman alleging marital rape filed a case under Section 377, which relates to unnatural sex with a man, woman, or animal, instead of Section 375. Regardless of the lack of judicial interpretation of the amended provision in the Penal Code, the removal of the exclusion of marital rape has led many to believe that the provision covers marital rape as well and that the country recognises marital rape as a punishable offence.



SRI LANKA



Like much of South Asia, Sri Lanka is a melting pot of a variety of cultural beliefs that may act as barriers to equality under the rule of law. As a result, the legal framework of Sri Lanka is packed with loopholes. For instance, marital rape is not explicitly criminalised but only conditionally recognised. In 1995, the government amended the Penal Code, taking into account rape and age of consent. According to the amendments, the punishment for rape was enhanced to 10 years imprisonment and the age of consent was raised from 12 to 16 years. As per the current position, marital rape is legally identified as a criminal offence if the spouse is judicially separated or the wife is under 16 years. In 2005, the Prevention of Domestic Violence Act was introduced to provide protection against physical and psychological violence, however, it does not include sexual violence.

The bulk of rape cases in Sri Lanka are detected in remote regions where women are unlettered and living in poverty. Girls are married off as soon as

they reach puberty and are not conscious of their rights or their agency. Marital rape is often relegated to a private matter that is not addressed.

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As per the 2019 Women's Wellbeing Survey conducted in 2019, which was the first survey on violence against women and girls using standardised international research methodology, 20.4 per cent of women who were ever partnered had experienced physical and/or sexual violence by an intimate partner in their lifetime. The sentencing provisions to the amended Penal Code provisions provide for rigorous imprisonment for a minimum period of 7 years, and a maximum of 20 years. However, this sentence can only be applied in the case of marital rape if a court has ordered the judicial separation of a married couple. Multiple activists and NGOs have cited this caveat as ineffective as there is no tradition of seeking legal separation in Sri Lanka. Distressed wives generally live separately if they are being abused by their husbands, most often under the protection of their parents. A fine may also be imposed along with the prison sentence. In a landmark judgment in the case of *Innoka Gallage v. Kamal Addararchchi (2002)*, a famous Sri Lankan actor was sentenced to 10 years in prison and a million Sri Lankan rupees was imposed as a fine under the amended provisions. In 2017, there was a proposal by Talatha Atukorale, the Justice and Foreign Employment Minister, to introduce amendments to the Penal Code that would explicitly criminalise marital rape. These amendments were, however, never introduced.

CONCLUSION

The analysis of country-specific legislation and policies to protect against sexual violence and marital rape across South Asia has exposed the gaps in the law, failures in implementation, and government shortcomings in fulfilling commitments to international law on women's rights.

Despite the obstacles that survivors of rape need to overcome, a small minority manage to file police complaints, the first step in a long and arduous quest for justice. With marital rape, women's rights are too easily sacrificed for the preservation of marriage and family. In India, Bangladesh and Sri Lanka, the quest for justice in marital rape is not even validated by law, and in Nepal and Pakistan, where laws to protect exist, there is no precedent.

This overview of the legal position on marital rape in five South Asian countries underlines that continued and consolidated legal and advocacy interventions are essential to ensure access to justice for survivors and pave the way to prevention. Governments must implement effective legislation to combat domestic violence and the often neglected issue of marital rape alongside public awareness in the media to challenge current thinking on the issue and create a dialogue that centres on the autonomy of women and their sexual health. Finally, in countries where marital rape is not recognised as a crime, there is a pressing need to address the protection gaps in the law to ensure women's rights.

