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A CONTRASTING LEGAL POSITION OF INDIA & ITS NEIGHBOURS ON MARITAL RAPE

AUTHORED BY: DAKSHITA SHARMA KATARE

Abstract

Rape is one of the most heinous crimes that has been recognized around the world and has been made punishable in almost every nation, though the degree of punishment may vary from state to state basis. While rape in itself is a horrendous crime, marital rape is even worse as it breaches the trust one has on his or her partner and creates a question mark on the sanctity of the institution of marriage itself. Sadly enough, even though rape is a recognised crime throughout the globe, every nation has their own perspective and their distinct laws on marital rape. Some countries recognize it as a crime, while others regard it as an exception to the status of crime. A few country also hold an unclear stance on the legal position of marital rape. India is one of the nation which does not recognise marital rape is a crime. Since, India is a one of the prominent countries in South Asia and lies in the Indian sub-continent, wherein it shares similar culture and history with its neighbouring countries, it is notable to look at the stance of India's neighbours on this issue. Recent developments within the country have been looking forward to making interpretations in this regard, to decide whether India should decriminalize marital rape or not. In such a situation taking a look at the position of this socio-legal issue in the neighbouring countries, shall help in taking an informed decision and incorporating the positive aspects of the fellow nations. In order to achieve the above purpose, this short note has been written by reviewing the available literature on this topic.

Keywords: Marital Rape, India, Bharatiya Nyaya Sanhita, Nepal, Bhutan, etc.

Marital rape is understood as rape within a marital relationship, that is, the act of sexual intercourse with one's spouse without his or her consent. It is a form of domestic violence and sexual abuse within the boundaries of marriage.

From the point of view of law, it has different in status in different countries. Out of the 198 nations, 142 countries have criminalised marital rape, 49 of them have explicitly excluded it

from the ambit of a crime, while the rest 7 have unclear laws and ambiguity regarding the same. Unfortunately, India is amongst those 25% nations who have not criminalised marital rape. On the contrary, two of its immediate neighbours, Nepal and Bhutan fall under the category of other 72% nations which have explicitly criminalised marital rape. Just like India, its other neighbours (except the above two), that is, Afghanistan, Bangladesh, China, Maldives, Myanmar and Sri Lanka, have also not criminalised marital rape, whereas Pakistan has taken no clear stand on this grave issue.¹

The major issue in criminalising marital rape is the difficulty in proving the incidence of the said act and the risk of abuse of such law.

Let us take a quick glance at the legal position of Marital Rape in India, Pakistan, China, Nepal and Bhutan.

Tussles and Conflicts within the System: *India*

The substantive law of crimes in the modern India has been governed under several legislations, wherein the major piece of legislation had been the Indian Penal Code, 1860 (also called the 'IPC' in short), along with several newer criminal legislations dealing with crimes of specific nature such as the Official Secrets Act, Prevention of Corruption Act, Arms Act, Drugs (Control) Act, etc. The IPC now stands repealed and has been replaced by a newer legislation – the Bharatiya Nyaya Sanhita, 2023 (also referred to as the 'BNS') this year. This new law now majorly governs the Indian substantive criminal law and defines major crimes along with prescribing their punishment.

Earlier the IPC, and now the BNS, are the primary substantive criminal law which deal with almost all the offences like theft, robbery, rape and murder. Section 375 of the IPC and Section 63 of the BNS define the term rape, and Section 376 of the IPC and Section 64 of the BNS provide for its punishment, thus criminalizing rape in India.

Now, it must be noted that Exception 2 to Section 375 of IPC read with Section 376B clearly provide that marital rape is legal in India, except when the wife is below the age of 15 years or when the husband and wife are separated from each other. The only change we see upon going

¹ Claire Provost, "UN Women justice report: get the data" *The Guardian*, Jul. 6, 2011.

through the provisions under Section 63 Exception 2 read with Section 67 of the BNS is that the statutory limit of 15 years has been increased to 18 years, yet marital rape has still not be criminalized under the Indian law.

It is noteworthy here that the Indian legal system has undergone a lot of changes in the past one decade, especially with respect to crimes against women including rape due to the uproar in the nation after the *Nirbhaya Gang Rape Case* (2012) and the *Shakti Mills Gang Rape Case* (2015). Now, in present, especially in the post covid-19 lockdown period, marital rape has emerged as a grave concern and attempts are being made to criminalize it.

It must be noted that research undertaken by various academicians and research scholars in the country have shown the following findings:

- 846 of 3447 women, that is, almost 25% women have disclosed that they have been victims of marital rape.²
- Spousal violence including marital rape is associated with depression and Post Traumatic Stress Disorder.³
- That during Covid-19 pandemic the stringent lockdowns had concurrently increased complaints of domestic violence and cybercrime.⁴

Pathway to disclosure	
Women disclosing marital rape to counsellors while seeking support for domestic violence (counselling records)	828 of 1783
Women reporting marital rape to the hospital (Medico-legal forms)	18 of 1664

² Deosthali, P. B., Rege, S., & Arora, S., "Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records" 29(2) *Sexual and reproductive health matters* 2048455 (2021).

³ 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(6) *PLOS global public health* e0000601 (2022).

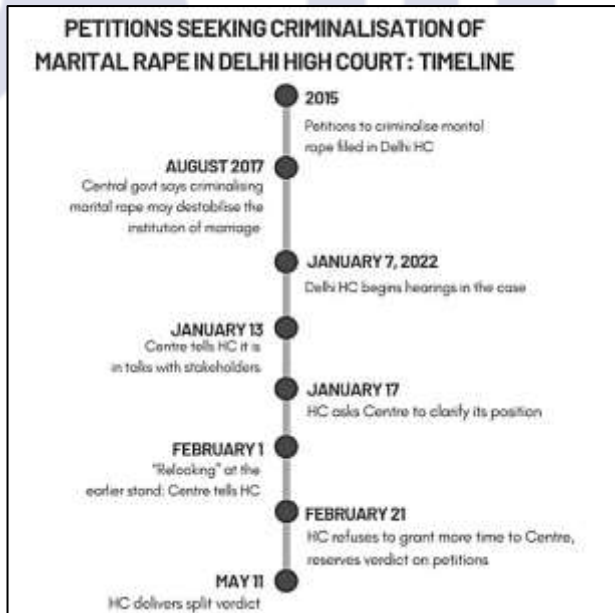
⁴ Bagchi, S.S., Paul, S., "Violence during lockdowns in India" 7 *Nat Hum Behav* 306–307 (2023).

Table 2.
Forms of sexual violence disclosed to a counsellor

Forms of violence (multiple responses)	Total number of women	
	N = 828	%
Forced sexual intercourse	565	68
Withholding sexual pleasure	260	29
Not allowing women to use any contraceptive	79	10
Forcing her to have children	119	14
Forcing wife to perform sexual acts against her will (e.g. oral sex)	64	8
Sexual advances from other family members	30	4

(Table 1 & Table 2 Source: Deosthali, P. B., Rege, S., & Arora, S., “Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records” 29(2) *Sexual and reproductive health matters* 2048455 (2021).)

In 2013, the Justice JS Verma Committee had recommended the criminalization of marital rape in India by deleting the Exception from the provision of rape in law. Later, several petitions were filed in the Delhi High Court in the year 2015 for the first time demanding criminalisation of marital rape. But, the Central Government viewed it as opposed to the ‘sacrament’ of marriage.



(Image Source: Marital Rape in India, available at: <https://www.drishtiias.com/daily-updates/daily-news-analysis/marital-rape-in-india-1> (last visited on December 22, 2024).)

In 2017, a complaint was filed against Hrishikesh Sahoo by his wife on the charges of rape and cruelty which was being heard by the Sessions Court. During the pendency of the case, Sahoo

preferred a writ petition to the Karnataka High Court pleading to drop the charges against him on the grounds of exception to the provision of rape which allows marital rape. But Justice M. Nagaprasanna rejected the petition taking into consideration the 2013 report recommendations. He then went ahead to file a Special Leave Petition before the Supreme Court of India challenging this ruling, whereby, the 3-Judge Division Bench comprising of CJI N.V. Ramana, Justice Hima Kohli and Justice Krishna Murari passed the order of interim stay on the High Court's decision, which was opposed by the Karnataka state government.⁵

Meanwhile, in 2022, four cases namely as, *RIT Foundation v. The Union of India*, *Khusboo Saifi v. The Union of India & Anr.*, *All India Democratic Women's Association v. The Union of India*, and *Farhan v. State & Anr.*, were heard together by a Divisional Bench of the Delhi High Court constituted by Justice Rajiv Shakhder and Justice C. Hari Shankar with the major issue of criminalising marital rape. While the former ruled out in favour of criminalising marital rape, the latter held that marriage in itself is an "implied" consent.

This split verdict created anomaly and thus the matter went to the Supreme Court, where it is still pending. Also, Dalit activist Ms. Ruth Manorama also filed a fresh petition before the Apex Court challenging the marital rape exception under the law. All these petitions were clubbed in early 2023, to be heard by the CJI D.Y. Chandrachud and Justice P.S. Narsimha, but had remained unheard until January 2024. It was only in October 2024, when the Union Government filed a 49-paged lengthy affidavit which opposed the idea of removing or repealing the marital law exception provision and claimed that the Protection from Domestic Violence Act exists to cater to the issue of marital rape by providing penal provisions in it and that the BNS does not require said changes. This has led to a huge setback in the desire for criminalization of marital rape.

Here, it must be noted that previously, in a major development in September 2022, a Supreme Court bench headed by the present Chief Justice DY Chandrachud while ruling on women's right to safe abortions regardless of marital status held that for the purposes of the Medical Termination of Pregnancy Act, the definition of rape should include marital rape.

⁵ Challenge to the Marital Rape Exception, available at: <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception/> (last visited on December 22, 2024).

Awaiting a Clarification: *Pakistan*

Earlier, the definition of rape under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 explicitly excluded marital relationship. But with its repealment and consequent enactment of the Protection of Women (Criminal Laws Amendment) Act, 2006, rape has been newly defined.⁶ The new definition has no reference to marriage altogether. Thus, it has been argued that marital rape has been included within the ambit of the offence of rape.⁷ However, as of February 2015, there were no reports of a case being brought before a superior court to clarify the law.⁸

Thus, Pakistani legal system is still awaiting a clarification as to the interpretation of the term „rape“ and whether it in application includes marital rape or not.

An Issue Left Untouched: *China*

In the year 2015, Domestic Violence Law was introduced in China and it in itself is landmark legislation as for the very first time in the Chinese legal system, it attempts to define the term ‘domestic violence’.

But, the Anti-domestic Violence Law of the People's Republic of China in no manner whatsoever deals with the gruesome issue of sexual violence. It only deals with physical and psychological aspect of domestic violence and not with the sexual aspect. Thus, the Chinese legal system is absolutely silent towards marital rape.

Further, a study conducted by the U.S. State Department reveals that the Chinese law does not safeguard same-sex couples or victims of marital rape.⁹

Thus, the entire issue of marital rape has been left completely untouched by the Chinese government and no major developments with regard to this are visible in the country.

⁶ The Pakistan: Penal Code, 1860.

⁷ Rao, Hamza, “Marital rape: Is it criminalised in Pakistan?” *Daily Pakistan Global*, Aug. 31, 2017.

⁸ Khan, Myra “Rape Laws in Pakistan” *The Legal Brief*, Feb. 21, 2015.

⁹ U.S. Department of State Bureau Of Democracy, Human Rights, And Labor, “2017 Country Reports on Human Rights Practices” (April, 2018).

The Petty Equality in the Land of Happiness: *Bhutan*

The Penal Code of Bhutan, 2004 criminalises marital rape under its Section 199 and 200.

These Sections read as follows:

Marital rape, Section 199.

A defendant shall be guilty of marital rape, if the defendant engages in sexual intercourse with one's own spouse without consent or against the will of the other spouse.

Grading of Marital rape, Section 200.

The offence of marital rape shall be a petty misdemeanour.

Now it must be clearly noted here that under Section 199 marital rape has been criminalised in Bhutan. But under Section 200, the offence of marital rape has been graded as an offence of petty misdemeanour. Now under Section 3 of the same Code an offence of petty misdemeanour as a class of crime has been defined as the one which provides for a maximum term of imprisonment of less than one year and a minimum term of one month for the convicted defendant.

Thus, the incidence of marital rape though criminalised in the Land of Happiness Bhutan, it has been treated as a minor violation of the rights of the spouse. In fact, even rape in Bhutan under Section 177 & 178 is regarded as a mere felony of the fourth degree, that is, punishable with a sentence of imprisonment which is for a minimum three years and a maximum of less than five years.

So, though the law of Bhutan protects both a husband and a wife from marital rape by the use of gender-neutral term „spouse“ and gives equal treatment also in the definition of rape to both men and women, it fails to create equality between the rape and marital rape. In addition to this, its treatment of both the offences as non-heinous ones needs a recheck and the punishment for these offences should be increased.

Ushering Improvements in the Legal System: *Nepal*

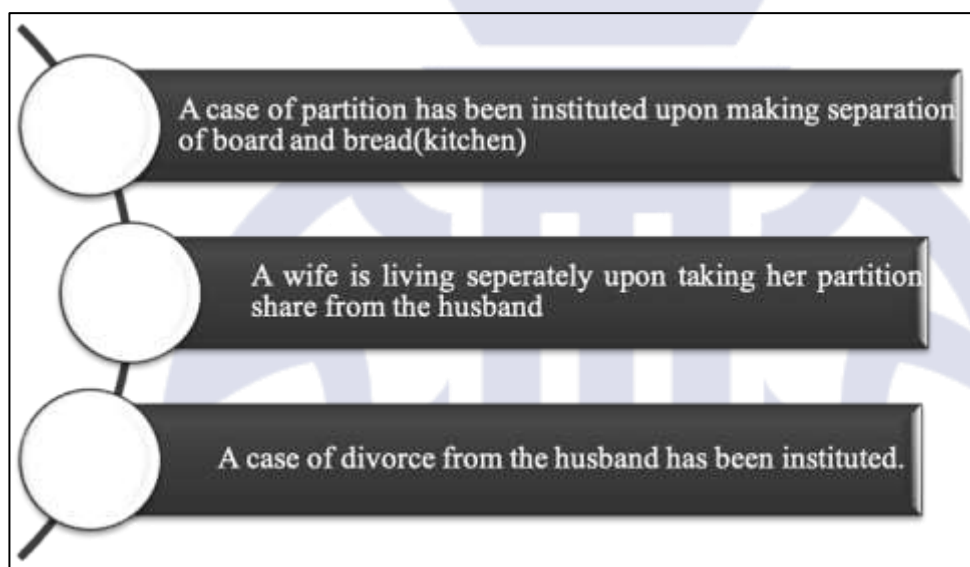
Out of all the countries neighbouring India, the one which has seen maximum development with respect to marital law is Nepal.

Marital rape was criminalised under the previous existing Criminal Code of Nepal of the year

2006, which now stands repealed.¹⁰ Thus, marital rape has been criminalised in Nepal since long. In the year 2017, the new Criminal Code Bill was introduced. Under Section 219 (4) of Chapter 18 of this Muluki Criminal Code, 2074, "If a man rapes his wife when he is still in marital relationship with her, he shall be sentenced to up to five years in jail."¹¹

Marital rape was criminalised in Nepal for the first time in 2001 by the precedent *Meera Dhungana v. HMG, NKP 2058*. In this case, the Supreme Court of Nepal had declared "marital rape as punishable crime and issued a directive order to Justice and Parliament to formulate just legal provisions for marital rape."

In Nepal, marital rape has three exceptions. They have been depicted in the figure below:



(Image Source: Marital Rape in Nepal, available at: <https://lawinpartners.com/publication/marital-rape-in-nepal/>(last visited on December 22, 2024).)

As far as the procedural requirements for convicting a person on the grounds of marital rape are concerned, the statute imposes a limitation period for filing a complaint of the said offence. The complaint of marital rape has to be filed within a year of commission of crime by either spouse. The victim gets only a year's time to get an FIR registered for commission of marital rape and bring his/her accusation to police and prosecution.

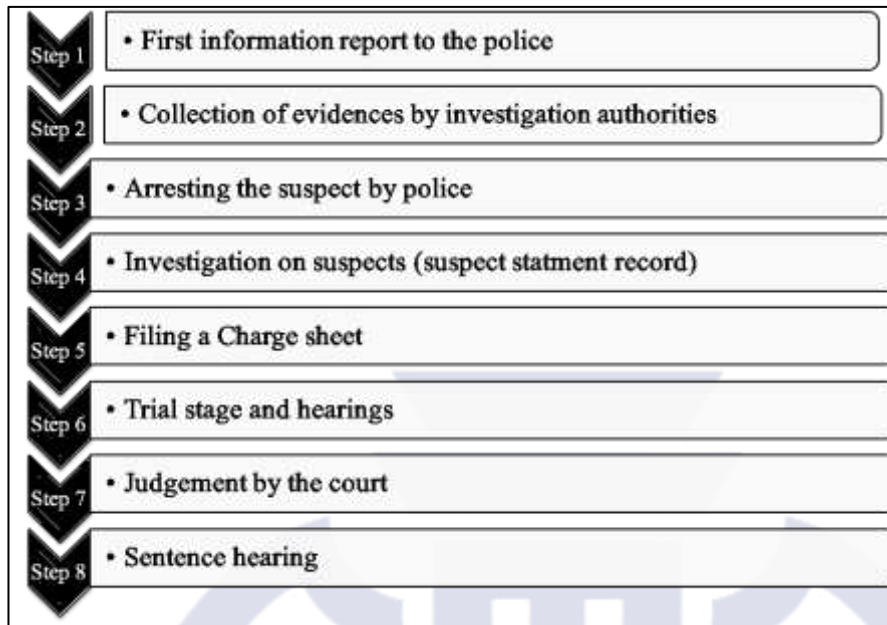
Post the registration of complaint, the investigation process and the trial procedure is followed more or less in the same way as in any cognizable criminal case in India. The major difficulty

¹⁰ UN Secretary-General, *In-depth study on all forms of violence against women*, UN Doc A/61/122/Add.1 (Jul. 6, 2006).

¹¹ "New law sets five-year jail term for marital rape" *The Himalayan Times*, Oct. 29, 2017.

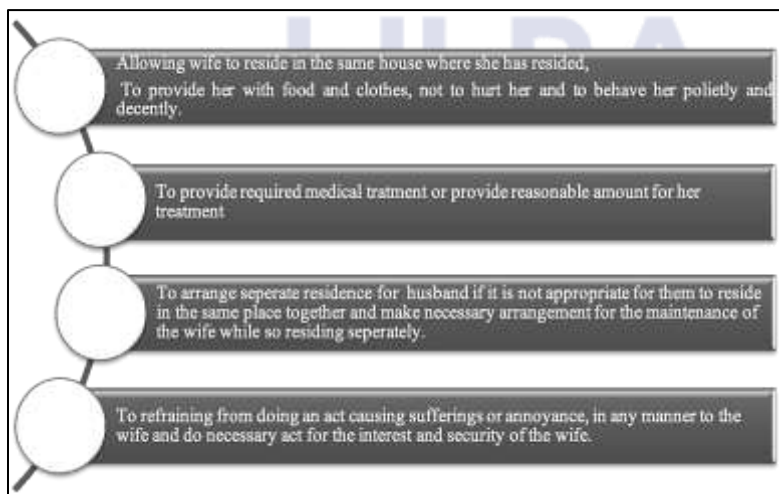
during this process is the collection of evidences against the accused. Because of the nature of the offence, arguing a case of marital rape in the Court becomes very challenging.

The figure below gives a quick glance of the procedure to be followed in case of marital rape:



(Image Source: Marital Rape in Nepal, available at: <https://lawinpartners.com/publication/marital-rape-in-nepal/>(last visited on December 22, 2024).)

During the course of pendency of the case, the court is empowered to give temporary reliefs by the way of interlocutory orders, that is, giving interim orders. A few types of interim orders which the court can give to the husband are:



(Image Source: Marital Rape in Nepal, available at: <https://lawinpartners.com/publication/marital-rape-in-nepal/>(last visited on December 22, 2024).)

In order to prove ones case, the prosecution has to, like any other crime, prove marital rape

beyond reasonable doubt. Further, lack of consent must be proved, which is in fact very difficult to prove in these cases due to the nature of relationship between the victim and the accused. Nevertheless, the testimony of the victim plays a pivotal role as important evidence in the cases of marital rape in Nepal.

As far as the protection of the accused is concerned, marital rape poses a great threat on their rights. This is because, one might misuse this legal protection to retaliate against their spouse, take vengeance or revenge, harm the reputation of the other party, hide their own mistakes and acts of adultery, etc. This is also one of the reasons why India is yet to criminalise marital rape. Apart from this, it must be noted that just like Bhutan, the rape laws in Nepal are also gender neutral, unlike the gender biased rape laws of India, where rape is recognized only against a female and not against a man.

A Way Forward

A careful analysis of the existing laws of these five countries shows how laws greatly differ even in geographical close regions. All the five legal positions bring us to a simple conclusion that it is a very tough task to criminalise marital rape and assign a proper punishment to it. Family is a space where one lives the most comfortably, but heinous patriarchal practices like that of marital rape deter this peaceful dwelling. It is the duty of the state to protect the lives of each and every individual not only on the streets, but also within the four walls of the homes. Also, various steps taken by the respective governments for criminalising marital rape and gender-neutral treatment of rape are few of the indicators of advanced democracy as they define the position of women in the society as well as the available social and legal protections to both men and women. Criminalising marital rape and gender neutral treatment of rape is an essential for any legal system. Thus, India must learn from its neighbours to accept these changes and reform its legal system. Finally, apart from the drafting of laws, proper implementation of such a noble law must also be facilitated so that justice in true sense can be attained by the people and human rights of the Indians as well as that of the nationals of other countries are also kept secure!