

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 9 | Issue 2

2026

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Understanding India's Perspective on Marital Rape through the lens of RIT Foundation v. Union of India

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ABSTRACT

The RIT Foundation v. Union of India (2022) is a groundbreaking Delhi High Court case that questions the constitutional validity of the Exception 2 to Section 375 IPC which absolves marital rape of criminal responsibility. The case concerns the extinction of a right to consent in the woman who is married, which leads to the questions of equality, dignity and autonomy of the body. The split bench demonstrated opposite jurisprudence. Justice Rajiv Shakti overturned the exception, claiming that no consent can be bargained on marriage and transformative constitutionalism. Justice C. Hari Shankar affirmed the exception, citing the importance of judicial restraint and legislative supremacy, and the concerns of evidence under Section 114A. This commentary compares and contrasts the two views and also points out serious weaknesses in the reasoning of Justice Hari Shankar, especially his undue faith in the judgment of the legislature and his reaffirmation of colonial-era beliefs of implied spousal consent. The split verdict is contextualized in the analysis by observing that the UK, Canada, South Africa and Nepal have already abolished the marital rape exceptions, and India remains behind in terms of gender protection. The commentary suggests such reforms as legislative abolition of the exception, gender neutralization of sexual offenses, evidentiary protections, and sensitization programs. Since the case is yet to be resolved by the Supreme Court, it will influence the Indian gender justice greatly as it will decide whether the country will follow transformative constitutionalism or remain legislative conservative in upholding the bodily autonomy and dignity of women in marriage.

I. INTRODUCTION

This was a historic case of RIT Foundation versus Union of India that the constitutionality of Exception 2 of the Indian Penal Code, 1860, now Exception 2 of Bhartiya Nyaya Sanhita, 2023, also called the marital rape exception (MRE) was examined. The case is a milestone in Indian gender justice and women rights history. The most crucial issue of the case RIT Foundation and

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Ors. v. Union of India is whether marriage is tampering or tarnishing the right of a woman to present her free consent to sexual intercourse.

In a divided opinion rendered on 11 May 2022, the Delhi High Court did not give a definite answer, but did give a definite overview of the constitutional, social arguments, including running and contra, that comprise this debate. Justice Rajiv Shakdher ruled the Martial Rape Exemption was invalid and left no doubt that consent can not be negotiated under the guise of marriage. On the contrary side of the coin was however defended by Justice C. Hari Shankar, who admired the effects of a legislative act of intervention, the difficulties of life in a marriage, and the higher social effects.

This case comment aims to examine the core issues, highlight the contrasting judicial approaches, identify potential flaws and drawbacks, and offer suggestions that may create a more defined approach towards the topic.

II. PETITIONERS AND DEFENDANTS' ARGUMENTS

The legal provision in question of law in this case, is the rape definition in Section 375 of the Indian Penal Code, but it provides an exception to the crime on rapes that includes male perpetrators, which in Exception 2 read as follows:

Sexual intercourse or sexual acts by a man on a wife, the wife not being under the age of fifteen, is not rape. RIT Foundation, individual survivors, contested this exception claiming it to be unconstitutional and violates Articles 14, 15, 19 and 21 of our Constitution. They claimed that the difference between the married and the unmarried women is artificial and that marriage can give an irrevocable consent to the female wives against sex. Conversely, the respondents, such as the Union of India, as well as intervening forces, such as the Men Welfare Trust, insisted on the fact that the issue is within the realm of Parliamentary debate, as opposed to the Court. They further explained that the exception provides a stability to the institution of marriage and cannot be abused and that the remedies are already available under the domestic violence laws, Section 498A IPC and others. Putting the debate into a larger context, the marital rape exception is commonly attributed to a colonial past that goes back to the 17th-century Doctrine of Coverture that absorbed the legal identity of a wife into that of her husband. Interestingly, since that time, marital rape has been criminalized by most jurisdictions such as the United Kingdom, Canada, South Africa and Nepal. Contrary, India has this exception yet and writes on this subject.

III. CORE CONSTITUTIONAL ISSUES

1. Is Exception 2 of Section 375, IPC, violative of Article 14 of the Indian Constitution?

2. Does it violate Non-discrimination on sex/marital status as guaranteed by Article 15?
3. Does it infringe Article 19(1)(a) and revoke Freedom of expression and autonomy?
4. Does it violate Article 21's Right to life and dignity

IV. THE DIVERGENT JUDICIAL APPROACHES BY DIVISION BENCH

What is making this judgement a landmark judgement by itself is not just the fundamental issue of marital rape in India but the many positions that the learned division bench took and their different approach to the matter. Learned judges Rajiv Shakti, J., C. Hari Shankar, J., did not, however, agree upon the approach and differed in their verdict, so the decision was split also. We need to know how different in their methods are the two judges to appeal to legal argument and learn something of the ideology of our judicial system to-day, against social evils, without disturbing the social institutions and larger consequences.

Justice Rajiv Shakti's Reasoning

Justice Shakti declared the provisions in question unconstitutional because they were against Articles 14, 15, 19(1) and (a), as well as 21. He directed that the declaration operates prospectively "from the date of the decision." He also held that offending husbands did not fall within "*relative*" in Section 376(2)(f) IPC, and therefore the Section 114A Evidence Act presumption does not apply to them. Justice Shakti concluded that carving out husbands from the reach of rape (Exception 2) and separately criminalizing only "*separated*" husbands in Section 376B with a lower minimum sentence and extraordinary cognizance restrictions under Section 198B, offends the principles of equality and dignity. He reasoned that "*a rapist remains a rapist irrespective of his relationship with the victim*," and found the separate treatment of separated husbands "*incongruous*." On the question of Section 376B and Section 198B, the opinion emphasizes that the scheme offers a different trigger and a lower minimum sentence without demonstrating why a "separated" husband's act is intrinsically less culpable than the same act by a non-separated husband or a stranger. That incongruity, in his view, fails constitutional scrutiny.

Justice C. Hari Shankar's Reasoning

The petitions were dismissed by Justice Hari Shankar who believed that the issue against the exception 2, Section 376B IPC and the exception 198B CrPC is faulty. He differed with the belief that any non-consensual sexual intercourse by a man with a woman constitutes rape, as the law considers such acts as being different in different situations.

He believed that Exception 2 was founded on an intelligible differentia and a rational nexus

with the object of Section 375 and thus did not contravene Articles 14, 19(1)(a) or 21. In his view, there is a lack of sufficient reasons that can justify the unconstitutionality of the provision.

Justice Hari Shankar reiterated on judicial restraint numerous times when he said that a court cannot replace the value judgment of the legislature with the judgment of itself. He warned that abolishing the exception will amount to a new criminal act and uproot the whole system of sexual crimes law, such as the presumption of evidence in the form of Section 114A. This according to him, is a question of legislative wisdom.

He further noted that there is a lot of debate whether a husband can be classified as a relative or a person in a position of trust, and that indicates that the statutory scheme has already considered such relationships.

With respect to Section 376B, he considered this would be a different case; the spouses are living apart, and the legislature has taken a middle ground by giving different punishments. As a result, he did not see the need to also strike down Section 198B.

Points of Divergence

Both the opinions have a similar stand but different ways to prove their point. According to Justice Rajiv Shakti, his analysis was based on individual rights like the right of equality under Article 14, right against discrimination under Article 15, right of free speech under Article 19(1)(a), and the right of dignity under Article 21. He opined that the Exception 2 to Section 375, and Sections 376B and 198B could not sustain themselves when there is a lack of consent.

Justice Hari Shankar stressed judicial restraint and legislative supremacy. It was stated that making any change to the provision related to marital rape would lead to an amendment in the structure of criminal jurisprudence, particularly the burden of proof provided under Section 114A of the Evidence Act.

On interpretation, Justice Shakti held that husbands cannot be treated as “relatives” under Section 376(2)(f), applying *noscitur a sociis*. Thus, Section 114A’s presumption would not apply to husbands, addressing concerns about evidentiary burden. Justice Hari Shankar, however, found it arguable that husbands could fall within “relative” and warned of serious consequences if Section 114A applied in marital cases.

Regarding Sections 376B and 198B, Justice Shakti found them inconsistent and unconstitutional, as a lesser punishment or procedural limitation cannot be justified when the act is non-consensual. Justice Hari Shankar, however, viewed Section 376B as a valid legislative choice for separated spouses and Section 198B as a proper procedural safeguard.

On remedies, Justice Shakti Chaudhary struck down the provisions prospectively, clarified that Section 114A and Section 376(2)(f) would not apply to husbands, and allowed appeal. Justice Hari Shankar upheld the provisions and only granted a certificate of appeal.

V. ANALYSIS AND OPINIONS OF VERDICT

In conclusion, the matter is currently pending before the Supreme Court, which would have a very important part to play in determining the future of marital rape immunity. Either way, the court could choose a transformative rights-based model, as was followed in *Navtej Johar* and *Joseph Shine*, or take recourse to legislative wisdom. However, considering the prevailing judicial discourse on the subject, it is more than likely that the court will side with the rights-based model of Justice Shakti Chaudhary. Even if the exception is found to be valid, the battle is far from over as there remains a constitutional mandate that cannot be wished away by Parliament.

It can be argued that the case for *Shakti Chaudhary J.* is much stronger since, according to Articles 14 and 21, discrimination is prohibited, especially where the right to bodily autonomy of one spouse is concerned. Although there is some merit in Justice Hari Shankar's arguments, concerning judicial overreach and evidentiary concerns, such reasons do not justify the existence of an otherwise unconstitutional piece of legislation. Such a law can be struck down even if the legislature is left free to provide safeguards does not extinguish consent, and address evidentiary concerns through procedural reforms.

VI. CRITIQUE AND FLAWS OF THE VERDICT

In Justice Hari Shankar, there was excessive legislative deference when he argued that it would not be right for the court to "create a new offence" in the form of nullifying Exception 2 of Section 375 IPC. In doing so, he is disregarding the authority vested upon him by Article 13 of the Constitution which authorizes courts to declare void any provision that violates fundamental rights. Such reasoning gives way to rights-violating legislation. For example, in *Navtej Singh Johar (2018)*, the Supreme Court declared Section 377 IPC void not to make a new law but to correct a constitutional flaw.

Additionally, he placed unwarranted significance on the institution of marriage. The relationship between spouses, according to his argument, is unique and deserves special consideration. Such a perspective brings back the concept of the wife's implied consent to sex during the marriage period, something common in colonial times. Such reasoning runs counter to modern constitutional principles of autonomy and equality. The doctrine of equality enshrined under Article 14 of the Constitution forbids arbitrary discrimination based on

personal preferences. Therefore, the notion that a rape offender cannot be a rapist if the perpetrator is married is absurd because the crime committed still stands.

The next poor argument against repeal is misuse. While the fear of misuse is always present in criminal statutes, it cannot be used as an excuse for refusing legal protection. Any concerns about abuse of the law can be resolved through the trial process, and not by offering any sort of immunity. It is simply an excuse to protect the illegal exception from being removed.

Lastly, the divide between Justices in this case makes things even more complicated. While Justice Shakti Chandra invalidated Exception 2, Justice Hari Shankar allowed it to stay, and thus the issue will now have to be resolved in the Supreme Court. In the meantime, victims of rape will be unable to find redress under Section 375 of the IPC.

VII. COMPARATIVE JURISPRUDENCE AND INTERNATIONAL APPROACH

- **UK: THE EXCEPTION OF MARITAL RAPE WAS ABOLISHED IN *R V. R (1991)*.**
- **Canada:** Under the Criminal Law Amendment Act, 1983 spousal immunity was abolished.
- **South Africa:** Under the Criminal Law (Sexual Offences) Amendment Act, 2007 marital rape is recognised.
- **Nepal:** Supreme Court (2002) declared marital rape to be unconstitutional with some exceptions.

These examples show that India lags behind in recognizing marital rape as a crime.

VIII. SUGGESTIVE REFORMS

1. Amending Legislation: Repeal of Exception 2 of Section 375, IPC

The Parliament enjoys complete legislative power under Entry 1 of the Concurrent List. The proposed deletion would be neither creating an offence nor extending its ambit to cover wives. This move will bring the Penal Code in line with Articles 14, 15, and 21, as observed in Navtej Singh Johar and Joseph Shine. It is bound to eliminate discrimination on marital status, meet international commitments in terms of CEDAW, and affirm consent does not exhaust within marriage.

2. Gender Neutralization of Offences Against Sexual Integrity

Gender neutralization of offences has been suggested by the Law Commission of India (in its 172nd and 243rd Reports). The current law envisages sexual offenses being committed only by

males against females and thus excludes men and transgender individuals from the scope of legislation. It runs counter to Article 14 of the Constitution.

3. Measures against Misuse through Safeguards

Rather than depriving the offenders of their rights, measures such as safeguarding can help avoid the misuse of this law. Parliament can introduce evidentiary measures such as corroboration, timeliness, or proof of continuing violence under Section 114A of the Evidence Act without violating fair trial rights under Article 21.

4. Harmonization of PWDVA 2005 and IPC with Domestic Violence Act

PWDVA of 2005 recognizes sexual assault but offers no criminal relief. Meanwhile, IPC criminalizes non-marital rape. Harmonization of the two can create an integrated legal approach where the victims can either seek civil or criminal remedy, thus helping resolve marital rape issues.

5. Sensitization and Training

While law reform is one measure, sensitization cannot be ignored. Article 51A(e) seeks to protect the dignity of women, and sensitization of the police force and the judiciary is imperative. Through sensitization campaigns under Section 39 CrPC, victim-blaming and stigma can be avoided, and public perceptions can be changed that marital rape is a grave offense because of non-consent.

IX. CONCLUSION

The case of RIT Foundation may be defined as the ideal illustration of the clash between the transformative constitutionalism and conservatism in the sphere of legislation. Even though the opinion expressed by Justice Shakti Chandra espouses the ideals of dignity, autonomy, and equality, the course of action adopted by Justice Hari Shankar can grant the perpetuation of patriarchal domination under the name of safeguarding marriage.

It is a potentially divided decision and why the Supreme Court and the Parliament must go decisively onwards is that it is an urgent case. Lastly, the Constitution compels us to realize the fact that the institution of marriage is not an invitation to sexual abuse and consent is the mainstay of human dignity.
