

# THE IMPORTANCE OF CONSENT: THE HINDU EDITORIAL ON MARITAL RAPE

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

A [split verdict in the Delhi High Court](#) on the question of criminalising marital rape has reignited the controversy over legal protection for disregard of consent for sex within marriage. On Wednesday, while Justice Rajiv Shakdher, who headed the Bench, struck down as unconstitutional [the exception to Section 375 of the IPC](#), which says that intercourse by a man with his wife aged 18 or above is not rape even if it is without her consent, Justice C. Hari Shankar rejected the plea to criminalise marital rape pointing out that any change in the law has to be carried out by the legislature since it requires consideration of social, cultural and legal aspects. With the judges differing on key points such as difficulty in getting evidence, the importance of consent, whether the state's concerns about safeguarding the institution of marriage were valid, and if other laws against sexual violence protected married women, the issues involved may have to be ultimately adjudicated with the help of a third judge or a larger Bench of the High Court or the Supreme Court. The Union government has been opposing the removal of the marital rape exception. In 2016, it had rejected the concept of marital rape, saying it "cannot be applied to the Indian context" due to various reasons, not least because of the "mindset of society to treat marriage as a sacrament". However, in the final hearing, the Union government did not take a stand on the issue.

Justice Shakdher's opinion goes to the heart of the matter, inasmuch as it treats the absence of consent as the core ingredient of rape. He says what is defined as rape in law should be labelled as such, irrespective of whether it occurs within or outside marriage. He finds that the marital exception violates equality before law, as well as deprives women of the right to trigger a prosecution for non-consensual sex. Besides, it also discriminates among women based on their marital status and robs them of sexual agency and autonomy. In contrast, Justice Hari Shankar's opinion, somewhat disconcertingly, de-emphasises the element of consent and lays much store by the importance of preserving the institution of marriage to such an extent that he holds that any legislation that keeps rape out of a marital relationship "is immune to interference". If marriage is regarded as a partnership between equals, an exception in a 162-year-old law should have had no place. While there are other laws governing civil relationships that legitimise conjugal expectations, these cannot be seen as giving a free pass for violence within marriage, which is essentially what sex without consent is. Whether the legislative route is more appropriate in making marital rape a criminal offence is a matter of detail. What is important is that sexual violence has no place in society, and the institution of marriage is no exception.

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