

INTERNATIONAL JOURNAL OF LAW  
MANAGEMENT & HUMANITIES  
[ISSN 2581-5369]

---

Volume 8 | Issue 3  
2025

---

© 2025 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

---

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of any suggestions or complaints, kindly contact [support@vidhiaagaz.com](mailto:support@vidhiaagaz.com).

---

To submit your Manuscript for Publication in the International Journal of Law Management & Humanities, kindly email your Manuscript to [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Marital Rape in India: Call for Legal Reform

---

SANKRITI DWIVEDI<sup>1</sup>

## ABSTRACT

*Marital rape, or spousal rape, refers to non-consensual sexual intercourse by a male, frequently identified as a manifestation of domestic violence and sexual abuse. Historically seen as a moral obligation, it is now predominantly classified as rape in several nations. The spouse may employ physical coercion, threats, or insinuated violence, instilling dread of violent retribution in the lady should she oppose him. Research indicates that women endure profound trauma and physical harm due to rape, resulting in diminished confidence in others and significant mental turmoil. Certain women persist in abusive marriages out of fear of violence or concern for their children, underscoring the subservient and compliant roles women occupy in patriarchal countries. Despite recognizing the accomplishments of over 79 years of independence, several elements and deficiencies in the Act render it erroneous or inappropriate. Women in our nation persist in experiencing oppression and fear from their counterparts, and they remain inadequately independent. Ironically, women in our country are not shown sufficient respect or dignity, despite our national celebration of historic verdicts such as Triple Talaq and other landmark cases. The notion of marital rape exemplifies implied consent, as women are perceived to have granted automatic consent upon marriage, hence allowing their husbands unlimited rights to invade their privacy and bodies. India lacks specific legislation addressing marital rape. The government refrains from enforcing stringent rape laws, apprehensive that it may undermine the institution of marriage and erode its values. Justice J.S. Verma has established a committee to examine marital rape legislation, contending that marriage should not serve as a defence against rape and advocating for the elimination of the exemption. The necessity for marital rape legislation is imperative, as it erodes the fundamental principles of marriage, allowing males to engage in non-consensual intercourse without accountability, hence presuming the woman's permission.*

**Keywords:** Gender equality, marital rape, article 15, consent, etc.

## I. INTRODUCTION

Rape is one of the abhorrent forms of crimes because in this crime the consent of the women is not considered, and her self-determination was not considered. The accused of this crime fails to identify woman as a human being who has her own human rights which cannot be

---

<sup>1</sup> Author is a Research Scholar at Banasthali Vidyapith, Rajasthan, India.

denied. It shows the imbalance of power, socially and politically, among men and women.

The definition of rape in many legal systems are given according to the standards of patriarchal society such as in the notion of chastity, virginity etc. When we discuss about rape it is obviously related to the forced and non-consensual sex includes vaginal penetration. Some men are excluded from this offence such as husbands.

In 1678, English Jurist Sir Mathew Hale had made a statement that “the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up her in this kind unto her husband, which she cannot retract”.<sup>2</sup> This concept provided immunity to husbands from criminal liability of raping their wives.

### **A. The Incidence and Causes**

Marital Rapes are usually not recognized because women are considered as the property of their husbands; such property can be used sexually anytime whenever they want. The concept of taking women as the property has a genesis from patriarchal society.<sup>3</sup> When we discuss marital rape, it is not only a contradiction between husband and wife but the violence on wife which is not rare, but we hesitate to discuss such issue in public. An assault by husbands happens very frequently than assaults by strangers. Dr Diana Russell conducted research and found that every seventh husband rape his wife.<sup>4</sup>

There are many arguments given for not considering a marital rape as an offence such as firstly that some women will misuse the law and will make false complaints against husbands to blackmail them for anything. Secondly provision of rape protects women from strangers who attack them but if it is made an offence than headachy women who will feel discomfort from sex will file complain and thirdly if legally women are allowed to file a complaint of rape against husband, then scope of reconciliation in marriages be narrowed down to null.

The wives who lived with their husbands after being raped by them are more traumatized because they have to live with their rapist. The betrayals for them use to be so hard for them to trust a person again is difficult for them. The rape survivors have the memory of the attack by strangers, but wives have to go through it again and again. The woman in marital rape has to convince herself that it is normal otherwise if they leave their husband then what society will say, they must separate by children and their will be no financial security all such things

---

<sup>2</sup> R vs R, (1994) 4 All ER 481.

<sup>3</sup> Id.

<sup>4</sup> Katherine Q. Seelye, *Diana Russell: Who studied violence against women*, The New York Times, Aug. 6, 2020, at pg no. 26.

come in her mind.

The picture of marital rape is men believe that they can overpower the women, they can take out their frustration, depression or anger on them and it is also permissible by the law that is why marital rape is considered as one extension of the domestic violence.

## **II. FROM THE LENS OF JUDICIARY**

### **A. Independent Thought vs. Union of India**

The NGO Independent Thought had filed a writ in the Supreme Court to consider the extent and feasibility of exception 2 of section 63 of Bharatiya Nyaya Sanhita, 2023. The issue which is raised in the writ petition was that husband should be prosecuted if he does sexual intercourse with the wife of age between 15 to 18 years of age. The Court held:<sup>5</sup>

“Exception 2 to section 63<sup>6</sup> of the Bharatiya Nyaya Sanhita answers this in negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the BNS creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the girl child.”

The Court pointed out that artificial distinction between philosophy and ethos is contradictory of Article 15(3) and 21 of Constitution of India including the International Conventions. This provision is taking the right of girl child to make reproductive choices and integrity of her body.

The Petitioner argued that the consent of a girl below 18 years will not be considered if any person does sexual intercourse with her but the situation at the time when such person happens to be her husband get changed because it is considered that because she is married, she has given her consent for whole life. Marriage does not increase her mental capacity.

This provision is also in a contradiction with the POCSO Act and Juvenile Justice Act. These legislatures are adopted by the Parliament because India is the signatory of Convention on Rights of Child, 1990.<sup>7</sup> POCSO defines “penetrative sexual assault”<sup>8</sup> and liability got aggravated when offender has any relation to the victim<sup>9</sup> and in JJ Act the girl below 18 years

---

<sup>5</sup> Independent Thought vs Union of India, (2017) 10 SCC 800.

<sup>6</sup> Section 63 Exception 2 of BNS states “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”.

<sup>7</sup> United Nations Human Rights office of the High Commission, 1990.

<sup>8</sup> The Protection of Children from Sexual Offences Act § 3, No. 32, Acts of Parliament, 2012 (India)

<sup>9</sup> The Protection of Children from Sexual Offences Act § 5, No. 32, Acts of Parliament, 2012 (India)

but married was asked to put in care and protection due to more susceptible to exploitation, but husband got exception under BNS which makes the situation ambiguous.

The Court pointed out that marriage of a girl child below 18 years is voidable on her instance<sup>10</sup> and accused (husband) liable for punishment under POCSO Act but bar is exception of BNS.<sup>11</sup>

The Court referred the report of Justice Verma Committee where it was held that age old norm of taking wife as the chattel of husband is no longer true and thus exception 2 of section 63 should be deleted and rapist should be considered rapist irrespective of his relationship with victim.<sup>12</sup>

The Court have after finding the issue of contradiction among Prevention of Child Marriage Act 2006, POCSO Act and Juvenile Justice Act decided that the Amendment made by the Karnataka in PCMA 2006 is the best solution to harmonise all the statutes in which child marriage was declared void ab initio so the husband cohabiting with minor girl can be held guilty under POCSO Act.

The Court pointed out “it would be wise for all state legislatures to adopt the route taken by the Karnataka legislature<sup>13</sup> to void child marriage and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the BNS.<sup>14</sup>”

In the case of independent thought though Court has used the skills of craftsmanship and also showed the vivid illustration of judicial activism. There was a dead concept which the Court interpreted in socially feasible manner that such provision could not be used against the welfare of girl child. The Judgment although solved the issue of minor girl child but it was harsh to accept the statement by Supreme Court that Court would not comment on issue of marital rape of wives who are 18 years or more than 18 years old at this stage of 21<sup>st</sup> Century.

### **B. RIT Foundation vs. Union of India<sup>15</sup>**

The writ petitions were clubbed to which were challenging the Constitutionality of the Exception 2 of Section 63 of BNS. This section deals with marital rape. The petitions were put in front of Delhi High Court. There were two NGOs, RIT Foundation and All India

---

<sup>10</sup> The Prohibition of Child Marriage Act § 3, No. 32, Acts of Parliament, 2006 (India)

<sup>11</sup> Supra Note at 4.

<sup>12</sup> Rachit Bansal, *Criminal (Amendment) Act, 2013*, Manupatra.

<sup>13</sup> The Prohibition of Child Marriage (Karnataka Amendment) Act § 3 (1-A), No. 26 Acts of Karnataka State legislature, 2017 (Karnataka)

<sup>14</sup> Supra Note at 4

<sup>15</sup> RIT Foundation vs. Union of India, (2022) SCC Online Del 1404.

Democratic Women's Association from the side of petitioners who are aggrieved married women being the victims of marital rape.

The Petition was also challenging Section 67 of BNS which states that when any husband had sexual intercourse without the consent of wife who is living separately under any decree or otherwise shall be punished. The Petitioners argued that differentiation between 67 and exception 2 of section 63 is arbitrary and unconstitutional.

The Petitioners argued that principles of natural justice, Article 19(1)(a), 14, 15 and 21 is being violated till the marital is exempted from penal sanction.

The Petition was put before the Division Bench of Justice Rajiv Shakti and Justice Hari Shanker of Delhi High Court. The Judges have passed the split judgment over the matter.

Justice Shakti has passed the judgment that marital rape exception should be struck down, but Justice Shanker uphold the exception of marital rape as a valid law.

### **C. Constitutional Validity of the Exception of Marital Rape**

Justice Shakti believed classification of married and unmarried women is unreasonable and it is arbitrary to call forced sex with unmarried women as real rape and other as rape and he acknowledged that because of exception 2 of section 63 half of the population is not getting the equal protection of law.

Justice Shakti has observed that Conjugal expectation is legitimate in joyful marriage but this defence cannot be taken by husband who is not respecting his wives consent for sexual intercourse and also pointed out that non-consensual sexual intercourse should be termed as rape irrespective of offender being husband or not because saving the institution of marriage cannot be the reason to not make it an offence.

He also asserted that by demarcating it as infringing the private space of husband and wife we will snatch the right of autonomy over wife's body. The difficulty in collecting the evidence should also not be the reason to deny right over her body. He pointed out that it is the misconceived notion that by striking the exception of marital rape new offence will be created.

He observed that exception 2 of section 63 of BNS is violating Article 15 of the Constitution by discriminating between married and unmarried women and Article 19(1)(a) of the Constitution by snatching their right to express their consent regarding their body. He pointed out that husband who is separated from his wife suffers the punishment as rapist which makes it violation of Article 14, 15 and 21 of Constitution.

Justice C. Hari Shankar had denied in his judgment to strike down the exception 2 of section 63 of BNS. Justice Hari asserted that the relationship of husband and wife cannot be compared with any other relation. He finds that Petitioner's case is based on erroneous postulate that every non-consensual sex with women is rape.

He asserted that Exception 2 of section 63 does not violate Article 14 but there is intelligible differentia which has nexus with object. He even explained that it does not violate Article 15, 19(1)(a) and 21 of Constitution.

Justice Hari made it clear that exception 2 of section 63 is not the license to the husband to do sexual intercourse without her consent or will. It is intelligible differentia and that to for surviving marriages and not for separated couples. He observed that the question of whether marital rape is to be punished or not should be decided by the legislature.<sup>16</sup>

#### **D. Consent and Effect Doctrine**

Justice Hari made it clear that exception 2 of section 63 does not compel the wife to give consent every time when her husband demands or requests for sexual intercourse.

The Division Bench of Delhi High after giving the split judgment both the judges concurred that Petitioner's should be granted leave to Supreme Court as this matter involves substantial question of law.

### **III. CRITICAL VIEWS OF FEMINISTS**

#### **A. Ratna Kapur**

The feminist Ratna Kapur responded that in one of the student articles it was clearly indicated which was the fact that in case of marital rape rapist is known to the victim however in rape the rapist is stranger to the victim, it is the harsh difference between marital rape and rape. She questioned that why men get immunity in such an important relationship and question the legislature about their ignorance to alter the statute. She contested that if in a marriage consent of women is not respected than how in public her consent will be valued.<sup>17</sup>

She explained that sexual violence is an expression made by a man to show his masculinity. It doesn't mean all men rape, but it means that there exists some dangerous masculinity that is with only man and not with women or gays. It is destructive kind of masculinity from which we need to save society and for that we need to teach that this masculinity is wrong in our families, educational institutions, social and cultural groups.

---

<sup>16</sup> Devika Sharma, *Split verdict on Criminalisation of Marital Rape*, 4 Part 5, SCC Blog, 2022.

<sup>17</sup> Ratna Kapur, *Ratna Kapur responds*, The Hindu, Jun. 15, 2016.

## **B. Andrea Dworkin**

Andrea Dworkin published her work in 1987, *Intercourse* where she analysed pornography to sexual intercourse. She found that in Patriarchal society heterosexual sex is always coercive and degrading to women. She gave reference of *The Krutzer Sonata*, *Madame Bovary* and *Dracula* (including both literature and pornography) and argued such coercive depiction of sexual intercourse become the central part. The women experience it as an occupation despite which it is expected as pleasure for women and define women's status.

She was criticised for being terming all heterosexual intercourse as rape. She rejected this criticism by stating that she thinks sexual pleasure and intercourse will and can survive equality. She explained that according to her men believe they need an unfair advantage since the paradigm for sex has been one of conquest, possession, and violation, which at its extreme would be called rape. They do not need it, in my opinion.<sup>18</sup>

## **C. Catherine Mackinnon**

In her book, Catherine Mackinnon aims to clarify how sexual subordination leads to the oppression of women. He makes use of the notion that women are a class whose sexuality, like the labour of the proletariat, is exploited. The anti-pornography campaign points to the sex-based subordination of women as a key aspect of women's subjugation that sustains the gender binary.

Although many progressive cultures believe that by making rape or marital rape illegal, they are helping women, they may be completely mistaken. We still define everything from a masculine standpoint because of this. It is past time to examine certain issues affecting women from a female perspective.

The "confusion about permission" is another major reason why marital rape is not a crime. It can be difficult to tell when a woman gave her consent and when she did not because marriage entails frequent sexual contact between the married pair. Because of their relationship, it is also difficult to determine if the man forced her. Making marital rape a crime will open the door for many women to accuse their husbands, according to the Indian legislative, who has also stated that they do not want to destroy the institution of marriage. While it is true that women may be able to accuse men with ease, it is also true that most women experience marital rape but are unable to discuss it in public.

---

<sup>18</sup> Tamanna Khosla, *Marital Rape in India: A Radical Feminist Perspective*, Vol LII, Mainstream weekly, Sep. 13, 2014, at pg no. 38.



In India, the BNS still makes an exception for marital rape. If a female is over 15 and married, engaging in sexual activity without her consent is not considered rape. Legislators assert that "consent" is the only factor distinguishing rape from a typical sexual encounter. But this is a terribly misinterpreted concept. Not simply "consent," but also "dominance" and "lack of recognition" of a woman's sentiments distinguish sexual encounters from rapes. The Indian rules are quite vague in this regard and do not clearly distinguish between the two circumstances. Therefore, marital rape constitutes both a crime and a violation of a woman's constitutional rights. And rather than constantly supporting masculine ideals, we need to punish marital rape and comprehend it from her perspective to eradicate patriarchal and stereotyped notions from society.<sup>19</sup>

#### IV. CONCLUSION

The Marital rape is such a grievous offence because the women whom she thought of as her protect for whole of her life did not consider her consent before involving in sexual intercourse with her. Marital rape traumatises the victim more because she must be with that rapist every day and suffer every day sometimes because of society and sometimes because of economic dependency.

The Apex Court although saved minor wives from the offence of marital rape by considering that child marriage is void ab initio but what about the wives who are major, they don't have any recourse for them, and this is making their lives miserable.

The Radical Feminists their thoughts have been discussed above on the issue of marital rape who consider it a problem of patriarchal society. They have common contention that consent of the women need to be respected and it should start from home, and they criticised the offence of marital rape. The battle is still on and by the split decision though it is taking lots of time, but the mindset of Indian society is changing.

\*\*\*\*\*

---

<sup>19</sup> Aishwarya Sandeep, *Catherine Meckinnon and Criminalization of Marital Rape in India*, Aishwarya Sandeep Parenting & Law, Jan. 18. 2022